The Appellate Advocate

State Bar of Texas Appellate Section Report

Articles

Special Features

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Regular Features

The State Bar of Texas
Appellate Section

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Chair's Report

Macey Reasoner Stokes, Baker Botts, LLP, Houston

The Appellate Section has had a very productive 2016 so far. This is thanks not to your Chair, but to our dedicated officers, Council members, and committee co-chairs and members, who do the real work of the Section. I am continually amazed that so many busy, accomplished practitioners are willing to give their time and talents to make the Section better. I literally could not do this job without them. Here is a sampling of the good work they have been doing:

CLE

Based on the results of last year's membership survey, we have been really ramping up our CLE offerings. We co-sponsored with the Austin Bar Association "An Evening with the Supreme Court of Texas." This April 21 event featured a panel discussion with several Court members followed by a reception. Our CLE Committee, chaired by Jeff Oldham and Steve Knight, hosted its popular "How to Handle Your First Appeal" in Austin on April 15. That committee has also planned, in conjunction with the Individual Rights and Responsibilities Section, three hours' worth of CLE presentations at the State Bar's annual meeting onFriday, June 17. Our Diversity Committee, led by Kirsten Castaneda and Dori Goldman, planned a "Diversity in Appellate Law" panel discussion and lunch in the Dallas area, but floodwaters required us to reschedule it to the Fall. A new date will be announced soon.

Our annual Civil Appellate Practice 101 and Advanced Civil Appellate Practice Courses are just around the corner. The committee, led by Jeff Levinger, has a lot of great presentations planned, including a total of 3.75 hours of ethics for the two courses. The 101 course will be held on Wednesday, September 7 at the Four Seasons Hotel in Austin. The Advanced Course will be at the same location on Thursday,

September 8 and Friday, September 9. Brochures will be mailed to Section members, but you may register online now for the courses at http://www.texasbarcle.com/CLE/AABuy0.asp?sProductType=EV&lID=14734. As always, our annual Section meeting will be held after the Thursday session adjourns, followed by a reception honoring the judiciary. I hope you will join us.

On the online CLE front, our membership committee, headed by Becca Cavner and Thomas Allen, has been working hard to update the CLE articles available to members on our website. These include not just Appellate Section CLEs, but also CLEs presented by other sections of the State Bar. Our online CLE committee, led by Justice Greg Perkes and Robert Dubose, also plan to have some CLE video presentations uploaded to the site later this year. Thanks to Lauren Harris for serving as our "CLE Czar" and herding all our CLE "cats."

Coffees with the Justices

As I mentioned in my previous report, our Bench Bar Committee has been planning several "Coffees with the Justices" around the State in an effort to give Bar members more opportunities to meet and socialize with the justices of our various courts of appeals. As of this report, the committee, led by Justices Sue Walker and Rebeca Huddle, has held coffees in conjunction with the Courts of Appeals in San Antonio, Corpus Christi, Edinburg, Fort Worth, and Texarkana. The coffees have been very well attended, and more are planned. Eblasts announcing these coffees are sent to bar members in the respective court of appeals districts, so please keep an eye out for one in your district.

Donations and Scholarships

The Council joined numerous other sections in making a donation to the Sheeran-Crowley Memorial Trust, which supports the Texas Lawyers Assistance Program and its

provision of substance abuse and mental health services to Texas attorneys. Thanks to Tracy Nuckols, the Bar's section project manager, and our donations committee, led by Dylan Drummond and Chris Kratovil, for bringing this worthwhile cause to our attention.

We are also working to support appellate court staff, by providing scholarships to staff attending the annual meeting of the Texas Association of Appellate Court Attorneys. The scholarships, which we are providing for the third year in a row, help to defray travel expenses for staff. We are also helping recruit speakers for the meeting, which is held the day before the Advanced Course in September. If you would like to volunteer to speak, please let me know.

Excellence in Appellate Advocacy Award

Our Law School Liaison Committee, chaired by Dean Darby Dickerson and Steve Hayes, has inaugurated the Excellence in Appellate Advocacy Award. The award is given to one student at each Texas law school selected by faculty. It is designed to encourage interest in appellate practice among law students and make them aware of the Section. These have been warmly received by both the schools and the recipients.

Thanks for your continued support of the Section, and I hope to see you at our annual meeting in September.

Disclaimer

Contributions to the *Appellate Advocate* are welcome, but we reserve the right to select material to be published. We do not discriminate based upon the viewpoint expressed in any given article, but instead require only that articles be of interest to the Texas appellate bar and professionally prepared. To that end, all lead article authors who submit an article that materially addresses a controversy made the subject of a pending matter in which the author represents a party or amici must include a footnote at the outset of the article disclosing their involvement. Publication of any article is not to be deemed an endorsement of the views expressed therein, nor shall publication of any advertisement be considered an endorsement of the product or service advertised.

Call for Nominations for the Texas Appellate Hall of Fame

The Appellate Section of the State Bar of Texas is now accepting nominations for the Texas Appellate Hall of Fame. The Hall of Fame posthumously honors advocates and judges who made a lasting mark on appellate practice in the State of Texas.

Hall of Fame inductees will be honored at a reception held by the Appellate Section on Thursday, September 8, 2016, during the State Bar's Advanced Civil Appellate Practice course.

Nominations should be submitted in writing to halloffametx@outlook.com no later than Friday, July 15, 2016. Nominations should include the nominator's contact information, the nominee's bio or CV, the nominee's photo if available, and all the reasons for the nomination (including the nominee's unique contributions to the practice of appellate law in the State).

Nominations will be considered based upon some or all of the following criteria, among others: written and oral advocacy, professionalism, faithful service to the citizens of the State of Texas, mentorship of newer appellate attorneys, pro bono service, participation in appellate continuing legal education, and other indicia of excellence in the practice of appellate law in the State of Texas.

In Search of a *Fisher* King: The Ironic Implications of Justice Scalia's Passing for *Fisher v. University of Texas*

Vinay Harpalani[1]

Introduction

The recent death of Justice Antonin Scalia on February 13, 2016, leaves the U.S. Supreme Court in ideological equipoise.[2] The Court is seemingly at a 4–4 impasse on many charged cases until Justice Scalia is replaced.[3] However, the immediate effect of Justice Scalia's absence is not as simple in all cases. For

[1] Vinay Harpalani is Associate Professor of Law at Savannah Law School, where he teaches constitutional law, civil procedure, and employment discrimination. He has written several pieces on race-conscious university admissions and is frequently invited to speak about the topic.

[2] Chief Justice John Roberts and Justices Anthony Kennedy, Clarence Thomas, and Samuel Alito form the conservative bloc on the Court—to which Justice Scalia also belonged. Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan form the liberal bloc. *See* Dan Roberts & Sabrina Siddiqui, *Anthony Kennedy: How One Man's Evolution Legalized Marriage for Millions*, Guardian (June 26, 2015), http://www.theguardian.com/us-news/2015/jun/26/kennedy-ruling-gay-marriage-supreme-court (discussing how Justice Kennedy often serves as the Court's swing vote). Of the conservative Justices, Justice Kennedy has been the most likely to crossover and side with the liberal bloc. *Id.*

[3] On March 16, 2016, President Barack Obama nominated Chief Judge Merrick Garland of the United States Court of Appeals for the District of Columbia Circuit to replace Justice Scalia. Michael D. Shear, Julie Hirschfeld Davis & Gardiner Harris, *Obama Chooses Merrick Garland for Supreme Court*, N.Y. Times (Mar. 16, 2016), http://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html. However, a number of Republican senators—including Senate Majority Leader Mitch McConnell—have stated repeatedly that the Senate will not act on President Obama's nomination and Justice Scalia's seat will remain vacant until the next President is inaugurated in 2017. *Id.*

example, in *Fisher v. University of Texas at Austin* (*Fisher II*)[4]—the pending case about race-conscious university admissions at the University of Texas at Austin (UT)—one might think that Justice Scalia's absence would yield a ruling more favorable to proponents of affirmative action. But *Fisher II* could actually turn out worse for affirmative action proponents than it would have with Justice Scalia on the Court. And ironically, this may happen if Justice Anthony Kennedy votes with the liberal Justices to uphold UT's race-conscious policy.

The reasons for this irony are threefold. First, Justice Elena Kagan recused herself from *Fisher*, due to her role in earlier phases of the case when she was Solicitor General under the Obama Administration.[5] With Justice Scalia's death, seven Justices will decide *Fisher II*, eliminating—rather than creating—the possibility of a tie. Because Justice Kennedy is still the Court's swing vote, his view will probably be outcome-determinative in *Fisher II*.

Second, Justice Kennedy is likely to write a controlling opinion, as has often been the case in the past decade[6]—but this time by a 4–3 vote. Assuming a ruling on the merits, that opinion would become Supreme Court precedent and apply to the entire nation.

If Justice Kennedy votes to strike down UT's race-conscious admissions policy, the majority opinion would serve as nationally binding precedent either with Scalia (by a 5–3 majority) or without him (by a 4–3 majority). Either of these

[4] *See* 135 S. Ct. 2888 (2015) (mem.) (granting certiorari). This followed the Court's prior ruling in *Fisher I*. *See Fisher v. Univ. of Tex. at Austin* (*Fisher I*), 133 S. Ct. 2411 (2013) (remanding the case back to the Fifth Circuit to apply the correct standard of strict scrutiny). This Essay will refer to the case simply as "*Fisher*" when referencing the entire *Fisher* litigation.

[5] Adam Liptak, *Supreme Court Justices' Comments Don't Bode Well for Affirmative Action*, N.Y. Times (Dec. 9, 2015), http://www.nytimes.com/2015/12/10/us/politics/supreme-court-to-revisit-case-that-may-alter-affirmative-action.html.

[6] *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (5–4 decision) (Kennedy, J., for the Court) (holding that states may not deny to same sex couples the fundamental right to marry).

would reverse the Fifth Circuit and set precedent.

But if Justice Kennedy votes to uphold UT's policy, Justice Scalia's absence is more significant. If Justice Scalia were still on the Court, an affirmance by Kennedy would have led to a 4–4 tie in *Fisher II*, thereby passively upholding the decision of the Fifth Circuit without setting any precedent. Without Justice Scalia's vote, however, a Justice Kennedy affirmance will now control *Fisher II* and set precedent.

Third, *Fisher II* itself is unusual for an affirmative action case.[7] The main issue is not the implementation of UT's race-conscious policy, but whether UT needs that policy at all. Petitioner Abigail Noel Fisher contends that UT attains its compelling interest in diversity via Texas's so-called "Top Ten Percent Law" (TTPL), codified at section 51.803 of the Texas Education Code.[8] The TTPL, which grants automatic

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[7] For the history of *Fisher*, see Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 498–504 (2012). For commentary on the *Fisher I* decision, see generally Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After* Fisher, 45 *Seton Hall L. Rev*. 761 (2015) [hereinafter Harpalani, *Broadly Compelling*]. For commentary on the prospects of *Fisher II*, see Vinay Harpalani, Fisher v. Texas*, The Remix*, ISCOTUSNOW BLOG (July 18, 2015), http://blogs.kentlaw.iit.edu/iscotus/fisher-v-texas-the-remix. For a reaction to the *Fisher II* oral argument, see Vinay Harpalani, *The Fishing Expedition Continues: Will There Be a* Fisher III*?*, ISCOTUSNOW BLOG (Dec. 14, 2015), http:// blogs.kentlaw.iit.edu/iscotus/will-there-be-a-fisher-iii [hereinafter Harpalani, *Fishing Expedition Continues*]. Finally, for court documents related to the *Fisher* litigation, see *Fisher vs. Tex*., UNIV. OF TEX. AT AUSTIN, http://www.utexas.edu/vp/irla/Fisher-V-Texas.html.

[8] See, e.g., Brief for Petitioner at 31–37, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) (asserting that UT could not demonstrate the necessity of its affirmative action plan because of the TTPL); *see also* Brief for Petitioner at 2, *Fisher II*, No. 14-981 (U.S. Sept. 3, 2015) (arguing that UT's affirmative action plan is "highly dubious" because of the TTPL). Originally, the TTPL guaranteed admission to UT to the top 10% of each graduating class in all Texas public high schools; however, that law has since been amended to cap the number of students admitted to UT under the TTPL.

admission to UT for top Texas public high school students, accounts for three-quarters of UT's admitted class[9] on a race-neutral basis.[10] UT's use of race applies only to the remainder. Both parties in *Fisher* conceded that UT's race-conscious policy is consistent with the Supreme Court's *Grutter v. Bollinger* precedent.[11] In fact, the parties further conceded that UT's policy is actually more modest in scope than the University of Michigan Law School policy upheld in *Grutter*.[12] Consequently, Justice Kennedy could actually vote to affirm UT's modest policy and still narrow the scope of *Grutter*, curbing affirmative action in university admissions in the process. With these considerations in mind, this Essay turns to examine the possible outcomes in *Fisher II* and their impact on affirmative action more broadly.

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[9] TEX. EDUC. CODE § 51.803(a-1) (West 2015).

[10] The *Fisher* litigation has assumed that the TTPL is "race neutral"—meaning there is no direct and explicit consideration of race in the decision-making process. Nevertheless, this is a debatable assumption. *See* Harpalani, *Broadly Compelling*, *supra* note 6, at 764 n.3.

[11] *See Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the University of Michigan Law School's use of race as a flexible admissions factor in a holistic, individualized review of applicants); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down the University of Michigan's use of race as a rigid, mechanical admissions factor without individualized review in its undergraduate admissions). *See also Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 234 (5th Cir. 2011) (noting that Petitioner "do[es] not allege that UT's race-conscious admissions policy is functionally different from . . . the policy upheld in Grutter . . . . [but rather] question[s] whether UT needs a Grutter-like policy."), *rev'd*, *Fisher I*, 133 S. Ct. 2411 (2013). At the *Fisher II* oral argument, Petitioner did raise a new argument, subtly distinguishing between UT's policy and the one upheld in *Grutter*. *See* Transcript of Oral Argument at 4–8, 16–17, *Fisher II*, No. 14-981 (U.S. Dec. 9, 2015) (arguing that UT's policy is "not truly holistic" because race is not considered at the exact same time as applicant's academic qualifications and the entirety of the applicant's profile). However, this is a rather minor distinction, and for most of the *Fisher* litigation, Petitioner has conceded that UT's policy is functionally similar to that in *Grutter*.

[12] *See infra* notes 16–17, 23–24 and accompanying text (noting Petitioner's argument that UT's race-conscious policy has only minimal effects).

I. A Vote Against UT

Justice Kennedy may well vote to strike down UT's race-conscious admissions policy. He could accept Petitioner's main argument and find that UT has not demonstrated that it needs to use this policy, in addition to the TTPL, to attain the educational benefits of diversity. This would be a loss for affirmative action, but Justice Scalia's absence does not affect it.

Moreover, Justice Kennedy is unlikely to vote to overturn *Grutter* altogether. Although he dissented in *Grutter*, Justice Kennedy has recognized a compelling interest in diversity in three separate Supreme Court opinions.[13] In fact, for proponents of affirmative action, the silver lining here could be a narrowly framed ruling: one that focuses on the effects of the TTPL and thus has little applicability beyond UT.

II. A Vote for UT

In the alternative, Justice Kennedy could vote to uphold UT's race-conscious admissions policy, based on its modesty. In his *Grutter* dissent, Justice Kennedy stated: "There is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity," so long as universities make sure "that each applicant receives individual consideration and that race does not become a predominant factor in the admissions decisionmaking."[14] Even though he conluded the University of Michigan Law School

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[13] *See Fisher I*, 133 S. Ct. at 2418 ("The attainment of a diverse student body . . . serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes."); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797–98 (2007) (Kennedy, J., concurring in part) ("[A] district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity . . . ."); *Grutter*, 539 U.S. at 392–93 (Kennedy, J., dissenting) ("To be constitutional, a university's compelling interest in a diverse student body must be achieved by a system where individual assessment is safeguarded through the entire process.").

[14] *Grutter*, 539 U.S. at 392–93 (Kennedy, J., dissenting).

plan did not fulfill this requirement, Justice Kennedy could hold that UT's policy does satisfy it.

Paradoxically, one of Petitioner's arguments could tilt Justice Kennedy in that direction. Petitioner has argued that UT's use of race is too modest to yield any diversity benefits and that UT cannot demonstrate that race was a deciding factor in the admission of any students.[15] Consequently, Petitioner has contended that UT's race-conscious policy did not further any compelling interest.[16] But at the *Fisher I* oral argument, Justice Kennedy was at least initially antithetical to Petitioner's contention.[17] And UT effectively countered Petitioner, arguing that the modesty of its race-conscious policy was a "constitutional virtue, not a vice,"[18] because it demonstrated UT's commitment to phasing out the use of race and finding race-neutral alternatives.[19]

If Justice Kennedy votes to uphold UT's race-conscious policy based on its modesty, his opinion would control *Fisher II* 4-3 and set precedent. This would not have been the case

[15] *See* Brief for Petitioner, *Fisher I*, *supra* note 8, at 38–39 ("UT is unable to identify any students who were ultimately offered admission due to their race who would not have otherwise been offered admission." (internal quotation marks omitted)).

[16] *See id*. at 38–42 (arguing that racial classifications are unnecessary).

[17] Transcript of Oral Argument at 22, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345) (asking Petitioner's counsel: "You argue that the University's race-conscious admission plan is not necessary to achieve a diverse student body because it admits so few people—so few minorities. And I had trouble with that . . . . [I]f it's so few, then what's the problem?").

[18] Brief for Respondents at 36, *Fisher I*, 133 S. Ct. 2411 (2013) (No. 11-345).

[19] *Id*. For other critiques of Petitioner's argument, see Harpalani, *Broadly Compelling*, *supra* note 6, at 796–99 (noting that if universities phase out the use of race in admissions gradually, it logically follows that at some point the use of race will be small but still constitutional; that a small number of students can still provide the educational benefits of diversity; and that it is difficult to "smoke out" modest uses of race). *But see* Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEXAS L. REV. 517, 523 n.27 (2007) ("At least as a theoretical matter, narrow tailoring requires not only that preferences not be too large, but also that they not be too small so as to fail to achieve the goals of the relevant compelling government interest.").

if Justice Scalia were still a member of the Court, as such an affirmance by Kennedy would then have resulted in a 4-4 tie. But ironically, because UT's race-conscious admissions policy is more modest than the plan upheld in *Grutter*, Justice Kennedy could actually approve UT's plan and still limit the scope of *Grutter*—dealing a blow to proponents of affirmative action.

In fact, Kennedy could craft a *Fisher II* affirmance that focuses directly on the modesty of UT's plan—building on his *Grutter* dissent[20]—thereby making such modesty a defining principle of a constitutional, race-conscious university admissions policy. As Professors Ian Ayres and Sidney Foster note, *Grutter* itself is agnostic on the weight of race in the admissions process.[21]

Ayres and Foster further argue that the UT policy differs from the *Grutter* policy in that the latter admission procedure was outcome determinative for many applicants.[22] This stands in contrast to UT's policy, which Petitioner has contended did not make a difference for any minority applicants.[23] Professors Ayres and Foster further suggest that courts should impose a limit on the weight of race in university admissions.[24] Thus, Justice Kennedy's opinion could both affirm UT's policy and create such a limiting principle on race-conscious admissions policies.

Although such a ruling in *Fisher II* would technically be a victory for UT, it would further limit universities' use of race in admissions. This would be a worse outcome for affirmative action proponents than if Justice Scalia had been on the Court and Justice Kennedy's opinion had no precedential value. In other words—and rather ironically in light of Justice Scalia's

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[20] *See supra* note 15 and accompanying text.

[21] *See* Ayres & Foster, *supra* note 20, at 526 (noting that the *Grutter* Court did not "engage in an inquiry into how much weight each school placed on race").

[22] *See id.* at 529–33 (noting that the University of Michigan Law School admissions plan upheld in *Grutter* had a greater percentage of applicants for whom race determined admissions outcome than the undergraduate plan struck down in *Gratz*).

[23] *See supra* note 16 and accompanying text.

[24] *See* Ayres & Foster, *supra* note 20, at 582-83 (advocating a return to the "minimum necessary preference requirement").

absence—affirmative action may suffer even if Justice Kennedy leans to affirm UT's policy. Thus, there is little prospect for a long-term affirmative-action victory if the Court reaches the merits of *Fisher II*.

III. A Punt

The best result for affirmative action might be another punt: a remand all the way back to the district court for more fact-finding. Justices Kennedy and Alito discussed this prospect at the *Fisher II* oral argument, wondering if additional facts could settle the issue of whether UT really needs its race-conscious policy to attain the educational benefits of diversity.[25] This result would delay matters further for UT, but it is probably the only way for Justice Kennedy to write a controlling opinion that does not narrow *Grutter*.

Conclusion

If the Supreme Court rules on the merits of *Fisher II*, supporters of race-conscious university admissions should brace for disappointment, even if UT's admission procedures are affirmed. Indeed, affirmance may actually be worse for affirmative action than a decision striking down the policy. So while Scalia's *Fisher II* vote will never be cast, his viewpoint will likely prevail in the end. Thus, affirmative action jurisprudence today is an Orwellian double-edged sword,[26] and as the late Professor Derrick Bell predicted after Grutter, a civil rights victory here will be "hard to distinguish from defeat."[27]

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[25] Transcript of Oral Argument, *Fisher II*, *supra* note 12, at 18–23.

[26] *Cf.* George Orwell, 1984, at 4 (1950) (giving ironic political slogans: "War is Peace," "Freedom is Slavery," and "Ignorance is Strength").

[27] Derrick Bell, *Diversity's Distractions*, 103 Colum. L. Rev. 1622, 1622 (2003).

North Carolina Board of Dental Examiners v. FTC: The High Court Increases Scrutiny of Professional Licensing Boards

Hon. Craig T. Enoch & *John J. Vay*,
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I. Introduction

Principles of federalism and state sovereignty led the U.S. Supreme Court to historically interpret the Sherman Act and other federal antitrust laws as conferring broad immunity on States and their agencies for anticompetitive actions taken in their sovereign capacity (*i.e.*, the state-action immunity doctrine). However, a recent decision by the high court may substantially limit the availability of state-action immunity where a State's regulatory power has been delegated to a professional licensing board that is controlled by active market participants (*e.g.*, self-regulating doctors, dentists, cosmetologists, etc.). The decision recognizes the structural risk that active market participants authorized by a State to regulate their own profession may pursue private interests and restrain trade under the guise of implementing state policy.

In *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101 (2015), the Supreme Court clarified the proper use of a two-pronged test to determine whether a professional licensing board accused of anticompetitive conduct can successfully raise the state-action immunity doctrine as an affirmative defense. The Court's new articulation of the second prong, which requires definitive State supervision of anticompetitive conduct by certain licensing boards, is likely to breed confusion, increase litigation costs, and inspire reactionary legislation. Moreover, *Dental Examiners* is further evidence of a trend away from judicial deference to agency determinations after decades of strict adherence to deferential doctrines.

II. *Dental Examiners*

In *Dental Examiners* the Supreme Court held that licensing boards controlled by active market participants do not enjoy automatic immunity from antitrust liability.

Starting in 1943 with *Parker v. Brown*, 317 U.S. 341, 352 (1943), the Supreme Court has immunized sovereign activities of "the state itself." Nearly 40 years later, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 112

(1980), the Supreme Court expanded sovereign immunity to non-sovereign state actors, but explained:

> "[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct."

Dental Examiners refines the second prong of *Midcal* by resolving a question of first impression for the Court: if a professional licensing board is an authorized state agency, but is composed either primarily or entirely of active market participants, what level of active supervision by the State—if any—is necessary to allow for immunity?

A. Background

The North Carolina Legislature has delegated regulation of dentists to a dental board. *Dental Examiners*, 135 S. Ct. at 1107. By state law, practicing dentists must fill a majority of the seats on the dental board. *Id.* at 1108. Though created and empowered by the state of North Carolina, the dental board's actions are not supervised by any other state branch or agency. *Id.* at 1110. This self-regulation is common among state licensing boards because of the need for expertise. *Id.* Self-regulation runs the risk of facilitating anti-competitive policy because licensed professionals often want to protect their market share, keeping insiders in and outsiders out. *Id.* at 1111–12.

At issue in this case was a rule reserving professional teeth-whitening services for licensed dentists. *Id.* at 1108. The rule was promulgated after several dentists complained about low prices non-dentists charged for teeth whitening. *Id.* The dental board sent threatening letters to non-dentists who offered teeth whitening services and even encouraged mall operators to kick out kiosks used for teeth whitening. *Id.* When the unlicensed whiteners complained to the Federal Trade Commission

(FTC), the FTC took action against the dental board, alleging violations of 15 U.S.C. § 45, which prohibits unfair methods of competition. *Id.* at 1108-09. The FTC and the Fourth Circuit both rejected the dental board's attempt to invoke the defense of state-action immunity. *Id.* at 1109. Both tribunals reasoned that the Board is a "public/private hybrid" requiring active State supervision in order to claim immunity. *Id.* Both courts premised their analysis on the assumption the Board had acted pursuant to a clearly articulated state policy to displace competition, which was not at issue or decided in this case. *Id.*

B. Majority Opinion

In a six-to-three opinion written by Justice Anthony Kennedy, the Supreme Court affirmed the Fourth Circuit, holding that the dental board is not immune from antitrust laws. *Id.* at 1101.

The Court explained that even though the dental board is an agency of the state, its actions must still be actively supervised by the state in order to enjoy antitrust immunity. *Id.* at 1110. The Court elaborated:

> Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.

Id. at 1111. Thus, the "formal designation given by the States" cannot alone create immunity from federal law. *Id.* at 1114.

The Court further explained that immunity will not lie where there is a "risk that active market participants will pursue private interests in restraining trade." *Id.* Therefore, "[w]hen a State empowers a group of active market participants to decide

who can participate in its market, and on what terms, the need for supervision is manifest." *Id.* Accordingly, the Court held, "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity." *Id.*

The Court went on to identify a few factors lower courts must look to in assessing state supervision:

> It suffices to note that the inquiry regarding active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests." . . . The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the "mere potential for state supervision is not an adequate substitute for a decision by the State[.]" Further, the state supervisor may not itself be an active market participant.

Id. at 1116–17 (internal citations omitted). Notwithstanding these factors, the Court emphasized that the adequacy of any supervision otherwise will depend on all facts and circumstances. *Id.*

C. Dissent

Justice Alito dissented, joined by Justice Thomas and the late Justice Scalia, arguing the majority holding is impractical, imprudent, and wholly unjustified by the Court's antitrust jurisprudence. *Id.* at 1117–23 (Alito, J., dissenting). The dissent

would have extended immunity based solely on the fact that "North Carolina's Board of Dental Examiners is unmistakably a state agency created by the state legislature to serve a prescribed regulatory purpose and to do so using the State's power in cooperation with other arms of state government." *Id.* at 1120. The dissent characterized the majority's test as impractical and denounced its analysis as an unfaithful application of *Parker* and an affront to federalism.

D. Impact and Effect

Dental Examiners may generate more questions than answers. The Court expressly indicated its holding applies to boards in which a "controlling number of decisionmakers are active market participants." What constitutes a "controlling number of decisionmakers"? Clearly active participants controlled the North Carolina Dental Board, as three-quarters of the board were practicing dentists. What if just 50% were active participants, but the others tend to defer to the expertise of the practitioners?

The ultimate question raised by *Dental Examiners* is what constitutes a "realistic assurance" that state oversight is adequate? The Court offered certain guideposts, including that the state supervisor must conduct a substantive review of the proposed regulations. But what level of scrutiny constitutes "substantive review"? Must a supervisor review the evidence in support of a newly promulgated rule, or is a clearly articulated justification enough?

The holding is particularly problematic for legal licensing boards. The Supreme Court expressly held that state oversight is not adequate where the designated supervisor is "an active market participant." Yet judicial review is necessarily provided by active participants in the law. One might argue that judges are indeed active practitioners of the law, but are not present in the legal market. Such an argument, however, seems to undermine the fact that many state judges eventually return to private practice.

And finally, as a matter of policy, what level of antitrust

pressure will best facilitate the purpose of the typical licensing board? The majority did not wrestle with or even identify the purpose of licensing boards, which is presumably to protect the public by dictating certain tradecraft norms. How will the increased burden under *Dental Examiners* interfere with the efficient and effective dispatch of that task? The Supreme Court left this question—and many others—unaddressed, but the lower courts are already stepping in to fill the void.

III. The Western District of Texas Applies *Dental Examiners* to Texas Medical Board

The first thorough examination and application of the *Dental Examiners* decision was rendered by a Texas district court at the end of last year. In *Teladoc, Inc. v. Texas Medical Board*, No. 1-15-CV-343 RP, 2015 WL 8773509, at *10 (W.D. Tex. Dec. 14, 2015), the U.S. District Court for the Western District of Texas denied immunity after strictly construing the "active state supervision" prong of the doctrine.

This ongoing dispute involves a 2015 Texas Medical Board rule requiring "a face-to-face visit before a physician can issue a prescription to a patient, regardless of medical necessity." *Id.* at *2 (referring to Rules 174 and 190.8). Teladoc is a national virtual health care provider that offers physician consultation, evaluation, and diagnosis via phone and internet. *Id.* at *1. By the time the new rules were promulgated, Teladoc had already been mired in a five-year dispute as to whether its services are consistent with Texas law. *Id.* at *2. When Teladoc learned of the face-to-face rule, it sued the Board, challenging the rule as anticompetitive under antitrust laws and a violation of the Commerce Clause of the Constitution. *Id.* at *3. Specifically, Teladoc characterized the rule as an unfair restraint on telemedicine practitioners' ability to compete, and argued that the rule would unjustifiably reduce access to affordable medical treatment. *Id.* at *5.

There is no dispute Texas law empowers this Board, composed entirely of medical professionals, to regulate the practice of medicine. In response to Teladoc's challenge,

the Board asserted state-action immunity in a Rule 12(b)(1) motion to dismiss, arguing that the "active state supervision" prong is satisfied because its decisions are subject to judicial and legislative review by the state of Texas. *Id.* at *6–10. Judge Robert Pitman rejected the Board's argument after elaborating on the standard articulated in *Dental Examiners*. *Id.* at *10.

As a preliminary matter, the court emphasized that the immunity sought is an affirmative defense such that the Board carries the burden of proof on the issue. *Id.* at *6. The court then reiterated that to show active supervision under *Dental Examiners*, an agency must point to oversight that includes:

- Legislative review of the substance of the agency's decision, not merely the procedures used to effect that decision,
- Legislative power to veto or modify particular decisions to ensure they accord with state policy, and
- A "realistic assurance" that the challenged rule promoted state policy, rather than merely the board members' individual interests.

Id.

The Board identified three state laws that might provide the state supervision necessary to establish its immunity. The court considered and rejected each argument. *Id.*

While Texas Government Code § 2001.038 allows individuals to challenge "the validity or applicability of [a] rule" in state court, the court found that supervision insufficient after explaining that the review is "limited to inquiring whether the decision exceeded the statutory authority granted to the agency." *Id.* at *7 (citation omitted). In other words, this statutory authority did not allow for meaningful review of the substance of the rule. The court emphasized that "review of the validity of a rule does not permit evaluation of the policy underlying the rule" such that *Dental Examiner*'s supervision standard might be satisfied. *Id.* at *8 (citation omitted).

The court similarly rejected any suggestion that the state's Administrative Procedures Act might provide adequate

supervision, as the cited sections render rules voidable only for procedural deficiencies. *Id.* at *8 (citing TEX. GOV'T CODE §§ 2001.033 & 2001.035). Interestingly, the court concluded that the Act allows for no substantive review, notwithstanding its express indication that courts must look for a "reasoned justification for the rule as adopted," and "a reasonable means to a legitimate objective." *Id.* It is unclear from the court's analysis what *would* qualify as statutory authority to review of the substance of a rule, but the court characterized the review afforded by the Administrative Procedure Act as wholly procedural—rather than substantive—in nature. *Id.*

Finally, the court rejected the Board's arguments that judicial review of disciplinary proceedings constitutes active supervision adequate to give rise to immunity. *Id.* (citing TEX. GOV'T CODE 2001.074). Judge Pitman observed that courts have limited authority to review licensing decisions, and he was not persuaded that licensing procedures could be used to immunize an agency from complaints related to rule promulgation. *Id.* at *8–9.

After rejecting each argument raised by the Board, the court found active supervision lacking and state-action immunity inapplicable to the antitrust claim alleged. *Id.* at *10. The court then examined other claims before denying the motion to dismiss. *Id.*

Perhaps the most interesting aspect of *Teladoc* is the court's refusal to construe judicial review of the justification, means, and objective of a rule as an examination of the substance of that rule. Such a robust interpretation of *Dental Examiners'* requirements greatly limits the availability of the state-action immunity defense to these professional licensing boards.

As the only extensive discussion and interpretation of *Dental Examiners*, and with an appeal docketed at the Fifth Circuit,[1] this case may serve as a bellwether for the post-*Dental-Examiners* state-action-immunity doctrine. With no other authority on point, it is difficult to say whether the court's analysis will withstand appellate review. To the extent it does,

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[1] *Teladoc Inc. v. Tex. Med. Bd.*, No. 16-50017 (5th Cir. *appeal docketed* Jan. 8 2016).

we should expect to see Texas lawmakers—and perhaps the legislatures of other states—amend state law to more expressly allow for substantive oversight of professional board decisions such that these state-authorized boards are entitled to state-action immunity under *Dental Examiners*.

IV. Broader Implications

At least two courts have used *Dental Examiners* to justify increased judicial scrutiny of state actors or state agencies—even outside the context of anti-competitive behavior from licensing boards. One court cited *Dental Examiners* as a reason for withholding immunity from a state university accused of conspiracy and anti-competitive conduct. The court held that—in light of the well-established need for supervision of state agencies—close cases should be resolved in favor of potential liability. *Seaman v. Duke University*, No. 1:15-C-42, 2016 WL 1043473 (M.D. N.C., Feb. 12, 2016) (citing *Dental Examiners*). And a Florida court of appeals referred to *Dental Examiners* before holding that a state agency for health care administration had exceeded its statutory authority with respect to amending its own procedural rules and regulations. *Baker Cnty. v. State of Florida*, 178 So. 3d 71 (Fla. App. 2015).

And although the *Dental Examiners* precedent has yet to be extensively discussed by the lower courts, the decision is certainly consistent with a recent trend away from judicial deference to agency adjudication in general and professional licensing decisions in particular.

A. *Patel v. Texas Department of Licensing*

Evidence of the trend away from deference to licensing requirements is apparent in *Patel v. Texas Department of Licensing and Regulation*, 469 S.W.3d 69 (Tex. 2015). In *Patel*, the Supreme Court of Texas considered a longstanding dispute between a group of eyebrow threaders and the Texas Department of Licensing and Regulation (TDLR). The

threaders had, for many years, maintained they do not practice any "cosmetology" and therefore are not subject to the relevant licensing requirements of that profession. *Id.* at 74. The substantive cosmetology statute itself did not expressly indicate whether threaders practice any form of cosmetology, but the Texas Department of Licensing and Regulation promulgated a rule dictating as much. *See* TEX. OCC. CODE § 1602.002(a)(8) (referring to "depilatories, preparations, or tweezing," but not threading); TEX. ADMIN. CODE § 83.10 (defining tweezing to include removal by "thread or other material").

The threaders raised, *inter alia*, a due process challenge to any construction of the governing statutes that might allow TDLR to impose the cosmetology licensing requirements on their trade. *Patel*, 469 S.W.3d at 74. While the lower courts rejected the challenge, a fractured Texas Supreme Court found the arguments persuasive, holding the 750-hour cosmetology licensing requirement so "oppressive" as applied to the threaders that it failed to satisfy even the historically deferential rational-basis test. *Id.* at 90. The court articulated a new rational basis standard, explaining that a rational basis will not lie where:

> "the statute's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest."

Id. at 87. In other words, even where the licensing regulation is rooted in a rational interest, that regulation will fail if its real-world effects reveal it to be an unreasonable means of achieving that interest.

This novel articulation of rational basis is a potential game-changer for those wishing to challenge agency action. The majority's emphasis on real-world effects may accommodate fact-bound disputes over oppression in cases that otherwise, under the pre-*Patel* doctrine, would have been dismissed as soon as the agency identified its rational interest.

Note, however, that the Texas Supreme Court has recently clarified that the *Patel* test is "properly limited to the particular

legal framework[] in which [it] arose,"[2] thereby leaving some uncertainty as to the significance of *Patel*'s holding.

B. *Serafine v. Branaman*

The Fifth Circuit recently addressed the unusual instance in which a professional regulatory scheme implicates First Amendment political-speech rights. *Serafine v. Branaman*, 810 F.3d 354, 357 (5th Cir. 2016). The case involved a dispute over a political candidate's use of the word "psychologist" on her campaign website. Under Texas law, an unlicensed individual who refers to herself as a psychologist is subject to criminal penalties. *Id.* at 358. Serafine, while not licensed by the state of Texas, had done post-graduate work in psychology and offered counseling and personal-growth classes in Austin. *Id.* Outside of the political website itself, she did not advertise herself as a "psychologist."

On learning of the campaign website, the Texas Board of Examiners of Psychologists and the Attorney General told Serafine to stop advertising herself as a psychologist and to stop providing "psychological services" without a license. *Id.* at 358. When she received these cease-and-desist letters, Serafine stopped the offending actions and sued the State, alleging infringement of her First Amendment rights, among other claims. *Id.* at 358–59.

Although the district court rejected Serafine's challenge, the Fifth Circuit reversed, holding the licensing statute unconstitutional as applied to Serafine's political speech. *Id.* at 361. The court emphasized the distinction between commercial speech and political discourse. *Id.* As the court explained, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Id.*

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[2] *Hagar v. Tex. Small Tobacco Coal.*, No. 14-0747, ___S.W.3d ___, 2016 WL 267843 (Tex. Apr. 1, 2016) (holding the Texas Legislature may impose a tax on business competitors without violating the Texas Constitution's prohibition of unequal taxation when the State settles significant litigation against a business enterprise, under which that enterprise agrees to ongoing financial payments to the state).

Therefore, because Sarafine had used the word "psychologist" on a campaign website, the State's commercial regulations could not be used to curtail her speech. *Id.* at 362.

But the court did not end its analysis with political speech. In a groundbreaking ruling with potentially national implications, the court struck down the heart of the statute, holding the psychology definition facially—and unconstitutionally—overbroad. Under the statute, "[a] person is engaged in the practice of psychology" if she "provides or offers to provide psychological services to individuals, groups, organizations, or the public." TEX. OCC. CODE § 501.003 (b)(2). These services include "describing, explaining, and ameliorating behavior." *Id.*at § (c)(1).

The Court rejected any suggestion this kind of discourse could be the exclusive province of those licensed to practice any one profession. As Judge Smith explained:

> The ability to provide guidance about the common problems of life–marriage, children, alcohol, health—is a foundation of human interaction and society, whether this advice be found in an almanac, at the feet of grandparents, or in a circle of friends. There is no doubt that such speech is protected by the First Amendment.

810 F.3d at 369. Because the statute abridges this constitutionally protected speech from all but those duly licensed as psychologists, the Fifth Circuit panel struck the section as facially unconstitutional, holding, "By limiting the ability of individuals to dispense personal advice about mental or emotional problems based on knowledge gleaned in a graduate class in practically any context, subsection (c) chills and prohibits protected speech." *Id.* at 369–70.

C. *Hines v. Alldredge*

But while we have seen a general trend away from judicial deference to professional regulatory schemes, the trend is not

unlimited. In *Hines v. Alldredge*, the Fifth Circuit upheld a narrow statutory requirement that veterinarians must physically examine an animal before practicing veterinary medicine, as required by Texas law. 783 F.3d 197 (5th Cir. 2015). Hines was a licensed veterinarian retired from traditional veterinary practices, who in retirement, provided veterinary advice via email and telephone. *Id.* at 199. In contrast to *Dental Examiners*, in which the Court undertook an examination of a professional board's rule promulgation, the Hines court considered a challenge to the substantive statute itself. *See* TEX. OCC. CODE § 801.351(c) (indicating that a veterinary relationship may not be established by "telephone or electronic means").

Hines alleged the statute violated his First Amendment rights and his rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id* at 200. The court rejected each argument.

The court evaluated the Due Process and Equal Protection claims and concluded the physical examination requirement was rationally related to a legitimate government interest. *Id.* at 202–03. "It is reasonable to conclude that the quality of care will be higher, and the risk of misdiagnosis and improper treatment lower, if the veterinarian physically examines the animal in question before treating it." *Id.*

The court also rejected the First Amendment challenge, emphasizing a long line of precedent indicating that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* at 201. The court explained that the physical-examination requirement does not regulate the content of the veterinarian's speech or require the veterinarian to deliver a particular message, and serves as—at most—an incidental restraint on commercial speech. *Id.* So while the *Serafine* court struck down a broad, general restriction as inapplicable as applied to political speech, the Hines court rejected an a facial challenge to a statute that restricted the practice of a trade in narrow, specific terms.

V. Discussion

In *Dental Examiners*, the U.S. Supreme Court utilized a two-prong, state-action immunity test originally developed for evaluating anticompetitive conduct by state-delegated trade associations (private, non-sovereign actors) and extended its application to state-created licensing boards that are controlled by active market participants (*e.g.*, doctors, dentists, cosmetologists, etc.). As a result, there are now effectively two classes of non-sovereign actors (private and public) for which both prongs of the state-action immunity test must be satisfied before the affirmative defense can be asserted.

Under the Court's decision, boards that are not controlled by active market participants will remain immune and are not required to meet the two-prong test. Also, municipalities are only required to meet the first prong (clearly articulated state policy).

For the second prong of the state-action immunity test, the Supreme Court has stated that the adequacy of active supervision by a State will depend on all the circumstances of a case. Nevertheless, the Court did identify several constant requirements of active supervision from case law including the following:

- The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it;
- The supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy;
- The mere potential for state supervision is not an adequate substitute for a decision by the State; and
- The state supervisor may not itself be an active market participant.

Additionally, the Court noted that the dental board had

avoided passing a regulation that was reviewable by the independent North Carolina Rules Review Commission whose members are appointed by the state legislature. One is left to imagine whether the dental board's promulgation of a rule and its formal review by the Commission might have been sufficient under the preceding criteria.

The question remains, what does active supervision look like? In *Teledoc* when the U.S. District Court for the Western District of Texas applied the *Dental Examiners* principles, the court found active state supervision was not demonstrated by various provisions of the Texas Administrative Procedure Act and other statutes cited by the Texas Medical Board, thereby denying the agency's state-action immunity defense. The Texas Legislature—with input from stakeholders on both sides of the state-action immunity issue—might be compelled to consider legislation regarding the active supervision requirement. However, it may be too challenging to establish the supervisory mechanisms necessary to meet the preceding criteria—particularly the power to veto or modify licensing board decisions based on a failure to meet state policy.

Other potential means of addressing the state-action immunity issue might include:

- altering the composition of board membership to address the issue of control by active market participants;
- requiring board members to be retired or otherwise inactive participants within the marketplace; or
- requiring practicing members to abstain from participating in matters for which there is an actual or perceived competitive advantage.

Of course, such actions could undermine the legitimate reasons for appointing technically knowledgeable people to serve on professional licensing boards.

IV. Conclusion

With the stringent standards set out in *Dental Examiners,* we can expect to see the anticompetitive actions of licensing boards curtailed and subject to increased scrutiny. And while many practitioners may never see a state-action immunity dispute in the course of their practice, the precedent does provide some insight into an judicial trend away from deference to these agencies.

And the Light Got In: From Habeas Volunteer to Full-Time Capital Writs Attorney

Gretchen Sween[1]

Ring the bells that still can ring
Forget your perfect offering
There is a crack in everything
That's how the light gets in.

— Leonard Cohen, "Anthem"

Singer-songwriter Leonard Cohen released *The Future* on November 24, 1992. Since my husband was a long-time fan, he commenced playing it obsessively shortly thereafter, much to my dismay. But one song in particular, "Anthem," resonated with me—then and now. "Anthem" reminds the listener that perfection is illusory; everything has a crack in it, yet, in the end, the crack is "how the light gets in." In other words, the vessel that delivers the prospect of real progress is also damaged goods.

This essay describes how a decision to take on a pro bono appellate matter allowed the light to get in—thereby changing the course of my professional life rather dramatically.

I could take some poetic license and insist that the story begins when Cohen's song inspired me to abandon my self-absorbed dreams of leading an experimental theater revolution in the wilds of Dallas, Texas and go to law school. After all, I should have recognized back then that I could effect social

[1] Gretchen Sween is a senior attorney with the Office of Capital and Forensics and a member of The University of Texas School of Law adjunct faculty. This essay expands upon an account published by The Marshall Project, *available at* https://www.themarshallproject.org/2015/12/17/raphael-holiday-was-put-to-death-and-his-lawyers-should-have-tried-harder-to-stop-it#.oMKKc1MEY. She is grateful to *The Appellate Advocate* for its interest in this story.

change and improve lives more easily with a law degree than performing shows in Deep Ellum basements before audiences the size of the Luckenbach public school system. But in truth, I continued to beat my head against a decidedly artsy wall for several more years, devoting most of my energy to quixotic theatrical endeavors while earning a meager living juggling part-time jobs as a teacher and freelance writer. I only decided to throw in the towel and head to law school nearly eight years after "Anthem" was released. I was then thirty-six.

Also, I cannot claim that I decided at last to head to law school because I'd finally recognized that I wanted to be a public interest lawyer. I was instead motivated by the basest of motives: the desire for a steady paycheck. I was tired of combatting the unstated assumption that seemed to follow me around—that I must be a deeply flawed individual considering my failure to parlay so much liberal arts education into an annual income barely above the federal poverty level.

As a neurotic Bohemian misfit, self-conscious about having achieved so little by "a certain age," I entered law school with a discernible chip on my shoulder. In commencing my time at The University of Texas School of Law, I felt that I'd made a wrong turn in Albuquerque and thus found myself trapped in halls full of enterprising youngsters well-schooled in the ways of white-shoe firms. My disorientation did not, however, mean that I successfully resisted the urge to mouth off in class about what I saw as the irrational presumptions underpinning so many core legal concepts—like the notion that juries can be instructed to apply an objective "reasonable man" standard to assess whether someone, serving as a stand-in for a corporation, had been negligent in leaving macaroni salad on a grocery store's floor.

I found our introductory Criminal Law class particularly unbearable. Even developments that were considered progressive—such as the attempts to distinguish among different degrees of culpability through concepts like first- and second-degree murder—seemed so retrograde. When it came to crime and punishment, the law appeared to afford little

room for nuance, science, and compassion. Legal rules were permitted to trump the consensus teachings of neuroscience, sociology, psychology, and the humanities. And the law was ill-equipped to account for a criminal defendant's social history, drug addiction, mental illness, or intellectual disability in assessing guilt or doling out punishment. For instance, then and now, in most jurisdictions, those accused of crimes could only be found "not guilty by reason of insanity" if they could prove that, when the crime was committed, through no fault of their own, they were so impaired that they could not tell the difference between their victim and a grapefruit.

Moreover, back when I started law school, it was perfectly legal in many states, including Texas, to execute someone who had mental retardation; who had committed the crime in question as a teenager; who was so psychotic he thought the devil had arranged for the warden to pump ozone into the cell to control his thoughts and prevent him from preaching the Gospel; who had never had much of a chance due to multi-generational poverty, racism, drugs, and rampant violence in the home; or whose appointed lawyer had slept through the trial or failed to put on any mitigation case whatsoever. Back then, as now, Texas was busily executing the lion's share of those in this nation who had been sentenced to death. And I was appalled.

The disorientation caused by one semester of Criminal Law had made me categorically certain about one thing: No way in hell was I interested in a career in that particular practice area. Despite my attraction to various progressive causes—such as constitutional challenges to institutional discrimination and to the arbitrary imposition of the death penalty, I eventually kept my head down, worked hard, and ended up with a job clerking for a well-respected, tough-on-crime, Republican-appointed, federal district court judge to be followed by a full-time job with an elite civil litigation boutique that specialized in complex commercial disputes. A success story, yes?

Years later, at the end of 2015, I agreed to represent a death-sentenced indigent named Raphael Holiday pro bono. As a

result, my whole notion of success changed—and, once again, as did my career trajectory.

* * * * *

When I got a call from one of the directors of UT Law's Capital Punishment Clinic, I was busy putting some finishing touches on a brief explaining why certifying a merger class against our client, the acquiring company, was at odds with all of the requisite factors as well as common sense. The distraction was welcome.

"Gretchen, Jim Marcus here. I may have a case for you, if you're interested. It's kind of a desperate situation."

Jim told me about Raphael Holiday and how he was already "under warrant," meaning an execution date had been set. It had been set for November 18, 2015—and it was then already mid-October. Apparently, Raphael had been writing to lawyers all over the country seeking help after his appointed counsel had told him that they did not intend to do any more work for him. Apparently, they had sent him a letter with the news and suggested that he try finding a public interest group or volunteer lawyers who might be willing to help him instead.

Raphael's efforts to find new lawyers to volunteer under these circumstances had proven fruitless. Therefore, on September 14, 2015, he wrote directly to the court: "Your honor, I beg you to consider new appointment of effective counsels to my case. They have refused to help me and it is a disheartening conundrum I am not fit to comprehend." He also noted that he had been treated with "hostile verbality from these two attorneys" and the attorney-client "relationship [was] no longer functional in a way that was productive for either [of the] parties." He beseeched the district judge to appoint new lawyers so that he might at least try to pursue clemency before it was too late. At that point, the only avenue seemingly still available to Raphael was a clemency application. And under Texas law, the deadline for such an application is cued off of an execution date. Thus the clock had already been ticking when Raphael turned to the court for help.

His appointed lawyers filed a response, opposing their client's request. They admitted that they did not intend to pursue clemency on his behalf. They justified that decision with the bald assertion that, "given political realities, there is no chance at all that a clemency petition would be granted." They also sought to assure the court of their commitment by stating that they had "filed (and were granted) a stay of execution the day before the execution was to take place in" the case of Clifton Williams, another one of their death-sentenced clients. That assertion, however, proved to be untrue—as was their insistence that Raphael had no basis for further legal appeals. But at this point, Raphael was on his own and had no one to expose his appointed lawyers' misstatements. The district court accepted the representations made by Raphael's appointed lawyers—trusting that they, as officers of the court, were telling the truth. The court denied Raphael's pro se request without a hearing based on the representations of his appointed lawyers.

Not knowing that the district court had already ruled against him—because his lawyers had not told him—on October 15, 2015, Raphael wrote a second letter to the district court. The letter expressed urgency, explaining that his appointed lawyers had said they would do "NOTHING ELSE." By then, as Raphael explained, he had gotten some responses to his letters, but no one was willing to take over unless his appointed lawyers would agree to step down. Apparently, his appointed lawyers had responded to this development, as Raphael told the court, by "fighting to stay on" and "demanding" that he give them "the legal work that others have done on my behalf." In other words, his appointed lawyers were unwilling to withdraw or do further work, but they seemed willing to take credit for work others might do for free even as they insisted there was nothing more that was worth doing.

All this had happened before I'd gotten that call from Jim Marcus.

I told him I would think hard about it.

Aside from conferring with Jim about the basic posture of

the case, I had some due diligence to do. I recognized that I needed to have some understanding of the criminal allegations that had been pursued so as to put Raphael Holiday on death row. Even though I was not going to be addressing questions relevant to the underlying conviction, I needed to know what the State would be invoking in the likely event that it would oppose the appeal. What I learned was harrowing. Raphael Holiday had been convicted of three counts of capital murder as a result of the deaths of three young girls, the youngest of which was his biological daughter. She was only 18 months old at the time. The fire had consumed a log house in the woods in Madison County. Raphael had been living in that log cabin with the mother of those three girls, until she had had the law turn him away. Each of the girls had a different father. Raphael, the father of the third girl, had recently been rejected for a new lover. She was white; Raphael—and his predecessors and the new boyfriend—were black. This was in southeast Texas where it is not uncommon to see Confederate flags plastered on the backs of pick-up trucks below visible, well-appointed gun racks.

The night of the fire, Raphael had confronted his former girlfriend. It was nearly midnight when he appeared on the scene in a rage over allegations that he had sexually molested the eldest child. The girls' mother called her aunt, who lived just down the road, to come intervene. This other woman and her brother arrived with a shotgun. Then the story gets very confusing. Raphael pulled out a pistol; his girlfriend ran out the back of the house; the uncle then ran off—and later ran into his niece with some other man in the woods. Meanwhile, the aunt was left behind with Raphael and his gun. The aunt ended up splashing gasoline, retrieved from her house, all over the house. The stories differ about how the fire started and why three little girls were left inside when it went up in flames. When the fire erupted, Raphael had fled the scene in the aunt's car. But because a cop was already waiting there on the dirt country road, he was quickly apprehended and arrested just before the car too burst into flames.

Not even these scant details were available as a result of an

Internet search, but I was able to learn enough to know that the end result was horrible: three children burned alive. An Internet search also yielded a picture of a rail-thin young mother with three little girls—an image that I later learned had been blown up into a large poster and used as a trial exhibit.

Looking at an image of those three beautiful little girls made me physically ill. But I also recognized that the events that had caused their untimely deaths had little to do with the legal principle I was being asked to fight for now, sixteen years later. Nor did my client's guilt or innocence or even the constitutionality of his sentence have anything to do with the issue at hand: his right to conflict-free counsel on the eve of his execution. I took some deep breathes and stiffened my resolve.

What I was willing to do for Raphael Holiday was quite circumscribed. I did not feel qualified to take on full responsibility for his representation. I was not a criminal lawyer, let alone a death-penalty specialist. Moreover, I was rather terrified by the fact that he had a looming execution date less than a month away. But because, or in spite, of the dire circumstances, I thought I could handle an appeal intended to address a fairly discrete legal issue. More specifically, I would be making a statutory construction argument. I would be asking: under the relevant federal statute, the Criminal Justice Act provision that provides for appointment of counsel in death cases, wasn't this man entitled to new court-appointed lawyers since his current court-appointed lawyers had told him that they did not intend to do any more work for him even while admitting that there was, in principle, at least one more possible remedy—which he wished to pursue? And then there was an ancillary issue: what were the implications of the fact that his current appointed counsel had taken steps to block his pro se efforts to replace them after they had expressly told him to seek out other lawyers who might be willing to help him on a pro bono basis?

I needed to see if Raphael Holiday would accept that I would only be undertaking an appeal of the district court's ruling on his pro se motion and seeking a stay of his execution so that, if the appeal succeeded, the relief would be meaningful. That

is, the goal would just be to preserve his right to obtain new appointed lawyers who would be willing to pursue any relief still available to him before time ran out. If his execution date was ultimately withdrawn, that would automatically reset key deadlines that were rapidly approaching, including the deadline to file a clemency application with the State's executive branch. A stay would be the only way substitute counsel would have a chance to step in and do the kind of investigation and extra-legal drafting that a clemency application would require.

To make sure that we were on the same page, I arranged to have Dick Burr, a veteran capital-defense lawyer who had access to death row, meet with Raphael to discuss the arrangement. I could not simply call Raphael up or shoot him an email at the Polunksy Unit in Livingston, Texas as I was used to doing with my commercial clients. So I needed an intermediary. Apparently, Raphael was thrilled by the idea. He agreed to the terms, and an attorney-client relationship between us was formed. We both signed an engagement letter clarifying the limited scope of what I was agreeing to do. Then I got to work.

As soon as I filed a notice of appeal on his behalf, Raphael's appointed lawyers reacted to this development by first offering to withdraw—but only if I would agree to take on the entire representation pro bono. After I explained that that was not what I had been retained to do, they tried a different course. That night, they filed a motion to reopen litigation in the district court—asking the judge to order me to take over the whole case pro bono and to abandon the appeal. When that effort failed, decorum was largely abandoned. Raphael's appointed lawyers alternatively threatened to pursue sanctions against me if I did not dismiss the appeal and proposed that I ghost-write a clemency petition, again pro bono, for their signature. In a matter of days, they reversed course yet again, promising the district court that they would put together a clemency application after all—even though, by then, the deadline was only a few days away and they had not undertaken any investigation or even spoken with Raphael about their intentions. The district court, however, decided that their pledge to file something was sufficient.

The court denied my motion to reconsider Raphael's request to have new lawyers appointed and denied the request to stay the imminent execution date so that new lawyers would have a reasonable opportunity to pursue clemency in accordance with standards promulgated by both the ABA and the State Bar of Texas.

Time was flying by far too quickly. I immediately filed an amended notice of appeal and prepared to move forward in the Fifth Circuit with an appellant's brief and a motion to stay the execution.

Meanwhile, Raphael's appointed lawyers threw together a clemency application in a 48-hour period—without Holiday's knowledge or input. They were seemingly determined to moot the appeal. But the clemency application, which I obtained from Raphael's bewildered mother, reflects precisely what one would expect from those who had disavowed any belief in the endeavor and who had been fighting against their own client's efforts to obtain a stay of his execution. On the first page, they twice misreported the execution date as "February 18, 2015"—a date that had passed seven months earlier. Most of the sham application is a description of the gruesome details of the crime, lifted virtually verbatim from a Texas Court of Criminal Appeals decision from 2006. That same material—that no rational person could suggest was prepared to evoke a sense of mercy—was later quoted in full in the ***State's*** appellee's brief opposing our motion to stay. Only buried in affidavits, prepared years ago for other proceedings as a result of the work of other lawyers, can one find descriptions of the horrific abuse to which Raphael was subjected throughout his childhood. The sham application's superficial bulk was derived from required attachments, ten-year-old affidavits, and an academic article that had nothing to do with Raphael or his quest for clemency.

The only "original" material was a short, required victim-impact statement, a paragraph drafted in such a way that it seemed calculated to stick a knife in the client's back: "It is not possible to address the impact of this crime on the family of the children killed," they wrote. "Neither Raphael nor

his attorneys have had any communication with them." But one victim of the crime was the grandmother of one of the children, Angella Nickerson, who was also Raphael's mother. Raphael's appointed lawyers ***had*** been in communication with her—prompting pointed anguish over their refusal to pursue clemency for her son and then their eleventh-hour attempt to manufacture the appearance of a clemency application. Mrs. Nickerson is part of the larger untold story of extreme poverty, degradation, and virtual torture that characterized Raphael's childhood that may have shed some light on a devastating event that had occurred 16 years earlier when he was 20 years old. That story had not been fully investigated or told—nor had the story of his transformation during years spent in prison haunted by the spirits of three lost innocents.

Because, in my view, the clemency application was a sham, I pushed forward with the appeal to secure meaningful representation for my client as I had pledged to do. By then, further investigation had revealed that Raphael also had additional legal claims that his appointed lawyers seemed to have forgotten about. I also learned that the argument they had made to the district court as proof of their williness to zealously represent Raphael involved a significant misrepresentation. They had claimed that, when an additional avenue of relief had manifested itself in another case, they had "not hesitated" to seek relief and had even obtained a stay of execution for their client Clifton Williams. Yet by the time I was preparing my Fifth Circuit brief, I knew that this representation made to a federal judge in a public filing was false. An entirely different lawyer, who had been appointed by a state court judge after these same lawyers had abandoned Mr. Williams, had found a forgotten basis for relief and had obtained the stay, not his federally appointed lawyers who were also representing Raphael. That information seemed highly relevant in considering whether a conflict existed between Raphael and his appointed counsel, as did the way they had litigated against Raphael in the district court.

However, even before I filed the appellant's brief and motion to stay, Raphael's appointed counsel appeared on the scene—

claiming to be appearing on his behalf too. They then filed responses opposing the relief I sought and a motion of their own asking the court to dismiss Raphael's appeal as frivolous.

I responded to each of these filings—as well as the opposition briefs filed by the State, the actual appellee. The State sought to exploit the fact that two sets of lawyers were purporting to representing Raphael—accusing me of having "no standing" and of being a mere "next friend," although neither of these legal concepts fit the facts. But the State certainly could not be faulted for trying to paint me as an "interloper" because that was the same argument that Raphael's appointed counsel were making as they urged the Fifth Circuit to dismiss the appeal and deny the stay of execution (sought by their own client) because, in their view, the appeal had been mooted by the clemency application they had filed in his name, though without his involvement or consent.

The Fifth Circuit panel assigned to the case did not ultimately decide whether the clemency application was a sham, as Raphael and I believed. But Raphael's appointed lawyers essentially confessed to the court that it was. While the application was ***still pending***, they wrote to the Fifth Circuit that, in their "informed professional belief[,] the clemency has next to zero chance of success[.]" It was inconceivable to me that a lawyer laboring on the civil side of the docket would ever file a document with a federal court stating that his corporate client had "zero chance" of succeeding in another proceeding that that same lawyer had initiated and that was ***still pending***. More inconceivable still was the notion that anyone would argue that such conduct does ***not*** reflect a conflict of interest. Yet that is what the State argued to the Fifth Circuit—even as it quoted Raphael's appointed lawyers' statement that he had "zero chance" of prevailing.

The Fifth Circuit's one-page order denying relief simply noted that the district court had not abused its discretion in denying Raphael's request for new lawyers. The decision also stated in a footnote: "Although we do not dismiss this appeal as frivolous, in light of the district court's explanations for not

displacing court-appointed counsel we warn the attorney here that subsequent attempts in this case to displace counsel will be viewed with skepticism."

By this time, the Texas Board of Pardons and Paroles had summarily denied the hastily prepared clemency application.

With only two days left before the execution date, Raphael and I decided to take the fight up to the Supreme Court. There was reason to hope that the nation's highest court might, just might, review the case. In a 2009 decision, *Harbison v. Bell*, the Supreme Court had emphasized that the rights to representation that death-sentenced indigents are provided under federal law include the right to have "meaningful" access to clemency as well as other proceedings. Congress, the Supreme Court reasoned, "did not want condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells."[2] Subsequent cases had also emphasized that when a conflict of interest arises between a death-sentenced indigent and his appointed lawyers, the district court is "compelled" to appoint substitute counsel.[3]

But on the very day of the execution, the Supreme Court issued an order, declining to review the case or to stay the execution. Justice Sotomayor, however, took pains to issue a statement in conjunction with the order, expressing unambiguously her view that Raphael's appointed lawyers had abandoned him, that the district court had abused its discretion by refusing to appoint new lawyers, and that the clemency application the appointed lawyers had submitted "proved unsuccessful—and likely would have benefited from additional preparation by more zealous advocates." She also speculated

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[2] 129 S. Ct. 1481, 1491 (2009).

[3] *See, e.g.*, *Martel v. Clair*, 132 S. Ct. 1276 (2012) (holding that district courts should apply the "interests of justice" standard when deciding whether to grant a death-sentenced indigent's request for the appointment of substitute counsel); *Christeson v. Roper*, 574 U.S. ___ (2015) (finding that the substitution of appointed counsel should have been permitted under *Martel* because of the original attorneys' apparent conflict of interest with their client).

that "this Court, unlike a state court, is likely to have no power to order Texas to reconsider its clemency decision with new attorneys representing Holiday."

Meanwhile, litigation—and hope—had opened up on another front. After reading about what was happening with Raphael, his original trial lawyers had surfaced and expressed an interested in seeing if there was anything they too could do. Working independently of me, they had discovered a double-jeopardy problem with the indictments and another unexhausted claim. They prepared a pleading and raced to the state trial court on the very date the execution was scheduled. Miraculously, after a hearing, that judge was willing to enter a stay of the execution long enough to see what appellate remedies might still be available to Raphael. I got the news that afternoon and was elated. But just as quickly, I was plunged back into a state of extreme anxiety, because the State announced at the same hearing that it was going to seek mandamus relief from the Court of Criminal Appeals to force the execution to go forward.

The State filed its mandamus petition that afternoon. At the same time, the Court of Criminal Appeals was hearing extended oral arguments in the criminal case against former Governor Rick Perry over the propriety of charges based on his use of the executive veto. Before the close of business that day, Raphael's trial lawyers filed a response opposing the State's mandamus petition. But shortly after the court received that filing, it issued a per curiam decision granting the State leave to seek mandamus relief. The short order also stated "that the trial court's November 18, 2015 order withdrawing the death warrant is void, and the death warrant is still valid. No motions for rehearing this matter will be entertained." In other words, the court ordered the execution to take place that night as originally scheduled.

In a dissenting opinion, Justice Alcala questioned whether the State had carried its burden of establishing that it was entitled to "extraordinary relief," as it had not, in her view, satisfied either element of the mandamus standard.

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Just before the lethal injections were administered, Raphael thanked his "loved ones" and the warden.

Following the execution, a member of the press reported that one of Raphael's appointed lawyers had insisted in an interview: "I'd walk through hell with a can of gasoline with my clients to protect their interests." The lawyer made this remark in the context of questions about his commitment to a man who, that very night, had been executed for deaths caused by a gasoline fire.

The State declared Raphael Holiday dead at around 8:30 pm Central time while I sat alone sobbing in a parked car, finding myself incapable of fielding any more phone calls from the many people who had shown interest in this fight about whether a death-sentenced man was entitled to have a conflict-free lawyer appointed to fight for him by making, among other things, a meaningful effort to pursue clemency.

* * * * *

Clemency, although a rule-based process, is fundamentally about injecting mercy into the process dispensing criminal punishment. As the Supreme Court recently explained: "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."[4] Indeed, over 180 years ago, the Court recognized that clemency reflects "an act of grace," proceeding "from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed."[5]

In short, a clemency proceeding gives a condemned person the right to plead for his life in terms the judicial process cannot accommodate. The point is not to rehash legal claims that the

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[4] *Harbison*, 129 S. Ct. at 1490 (quoting *Herrera v. Collins*, 506 U.S. 390, 411-412 (1993)).

[5] *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833).

courts have previously rejected hoping for a better outcome before different decision-makers in the executive branch. Instead, it affords the chance to present humane reasons unique to the applicant that evoke the need for, and instill the desire to, grant mercy. The right to seek mercy, by arguing from a perspective that transcends the limits of the judicial process, is not a matter to abandon or pursue without considerable care

The clemency application that Raphael's appointed lawyers threw together in a 48-period by cutting-and-pasting old work-product into a form borrowed from other lawyers at the last minute does not reflect "meaningful" access to this inherently long-shot relief. Clemency requires that lawyers spend time investigating and learning the part of the client's story that cannot simply be gleaned from prior legal proceedings. It is a story that begins well before a devastating crime was committed and continues well after incarceration commenced. It is a story that played out beyond the confines of courts and legalistic arguments. No one can meaningfully accomplish that mission in 48 hours.

The clemency application submitted in Raphael's name (and without his knowledge) did not reflect any attempt to understand Raphael Holiday as a human being, but instead reduced him to the worst moment in his life—a dreadful moment that haunted him thereafter, but had not, in his view, been fully or fairly developed in judicial proceedings. The sham application did not capture the stories of the many people who were still in his life—including others directly affected by the crime that he was convicted of committing or the siblings he essentially raised when he himself was no more than a child—people who continued to value his life and were appalled that his appointed lawyers had rejected out of hand the chance to pursue this last recourse the criminal justice system offers.

Raphael's appointed lawyers didn't ask him why pursuing clemency was so important to him before they announced in a letter that pursuing clemency "just gives an inmate false hopes." But Raphael had an answer. He felt his side of the story, during his 16 years in prison in the wake of a horrific tragedy,

had never been told. It wasn't that he was deluded about the odds of relief. He understood that clemency was his last chance to get his story out.

Because no one undertook any real investigation in conjunction with Raphael's federal appeals or to support a clemency application, we cannot know the full story. But a sketchy outline can be pieced together from his words, his mother's memories, and undeveloped clues lurking in the judicial record.

Picture this: You are born poor and black in a small town in southeast Texas in 1979. Your mother is 15 years old. Your biological father is not part of the story. Your mother eventually marries someone else. Your step-father and mother beat you routinely because that was how things were done in their experience. Life is hard and you are expected, from a very young age, to take care of your two younger half-brothers. You are beaten when you fall short. You run away repeatedly.

By age 15, you finally succeed. You are taken in by a friend of some relative in another town. She starts giving you drugs hoping to disable you so that you can then get "sick checks." You are in and out of school. You have trouble holding a job.

Then you fall in love. She is white. She has two kids from two different men. You want to help her raise those kids. You arrange to move into a trailer together and build a family. Soon she is pregnant with your child. The baby is born early and with a hole in her heart. But when you hold her in your arms, she reaches a hand up toward the sky. So you decide "The Lord wants her to be named Justice." You are now 19.

That year, your common-law wife's aunt offers your family a place to live. It is a cabin deep in the woods on property she and her husband own. You are excited to move there. It is rickety and old, but it will be a place of your own. But your wife doesn't like it there. She soon grows distant. One day, you come home and she is there with her mother ordering you off the place. Your wife gets an ex parte protective order against you. But she also keeps trying to see you. You suspect she is also sleeping with someone else. You go to confront her and

catch her in bed with another man. That man threatens you; he sends word through mutual friends that he will kill you if you come around again. Then you are accused of sexually assaulting the eldest child. (Years later, a criminal background check of your estranged wife's boyfriend shows that he was convicted of sexually assaulting a minor the very same month you were accused; but this was never investigated.)

You are in a rage. You decide to confront this man. You get a gun for protection. You go to the house and he is not there. Only your estranged wife is there with the three girls. You argue. Your wife's aunt comes over along with her brother, armed with a shotgun. He points the gun at you. You then pull out your own gun and point it at your wife's aunt. The other man drops his gun. Your estranged wife runs off. You go with her aunt to the main house. She gets large containers of gasoline. You go back to the cabin. She starts pouring gas all over the house as you continue to follow her holding a gun. You notice that, although your wife is gone, the three little girls are still there sitting on a couch. You go toward them to get them out of the house that is filling up with fumes. As you get up to go to them, the house explodes. You get out of the house and then help pull your wife's aunt out of a back window. You ask her about the kids. She says they are all dead. You try to get back inside, but the whole place is by then engulfed in flames. You panic, run to the aunt's car, and speed off. You are soon stopped by the police who were waiting just down the road. You are 20 years old.

You tell the deputy what happened as you are arrested. He believes you should not be charged with a capital crime—so much so that he testifies to that effect during the sentencing phase of your trial.

But you are charged with, and convicted of, three counts of capital murder. And you are given multiple death sentences. You cannot imagine how anyone believed you intended to kill those kids. Meanwhile, the sexual assault accusation made against you was dropped by Child Protective Services. You had voluntarily submitted to a DNA test and adamantly denied the allegation. But that test was not made part of the record at trial.

Instead, the accusation was. Your wife's aunt, who poured the gasoline all over the house, testifies at trial that she saw you bend over just before the fire started. She had not said that in previous statements to investigators. You had wanted to testify at trial to explain that you never intended to kill those kids and that you did not start the fire. Your lawyers advise you not to testify. Your trial is interrupted one day by the man your wife had been sleeping with who had threatened to kill you and who had been convicted of sexual assault of a minor the same month that you were accused of such conduct. The man was arrested for making a "terroristic threat," but this role in the story was not investigated or explained to the jury or to any court.

You spend 16 years in prison, 14 on death row in Livingston, Texas. You keep hoping your lawyers will help you get your story out. You believe in God. You become a valued member of the prison community. Your mother, your brothers, and other loved ones continue to believe in you. But your federally appointed lawyers, during the first of only a few meetings, stop you when you start to volunteer your story. They say they "don't need to hear that." They don't care that you didn't pour any gasoline in the house, that you didn't start the fire, that you didn't intend for the kids to be there. They say they are bound by the record.

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As noted above, the Supreme Court decided not to review Raphael's case. That is, of course, the Court's prerogative; and it denies the vast majority of the requests it receives. But previous Supreme Court cases and Justice Sotomayor's statement in this case tell us what should have been done. When a death-sentenced indigent states that a conflict has arisen with his court-appointed attorneys and he or she asks for the appointment of new lawyers, the district court should investigate the source and nature of the client's complaint.[6] Judges should not simply rely on the representations of thelawyers, who may well be solely responsible for the problem.

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[6] *See Clair*, 132 S. Ct. 1276; *Christeson*, 574 U.S. ___.

I continue to wonder: when the conflict between lawyer and client only becomes obvious ***after*** the State has set an execution date, shouldn't that be a reason to slow down, not speed up, the wheels of justice?

Also, drawing on my experiences on the civil side, it seemed to me that when appointed lawyers file documents with federal courts in which they take positions adverse to their own client and make material misstatements about what they have and have not done for their clients, this should be a cause for concern. Such violations of basic rules of professional responsibility are generally not tolerated in civil cases involving, for instance, disputes about intellectual property. Should the ethical standards be more lax when the client is indigent and the lawyers have been appointed by a court and are being paid by federal tax dollars?

I will continue to seek answers to these and other lingering questions—because when Raphael was executed, I did not know, and still do not know, most of his story.

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The day after the State of Texas executed Raphael Holiday, I dragged myself into the office. I did so by thinking about the career death-penalty lawyers who had inspired me during this month-long ordeal. They, in stark contrast to Raphael's appointed lawyers, commit routinely and fiercely to the Sisyphean task of pushing an enormous boulder straight uphill—again and again. They do so not because they expect to win many legal battles. They mostly lose. As Dick Burr, who has been toiling selflessly in this arena for 40 years said to me, "We do this work to fight against the caste system in America. The lowest of the low are the poor who have been convicted of capital crimes. Most people are not interested in these people—until after it becomes clear that they are actually innocent." The toil is worth it to lawyers like Dick Burr, not because of, but in spite of, the odds of losing. "The winning," Dick Burr explained to me, "comes from seeing the difference you can make in taking the time to build relationships with these

people whom society has cast off. If they get past the initial stage of anguish and depression, they begin to read, to think, to build connections. Being part of seeing that redemption is what makes this work so rewarding."

When I got back to my office the day after the execution, I found an envelope addressed to me sitting in my chair. It was from Raphael. Inside was a card. It had a picture of bright yellow and red flowers on the front with the word "generosity" printed in bold letters in the corner. Inside he had written: "Thank you for your help. I cannot thank you enough. God bless you always."

For me, that was how the light got in.

Less than two months later, I left my comfortable practice as a civil appellate practitioner and took a job with the Office of Capital and Forensic Writs. I now work for the State of Texas, against the State of Texas, representing indigents on death row in state habeas corpus proceedings. Every day I am reminded of Raphael Holiday and the fuller story of what led up to and followed that terrible, chaotic night in 2000 when he was 20 years old, which culminated in the senseless death of three innocent girls. Numerous questions remain. One thing is certain, however: Raphael's execution—but one example of the many cracks plaguing our criminal justice system—was a catalyst, compelling me to do my part to let more light in.

Interview of Justice Maryellen Hicks[1]

Perry Cockerell, Adkerson Hauder & Bezney, P.C.

The following is an excerpt of an interview of Justice Maryellen Hicks (MH) conducted on January 16, 2015, by Perry Cockerell (PC). Perry is the co-chair of the Judiciary and Section History Committee of the State Bar Appellate Section. The interview is part of an ongoing effort by the State Bar of Texas and the Appellate Section to preserve and document matters of historical interest to members of the bar.

PC: What made you decide to become a lawyer?

MH: I had the great fortune of having a great uncle who was a pioneer lawyer here in the State of Texas. His name was W. J. Durham. And I knew, as a young person, I could be a lawyer because my uncle was a lawyer. I probably was age five when I decided that was the career path I wanted to take.

PC: Where did you go to high school?

MH: I graduated from high school in Odessa, Texas, and then from there went to Texas Woman's University in Denton, and then on to Tech Law School.

PC: When did you get out of Texas Tech Law School?

MH: '74.

[1] Justice Maryellen Hicks, the first AfricanAmerican woman to serve on the Second Court of Appeals in Fort Worth, was the first black municipal court judge in Fort Worth, and the first black woman elected to a district judgeship in Tarrant County. She has served as president of the Black Women Lawyers of Tarrant County and the Fort Worth Black Bar Association. She was the first AfricanAmerican graduate of the Texas Tech School of Law, where she received her law degree.

PC: Was that one of the first law classes there?

MH: Yes. In fact, another person of color, an African American, Jean Gaines, had gone to Texas Tech, but did not graduate. I had the distinction of being the first black graduate of the Texas Tech School of Law, of which I am extremely proud. I think I got a great education there, I made a lot of friends and met folks with whom I share a bond today.

PC: Tell us how your uncle inspired you.

MH: My uncle inspired me because with a little of nothing he became successful. I remember him taking vegetables and chickens and things like that for legal fees. He did civil rights cases, he did criminal cases—you name it. The interesting thing about W.J.—he did not go to law school. He read the law. The story in the family is that he was working in a white law firm and they encouraged him. He took the Bar and passed it.

My uncle and my grandfather were inspirational. Even today people come up to me, especially the older lawyers or older citizens, and remember him and remember everything he achieved for others. My uncle was a counsel on *Sweatt v. Painter* along with Justice Thurgood Marshall.

PC: After you got out of law school where did you go to work?

MH: I came to the best city in the world—besides Houston—Fort Worth. I had a lot of great job offers here in Fort Worth. I was a novelty when you think about it, a black female lawyer. And so I had some opportunities of which I'll always be grateful. I went to work for Huey Mitchell and Norman Bonner. They had a small partnership of black lawyers who did everything, anything that

came through the door. They didn't take chickens and vegetables for their fees, but they represented a lot of people.

PC: How long did you work for Huey Mitchell?

MH: About two years and then Norman Bonner and I went out together. We purchased an old house on Evans Avenue, which is the jewel of the South Side of Fort Worth, 100 percent black at that time. We fixed it up and opened our doors to the community. At that point it seems like most of my clients were ladies of the evening. [Laughter] But they paid.

PC: How long were you with Norman Bonner

MH: Probably two years. I have always been interested in politics and one of the things my mother and father stressed to us was civic participation. Hugh Parmer was running for mayor, and my sister and I worked on his campaign. I got to meet him and when a vacancy came for a municipal-court judgeship, I was elated to receive that appointment.

PC: When was that?

MH: You're really taking me back. 1977.

PC: How long were you a Municipal Judge?

MH: A year or two and then Mayor Hugh Parmer nominated me and I became Chief Judge. You will remember those days—we're talking about the 70s when there certainly were no black judges, very few women judges, there wasn't a lot of diversity in our legal community here in Tarrant County. Of course that has changed all for the best, in my opinion, but there just weren't a lot of us and

I call myself a novelty. I was at the right place at the right time and I became Chief Judge for about two years.

PC: And where did you go after that?

MH: I ran for County Criminal Court, but I lost in the Democratic Primary by 88 votes. That brought me to the attention of Governor Mark White and a lot of other people who were in a position to elevate me to an even higher court. By then Hugh Parmer was a State Senator, and there were all these vacancies in Tarrant County and quite frankly, I had a decision to make. I chose the Family Court, and the rest, as they say, is history.

PC: When were you appointed to the Family Court?

MH: You would ask that. [laughs.] Okay, let's see, that had to be 1983.

PC: And how long were you on the Court?

MH: That was the 231st Family District Court. I was there ten years and that's about as long as one needs to be in Family Court, in my opinion. Eight years would be even better.

PC: During that time on the District Court did you have any particular cases that were inspirational or interesting?

MH: I wouldn't call it inspirational or interesting, but I had the gentleman, Mr. George Lott, who went on a rampage and injured judges and killed two lawyers. I had presided over his divorce.

PC: You might want to describe that case because some people may not know about it.

MH: Mr. Lott's divorce was filed in the 231st. After a two-week jury trial, the jury awarded custody to his wife. Lott was angry at everybody. He was angry at me, he was angry at the amicus lawyer, he had a whole list of people he disliked.

But Mr. Lott, God rest his soul, was a very disturbed person. He was angry at me because I had given him supervised visitation and there were other allegations that I won't go into that were very, very serious.

Other than the loss of loved ones, that is the most distressing thing that happened to me. I'll carry that to my grave. Could I have done anything differently where he was concerned? I've examined that and I know every order I took was in the best interest of that family unit and most particular his young son. After the Court of Appeals affirmed the judgment, Lott went upstairs to kill some of them.

PC: Were there any other interesting cases?

MH: They were all interesting. I ordered a husband to give his wife the engagement ring that had been a gift. He didn't want to do that, so he swallowed it. Needless to say, I held him in contempt and he was escorted over to the Sheriff's Department where you can imagine how they extracted the ring. Well, guess what, we found out it wasn't even a real diamond, it was a CZ, so I thought that was most interesting. That case settled.

PC: Now, when did you go off the 231st?

MH: After George Lott, I immediately decided I would not run again. I sought a position on the Court of Appeals and again, it did not hurt that I was black and a woman, and the late, great Ann Richards—the greatest governor that's ever lived, in my opinion, other than Mark White—appointed me as a Justice on the Second Court

of Appeals and that was the end of 1992. Again, there had never been any women up there and there had never been anybody of color.

PC: Do you like appellate practice?

MH: I really did. It made me go back and learn. The best thing about serving on an appellate court is the search for what is actually the law. You don't make law, you go back and find a precedent that fits. And a lot of times cases were right on point. That was very exciting to me.

PC: Now did you read through the record yourself?

MH: I read everything. If I wasn't on a panel that week I would read all week, and I would take notes, and then I'd go do my research, okay? It was an awesome experience for me. It was most rewarding for me because it made me think. It made me reason more. It made me understand more. And for that I'll always be grateful.

PC: What advice would you give attorneys in preparing their appellate briefs?

MH: Be brief. Get to the point, don't try to finagle stuff, those folks up there are extremely bright and they have a bright staff and bright minds, don't try to pull the wool over anybody's eyes. Be prepared for the pros and the cons. Know what you're talking about and don't just appeal to appeal. Just don't send us, you know, 40 pages of the same things over and over again. It doesn't work.

PC: What advice would you say to give an attorney concerning oral argument?

MH: Be prepared, be sharp, be reasonable, be brief. [laughter]

PC: Does oral argument actually count?

MH: To me it did, especially if I was, if I was in the middle. I don't know about other folks up there. Sometimes, I'd made up my mind, but other times I had not. I'd read it, I'd made my notes, I'd researched it, and then oral argument changed my mind.

PC: How did your life change from the District Bench to the Appellate?

MH: It was much quieter, to say the least. In the 231st I had an open door policy, anybody could come back and see me. I had an office full of toys for when I interviewed children. You are isolated on the Court of Appeals. And that's okay. That's the way it needs to be.

I had one unpleasant thing happen to me while I was on the Court of Appeals. I will share the story. A law firm was celebrating its anniversary in the Court of Appeals. I was wearing a purple suit and had on a wonderful scarf my sister had sent me from the Museum of Modern Art in New York. One of the named partners in this law firm asked me to take his coat. He assumed I was wait staff. Wait staff had on black and white, Maryellen had on light purple. I will never forget how Chief Justice Hill and Justice Farrar were so hurt for me and showed their understanding and their belief in me so to say. I got my purse and I left. I felt we have not overcome yet if the assumption is the only black person up here has to be the wait staff. And that was the only time I can think of when I was devastated.

PC: Who was your mentor on the Court of Appeals?

MH: All of them, but in particular I have to say Chief Justice Hill and Justice Farrar. Their doors were always open. I knew I could go to them and talk to them and no question

was silly, no question was stupid. They'd listen. And they cared, they really, really cared. And for that I will always be grateful and I mean that sincerely.

PC: Now what did you find most rewarding as an Appellate Judge?

MH: The hours. Like in the summer, the summer it was catch-up time. And I liked the isolation, which gave me time to work and to think. I liked that, I mean I really mean that.

PC: Did you like to write?

MH: I learned. I took a writing class [laughter] I really did. I didn't think I would, but I did, okay? I learned I liked to write. I learned I liked to reason and make something speak to what our law really is and not what it should be—what it should be, Maryellen, is not your job.

PC: What was the most challenging aspect of being an Appellate Judge?

MH: The most challenging, even though you didn't think the law was right, was to write the opinion based on---

PC: Stare decisis.

MH: Exactly. I might have felt, this is not right, but so what? This is our law and you promise to uphold the Constitution and the laws of Texas and you must do that. Forget your personal opinion as to what's right and wrong.

PC: What is your advice to help the attorneys in their practice?

MH: For me, it's be honest. You can be strident, but not arrogant. You can be forceful without being disrespectful. You don't know how often judges talk to one another. The most difficult lawyer is on everybody's list as well as the lawyers we feel are dishonest. The same thing goes for judges—work hard, do your job.

PC: After you left the Court of Appeals, what did you do?

MH: I went to Houston. Originally, I planned to work until my retirement vested. It has vested and I've been in Houston 20 years. I serve as a visiting judge for the Family and Juvenile Courts. I have a private practice doing arbitrations and mediation. I cannot believe it this March will be 20 years. I love Houston. Half my legal career has been in Houston. I'll always be grateful to Harris County. I call it my second home, Houston.

PC: Tell me what other advice you'd like to give new attorneys and practicing attorneys.

MH: Get involved. We, as lawyers, have a responsibility for community service like Big Brothers, Big Sisters. Go clean your shelf off and take food to the Tarrant County Food Bank, or the Community Food Bank. We lawyers, to me, have an added responsibility to be the best stewards of our lives and our government than any other profession.

I would say for young lawyers, political participation is very, very important. I believe all of us have a responsibility and a duty, because of our legal training, to be involved in pro bono work or helping out at a homeless shelter or voting, or doing whatever we can to make our society even greater. And when you look at the great lawyers of the past, whatever color they were, whatever their gender is, those men and woman have made a difference in this country. For me, lawyers built this country.

Interview of Chief Justice Ann Crawford McClure[1]

Doug Alexander, Alexander, Dubose, Jefferson & Townsend, LLP

The following is an excerpt of an interview of Chief Justice Ann Crawford McClure (ACM) conducted on October 14, 2014, by Doug Alexander (DA). The interview is part of an ongoing effort by the State Bar of Texas and the Appellate Section to preserve and document matters of historical interest to members of the bar.

DA: Tell us a bit about your personal background.

ACM: I was born in Cincinnati, Ohio, but we moved to Texas when I was 22 months old, so as I like to say, I got here as fast as I could. I graduated from Winston Churchill High School in San Antonio. From there I went to Texas Christian University in Fort Worth and became a Horned Frog.

I majored in Communications and loved every bit of my time in Fort Worth. And then ended up moving to Houston where I worked for a while and then got bitten by the law bug.

DA: How did you end up in law school?

ACM: It was not easy to find a job in the communications field in the Houston market at 20 years of age unless one wanted to work the midnight to 6:00 shift. So, I went to work as a legal secretary in the Labor and Employment

[1] In 2011, Justice Ann Crawford McClure was appointed Chief Justice of the Eighth Court of Appeals by Governor Rick Perry, becoming the first female chief justice in the court's one-hundred year history. She was elected to an unexpired term in 2012 and re-elected in 2014. Chief Justice McClure served as Chair of the Appellate Section from 2000 - 2001. She is board certified in Civil Appellate Law and in Family Law.

section of Fulbright & Jaworski for a gentleman by the name of Hugh Hackney. He persuaded me to go to law school; I applied to U of H[ouston] and was accepted.

DA: You graduate law school 1979, and at that point stay with the same [boutique law firm] that you had been working for.

ACM: I did. I was turned over my own set of files and I was in Court the next morning.

DA: At some point, appellate practice came onto the scene. How did that develop?

ACM: We had a very specialized practice. The firm name changed seven times in seven years but eventually it became Piro and Lilly. Bob Piro was phenomenal in family law from a property standpoint. Earle Lilly handled all of the child issues and was masterful at custody litigation. I ended up doing the appellate work for both of them. Bob represented Tony Vallone of Tony's Restaurant in Houston. The case went all the way to the Texas Supreme Court. I did the briefing on that—which involved one of the major turning points in the development of Family law—and it gave me a unique opportunity to see what it was like. I got to argue part of it and I was hooked on that.

DA: You were with that firm through what year?

ACM: '83.

DA: So four years and then off to—

ACM: El Paso.

DA: —El Paso and what prompted that move?

ACM: I became involved in the State Bar committee that was writing the Texas Family Law Practice Manual. During that three-year process, I met someone from El Paso who was also on the committee. Eventually, we became engaged and I moved to El Paso. That was 31 years ago.

DA: At that point what did you do?

ACM: I was engaged in a solo practice. I was doing some family law contract work, I was doing some appellate law contract work. I handled all of the appellate work that came out of my husband's firm.

I became certified in Family Law the first year I was eligible, which was '84. And was doing a lot of Family Law appellate work at that time. When they developed this specialty in Civil Appellate Law, I sat for that the first time and became the first person west of Fort Worth to obtain certification in Appellate Law. And only one of three lawyers in the State who was dual certified in Family Law and Civil Appellate Law and it was, it was a great marketing niche, and I ended up with a statewide practice, argued in all the courts across the State.

DA: How, from El Paso, did you manage to develop a statewide practice? What advice would you give to young people who want to develop specialties like that?

ACM: Become involved in the Bar. I'm a Bar junkie, I will confess to that. I went on the speaking circuit, probably in '84, and met a lot of people in Family Law that way. As I grew into the civil litigation area, I would get phone calls about handling civil appellate matters and it just sort of morphed from there.

DA: Speaking of firsts, I think you may have been the first person in Texas to have chaired two different sections.

ACM: Justice Rivera, who just retired from our Court on the 31st of August, chaired Women in the Law and the Litigation Section. Richard chaired the Family Law Section and the Appellate Section. I also chaired the Appellate Division of the Judicial Section. So I never chaired the Judicial Section, but I get a two and a half.

DA: Tell us about some of the CLE courses you were teaching, the people you were working with, that type of thing.

ACM: Once I became certified, that was about the time that Ralph Brock and Rusty McMains and Hatchell and all of them were developing the Section. And I immediately joined the Section and I started going to the Section CLE. One year, I got a phone call, out of the blue, from your partner, Roger, asking if I would speak at one of the Appellate Conferences. And that was such a thrill for me because I had not spoken outside of the Family Law environment, yet, at that time.

DA: And what year was that?

ACM: Oh, gosh, I would have to say '89.

DA: Okay. So at that point you're a 10-year lawyer.

ACM: I'm a 10-year lawyer. I was a co-course director with Terry Tottenham for The Ultimate Trial Notebook. I had directed the Marriage Dissolution Institute. And in '02, I was the course director of the Civil Appellate Advanced Course.

DA: So that was 2002. Now let's go back in time because you were Chair of the Section 2000-2001.

ACM: I was the Millennium Chair.

DA: When did you first get on the ladder to become the Chair? Who got you there? Tell us a little bit about that.

ACM: Well, let's see. It was [Richard] Orsinger who got me on the ladder. He was pushing me to become involved, I was on the Council, served my years on the Council and it was probably '96 when he started talking to me about being ready to go up the ladder.

DA: Tell us about your involvement in the Standards for Appellate Conduct.

ACM: It was a joy and I'll tell you why. Kevin Dubose was Chair the year that we wrote it. It was proceeding so smoothly until we hit a sticky point with the judges. We wanted to do a section on the court's relationship to the attorneys and the judges' relationship to other judges. And there were a number of judges who didn't like that. I was already on the Bench then, and I went back and told Richard Barajas. He said that's the craziest thing I've ever heard of, we're gonna adopt it. So we signed an order, and put it in the Minutes of the Court, adopting the Standards in full, years before they were approved by the high courts. And we were very proud of that. So we were the first to do that and they have been in place, I think, since 2001. And eventually the high courts came about and signed onto it, but it was a struggle.

DA: Let's transition at this point from the Section, going back in time now, 1994, I believe it is, when you first went on the Bench in El Paso in 1994, is that correct?

ACM: I was elected in '94. I went on in January '95.

DA: Tell me about that. So here you've been practicing law for a period of time and you've been doing it from home and you've been a Mom and now you want to be a judge.

So when did those first stirrings begin and how did you make that a reality?

ACM: Well, it was a process. The 8th Court has had such a phenomenal legacy. The people that have served that court were great thinkers and great people. The new justice that I swore in this past week was only number 40 in the Court's 105-year history, which says a lot for seniority and tenure and respect. The lawyers in our district respect them immensely. I never would have run against any one of them. I liked them all too much and I thought they were all very good at what they did. But, in '94, Max Osborne called me, who was the Chief Justice, and one of my mentors. He planned to retire at the end of the year and wanted me to think about running.

DA: And so, and you're a woman running for the El Paso Court, what had been the history of women on that Court at that time?

ACM: Susan Larsen was the first woman to have served the Court. And that would have been '93.

And then I came on in '95, so I was the second woman to join the Court. I just finished my fifth campaign. I had two that were unopposed and three that were opposed. And I will tell you that unopposed is the much better way to run.

DA: Let's talk about the women angle some more.

ACM: Well, I'll tell you a funny story. I was working a divorce case with my supervising partner Earle Lilly. He was representing a stockbroker; his wife believed that he was having a number of affairs, which wasn't true. I was in the courtroom with Earle and somebody asked me why I was sitting on that side of the Bar—because all the witnesses were supposed to sit back there. And I said,

well, I'm a third-year law student and I have a third-year Bar card, so I'm representing this man. The judge looked down—I won't name him—and said, "You mean you're not one of the whores here to testify?" I said, "No, sir, I'm not one."

And you could hear chins drop just like yours did.

That was what I experienced. And I will tell you that there are people that don't take you seriously. That's okay with me. You want to underestimate me, you go right ahead and underestimate me. Because I would always be prepared and I would always be professional. I got my own share of "Honeys" and "Little Darlings." I think we've come a long way.

DA: So, Chief Justice. That was a first as well, another first. You were, I think, the first female Chief Justice in the one-hundred year history of the El Paso Court of Appeals.

ACM: I was.

DA: And tell me how that came about and how that felt and all of that.

ACM: The court has tried really hard over the years, to plan well for transition. We've had a Republican Governor for a number of years and our Court is all Democrat. So, when Richard Barajas planned his retirement, he asked me and he asked David Chew—we went on the Bench the same day—do either of you want to? And I did not at that time. But, David did, so we trekked down, met with the Governor and said please, it's so important because the Chief has to handle not only the appellate end of the writing part of the job but the Legislative side and has to be the spokesperson before the Legislature for all of our appropriations. We need somebody that's on the Court that's been through that process, to be named Chief.

Would you consider appointing Judge Chew as Chief Justice and then making an appointment to that vacancy, and Governor Perry did that, which we appreciated very much.

So, when Judge Chew announced that he was retiring, he came to me and he said, your turn. And we had talked about it for several years and I had been involved with him in preparing the LAR, the Legislative Appropriations Requests and was learning the ropes of the administrative end of it. So he and I came to Austin and met with the Judicial Appointments officer and asked the same thing. Would you appoint from inside the Court to the Chief's position and then make your appointment to that vacancy. And he did that.

So I was appointed Chief Justice in October, 2011. We had our centennial celebration that year. We were created in 1911.

DA: As we near the end of this oral history, what advice would you give to appellate lawyers in their appellate practice before a Court, like yours? And, then, what advice would you give to a young person who's considering whether to develop an appellate practice, as you did?

ACM: Well, I think there's nothing that aggravates a judge more than asking them a question in oral argument and counsel says well, I didn't try the case, or I'm not familiar with the record.

I find that the level of expertise has increased dramatically as specialization has had more of an impact. I tell our new hires and our young lawyers that you will see the very best and the very worst of oral argument. I think it is supposed to be a conversation. It's not supposed to be regurgitating to me what's in the brief. I've read the brief. Don't look down and make sure you make all of your points. Engage in eye contact with me and let's talk about it and let me ask some questions.

So preparedness is key and professionalism, proper decorum, is key.

DA: 35 years since you've graduated law school—

ACM: Oh, has it been that long.

DA: Yes, I was just doing the math in my head, so— But yes, and you know, the number of accomplishments you've had during that time is tremendous and I guess at this point, we haven't covered them all, but the big question for me is how many more years can we enjoy accomplishments from you on the Court. Have you thought about that?

ACM: Oh, I have. I'm not sure I want to tell you. Let's just say I'm starting January 1st a new six-year term. So you've got six years for sure.

DA: Excellent.

ACM: Six years for sure.

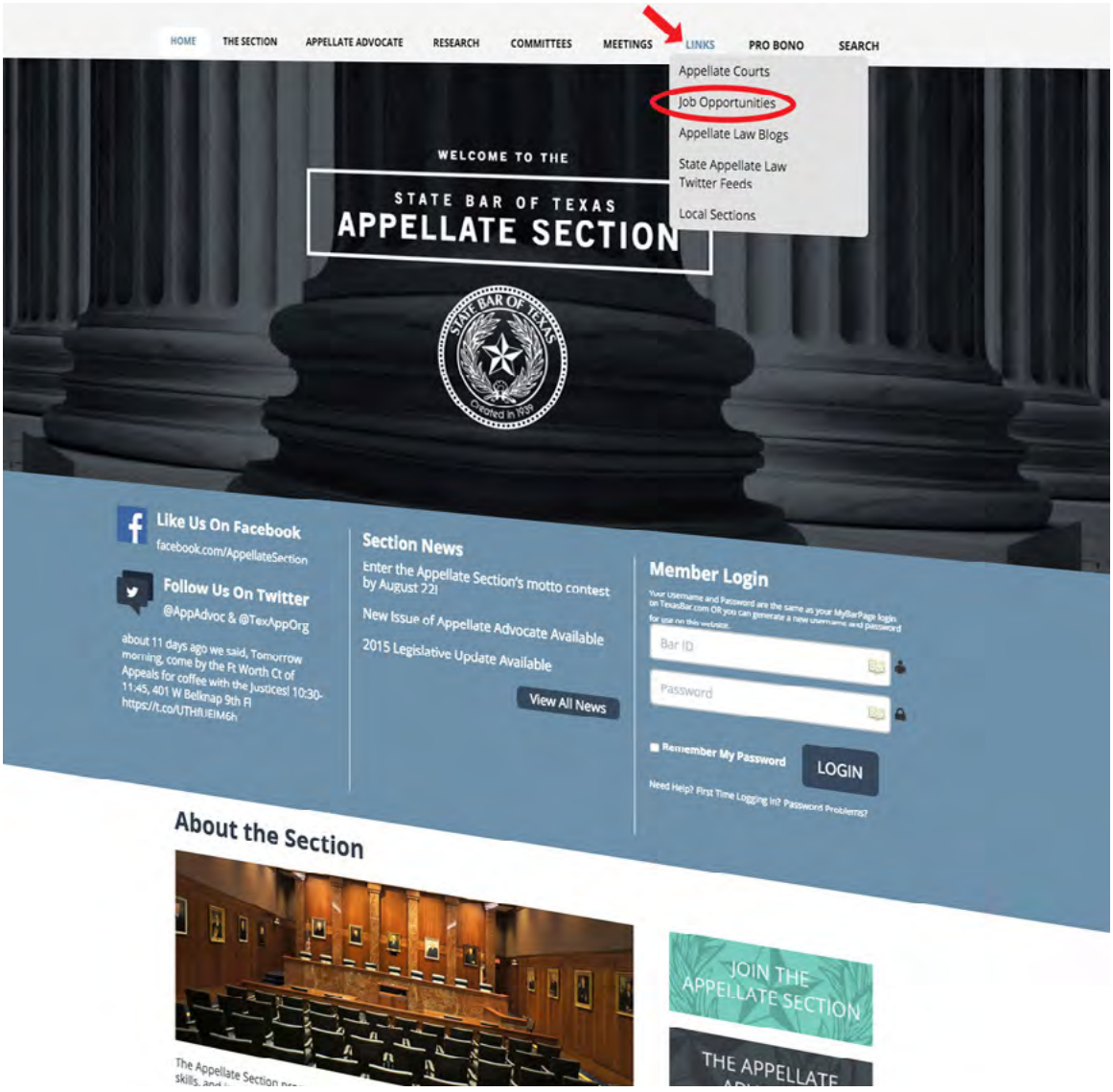
DA: I have thoroughly enjoyed this and you are a delight and it's always great to see you and I'm hoping that those who have been watching today have learned something from a pioneering and wonderful Chief Justice, Chief Justice Ann Crawford McClure. So thank you very much.

ACM: Thank you, Doug.

Job Announcements!

Did you know the Appellate Section homepage (www.tex-app.org) has links to each of the Texas appellate courts' employment announcement webpages?

Just click on the "Links" tab on the homepage, and select "Job Opportunities." Then select the court website you'd like to browse.



United States Supreme Court Update

Cam Barker, Deputy Solicitor General, Office of the Attorney General of Texas
Andrew Guthrie, Haynes and Boone, LLP, Dallas
Sean O'Neill, Assistant Attorney General, Office of the Attorney General of Texas
Ryan Paulsen, Haynes and Boone, LLP, Dallas

Arbitration

DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015)

DIRECTV, Inc. provided by contract for arbitration of customer disputes and a waiver of the right to consolidate consumer claims in class arbitration. The contract added that, if "the law of your state" makes class waivers unenforceable, the entire arbitration provision is unenforceable. Two customers sued DIRECTV in California state court, claiming that the enforceability under California law of the class waiver rendered the entire arbitration clause unenforceable. At one point, California law would indeed have made the class waiver unenforceable. But the U.S. Supreme Court held in 2011 that this California rule is an obstacle to the Federal Arbitration Act's purposes and thus is preempted. The California Court of Appeals here held that "the law of your state" is California law, regardless of whether it actually can apply, and thus held the entire arbitration clause unenforceable because the contractual condition as met.

The Supreme Court held that a California state court's refusal to enforce a contractual arbitration clause was not based on a reason that would justify revocation of any contract but rather was specific to arbitration clauses, and thus was contrary to the Federal Arbitration Act's directive that contractual arbitration clauses be enforced except on grounds as would support revocation of any contract.

The U.S. Supreme Court reversed by a 6-3 vote. Justice Breyer's opinion for the Court reasoned that the contractual

phrase "law of your state" did not refer to California law that is "invalid" as preempted by federal law. The Court reasoned that California courts would not interpret contracts other than arbitration contracts this way. Because California did not place arbitration on equal footing with any other contract, the state court's interpretation of was preempted and the arbitration clause must be deemed applicable and be enforced.

Justice Thomas dissented, expressing his view that the Federal Arbitration Act does not apply to proceedings in state courts.

Justice Ginsburg, joined by Justice Sotomayor, dissented. She would have interpreted "law of your state" to reasonably refer to state law untouched by federal preemption, and would have concluded that this interpretation by California state courts was not unique to (and thus discriminatory against) arbitration contracts.

Class Actions

Campbell-Ewald v. Gomez, 136 S. Ct. 663 (2016)

This case arises from a putative class action under the Telephone Consumer Protection Act, which prohibits, in relevant part, the unauthorized distribution of text messages using an automated system. Jose Gomez filed a class-action complaint on behalf of himself and other similarly-situated persons who received marketing text messages from the Petitioner, working on behalf of the United States Navy. Before Gomez filed his motion for class certification, Petitioner proposed to settle his individual claim at full value and filed an offer of judgment pursuant to Federal Rule of Civil Procedure 68. Gomez did not accept the offer, and Petitioner moved to dismiss, arguing that its offer of settlement rendered Gomez's claims moot. The District Court disagreed and denied the motion to dismiss, but granted summary judgment on the grounds that petition—acting on behalf of the Navy—was entitled to immunity. The Ninth Circuit reversed the summary judgment, finding that Petitioner was not entitled to "derivative

sovereign immunity." The Ninth Circuit agreed with the District Court's finding that Petitioner's offer of judgment did not render Gomez's claims moot.

The Supreme Court affirmed in an opinion authored by Justice Ginsburg and joined by Justices Kennedy, Breyer, Sotomayor, and Kagan. On the first issue, the Court held simply that an unaccepted offer of settlement has the same effect as any other unaccepted contract offer—it is a legal nullity, with no operative effect. Thus, if an offer of settlement is not accepted, the litigation carries on, unmooted. On the second issue, the Court held that federal contractors do not share the Government's unqualified immunity from liability, particularly where—as here—the contractor violates both federal law and the Government client's explicit instructions.

The Supreme Court held that an unaccepted offer of settlement to the named representative of a putative class action does not render the class action moot. The Court also held that a federal contractor acting on behalf of the United States Navy was not entitled to immunity from suit.

Justice Thomas concurred with the Court's judgment as to mootness, but wrote separately to urge that this holding should have been based on the common law history of tenders, rather than the modern contract law principles relied upon by the majority.

Chief Justice Roberts dissented in in an opinion joined by Justices Scalia and Alito. The dissenters would hold that Petitioner's offer of a full settlement eliminated any real "case or controversy" and thus rendered Gomez's claims moot. Simply put, when a plaintiff files suit seeking redress for an alleged injury and the defendant agrees to fully redress that injury, there is no longer a case or controversy for purposes of Article III. For purposes of justiciability, the question here is not whether there is a contract; it is whether there is a case or controversy under Article III. Justice Alito also wrote separately to stress that there was no real dispute Petitioner would have made good on its offer of settlement—otherwise, Justice Alito would have been compelled to find that the case is not moot.

***Hurst v. Florida*, 136 S. Ct. 616 (2016)**

After Cynthia Harrison's body was found in the freezer of the restaurant where she worked, Timothy Lee Hurst, her co-worker, was charged with her murder. A jury convicted Hurst. In the penalty-phase, the jury recommended that a death sentence be imposed. Under Florida's capital sentencing scheme, the jury's recommendation is not binding and a trial judge was required to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty. After the hearing, the trial judge imposed a death sentence, but the sentence was vacated on appeal and remanded for resentencing. At resentencing, another jury was convened, which recommended the death penalty by a vote of 7 to 5. The sentencing judge agreed and imposed the death sentence. The Florida Supreme Court affirmed and the Supreme Court granted certiorari.

The Supreme Court held that Florida's capital sentencing scheme, which requires a judge to make findings after advisory jury issues a recommendation, violates the Sixth Amendment requirement that a jury find each fact necessary to impose a sentence of death.

Justice Sotomayor, writing for the majority, held that the Florida sentencing scheme was unconstitutional. In *Ring v. Arizona*, 536 U.S. 584 (2002), the Court held that Arizona's capital sentencing scheme was unconstitutional because the State allowed a judge to find the facts necessary to sentence a defendant to death. The Court held that the analysis in *Ring* applied equally to Florida's scheme. Florida's scheme, like Arizona's, requires the judge to make fact findings to impose a death sentence. The Court rejected the argument that the jury's recommendation necessarily included a finding of an aggravating circumstance, because the Florida system made the jury's determinations advisory and not binding. The Court did not reach the issue of whether the constitutional error was harmless, and instead remanded to the Florida

Supreme Court for that analysis.

In a brief concurrence, Justice Breyer concurred in the judgment on the basis of his view that the "Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death."

Justice Alito dissented, arguing that the holding in this case did not necessarily flow from *Ring*. Unlike Arizona's scheme in *Ring*, Florida's scheme assigned the jury the role of primary adjudicator leaving the court to perform "what amounts, in practical terms, to a reviewing function." Even if Florida's scheme amounted to a constitutional violation, Judge Alito would hold that any error was harmless because evidence of the aggravating factors was overwhelming.

***Musacchio v. United States*, 136 S. Ct. 709 (2016)**

Michael Musacchio resigned as president of Exel Transportation Services ("Exel") in 2004. He formed a competing company and, with the help of Exel's former head of information technology, Musacchio gained unauthorized access to Exel's computer system, which he exploited through early 2006. Musacchio was indicted in November 2010 under a federal statute that forbids intentionally making unauthorized access of, or exceeding authorized access of, another's computer. The original indictment charged him with conspiracy to commit both forms of unlawful access and with making unauthorized access "on or about" November 24, 2005. A superseding indictment filed in 2012 dropped the charge for conspiracy to exceed authorized access and altered the timeline on the unauthorized access charge to November 23-25, 2005.

The Supreme Court held that a defendant's sufficiency challenge to his conviction should be assessed based on the indictment rather than the erroneous jury instruction and that the governing statute of limitations was not jurisdictional and thus had to be raised during trial.

At the close of trial, the district court instructed the jury that the prosecution was required to prove both unauthorized

access and access exceeding authorization to obtain conviction. The Government did not object to this instruction, and the jury found Musacchio guilty on both charges. On appeal, Musacchio challenged the sufficiency of the evidence against him and argued that the unauthorized access charge was barred by limitations. The Fifth Circuit affirmed the conviction. In so doing, it assessed the sufficiency challenge against the elements of the crime as charged in the indictment rather than the jury instruction. It also held that the limitations argument was waived for failure to raise it in the district court.

The Supreme Court affirmed in an opinion by Justice Thomas. First, the Court confirmed that a sufficiency challenge is properly weighed against the elements of the charged crime, not an erroneous jury instruction. A sufficiency challenge requires courts to determine whether the Government's case was strong enough to go to a jury. Thus, the court's analysis assesses whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, when viewing the evidence in a light most favorable to the prosecution. This determination does not rest on the jury instruction. Accordingly, because Musacchio disputed neither the elements charged in the indictment and nor the evidence supporting those elements, the Fifth Circuit properly rejected his sufficiency challenge.

Second, the Court held that the applicable statute of limitations was not jurisdictional and thus could not be raised for the first time on appeal. A limitations period is jurisdictional only where the text, context, and historical treatment of a limitations provision clearly indicate that Congress intended jurisdictional treatment. Here, none of these considerations indicate Congressional intent to treat the applicable limitations provision as jurisdictional. The text of the provision itself does not refer to jurisdiction or use jurisdictional terms. The applicable grant of jurisdiction in the statute does not refer to the limitations provision. And the history of the provision further confirms that it is not jurisdictional. As such, Musacchio's failure to raise the defense is determinative.

Election Law

***Shapiro v. McManus*, 136 S. Ct. 450 (2015)**

Dissatisfied with Maryland's redistricting of its eight congressional seats, petitioners, a bipartisan group of citizens, filed suit and requested a three-judge court be convened to hear the case. The district court did not convene three-judge court, and instead dismissed the suit finding it was "not one for which relief can be granted." The Fourth Circuit affirmed.

The Supreme Court reversed. Writing for the Court, Justice Scalia relied on the text of 28 U.S.C. § 2284, which requires that "[a] district court of three judges shall be convened ... when an action is filed challenging the constitutionality of the apportionment of congressional districts." Because there was no dispute that the suit was "an action . . . challenging the constitutionality of the apportionment of congressional districts," the Court held that "the district judge was required to refer the case to a three-judge court, [because the statute] admits of no exception[.]" The Supreme Court held that language in a subsequent section that mandates appointment of a panel upon request "unless [the district judge] determines that three judges are not required" should be read as addressing situations where a plaintiff requests a three judge panel, but has filed a petition that does not fall within the scope of § 2284. The Supreme Court also rejected Fourth Circuit precedent, relied upon by the district court, that held that pleadings that failed to state a claim were "insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court." The Court held that the Fourth Circuit's standard was too demanding and inconsistent with Supreme Court precedent that focused on substantiality for jurisdictional purposes and equated constitutional insubstantiality with frivolity.

The Supreme Court held that a district judge, presented with a suit challenging the apportionment of congressional districts, could not dismiss the case without convening a three judge panel.

Energy Regulation

FERC v. Elec. Power Supply Assn., 136 S. Ct. 760 (2016)

Most wholesale electric sales in the United States are made through auctions managed by nonprofit entities that administer a portion of the grid. Because the amount of energy produced and consumed at any given time must be equal, the auctions serve to balance supply and demand continuously. The auctions involve the purchase of electricity from producers, but also incorporate the purchase from consumers of commitments to curtail the use of power, called wholesale demand response. In 2011, FERC issued a rule that the price paid to demand response providers for conserving electricity must be equal to the price paid to generators for producing electricity. FERC based its authority on an assertion that the bids "directly affect" wholesale rates. When FERC's authority was challenged, the D.C. circuit vacated the regulation holding that it violated the Federal Power Act's (FPA) prohibition against direct regulation of the sales outside of the wholesale market. The D.C. Circuit also held, alternatively, that the rule was arbitrary and capricious because FERC did not adequately explain its justification for equal pricing.

The Supreme Court held that the Federal Energy Regulatory Commission (FERC) had authority to regulate the price of certain transactions in the wholesale electricity market.

Justice Kagan wrote for the majority. The Court first turned to FERC's authority to regulate practices "affecting" wholesale rates. Adopting the D.C. circuit's construction from a prior decision, the Court limited FERC's "affecting" jurisdiction to practices that "directly affect" the wholesale price. FERC's rule met this standard because wholesale demand response was "in short, all about reducing wholesale rates." The Court also held that the rule did not violate the FPA's proscription regulating retail electricity sales because it was limited to transactions occurring on the wholesale market. The Court also held that the rule was not arbitrary or

capricious but was the product or reasoned decisionmaking. FERC had explained that demand response bids should get the same compensation as generators' bids because both provide the same value to a wholesale market. FERC also incorporated an exception to the rule that addressed situations where the costs associated with a demand response payment exceeded savings that resulted from a reduced bid price.

Justice Scalia, joined by Justice Thomas, dissented. Justice Scalia argued that because the demand-response bidders do not resell energy to other customers, the transactions at issue are not wholesale transactions under the FPA and are therefore not subject to FERC regulation, regardless of any effect on the wholesale market. The dissent also disagreed with the majority's claim that the regulations do not regulate retail sales, because forgoing the demand response incentive payment effectively increases the consideration paid by the retail customer for energy.

ERISA

Montanile v. Bd. of Trs. of the Nat'l Elevator Indust. Health Benefit Plan, 136 S. Ct. 651 (2016)

Robert Montanile was severely injured in a collision caused by a drunk driver. As a participant in a health benefits plan (the "Plan") governed by ERISA, Montanile's obtained coverage for over $120,000 in medical expenses. As part of his agreement with the Plan, which Montanile reaffirmed at the time of his treatment, Montanile agreed to reimburse the Plan from any recovery he obtained pursuant to legal action or settlement. Montanile later sued the drunk driver and obtained a $500,000 settlement. The Plan sought reimbursement, but Montanile refused, and his lawyer notified the Plan that the settlement funds would be transferred from the client trust account to Montanile unless the Plan objected. The Plan did not object; the funds were transferred to Montanile; and the Plan filed suit six months later to obtain reimbursement from Montanile.

In the district court, the Plan requested an equitable lien

on any settlement funds or property in Montanile's possession and an order preventing Montanile from dissipating assets. Montanile responded that he had already spent most of the settlement and no identifiable assets existed on which to impose a lien. The district court rejected Montanile's argument and the Eleventh Circuit affirmed, holding that the Plan was entitled to reimbursement from Montanile's general assets.

The Supreme Court reversed in an opinion by Justice Thomas. The applicable provision of ERISA limits the Plan to obtaining "equitable relief." Whether the relief qualifies as equitable depends on the basis for the claim and the nature of the remedies sought. The basis for the Plan's claim—enforcement of a lien created by agreement—is equitable. The Court held, however, that the remedy sought by the Plan—enforcement of a lien against Montanile's general assets—is not an equitable remedy. Historically, courts of equity could enforce a lien against specifically identified funds or other traceable assets purchased by those funds. But if the defendant dissipated the entire fund on untraceable assets, then an equitable lien was eliminated. The Plan argued that the requested lien is consistent with ERISA's general purposes, but the Court held that this vague reference to purpose was insufficient to overcome the statute's express limitation to "equitable remedies." Accordingly, the Court remanded the case to the district court to determine whether Montanile retained any settlement funds or traceable assets.

The Supreme Court held that a benefits plan seeking to recover reimbursement of benefits under ERISA is not entitled to a lien against a plan beneficiary's general assets.

Justice Alito joined all but Section III-C of the opinion, which addresses and rejects the Plan's arguments regarding the purposes of ERISA and the ability of plans to monitor beneficiaries' use of settlement funds.

Justice Ginsburg filed a dissenting opinion. She noted that the Court's decision allowing Montanile to escape his obligation to reimburse the Plan by dissipating his settlement

funds illustrates the problems with the Court's jurisprudence interpreting the reference to "equitable" relief under ERISA.

***Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016) (per curiam)**

A group of former employees of Amgen Inc. and its subsidiary (collectively, "Amgen") participated in an employee retirement plan with holdings of Amgen's common stock. When the value of the stock fell, the former employees sued the fiduciaries of the retirement plan for breaches of fiduciary duty, including the duty of prudence, under the Employee Retirement Income Security Act of 1974 ("ERISA"). The district court dismissed the complaint and the Ninth Circuit reversed. While the petition for writ of certiorari was pending at the Supreme Court, the Court decided another case addressing the duty of prudence: *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). The Court thus granted the original petition, vacated the Ninth Circuit's judgment, and remanded the case for consideration in light of *Fifth Third*. On remand, the Ninth Circuit once again reversed the district court's dismissal, holding that its previous opinion was based on standards consistent with *Fifth Third* and that under those standards, the former employees stated an actionable claim for breach of the duty of prudence.

The Supreme Court held that a complaint filed by a group of participants in an employee retirement plan failed to meet the standard for alleging a claim against the plan's fiduciary for breach of the duty of prudence.

The Supreme Court reversed in a per curiam opinion. Under *Fifth Third*, a complaint alleging breach of the duty of prudence must plausibly allege that the defendant could have taken an alternative action consistent with securities laws that a reasonably prudent fiduciary could not have viewed as more likely to harm the fund than help it. The Ninth Circuit held that the Amgen employees met their burden under *Fifth Third* because the complaint stated a plausible action that the fiduciary could have taken that would not cause undue harm. But the Court held that this approach failed to

assess whether the complaint alleged that a prudent fiduciary could not have concluded that the alternative action would do more harm than good. Applying this standard, the Court held that the complaint did not state the necessary facts and allegations. Accordingly, the Court reversed and remanded to the district court for a determination of whether the employees could amend their complaint.

Federal Contracts

***Menominee Tribe of Wisconsin v. United States*, No. 14-510 (Jan. 25, 2016)**

Under the ISDA, Indian tribes may be reimbursed for "contract support costs" they expend in administering certain federally funded programs for their members. The Contract Disputes Act (CDA) applies to such reimbursement requests and requires a tribe to present "[e]ach claim" it may have to a federal contracting officer. The CDA also includes a 6-year statute of limitations for the presentment of each claim. In 2005, the Petitioner tribe presented its contract support claims for the years 1995 through 2004. The contracting officer denied those claims for 1996-98 based on the statute of limitations. Both the District Court and the D.C. Circuit affirmed those decisions after rejecting the tribe's argument for equitable tolling in light of an intervening, related class action lawsuit.

The Supreme Court held that an Indian tribe failed to timely present its claim for reimbursement of contract expenses under the Indian Self-Determination and Education Assistance Act (ISDA).

The Supreme Court affirmed in a unanimous opinion authored by Justice Alito. The Court first confirmed that, to qualify for equitable tolling, a litigant must show *both* that (1) he has been pursuing his rights diligently; and (2) that some extraordinary circumstance stood in his way and prevented timely filing. The Court found that the tribe was required to—and did not—establish the second element. The tribe's

mistaken reliance on the intervening class action to protect its rights was not an obstacle beyond its control; instead, this was simply a garden variety example of excusable neglect, which does not trigger equitable tolling.

Federal Courts

James v. City of Boise, 136 S. Ct. 685 (2016)

Federal law provides for a "prevailing party" to recover fees in a civil rights lawsuit filed under 42 U.S.C. § 1983. The Supreme Court has held that a *defendant* can get fees, however, only if it both prevails *and* the plaintiff's action was frivolous, unreasonable, or without foundation. A plaintiff sued under § 1983 in Idaho state court and lost. The Idaho Supreme Court affirmed an order shifting fees to the prevailing defendant under federal law. That court reasoned that the Supremacy Clause states the Supremacy of federal law, not the Supreme Court atextual glosses on federal law, and so the court need not determine if the plaintiff's suit was frivolous or unreasonable.

The Supreme Court held that its holdings interpreting a statute bind state courts, even if the state court believes the Supreme Court's interpretation "is not contained in the statute."

The Supreme Court unanimously reversed and remanded. In a per curiam opinion, the Court directed that its ruling on a federal law's meaning binds state courts, no matter a state court's view about the textual basis for the Supreme Court's ruling.

Foreign Sovereign Immunity

OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015)

The Foreign Sovereign Immunities Act (FSIA) generally shields foreign states and their agencies from suit in United States courts except under several enumerated circumstances. This case concerns the commercial activity exception, which withdraws sovereign immunity in any case "in which the

action is based upon a commercial activity carried on in the United States by [a] foreign state." 28 U.S.C. § 1605(a)(2). Respondent Carol Sachs was injured when she fell onto the tracks at a train station in Austria while attempting to board a train operated by the Austrian state-owned railway. She sued the railway and claimed that its immunity had been waived under the FSIA's commercial activity exception. The only relevant activity in the United States was Sachs' purchase of a Eurail pass, *i.e.* her ticket to get on the train, in California from a Massachusetts company. The District Court found that this limited connection did not satisfy the commercial activity exception, and a divided panel of the Ninth Circuit affirmed. However, a majority of the *en banc* Ninth Circuit reversed, finding that the sale of the Eurail pass in the United States was sufficient to trigger the exception.

The Supreme Court held that a foreign agency retained immunity for personal injury claims arising out of a train accident in Austria.

The Supreme Court reversed in a unanimous opinion authored by Chief Justice Roberts. The Court held that Sachs' suit was not "based upon" the purchase of her Eurail pass in the United States, as required by the plain language of the commercial activity exception, but was instead based on the allegedly negligent conduct of the railway that occurred abroad. The Court rejected the Ninth Circuit's overbroad interpretation that the commercial activity exception is triggered if the activity in the United States establishes any essential element of the cause of action. Indeed, the Court found that this approach was "flatly incompatible" with previous FSIA decisions finding that an action is "based upon" the particular conduct that constitutes the core gravamen of the suit. Under that analysis, all of Sachs' claims turn on the same allegedly wrongful conduct and dangerous conditions related to the incident in Austria – and not the purchase of her ticket in America.

Habeas Corpus

***White v. Wheeler*, 136 S. Ct. 456 (2015) (per curiam)**

Roger Wheeler was convicted of murder and sentenced to death. After exhausting his state court appeals, Wheeler filed a federal habeas petition arguing, among other things, that the state trial court erred by striking a potential juror who expressed ambivalence toward the death penalty during voir dire. The district court denied the petition, but the Sixth Circuit reversed, holding that the trial court erred by treating the potential juror as though he knew he could not consider the death penalty when all he said was that he did not know whether he could consider it.

The Supreme Court reversed in a per curiam opinion. The Court held that the Sixth Circuit failed to afford the trial court the required level of deference. Under these circumstances, the trial court was entitled to "double deference": deference to its decision to strike the juror and deference in the procedural context of habeas review. The first level of deference means that a decision to strike a juror may be upheld even in the absence of clear statements from the juror. Here, the juror's statements regarding the death penalty were not clear. He first expressed uncertainty over his ability to reasonably consider the death penalty before later affirming his ability to consider all penalty options. The Court concluded that these statements reflected ambiguity, and under the Court's precedent, the trial court was entitled to resolve that ambiguity in the prosecution's favor.

The Supreme Court held that a trial court's decision to strike a juror based on ambiguous statements regarding his views on the death penalty did not warrant reversal under the deferential review required in habeas corpus proceedings.

The second level of deference provides that a state court ruling can be reversed only where it is contrary to or an unreasonable application of clearly established law as defined by the Court's decisions. As discussed above, the decision to strike the juror was consistent with rather than contrary to the

Court's precedent. The fact that the trial court reviewed the juror's testimony overnight before ruling does not diminish the level of deference owed. Nothing in the Court's precedent forbids a judge from giving additional consideration to jury decisions, and in fact, such consideration should be encouraged. Accordingly, the Court reversed.

***Duncan v. Owens*, 136 S. Ct. 651 (2016)**

Lawrence Owens was convicted of first-degree murder in a bench trial. The only evidence presented at trial linking him to the murder was questionable eyewitness testimony. In finding Owens guilty, the trial judge stated that "all of the witnesses skirted the real issue" that Owens knew the victim "was a drug dealer" and that Owens "wanted to knock him off." The State had presented no evidence that Owens knew the victim was a drug dealer, that he wanted to kill him, or that he even knew the victim at all. On direct appeal the conviction was upheld. In a federal habeas proceeding, the district court denied relief, but the Seventh Circuit reversed. The Seventh Circuit held that the judge's explanation of the verdict was "nonsense" and that Owen's conviction violated his clearly established constitutional "right to have [his] guilt or innocence adjudicated on the basis of evidence introduced at trial."

In a suit involving habeas relief, the Supreme Court dismissed the writ as improvidently granted.

After oral argument, the Supreme Court issued a per curiam opinion dismissing the writ of certiorari as improvidently granted, leaving in place the Seventh Circuit's holding that Owens was entitled to habeas relief.

Prisoners' Rights

***Bruce v. Samuels*, 136 S. Ct. 627 (2016)**

The PLRA generally requires prisoners to pay the filing fees for any lawsuit they initiate, but does so through a two-tiered, installment-based payment system. The prisoner must

first make an initial partial filing fee equal to 20% of the average monthly deposits in the prisoner's account. Then, the prisoner must continue making monthly payments equal to 20% of the previous month's income. The question in this case is whether the monthly installment requirement is capped at 20% of income regardless of how many suits the prisoner has filed—or whether a prisoner may be responsible for multiple monthly payments if he has filed multiple suits, each of which could be equal to 20% of his income. The D.C. Circuit found that the statute requires simultaneous monthly payments for all active cases.

The Supreme Court interpreted the *in forma pauperis* provisions of the Prison Litigation Reform Act (PLRA) to require simultaneous payment of relevant filing fees for all litigation filed by the prisoner.

The Supreme Court affirmed in a unanimous opinion authored by Justice Ginsburg. While the circuits had previously been split on this question, the Court found that the text of the statute requires simultaneous monthly payments of 20% for each action pursued by a prisoner. The Court found that the prisoner's extratextual arguments did not warrant a departure from the interpretation suggested by the text and the context. Moreover, the Court found that its interpretation more vigorously serves the statutory objective of containing prisoner litigation.

Sentencing

Montgomery v. Louisiana, 136 S. Ct. 718 (2016)

In the 1960s, Montgomery was 17 years old when he killed a Louisiana deputy sheriff. State law required an automatic sentence of life without parole, which he got. In 2012, the Supreme Court held in *Miller v. Alabama* that a juvenile murderer could not be sentenced to life without parole absent consideration of special circumstances. Montgomery then asked Louisiana courts for a resentencing. The Louisiana Supreme Court held that the 2012 *Miller* decision was not a basis

to reexamine the sentence on collateral review, because *Miller* is not a new substantive rule that applies retroactively. But a state may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole; resentencing is not required.

The Supreme Court held that a juvenile who commits murder or another serious crime cannot be sentenced to life without parole unless it is clear the juvenile is so corrupt as to lack any capacity for reform.

Justice Scalia, joined by Justices Thomas and Alito, dissented. They argued that the Court lacks jurisdiction because the state court disposed of a resentencing motion on state-law grounds, and that the Constitution does not require state court to adopt federal courts' collateral-review exception for "substantive" new rules. And they argued that, in any event, the majority rewrote *Miller*, which did not set forth categorical constitutional guarantees.

***Kansas v. Carr*, 136 S. Ct. 633 (2016)**

Sidney Gleason killed two people to cover up the robbery of an elderly man. Brothers Reginald and Jonathan Carr kidnapped, raped, and murdered five young men and women. At their sentencings, the jury found that the State proved aggravating circumstances beyond a reasonable doubt. All were sentenced to death, but the Kansas Supreme Court vacated the death penalties. It held the jury instructions inadequate for failing to instruct that mitigating circumstances need not be proved beyond a reasonable doubt, but only to any given juror's satisfaction. The Kansas Supreme Court also held the Carr brothers' sentences infirm because their sentencing proceedings were not

The Supreme Court held that the Eighth Amendment does not require courts to instruct juries considering a death penalty that mitigating circumstances need not be proved beyond a reasonable doubt, nor does the Constitution require the severance of joint sentencing proceedings on the theory that one defendant's mitigating evidence infected another defendant's sentence.

severed, inhibiting individualized jury consideration.

By an 8-1 vote, the Supreme Court reversed. In an opinion by Justice Scalia, the Court held that the Eighth Amendment does not require instructing the jury as the Kansas Supreme Court insisted, if a jury is even capable of considering mitigating circumstances as that state court imagined. And the Court held it purely speculative that the joint sentencing proceedings prejudiced either Carr brother.

Texas Supreme Court Update

Patrice Pujol, Forman Watkins & Krutz, LLP
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Appellate Procedure

***Sloan v. Law Office of Oscar C. Gonzalez Inc.*, 479 S.W.3d 833 (Tex. 2016) (per curiam)**

Isabel Sloan sued attorneys Oscar Gonzalez and Eric Turton and the Law Office of Oscar C. Gonzalez ("Law Office"), alleging that they misappropriated $75,000 in trust funds and asserting several negligence-and fraud-based claims. Among other things, the jury found that the three defendants were engaged in a joint enterprise and a joint venture with respect to Sloan's underlying case and that they knowingly and intentionally violated the Deceptive Trade Practices and Consumer Protection Act ("Act"). In response to a proportionate-responsibility question, the jury assigned 40% to Turton, 30% to Gonzalez, and 30% to the Law Office. Sloan elected to recover under the DTPA. Based on the jury's findings, the trial court entered judgment holding all three defendants jointly and severally liable for $77,500 in actual damages, $64,125 in pre-judgment interest, $424,875 in additional DTPA damages, and $238,366 in attorney's fees, plus costs, appellate fees, and post-judgment interest. Only Gonzalez and the Law Office appealed.

A court of appeals must address the parties' alternative theories of recovery if they are necessary to the disposition of the appeal.

Although the San Antonio Court of Appeals concluded the evidence was sufficient to support the jury's findings, it held that Sloan could only recover for professional negligence because all of the other claims, including the DTPA claim, represented an improper attempt to fracture her legal malpractice claim into alternative causes of action. Thus, the appellate court reduced Sloan's award to $77,500 in

actual damages plus costs and interest. And although the court did not address the jury's proportionate-responsibility findings, it applied those findings in its judgment and ordered Gonzalez and the Law Firm to each pay Sloan $23,250 (30% of $77,500) plus costs and interest.

In her petition for review, Sloan argued the court of appeals violated Rule of Appellate Procedure 47.1 by applying the proportionate-responsibility percentages without addressing whether Gonzalez and the Law Office were jointly and severally liable for all of the damages. The Supreme Court agreed. The jury found that the three defendants were engaged in a joint enterprise and a joint venture. But the court of appeals did not address the sufficiency of the evidence of a joint enterprise or joint venture, or the legal implications of those findings, despite that the issue was briefed by both parties. Because the court of appeals failed to address these issues—which were necessary to the disposition of the appeal because they would determine the amount of damages that the court could assign to each respondent—the Supreme Court reversed and remanded the case to the court of appeals for further consideration.

***Cardwell v. Whataburger Rests. LLC*, 484 S.W.3d 426 (Tex. 2016) (per curiam)**

Yvonne Cardwell sued her employer, Whataburger Restaurants LLC ("Whataburger"), to recover damages for an on-the-job injury. As a nonsubscriber, Whataburger moved to compel arbitration based on its employee handbook. Cardwell objected, asserting that the arbitration agreement was unconscionable on several theories, and illusory. After denying Whataburger's motion, the trial court entered findings of fact and conclusions of law revealing that its ruling was based on only some of Cardwell's unconscionability arguments and on its own research and views about arbitration. In fact, the trial court did not discuss all of Cardwell's unconscionability arguments, nor her argument that the arbitration agreement is illusory. The El Paso Court of Appeals reversed, concluding the trial court had abused its discretion and remanded the case with

instructions to the trial court to order arbitration. In its opinion, the court of appeals set out all of the parties' arguments at length, including the other grounds Cardwell raised in the trial court for denying arbitration. But the appellate court did not address any of Cardwell's other arguments, explaining without authority that "as the trial court did not base its determination of unconscionability on those grounds, we need not consider them."

Because the court of appeals failed to address all of the parties' arguments that were necessary to the judgment, reversal and remand were warranted.

The Supreme Court reversed and remanded. Basically, the court of appeals could not order arbitration without either addressing Cardwell's arguments or remanding the case to the trial court to address them. Rule of Appellate Procedure 47.1 requires a court of appeals to "hand down a written opinion that ... addresses every issue raised and necessary to final disposition of the appeal." Because Cardwell's various arguments were briefed by both parties, the appellate court should have considered them or remand them to the trial court for its ruling on them. Because the court of appeals did neither, the Supreme Court reversed and remanded to the appellate court for further proceedings.

***Blair v. Atl. Indus. Inc.*, 482 S.W.3d 57 (Tex. 2016) (per curiam)**

Eugene Blair sued Faustino Murillo and his employer, Atlantic Industrial, Inc. ("Atlantic"), following an automobile accident in which Blair was injured. At trial, Murillo stipulated that he was the sole cause of the accident. As to Atlantic's liability, the jury found it liable under respondeat superior and negligent entrustment theories and apportioned fault between Atlantic and Murillo at 60% and 40%, respectively. Disregarding the jury's apportionment answer, the trial court rendered a joint and several judgment against both defendants, who then appealed. The El Paso Court of Appeals reversed both liability findings as to Atlantic. The appeals court's opinion stated: "We

reverse and render judgment that Blair take nothing against Atlantic. The judgment in all other respects is affirmed." However, the judgment provided: "We therefore reverse the judgment of the court below and render that the Appellee [Blair] take nothing against Appellants [Atlantic and Murillo]. The judgment in all other respects is affirmed." The court of appeals later denied Atlantic's and Murillo's motion for rehearing and did not modify its judgment.

A court of appeals' judgment that is inconsistent with its opinion requires reversal and modification.

The Supreme Court reversed the court of appeals' judgment and remanded the case to that court for it to render judgment consistent with its opinion. After reversing the liability findings against Atlantic, the court of appeals' opinion rendered that Blair, the injured employee, take nothing against the company. But in its judgment, the appeals court ordered that Blair take nothing against Atlantic and Murillo. Because the opinion and judgment were inconsistent, the Supreme Court reversed and remanded the case to the court of appeals.

Attorney Disqualification

In re RSR Corp., 475 S.W.3d 775 (Tex. 2015)

From April 2007 to April 2010, Hernan Sobarzo was a finance manager for Inppamet S.A. ("Inppamet"), a Chilean manufacturer of anodes used in the mining industry. Sobarzo's self-described duties included ensuring cash flow and financing, as well as calculating Inppamet's payments to RSR Corporation ("RSR") under the terms of an agreement in which RSR had licensed anode-production information to Inppamet in exchange for Inppamet's promise to pay RSR a fee for every anode sold. In 2008, while Sobarzo was serving in this role, RSR sued Inppamet in Texas for breaching the parties' agreement and misappropriating trade secrets, among other things. The law firm of Bickel & Brewer represents RSR in the Texas lawsuit. The same year, Inppamet sued RSR in Chile, and

the law firm of Bofill Mir & Alvarez Jana ("BMAJ") represents RSR in the Chilean litigation. The following year, when RSR requested an audit concerning Inppamet's payments to RSR, Sobarzo gathered information and discussed the audit with Inppamet's lawyers and company officers. He also discussed litigation strategy with Inppamet's officers, communicated with Inppamet's lawyers, and reviewed invoices describing the attorneys' work. Sobarzo later resigned from Inppamet and took with him around 2.3 gigabytes of data, consisting primarily of e-mails, which included not only his personal communications, but also e-mails between Inppamet's lawyers, managers, and directors. Thereafter, an attorney with BMAJ e-mailed Sobarzo and the two eventually met to discuss Inppamet and the ongoing litigation with RSR. More meetings followed both in Chile and in New York City at Bickel & Brewer's office. In all, Sobarzo met with Bickel & Brewer's attorneys and consultants at least 19 times for a total of more than 150 hours. During these meetings, Sobarzo supplied significant information regarding Inppamet, and Bickel & Brewer attorneys looked on as Sobarzo displayed Inppamet documents on his computer. RSR asserted that Bickel & Brewer always told Sobarzo not to reveal Inppamet's privileged or confidential information during these meetings, but Inppamet contended that Bickel & Brewer freely viewed the documents Sobarzo took from Inppamet, many of which were privileged and confidential. BMAJ also possesses a "pen drive" with many Inppamet documents it obtained from Sobarzo, and the parties disputed the extent that Bickel & Brewer reviewed the documents on the pen drive. Sobarzo insisted on compensation for his time during these meetings, and based on a decision that was made in conjunction with RSR and Bickel & Brewer, BMAJ and Sobarzo formalized the terms of Sobarzo's compensation in a written consulting agreement. Two months after this agreement was executed, however, Sobarzo quit consulting with BMAJ and Bickel & Brewer. He then signed an affidavit recanting his accusations against Inppamet and asserting Inppamet never underpaid RSR.

Concerned about Bickel & Brewer's exposure to Sobarzo

and his documents, Inppamet moved to disqualify Bickel & Brewer from representing RSR. A special master concluded that the motion to disqualify should be denied, but the trial court concluded otherwise. Relying on the presumption-based analytical framework the Texas Supreme Court applied *In re American Home Products Corp.*, 985 S.W.2d 68 (Tex. 1998), the trial court found that BMAJ was "irreparably tainted" by hiring Sobarzo and reviewing his documents. The trial court also found a genuine threat that BMAJ or Sobarzo had disclosed confidential information to Bickel & Brewer and accordingly ordered Bickel & Brewer's disqualification. The court of appeals subsequently denied RSR's petition for mandamus relief.

A multi-factor approach governs an attorney-disqualification analysis based on communications with an adversary's former employee whose position existed independent of litigation and did not involve primarily reporting to lawyers.

In a unanimous opinion written by Justice Devine, the Court held that the trial court abused its discretion by disqualifying Bickel & Brewer under the *American Home Products* framework. The Court explained that the *American Home Products* presumptions apply only when paralegals, legal assistants, or other nonlawyers who are directly supervised by attorneys and are retained to assist with litigation switch sides. Here, the Court concluded that Sobarzo did not fit within this mold because he was a fact witness with information about his former employer, his position with that employer existed independent of litigation, and he did not primarily report to lawyers. Thus, to the extent that Sobarzo disclosed Inppamet's privileged and confidential information, the factors outlined by the Court *In re Meador*, 968 S.W.2d 346 (Tex. 1998) should guide the trial court's decision regarding disqualification. Therefore, without deciding whether disqualification would be proper under *Meador* (because the trial court did not reach that issue and did not resolve all fact issues relevant to a *Meador* analysis), the Court conditionally granted mandamus relief.

Constitutional Law

***Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416 (Tex. 2016)**

Middle and high school cheerleaders, through their parents, sued Kountze Independent School District (the "District") after the District prohibited them from displaying banners containing religious signs or messages at school-sponsored events. The District responded by filing a plea to the jurisdiction that asserted, in part, the case was moot because the District adopted a policy that it was not required to prohibit messages solely because the source of the messages was religious; although, the District retained the right to restrict the content of school banners. The trial court denied the District's plea, but the court of appeals reversed the trial court's order, holding that the District's adoption of the new policy mooted the cheerleaders' claims.

In an opinion written by Justice Devine, the Court reversed the court of appeals' judgment and remanded the case for further proceedings. The Court explained that a defendant's cessation of challenged conduct does not, in itself, deprive a court of the power to hear or determine claims for prospective relief. Here, the District no longer prohibited the cheerleaders from displaying religious signs at school-sponsored events, but the District had never expressed the position that it could not, and unconditionally would not, reinstate its prior policy. Because the District had not shown that it was "absolutely clear" it would not reverse its position, the case was not moot.

School district's voluntary cessation of challenged conduct did not moot the case absent an unconditional admission that the district would not resume the conduct.

Justice Willett filed a concurring opinion, in which he noted that it was unclear from the record which claims were still live. Therefore, he encouraged the parties and the trial court to clarify with precision on remand the status of the cheerleaders' claims.

Justice Guzman also filed a concurring opinion, in which she emphasized that, "in considering the delicate balance of correlative constitutional rights, free religious expression must be afforded no less than equal respect." Here, the District did not meet its "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."

Contracts

Fischer v. CTMI, LLC, 479 S.W.3d 231 (Tex. 2016)

Ray Fischer owned a tax-consulting business called Corporate Tax Management, Inc. As Fischer approached retirement, he began negotiations to sell the business assets to Mark Boozer and Jerrod Raymond. In 2007, the parties executed two contracts. The first was an employment agreement in which the parties agreed that Fischer would remain as a CTMI employee until the end of 2010. The parties also executed an asset-purchase agreement in which Fischer agreed to sell his business for $900,000 to CTMI, LLC ("CTMI"), which Boozer and Raymond created to receive the assets and operate the business. The asset-purchase agreement contained a complex calculation for the manner and timing of CTMI's payments to Fischer. Basically, after the initial lump-sum payment of $300,000, Fischer would receive a yearly minimum payment of $194,595, due in March of the following year, plus an "adjustment" payment equal to 30% of that year's business revenue in excess of $2.5 million, due in July of the following year. For 2010, the final earn-out payment included the same minimum payment and adjustment, but the 2010 adjustment included an additional component—a pending-projects clause—which was at issue in this appeal.

In 2008, disagreements developed between CTMI and Fischer. Initially, the disputes only involved the 2007 accounts-receivable payments and the adequacy of Fischer's performance under the employment agreement. But these later bloomed into a declaratory judgment action and multiple counterclaims.

When the case went to trial in April 2011, the parties settled and agreed to a judgment awarding Fischer $1.7 million. The settlement, however, specifically excluded one issue: CTMI's challenge to the 2010 adjustment, which CTMI asserted was an unenforceable "agreement to agree" because it provided that the pending projects' completion percentages at the end of 2010 "will have to be mutually agreed upon." After the parties agreed to sever out this issue, the case proceeded to trial. Ultimately, the trial court entered judgment declaring that the 2010 adjustment was enforceable. But the Dallas Court of Appeals reversed and rendered judgment that "the 2010 Adjustment was ... an unenforceable agreement to agree."

When a contract leaves material matters open for future adjustment and agreement that never occur, it is only an "agreement to agree" and is unenforceable.

The Supreme Court reversed, holding the trial court did not err in denying CTMI's claim that the 2010 adjustment was an unenforceable agreement to agree. To be enforceable, a contract must address all of its essential and material terms with a reasonable degree of certainty and definiteness. But a contract need only be definite and certain as to those terms that are "material and essential" to the parties' agreement, including agreements to enter into future contracts. Here, the Supreme Court held the pending-projects clause was sufficiently definite to enable a court to determine CTMI's obligations and to provide a remedy for its breach, and was therefore enforceable. Even though this clause affected the purchase price that CTMI agreed to pay for Fischer's business assets, the clause's language, as construed within the context of the agreement as a whole, confirmed the parties' mutual intent to reach a binding agreement that CTMI would pay Fischer a share of revenues from the projects pending at the end of 2010. Moreover, the pending-projects clause did not say that CTMI would have no obligation to make the pending-projects payments "if" the parties failed to agree on completion percentages; it simply said that those percentages "will have to be mutually agreed upon." And although the parties might

reasonably disagree over the exact completion percentages, they expressly agreed that those percentages would determine the amounts of the pending-project payments, which CTMI expressly agreed the 2010 adjustment "will include." Thus, the language providing that the parties "will have to mutually agree" on completion percentages does not render the pending-projects clause unenforceable because the clause contains all of the terms necessary for a court to enforce it. Based on these conclusions, the Supreme Court reversed the court of appeals' judgment and rendered judgment reinstating the trial court's denial of CTMI's claim for declaratory relief.

Damages

White v. Davis, 475 S.W.3d 783 (Tex. 2015) (per curiam)

In the case involving breach of fiduciary duty and fraud claims between former law firm partners Ledford White and Kent Davis, the jury awarded $2.8 million in exemplary damages against Ledford White. The trial court, applying the exemplary-damages cap in section 41.008(b) of the Civil Practice and Remedies Code, reduced the award to $564,169.64. The Fort Worth Court of Appeals reversed and rendered judgment reinstating the jury award, holding that (1) section 41.008(b) is an affirmative defense that must be pleaded and (2) the trial court abused its discretion by allowing a trial amendment to add the statutory-cap defense.

Supreme Court's decision in *Zorrilla v. Aypco Construction* warranted reversal and remand for consideration of the Court's interpretation of Civil Practice and Remedies Code section 41.008(b).

The Supreme Court reversed and remanded. The court of appeals decided this case because the Court's opinion in *Zorrilla v. Aypco Construction II, LLC*, which held that the exemplary-damages cap in section 41.008(b) is neither an affirmative defense nor an avoidance that must be affirmatively pleaded. 469 S.W.3d 143, 157 (Tex. 2015). Thus, the Supreme Court vacated the court of appeals' judgment and

remanded the case for the appellate court to reconsider the exemplary-damages award in light of Zorrilla.

***J&D Towing LLC v. Am. Alternative Ins. Corp.*, 478 S.W.3d 649 (Tex. 2016)**

J&D is a towing company owned that had one tow truck in its fleet, a 2002 Dodge 3500 purchased in April 2011 for $18,500. On December 29, 2011, while on a run, the tow truck was involved in an accident that rendered the truck a total loss. The driver of the other vehicle, Cassandra Brueland, was at fault. In late February 2012, Brueland's insurance carrier settled J&D's property-damage claim for the policy limits of $25,000. The following month, J&D bought another tow truck and resumed its business. J&D then filed a claim with American Alternative Insurance Corporation ("AAIC") based on an underinsured motorist policy issued by AAIC. J&D requested roughly $28,000 in compensation for the loss of use of the truck. J&D claimed that the funds from the settlement with Brueland's insurer were insufficient to compensate it for the loss-of-use damages, which rendered Brueland an underinsured motorist. After AAIC denied the claim and cancelled the policy, J&D sued the carrier. At trial, AAIC presented no evidence and instead asserted motions for summary judgment and an instructed verdict, arguing (1) its underinsured-motorist policy only offered to pay J&D damages that J&D was "legally entitled" to recover; (2) Texas law does not permit recovery of loss-of-use damages in total-destruction cases; (3) it is undisputed that J & D's truck was totally destroyed; therefore, (4) J&D was not legally entitled to recover loss-of-use damages; and (5) AAIC was not obligated to pay under the policy. The trial court denied both motions. After the jury awarded J&D $28,000, the trial court gave AAIC a credit of $5,500—the amount of the settlement with Brueland's insurer that did not cover the value of the truck but instead partially compensated J&D for its loss-of-use damages. The Waco Court of Appeals reversed and rendered judgment for AAIC, agreeing with the Carrier's argument that Texas law does not permit loss-of-use damages in total-destruction cases.

The Supreme Court reversed and rendered judgment for J&D, following the majority of jurisdictions that have done away with the archaic distinction between partial-destruction cases (where loss-of-use damages were allowed in Texas) and total-destruction cases (where such damages were prohibited in Texas). After tracing the history of this distinction from a pre-Emancipation case to the Second Court of Appeals' 2014 decision in *Morrison v. Campbell*, the Court examined the recent decisions of other jurisdictions, which overwhelmingly support the availability of loss-of-use damages in total-destruction cases. The reasoning of these myriad courts reflected two general arguments: (1) that any distinction between partially destroyed and totally destroyed personal property for purposes of loss-of-use damages is unpersuasive, and (2) that loss-of-use damages must be available in total-destruction cases pursuant to the principle of full and fair compensation. Agreeing with this modern trend, the Court held that the owner of personal property that has been totally destroyed may recover loss-of-use damages in addition to the fair market value of the property immediately before the injury. Thus, the Supreme Court reversed the court of appeals' judgment and rendered judgment for J&D.

In addition to recovering the fair market value of a damaged tow truck immediately before the accident, the truck's owner may recover loss-of-use damages, such as lost profits.

Employment Law

Kingsaire Inc. v. Melendez, 477 S.W.3d 309 (Tex. 2015)

Kingsaire, Inc. ("Kings Aire") is a heating, ventilation, and air-conditioning company in El Paso. Kings Aire hired Jorge Melendez as an employee, and while Melendez was participating in demolition work at a job site he was injured when a light fixture fell and lacerated his wrist. Melendez was taken to the emergency room, and Kings Aire's safety coordinator assisted Melendez with a workers' compensation claim. Following

Melendez's surgery, Kings Aire sent Melendez a notice about the Family and Medical Leave Act ("FMLA") in reference to his leave from work. The notice informed Melendez that he was entitled to up to twelve weeks of unpaid leave and that he would be required to furnish status updates every two weeks. Over the next several months, Melendez provided the requested status reports, and when his twelve weeks of leave expired, he had not been medically released to return to work. Kings Aire then informed Melendez that his employment had been terminated pursuant to company policy, which provided that an employee who failed to return to work within three months of a leave of absence would be terminated. Melendez sued Kings Aire for breach of contract and for wrongfully discharging him in retaliation for filing a workers' compensation claim in good faith. A jury found in Melendez's favor on both of his claims, and the trial court rendered judgment on the jury's verdict. Kings Aire appealed the portion of the judgment on the retaliation claim, contending that the evidence was legally insufficient to support the jury's verdict. The court of appeals affirmed the judgment.

In an opinion written by Justice Lehrmann, the Court reversed the court of appeals' judgment and rendered judgment for Kings Aire. The Court acknowledged that a retaliation plaintiff may recover by showing that his termination would not have occurred when it did absent his filing a workers' compensation claim in good faith, and an employee may generally rely on circumstantial causation evidence. Importantly, however, termination pursuant to the uniform enforcement of a reasonable absence-control policy cannot constitute retaliatory discharge. Here, the evidence demonstrated that Kings Aire consistently applied its leave policy, terminating employees who did not return to work upon the expiration of their three months' FMLA leave, while allowing

Because an employee was terminated pursuant to the uniform enforcement of a reasonable leave policy, legally insufficient evidence supported a jury's finding that the employee was terminated for filing a workers' compensation claim in good faith.

those who took less than the maximum amount of FMLA leave to return to work. Moreover, the jury could not have reasonably inferred from the evidence that Melendez was terminated before his FMLA leave expired. And Melendez's argument that Kings Aire unilaterally placed him on FMLA leave—thus triggering the twelve-week return-to-work deadline—was flawed because federal regulation require an employer to designate leave as FMLA leave once it has sufficient information to determine that an employee is on leave due to a serious health condition.

Justice Guzman filed a concurring opinion, addressing which party bears the burden of proof in a retaliatory discharge case when sufficient evidence exists that termination resulted from the uniform enforcement of a reasonable leave policy. Justice Guzman reasoned that the uniform enforcement of a reasonable leave policy is an inferential rebuttal defense that should be presented to a jury through the jury instructions, not submitted in separate jury questions.

Immunity

Tex. Dept. of Public Safety v. Bonilla, 481 S.W.3d 640 (Tex. 2015)

Merardo Bonilla sustained injuries in an automobile accident that occurred when a Texas Department of Public Safety ("DPS") trooper ran a red light while allegedly pursuing a reckless driver. Bonilla sued DPS, relying on the Texas Tort Claims Act's sovereign-immunity waiver. In a combined motion for summary judgment and plea to the jurisdiction, DPS claimed it retained immunity from suit based on (1) the trooper's official immunity and (2) the emergency-response exception to the Tort Claims Act's immunity waiver. The trial court denied DPS's motion and plea, and the court of appeals affirmed the trial court's ruling in an interlocutory appeal. The court of appeals held that (1) DPS failed to conclusively establish the good-faith element of its official-immunity defense, (2) DPS's summary-judgment evidence was incompetent to establish good faith because it failed to address whether the trooper considered

alternative courses of action, and (3) Bonilla raised a fact issue regarding applicability of the emergency-response exception.

In a per curiam opinion, the Court reversed the court of appeals' judgment and remanded the case for reconsideration. The Court first concluded that the court of appeals applied an incorrect good-faith standard. Good faith does not require proof that all reasonably prudent officers would have resolved the need/risk analysis in the same manner under similar circumstances. Rather, if the summary-judgment record contains competent evidence of good faith, then the good-faith element of an official-immunity defense is established as a matter of law unless the plaintiff shows that *no* reasonable person in the officer's position could have thought the facts justified the officer's actions. In other words, "the good-faith standard is analogous to an abuse-of-discretion standard that protects all but the plainly incompetent or those who knowingly violate the law." In addition, the Court held that the court of appeals erred in concluding that DPS's summary-judgment evidence was not competent to prove good-faith merely because it did not overtly show that the officer considered whether any alternative course of action was available. "Magic words are not required to establish that a law-enforcement officer considered the need/risk balancing factors," and DPS's evidence was adequate to address the alternative-options element of the need/risk analysis.

The good-faith element of an official-immunity defense is established when the summary-judgment record contains competent evidence of good faith unless the plaintiff shows that no reasonable person in the officer's position could have thought the facts justified the officer's actions.

Insurance

U.S. Metals Inc. v. Liberty Mut. Group Inc., No. 14-0753, 59 Tex. Sup. Ct. J. 144 (Tex. Dec. 4, 2015)

U.S. Metals, Inc. sold ExxonMobil Corp. custom-made, stainless steel, weld-neck flanges for use in constructing

nonroad diesel units at its refineries. The flanges were supposed to meet industry standards, were designed to be welded to piping, and were covered with a special coating after being welded to the piping. In post-installation testing, several flanges leaked, and further investigation revealed that the flanges did not meet industry standards. Thus, ExxonMobil decided it was necessary to replace the flanges, which involved stripping the special coating (which was destroyed in the process), cutting the flange out of the pipe, removing gaskets (which were also destroyed), grinding the pipe surfaces smooth for re-welding, replacing the flange, welding new flanges to the pipes, and replacing the special coating. This process delayed operation of the diesel units for several weeks, and ExxonMobil sued U.S. Metals for more than $23 million. U.S. Metals settled with ExxonMobil for $2.2 million and then claimed indemnification from its commercial general liability ("CGL") insurer.

As a matter of first impression, "physical injury" under a standard-form CGL policy requires tangible, manifest harm and does not result merely upon installation of a defective component. In addition, property can be "restored to use" if it is affected or altered in the process, but not if it is destroyed.

All damages for which U.S. Metals claimed coverage arose out of its defective flanges, and thus two exclusions in its CGL policy applied. Under Exclusion K, damages to the flanges themselves were not covered, and U.S. Metals did not claim them. Under Exclusion M, the policy did not cover damages to property, or for the loss of its use, if the property was not physically injured or if it was restored to use by replacement of the flanges. The existence and extent of coverage thus depended on whether ExxonMobil's property was (1) physically injured or (2) restored to use by replacing the flanges. U.S. Metals contended that ExxonMobil's property was physically injured both by the mere installation of the faulty flanges and also later, during the replacement process. U.S. Metals also asserted that the diesel units could not be restored to use simply by replacing

the flanges because welds, gaskets, insulation, and coating were destroyed in the process and had to be replaced as well.

When the insurer denied coverage, U.S. Metals sued in federal district court to determine its right to a defense and indemnity under the CGL policy. The court granted summary judgment for the insurer, and on appeal, the Fifth Circuit certified four questions to the Supreme Court of Texas concerning the meaning of "physical injury" and "replacement" in the CGL policy and their application in this situation.

In an opinion authored by Chief Justice Hecht, the Court concluded that the CGL policy did not provide coverage for most of the damages U.S. Metals claimed, and answered the certified questions accordingly. The Court concluded that the Fifth Circuit's certified questions distilled to two essential inquiries. First, is property physically injured simply by the incorporation of a faulty component with no tangible manifestation of injury? The Court answered this question in the negative, holding that a "physical injury requires tangible, manifest harm and does not result merely upon the installation of a defective component in a product or system." The second issue was whether property is restored to use by replacing a faulty component when the property must be altered, damaged, and repaired in the process? The Court answered this question in the affirmative, holding that ExxonMobil's diesel units were restored to use even though replacing the flanges involved cutting out the faulty flanges, resurfacing the piping, and welding in new flanges. Nevertheless, the Court held that the gaskets and special coating were not restored to use—and thus were covered by the CGL policy—because they were destroyed in the replacement process.

Jurisdiction

***TV Azteca, S.A.B. de C.V. v. Ruiz*, No. 14-0186, 59 Tex. Sup. Ct. J. 391 (Tex. Feb. 26, 2016)**

In the late 1990s, Mexican recording artist Gloria de Los Angeles Trevino Ruiz ("Trevino") was accused of luring

underage girls into sexual relationships with her manager. Authorities arrested Trevino and her manager in Brazil on charges of sexual assault and kidnapping, and she spent nearly five years in prisons in Brazil and Mexico before a Mexican judge ultimately found her not guilty and dismissed all charges in 2004. After her acquittal, Trevino moved to McAllen, Texas. As the ten-year anniversary of the scandal approached, various Mexican media outlets ran stories discussing the events and Trevino's activities following her acquittal. Trevino then filed this lawsuit in Hidalgo County, Texas, alleging that several media defendants defamed her in their broadcasts. Some, but not all, of the defendants challenged the trial court's personal jurisdiction over them. Specifically, two Mexican television broadcasting companies, TV Azteca, S.A.B. de C.V. ("TV Azteca"), and Publimax, S.A.B. de C.V. ("Publimax"), and a news anchor and producer for TV Azteca, Patricia Chapoy (collectively, "Petitioners") filed special appearances. The trial court denied the special appearances, and the court of appeals affirmed the trial court's order.

Mexico-based broadcasters purposefully availed themselves of the privilege of conducting activities in Texas, so as to support the exercise of specific personal jurisdiction over them, and exercising such jurisdiction comported with traditional notions of fair play and substantial justice.

In a unanimous opinion written by Justice Boyd, the Court affirmed the court of appeals' judgment. The Court considered allegations and evidence that Petitioners (1) "directed a tort" at Trevino in Texas; (2) broadcast allegedly defamatory statements in Texas; (3) knew the statements would be broadcast in Texas; and (4) intentionally targeted Texas through those broadcasts. The Court held that the evidence of the first three contentions did not establish purposeful availment for purposes of specific personal jurisdiction over Petitioners, but evidence of the fourth contention did. As an initial matter, "the mere fact that Petitioners directed

defamatory statements at a plaintiff who lives in and allegedly suffered injuries in Texas, without more, does not establish specific jurisdiction over Petitioners." Likewise, "the mere fact that the signals through which they broadcast their programs in Mexico travel into Texas is insufficient to support specific personal jurisdiction because that fact does not establish that Petitioners purposefully directed their activities at Texas." And "a broadcaster's mere knowledge that its programs will be received in another jurisdiction is insufficient to establish that the broadcaster purposefully availed itself of the benefits of conducting activities in that jurisdiction." Critically, however, "a plaintiff can establish that a defamation defendant targeted Texas by relying on other 'additional conduct' through which the defendant 'continuously and deliberately exploited' the Texas market," and Trevino had done so here by showing that Petitioners made substantial and successful efforts to benefit from signals that traveled into Texas and to expand their Texas audience. Moreover, Trevino's claims arose directly out of Petitioner's "additional conduct," and a Texas court's exercise of personal jurisdiction over Petitioners comported with traditional notions of fair play and substantial justice.

Limitations

***BNSF Ry. Co. v. Phillips*, No. 14-0530, 59 Tex. Sup. Ct. J. 136 (Tex. Dec. 4, 2015) (per curiam)**

James Phillips sued his employer, BNSF Railway Company ("BNSF"), under the Federal Employers' Liability Act ("FELA") and the Locomotive Inspection Act ("LIA") to recover damages for a latent occupational injury. Phillips alleged that while riding on locomotives, he experienced "rough riding locomotives" with poorly maintained seats, which he alleged caused him to suffer long-term vibratory exposure resulting in various back ailments, including spondylolysis. At trial, the jury awarded him over $1.9 million in damages and costs. A divided Fort Worth Court of Appeals affirmed, holding that because there was conflicting evidence in the record concerning when

Phillips' injury occurred, the jury was entitled to weigh that evidence and reach its finding that the lawsuit was timely.

The Supreme Court reversed and rendered, holding no evidence supported the jury's finding that Phillips timely filed his lawsuit. Phillips filed his lawsuit on April 13, 2007, and under the FELA, he bore the burden of proving that his claim accrued no earlier than April 13, 2004. However, the evidence demonstrated that as early as 1998, Phillips' injuries had begun to manifest themselves. And by 2003, Phillips received a concrete diagnosis that he had spondylolysis and other back injuries, and thereafter continued for several years to treat his symptoms. Although Phillips argued that he was not aware of his injuries or their cause until 2005, he never argued that he was not aware of the 2003 diagnosis and even conceded that he was diagnosed with spondylolysis in 2003 in his brief on the merits. The 2003 diagnosis, coupled with his complaints to BNSF and coworkers about the roughriding conditions and poorly maintained seats, and his 1998 statements to his chiropractor that those work conditions aggravated his symptoms, established that Phillips was aware of the critical facts surrounding his injury and its causation and should have known that his injury was work related. Because Phillips' claim accrued no later than his 2003 diagnosis, his 2007 lawsuit is untimely. Thus, the Court reversed and rendered judgment that Phillips take nothing.

Because the evidence conclusively established the claimant was aware of critical facts surrounding his injury and its causation in 2003, his 2007 lawsuit was untimely.

Medical Liability Act

Galvan v. Mem. Hermann Hosp. Sys., 476 S.W.3d 429 (Tex. 2015) (per curiam)

Sylvia Galvan sued Memorial Hermann Southwest Hospital ("Hospital") alleging that she was injured when she slipped on water on the floor. She alleged she was visiting a relative and was walking from the Hospital's pharmacy to her relative's

room when she encountered the water coming from a restroom. In response, the Hospital asserted that Galvan's claim was a health care liability claim ("HCLC") under the Medical Liability Act ("Act"). After Galvan failed to serve the required expert report, the Hospital moved to dismiss her case. The trial court denied the motion, but the Fourteenth Court of Appeals reversed, concluding that because Galvan's claim was based on an alleged departure from accepted standards of safety that involve health care or are directly or indirectly related to health care, it was an HCLC.

The Supreme Court reversed, holding the record did not reflect a substantive nexus between the safety standards Galvan claimed the hospital violated and the hospital's provision of health care. After the Fourteenth Court of Appeals decided this case, the Supreme Court addressed a similar situation in *Ross v. St. Luke's Episcopal Hospital*, 462 S.W.3d 496 (Tex. 2015). In that case, the Court held that a safety-standards-based claim against a health care provider is an HCLC only if a "substantive nexus" exists between the "safety standards allegedly violated and the provision of health care." *Ross* at 504. In so holding, the Court observed that "[t]he pivotal issue in a safety standards-based claim is whether the standards on which the claim is based implicate the defendant's duties as a health care provider, including its duties to provide for patient safety." *Id.* at 505.

A hospital visitor's slip-and-fall claim against the hospital is not a health care liability claim under Medical Liability Act.

Here, no substantive nexus connected Galvan's injury with the hospital's provision of healthcare. Although regulations require hospitals to ensure an acceptable level of safety for those within its confines, the record here contained no evidence of where Galvan fell. Moreover, nothing in the record supported the hospital's contention that patients regularly—or even occasionally—traversed the area where Galvan fell, regardless of whether it was in the main lobby or a hallway. As for the Hospital's argument that the water in the hallway

was the product of its cleaning efforts to maintain a sanitary environment and prevent infections and communicable diseases, the Court held the record did not show that infection-control activities and regulatory mandates would have been the hospital's reason for cleaning the water from its floor for safety purposes. Specifically, the guideline cited by the Hospital required that surfaces contaminated with "blood and other potentially infectious materials" should be disinfected. Here, the record did not indicate that the water Galvan slipped on was a "potentially infectious material" or was in an area where it posed a hazard to patients or persons seeking health care. Thus, the Hospital's duty regarding water on the floor did not implicate infection-control standards. Because no substantive nexus was shown to exist between the safety standards Galvan alleges the Hospital violated and the provision of health care, the Supreme Court reversed the court of appeals' decision and remanded the case to the trial court.

Oil & Gas

***Apache Deepwater LLC v. McDaniel Partners Ltd.*, No. 14-0546, 59 Tex. Sup. Ct. J. 411 (Tex. Feb. 26, 2016)**

Hugh W. Ferguson, Jr., assigned to L.H. Tyson four oil and gas leases, including the Peterman (insofar as it covered Surveys 36 and 37), the Broudy (also only insofar as it covered Surveys 36 and 37), and two Cowden Leases (Cowden Lease 36 entirely within Survey 36 and Cowden Lease 37 entirely within Survey 37). At the time of this assignment, the two Cowden Leases comprised 32/64 of the working interest in Surveys 36 and 37, and the Peterman and Broudy Leases added another 3/64. The assignment reserved to Ferguson a 1/16 production payment, which it described with the following equation: "1/16th of 35/64ths of 7/8ths" of the total production from Surveys 36 and 37. This descriptive equation included the fractional interest in production reserved from the conveyance (1/16); the fraction of the mineral estate within Surveys 36 and 37 conveyed under the four leases (35/64); and the fraction representing the leasehold

estate after subtracting the lessors' 1/8 royalty interest (7/8). The assignment provided further that the production payment would continue until net proceeds from the reserved interest amounted to $3.55 million and 1.42 million barrels of oil. About twenty years after Ferguson assigned the four leases, both Cowden Leases expired for lack of production, but production on acreage outside of Surveys 36 and 37 perpetuated the Peterman and Broudy Leases. Thus, the Peterman and Broudy leases were still held by production in 2009 when Apache Deepwater, LLC ("Apache"), as Tyson's successor-in-interest, acquired its interest under the Ferguson assignment. Because production under the Cowden Leases had ceased long before, the 3/64 mineral interest attributable to the Peterman and Broudy Leases were the only interests that Apache acquired subject to the assignment. Apache also acquired additional leases in Surveys 36 and 37 that were not subject to the assignment, completed additional wells, began production, and sent a division order to Ferguson's successor-in-interest, McDaniel Partners, Ltd. ("McDaniel"). Apache stated that the production payment reserved in the assignment was now 1/16 of 3/64 of 7/8, reflecting the expiration of the Cowden Leases, but McDaniel took the position that the production payment should be calculated under the assignment's original equation. When the parties were unable to come to agreement, McDaniel sued. After a bench trial, the trial court rendered a take-nothing judgment against McDaniel, concluding that the production payment was reserved from the four leases separately and was thus subject to extinguishment upon expiration of each lease to the extent it existed as a burden against the production attributable to that lease. McDaniel appealed, and the court of appeals reversed, holding that the assignment did not authorize Apache to adjust the production-payment equation to reflect the effect of an expired lease on the assigned interests.

Absent express language to the contrary, a production payment created in an assignment of oil and gas leases is extinguished when the leaseholds from which it was carved expire.

Justice Devine authored a unanimous opinion for the Court reversing the court of appeals' judgment and rendering judgment that McDaniel take nothing. The Court reasoned that neither the inclusion of the four leases in a single instrument, nor the instrument's statement of the leases' cumulative working interest as a single fraction demonstrated that the parties intended the production payment to be carved from something other than the estates conveyed. To the contrary, the Court observed that an explanatory phrase following the stated fraction tied the 1/16 reservation to the assignor's interest in the "respective" leases, indicating that the reserved interest pertains to the particular leases separately. The assignment neither stated, implied, nor suggested that the production payment would be unaffected by the termination of the leaseholds from which it was carved, and absent express language to the contrary, the Court applied the "general rule" that when an oil and gas lease terminates, the overriding royalty or similar production payment created in an assignment of the lease is likewise extinguished.

***R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.*, 482 S.W.3d 559 (Tex. 2016)**

In January 2008, the Texas Railroad Commission ("TRC") issued orders requiring American Coastal Enterprises ("ACE") to plug several inactive offshore wells in the Gulf of Mexico. After the orders became final and ACE declared bankruptcy, the TRC took responsibility for plugging the wells and awarded a contract with Superior Energy Services (Superior") to perform the work. On May 19, 2008, representatives from the TRC, ACE, and Gulf Energy Exploration ("Gulf") met to discuss Gulf's proposal to take over four of the wells set to be plugged. At this meeting, the parties reached an oral agreement that the TRC would delay plugging the four wells. On June 9, 2008, the agreement was memorialized in a signed contract between the parties. A few months later, Gulf discovered that one of the wells was plugged. An investigation revealed that the mistake was due to clerical error by a TRC employee who transposed

the coordinates for several of the wells, including the one that was mistakenly plugged.

Gulf sought and obtained legislative consent to sue the TRC for $2.5 million under Civil Practice and Remedies Code chapter 107. The suit asserted negligence and breach of contract claims against the TRC and a gross negligence claim against Superior. At the charge conference, the TRC objected that the charge lacked two questions: (1) whether the parties had a meeting of the minds when the contract was allegedly breached, and (2) whether the TRC's actions were made in good faith under Natural Resources Code section 89.045. The trial court overruled both objections, and as to the first, essentially held the parties had a binding, albeit oral, contract on May 19, 2008—before the well was plugged—not when they signed the written settlement agreement three weeks later on June 9—after the well was plugged. The jury found against the TRC on both the negligence and breach of contract claims, awarding identical damages on both. After Gulf moved for entry of judgment on the contract claim, the trial court rendered judgment for Gulf for $2.5 million, the maximum amount recoverable. The Corpus Christi Court of Appeals affirmed.

The Texas Railroad Commission may assert the good-faith defense in response to a suit for tort damages for mistakenly plugging a well.

The Supreme Court reversed. Addressing the good faith argument first, the Court held that section 89.045 provides a statutory defense of good faith, separate and apart from the common-law doctrine of official immunity, and was not limited to acts involving discretion (such as policy decision), as opposed to ministerial acts (like plugging the wrong well). Moreover, a fact issue exists as to whether this defense proven or not. A good-faith effort requires conduct that is honest in fact and is free of both improper motive and willful ignorance of the facts at hand. Applying this standard, the evidence at trial did not conclusively establish the TRC's good faith, nor did it show willful ignorance of the facts at hand. Thus, the trial court

committed reversible error in failing to submit it to the jury.

In addition, the Supreme Court held that a fact issue exists as to when the contract was formed and the trial court erred in failing to submit this issue to the jury. The evidence presented at trial was conflicting as to whether the TRC and Gulf intended to be bound by the May 19th oral agreement, or whether the agreement later memorialized and signed was necessary to form a binding contract. Because of the conflicting evidence, the question of whether the parties intended to be legally bound on May 19th was a disputed fact issue that should have been presented to the jury. Thus, the Court held that the trial court erred in resolving the contract-formation issue as a matter of law. Ultimately, determining whether the TRC's conduct in plugging the well constituted a breach of contract depends on whether the parties had entered into a binding contract at that time. Thus, to resolve this question and the issue of good faith, the Supreme Court reversed the court of appeals' judgment and remanded the case for a new trial.

Premises Liability

Occidental Chem. Corp. v. Jenkins, 478 S.W.3d 640 (Tex. 2016)

Jason Jenkins sustained serious eye injuries in April 2006 while using an acid-addition system at a Bayport, Texas chemical plant. The Bayport plant produces triethylene glycol ("TEG"), a chemical compound that is produced in a large tank. Because the TEG must be maintained at a certain acidity, the tank has an acid-addition system that adjusts the pH as needed. The system was added to the plant in 1992 by Occidental Chemical Corporation ("Occidental"), which previously owned the Bayport facility. In 1998, Occidental sold the plant to Equistar Chemicals, L.P. ("Equistar"), Jenkins' employer. Jenkins's injury was the first incident involving the system, which occurred 14 years after it was built and installed. Jenkins sued Occidental, among others, alleging that Occidental's negligent design of the acid-addition system caused his injuries. Occidental generally

denied Jenkins' allegations and affirmatively pled two statutes of repose—one governing claims against registered or licensed professionals who design, plan or inspect improvements to real property, and one governing claims against those who construct such improvements. At trial, the jury found Occidental's design of, and operating instructions for, the acid-addition system negligent and a proximate cause of Jenkins's injury and determined Jenkins's damages. The jury also found that the system was an improvement to real property that was designed under the supervision of, but not by, a registered or licensed professional. Concluding that the verdict supported at least one of Occidental's repose defenses, the trial court rendered judgment that Jenkins take nothing. The First Court of Appeals reversed, holding that the verdict did not support either of Occidental's statute-of-repose defenses. It also rejected Occidental's alternative defense that it owed no duty to Jenkins because his claims sounded solely in premises liability, a theory that no longer applied to Occidental as it did not own or control the premises at the time of Jenkins's accident. Thus, the court of appeals remanded for the trial court to render judgment for Jenkins on the jury's liability and damages findings.

A former property owner owed no premises-liability duty to worker employed by the new property owner.

The Supreme Court reversed and rendered judgment for Occidental. Essentially, the court of appeals erred in holding Occidental responsible for the alleged dangerous condition it designed and created—the acid-addition system—despite that it no longer owned the property. Using the Court's holding in *Strakos v. Gehring*, which recognizes that an independent contractor who creates of a dangerous condition can remain liable for the condition even after relinquishing control of the property, the court of appeals misapplied this dual-role analysis to Occidental, a former owner. 360 S.W.2d 787, 790 (Tex.1962). The Supreme Court disagreed with this application, concluding that no Texas case supported the court of appeals' dual-role

analysis. Going further, the Court rejected the notion that a property owner acts as both owner and independent contractor when improving its own property, subjecting itself to either premises-liability or ordinary-negligence principles depending on the injured party's pleadings. Ultimately, premises-liability principles apply to a property owner who creates a dangerous condition on its property. Moreover, the claim of a person injured by the condition remains a premises-liability claim as to the owner-creator, regardless of how the injured party chooses to plead it. Because it neither owned nor controlled the premises or workers at the time Jenkins was injured, Occidental owed Jenkins no duty of care. Therefore, and without addressing the arguments on the statutes of repose, the Supreme Court reversed the judgment of the court of appeals and rendered judgment that Jenkins take nothing.

Pretrial Procedure

In re J.Z.P., 484 S.W.3d 924 (Tex. 2016) (per curiam)

Vicky De La Cruz and Josue Pena divorced in Amarillo in 2009. The decree gave De La Cruz the exclusive right to determine the primary residence of the couple's two sons, then ages 8 and 6, and ordered Pena to child support. After De La Cruz moved with the children to Lubbock in 2013, Pena moved to modify the decree, obtain the right to determine his children's residence, and reduce his child support. After Pena effected service by posting the citation on the door of his ex-wife's alleged address, the trial court granted Pena's petition to modify, giving him the right to determine the boys' residence, relieving him of his support obligation, and ordering De La Cruz to pay child support. Copies of the order were sent only to Pena and his attorney.

After the trial court's plenary jurisdiction expired, De La Cruz filed a "Motion to Reopen and to Vacate Order," stating that neither De La Cruz nor her counsel were given notice of Pena's motion to modify and requesting that the matter "be reopened and the Order vacated." In her supporting affidavit,

De La Cruz stated the she had never lived at the address where the citation was posted, that Pena knew her actual address, and that she first learned the substance of the motion and order said on September 17, 2013, three days before she filed her motion. Pena opposed the motion on the sole ground that De La Cruz was at fault because she had not notified him and the trial court of her new address. He did not deny that he knew De La Cruz's correct address or that she received no notice of the order until the date she stated. Ultimately, the trial court denied De La Cruz's motion. The Amarillo Court of Appeals dismissed her appeal for want of jurisdiction, reasoning that her motion did not extend the trial court's plenary jurisdiction and post-judgment deadlines to run from the date she received notice of the trial court's order because it was not captioned a motion under Rule of Civil Procedure 306a.

Courts should acknowledge the substance of the relief sought despite the formal styling of the pleading.

The Supreme Court reversed, holding De La Cruz's notice of appeal was timely filed. Rule of Civil Procedure 71 provides that when a party mistakenly designates a pleading, the court will treat the pleading as if it had been properly designated "if justice so requires." Here, De La Cruz's motion plainly requested relief from the trial court's order on the grounds that she had not been served with citation and had not learned of the trial court's order until a few days before her motion was filed. Her motion stated that her attorney of record was given no notice of Pena's modification petition, and court records reflected that notice of the order was sent only to Pena and his attorney. Justice plainly required the trial and appellate courts to treat De La Cruz's motion as extending post-judgment deadlines. Based on the motion and Pena's response, De La Cruz's notice of appeal was timely filed. Thus, the Supreme Court reversed the judgment of the court of appeals and remanded the case to that court for further proceedings.

Probate

Hysaw v. Dawkins, 483 S.W.3d 1 (Tex. 2016)

Ethel Nichols Hysaw executed her will in 1947, at which time she owned three tracts of land in Karnes County, Texas: a 1065-acre tract, a 200-acre tract, and a 150-acre tract. Her will divided the property among her three children in fee-simple title as follows: Inez received 600 acres from the 1065-acre tract; Dorothy received the remaining 465 acres of the 1065-acre tract; and Howard received the 200- and 150-acre tracts. With respect to the related mineral estates, Ethel employed a different distribution method, stating that "each of my children shall have and hold an undivided one-third (⅓) of an undivided one-eighth (1/8) of all oil, gas or other minerals in or under or that may be produced from any of said lands, the same being a non-participating royalty interest." She further described the royalty interest devised to each child in nearly identical paragraphs, as follows:

> [T]hat is to say, that . . . [the named child] shall not participate in any of the bonus or rentals to keep any lease or leases in force; that it shall not be necessary for the said [named child] to execute any oil, gas or mineral lease over the lands of [the siblings], and that it shall not be necessary for [the named child] to obtain the consent either orally or written of the said [siblings], to lease any portion of said land so willed to [the named child] for oil, gas or other minerals, but that the said [named child] shall receive one-third of one-eighth royalty, provided there is no royalty sold or conveyed by me covering the lands so willed to [the child] . . . .

Finally, each paragraph concluded with a residual royalty clause that took into account the effect of an *inter vivos* royalty sale on lands bequeathed to a particular child, providing: "[A]nd should there be any royalty sold during my lifetime then [the three children], shall each receive one-third of the remainder of the unsold royalty."

Before and after executing the will, Ethel made several *inter vivos* conveyances to her children, including (1) a gift of equal royalty interests in the 200- and 150-acre tracts to each child, and (2) a gift of the surface estate of the 200-acre tract to Howard. The remainder of Ethel's real property interests passed under her will. Ethel's three children have since passed away, and their interests in the devised lands have passed to their descendants and other successors in interest. When Inez's line of successors executed a mineral lease in 2008 that provided for a 1/5 royalty on the 600-acre tract, they took the position that (1) Howard's 200- and 150-acre tracts were burdened by a floating (fraction of) royalty based on Ethel's *inter vivos* conveyance of royalty interests in those tracts, (2) for Inez's 600-acre tract and Dorothy's 465-acre tract, the will fixed each non-fee owner's royalty interest at 1/24 (a simple calculation of ⅓ times a fixed ⅛ royalty), and (3) excess royalties on the 600- and 465-acre tracts belonged to the fee owner. Conversely, Howard's and Dorothy's successors took the position that Ethel's will gave each child a "floating" ⅓ of any royalty obtained from all the tracts, resulting in equal sharing of royalties under all future leases (i.e., each sibling line was entitled to ⅓ of the 1/5 royalty (or a 1/15 royalty) under the mineral lease on the land devised to Inez).

Howard's and Dorothy's successor's initiated a declaratory-judgment action, and after stipulating to the pertinent facts, the parties filed cross-motions for summary judgment. The trial court granted the motion filed by Howard's and Dorothy's successors, rendering judgment that Ethel's will entitled each child to ⅓ of any and all royalty interest on all the devised tracts. The court of appeals reversed the trial court's judgment and rendered judgment in favor of Inez's successors. Under the court of appeals' analysis, due to Ethel's *inter vivos* royalty gifts to the children, her will effected equal sharing of royalties earned on Howard's tracts, but greater royalty interests to the fee-simple owners of Inez's and Dorothy's tracts.

In a unanimous opinion written by Justice Guzman, the Court reversed the court of appeals' judgment and rendered

judgment that Ethel's will devised to each child ⅓ of any and all royalty interest (i.e., a ⅓ fraction of royalty, not a 1/24 fractional royalty). Before turning to the language of Ethel's will, the Court discussed the nature of mineral-interest conveyances; the legacy of the "⅛ royalty," which was so pervasive for a time that it embodied an expectation that any future lease would provide for that royalty; and the theory of "estate misconception," which refers to the once-common misunderstanding that a landowner retained only ⅛ of the minerals in place after executing a mineral lease rather than a fee simple determinable with the possibility of reverter in the entirety. The Court then acknowledged that a mechanically applied, mathematical approach to factional-royalty cases is appealing as a bright line for resolving uncertainty. But the Court rejected bright-line rules of interpretation as "inimical" to the appropriate "intent-focused inquiry." Rather, the Court held, courts must use a holistic approach aimed at ascertaining intent from all words and all parts of the conveying instrument. Applying this approach here, the Court concluded that the overall structure of the royalty devise in Ethel's will confirmed her intent to treat the children equally in the distribution of the royalty interests—that is, to provide a floating ⅓ royalty to each. The most telling provision in this regard was the third royalty clause, in which Ethel clearly provided for equal sharing of royalties among the children as to lands affected by an *inter vivos* royalty sale.

Courts must take a holistic approach when discerning the nature of royalty interests conveyed using double fractions, and here the testatrix intended to convey a floating ⅓ royalty to each of her children, not a 1/24 fractional royalty.

Property Law

***Staley Family P'ship Ltd. v. Stiles*, 483 S.W.3d 545 (Tex. 2016)**

The Staley Family Partnership ("Staley") acquired a

landlocked 10-acre tract in 2009 and then sued the owners of the neighboring Stiles Tract for a declaratory judgment that an easement ran from the Staley tract across the Stiles Tract to a public road, either by necessity, estoppel, or implication. The owners of the Stiles Tract counterclaimed for a declaration that no such easement existed, and the case proceeded to a trial before the court. The evidence adduced at trial showed that the Staley tract and Stiles Tract were severed sometime in the late 1800s, and no public roadway existed through or along the Stiles Tract at any time before 1930. Based on this evidence, the trial court rendered judgment that Staley was not entitled to an easement across the Stiles Tract because, at the time the two tracts were severed, an easement across the Stiles Tract would not have allowed for access to any public road. Staley appealed on the limited basis that it established an easement by necessity. Although the court of appeals disagreed with the trial court's conclusion about exactly when the two tracts were severed, it nonetheless affirmed the trial court's judgment based on the lack of any evidence that at the time of severance an easement across the Stiles Tract would have resulted in access between the Staley tract and a public road.

An easement by necessity requires proof that at the time the dominant and servient estates were severed, an easement across the servient estate could in some manner have allowed access to an existing public road.

In a unanimous opinion authored by Justice Johnson, the Court affirmed the court of appeals judgment. The Court explained that establishing the "necessity" part of an easement by necessity requires, among other things, "proof that at the time the dominant and servient estates were severed, the necessity arose for an easement across the servient estate in order that the dominant estate could in some manner gain access to a public road." Because Staley failed to prove the existence of a public roadway across or along the Stiles Tract when the Staley tract and Stiles Tract were severed, it failed to fulfill this essential element.

Whistleblower Act

***McMillen v. Tex. Health & Human Servs. Comm'n*, No. 15-0147, 59 Tex. Sup. Ct. J. 421 (Tex. Feb. 26, 2016)**

Michael McMillen served as Deputy Counsel for the Texas Health and Human Services Commission's (the "Commission") Office of the Inspector General ("OIG"). In early 2011, a Deputy Inspector General asked McMillen to research the legality of the Commission's practice of obtaining payments from certain recipients of Medicaid benefits. McMillen prepared a memorandum in which he concluded that the Commission's actions lacked legal justification. He submitted this report to the Deputy Inspector General who made the initial request and made other reports to the head of the OIG Internal Affairs Division as well as to the Commission's Executive Commissioner. In early 2012, McMillen was placed on administrative leave, and he was terminated several months later. McMillen then sued the Commission and its Executive Commissioner in his official capacity under the Texas Whistleblower Act. The Commission and the Executive Director filed a plea to the jurisdiction, asserting that McMillen did not allege a good-faith report of a violation of law and that he did not allege his report was made to an "appropriate law-enforcement authority." The trial court denied the plea, but the court of appeals reversed the trial court's order, holding that McMillen did not make a report to an appropriate law-enforcement authority.

An employee's report of an alleged legal violation was made to an appropriate law-enforcement authority under the Texas Whistleblower Act because the reported-to persons had power beyond internal discipline to regulate under or enforce the law allegedly violated.

The Court reversed the court of appeals' judgment in a per curiam opinion. Assuming, without deciding, that McMillen made a good-faith report of a violation of law, the Court held that the OIG was an appropriate law-enforcement authority. Under the statute

in effect when McMillen made his report, the Commission, through the OIG, was responsible for not only the investigation of fraud and abuse in the provision of health and human services, but also the enforcement of state law related to those services. Thus, the Commission had authority to ensure compliance with the law that had allegedly been violated. And this authority extended beyond the Commission itself given the OIG's authority to enforce the law against violations outside the Commission. Accordingly, the OIG was an appropriate law-enforcement authority under the Whistleblower Act.

Texas Courts of Appeals Update

Jerry D. Bullard and Scott A. Cummings,
Adams, Lynch & Loftin, P.C., Grapevine

Contract/Construction of Industry-Standard Agreements

***Tri-County Elec. Coop., Inc. v. GTE Sw. Inc. d/b/a Verizon Sw.*, No. 02-14-00199-CV, 2016 Tex. App. LEXIS 1466 (Tex. App.—Fort Worth Feb. 11, 2016, no pet. h.).**

The Second Court of Appeals held that the trial court erred by granting summary judgment for breach of contract and, alternatively, trespass because the contract between the parties for the joint use of each's utility poles required removal of attachments upon termination of the contract. A fact issue existed as to which claims were viable because there was a fact issue as to whether one of the parties was treated as a tenant at sufferance or a tenant at will.

Tri-County Electric Cooperative, Inc. ("Tri-County") is an electric cooperative that provided electricity in Parker County and other Texas counties for over seventy years. In December 1959, Tri-County entered into a "General Agreement Joint Use of Wood Poles" with Southwestern States Telephone Company of Brownwood, Texas for the "joint use of their respective poles, erected or to be erected within the areas in which both parties render service." The agreement set forth an initial annual rental rate to be paid for the use of the joint poles and also provided for periodic adjustment of the rental rates at five-year intervals upon the request of either party. Tri-County executed four amendments to this agreement; in three of the amendments, the amount of the rentals was increased. The last rental adjustment occurred in 1993. GTE Southwest Incorporated d/b/a Verizon Southwest ("Verizon"), which provided telecommunications services in the same geographic area as Tri-County provides electricity, was the successor to Southwestern States through a series of mergers and corporate

transactions.

In 1975, Tri-County entered into the same type of agreement with Continental Telephone Company of Texas ("Continental"). That agreement also provided for the periodic adjustment of rentals. In 1981, Tri-County and Continental agreed to an amendment of the contract that increased the pole rental rates; no further rental adjustment or other amendment to that agreement had been made. Verizon was also the successor to Continental.

In a November 6, 2003, letter to Verizon, Tri-County requested a rental rate adjustment "pursuant to Article XII," stating that "[t]he new rates will be effective January 1, 2004." Tri-County also requested Verizon's costs for 30 foot poles and Verizon's annual charge percentage relating to poles to calculate the rate adjustment.

Verizon did not respond to the request for cost information, but Tri-County continued to bill, and Verizon continued to pay, rental at the 1981 and 1993 amended rates. In January 2005, Tri-County notified Verizon by letter that it was terminating the joint-use agreements effective February 2, 2008. In that letter, Tri-County demanded that Verizon remove its attachments from Tri-County poles by the termination date and also asserted, "Verizon has not cooperated in providing cost information as requested by letter dated November 6, 2003. Based on information filed by Verizon with the FCC and Tri-County Electric costs, the rental rate will be $31.17/pole for the remaining three (3) years of the Agreement." According to Tri-County, the $31.17 rate was a clerical error, and it told Verizon later that the rate should be $29.21 instead. Beginning in 2009, Tri-County began billing Verizon at the $29.21 per pole rate because Verizon's attachments remained on Tri-County's poles and were being used by Verizon; Verizon did not pay any pole rental after the termination date.

Verizon filed a motion for summary judgment on all of Tri-County's claims, and Tri-County filed a motion for partial summary judgment. At a hearing on the motions, the visiting trial judge verbally granted Verizon's summary judgment

motion. When the judge indicated that he would consider granting Verizon attorney's fees, Tri-County's counsel argued that Verizon had not pled for attorney's fees in its answer even though it had requested attorney's fees in its motion for summary judgment. Verizon filed a motion for leave to amend its answer to include a request for attorney's fees and to amend its motion for summary judgment to present evidence of reasonable and necessary attorney's fees. The trial court granted Verizon's motion for leave to amend both pleadings. Additionally, the trial court signed an order denying Tri-County's motion for partial summary judgment, and a final, take-nothing judgment for Verizon, awarding it $1,100,000 in attorney's fees for proceedings in the trial court and $150,000 in attorney's fees in the event of an unsuccessful appeal by Tri-County.

The court of appeals reversed and rendered in part, reversed and remanded in part, and affirmed in part the summary judgment order. The court held that the agreement between Tri-County and Verizon providing for joint use of utility poles required each party, upon termination, to remove its attachments from the other party's poles and rendered an order that (a) after termination, Verizon became a holdover tenant and (b) Tri-County had the right to demand removal of Verizon's attachments to its joint use poles as of the termination date. The court also held that whether damages were recoverable under a breach of contract theory or a trespass theory for failure to remove attachments upon termination depended on the resolution of factual issues as to whether Tri-County had consented to Verizon's holdover as a tenant at will, and thus summary judgment on that issue was not appropriate. The court further held that fact issues existed on the contract claims regarding rent increases, foreseeability of consequential damages, sharing cost information, and new attachments. Finally, the court held that there was insufficient evidence of malice to support exemplary damages for Tri-County on a trespass claim and affirmed summary judgment on that issue. GTE has filed a motion for rehearing en banc.

***Tatum v. Dall. Morning News, Inc.*, No. 05-14-01017-CV, 2015 Tex. App. LEXIS 13067 (Tex. App.—Dallas, Dec. 30, 2015, pet. filed).**

After the trial court granted summary judgment and entered a take nothing judgment in favor of the defendants on libel and DTPA claims, the Fifth Court of Appeals affirmed as to the DTPA claims, reversed as to the libel claims, and remanded the case to the trial court.

In May 2010, Paul Tatum was a seventeen-year-old high school student. He was an excellent and popular student, an outstanding athlete, and had no history of mental illness. On Monday, May 17, 2010, Paul's parents, John and Mary Ann Tatum (the "Tatums") were out of town at another son's graduation, and Paul was home alone. That night, Paul was involved in a one-car automobile accident. After the accident, he began sending incoherent text messages to friends. He made his way home from the accident scene and began drinking champagne. He then called a friend, and their conversation prompted her and her mother to drive to the Tatums' house during the early morning hours of May 18. Paul's friend went in the house and found Paul "dazed, confused, irrational, incoherent, and apparently in physical anguish and holding one of the family's firearms." Paul's friend left him alone to tell her mother the situation, and as she left she heard a gunshot. Paul died from a gunshot wound to the head.

The Tatums wrote an obituary for Paul and paid the Dallas Morning News ("DMN") to publish the obituary in the *Dallas Morning News* newspaper. Believing that Paul›s suicide was caused by a brain injury he sustained in the earlier automobile accident, the Tatums stated in the obituary that Paul died "as a result of injuries sustained in an automobile accident." The obituary was published on May 21, 2010.

One month later, on Father's Day, June 20, 2010, DMN published a column written by Steve Blow ("Blow"). The Tatums construed the column to (i) accuse them of lying about

the cause of Paul's death, (ii) state falsely that Paul committed suicide in a "time of remorse" over the accident, (iii) insinuate that Paul was mentally ill, and (iv) suggest that the Tatums were responsible for Paul's death and had done a disservice to others by failing to use his obituary as a platform to educate the world about mental illness and suicide.

The Tatums sued Blow and DMN for libel regarding Blow's column. According to the Tatums, the column criticized people who are dishonest about loved ones' suicides. Although the column did not mention the Tatums by name, it quoted from Paul's obituary and described him and the events surrounding his death. People who were familiar with the situation understood the column to refer to Paul and his parents. In addition to their libel claims, the Tatums also asserted DTPA claims against DMN.

The DMN and Blow moved for summary judgment on traditional and no-evidence grounds based in part on the contention that the column was (1) not "of and concerning" the Tatums; (2) not capable of the defamatory meaning ascribed by the Tatums, was true or substantially true; (3) privileged as a fair, true, and impartial account of official proceedings; and (4) privileged under the First Amendment as opinion and by statute as fair comment. DMN and Blow also claimed that they negated actual malice, defeating the Tatums' libel claims entirely if they were limited-purpose public figures and defeating their exemplary damage claims if they were private figures.

The court of appeals concluded that a reasonable person could find that people who knew the Tatums would reasonably understand that the column referred to the Tatums. The court also agreed that the column in question was capable of a defamatory meaning because a person of ordinary intelligence could interpret the column to accuse the Tatums of deception about the cause of their son's death and a statement is defamatory if it impeaches a person's honesty or integrity. The court also concluded that a reasonable factfinder could find that the column's gist was that the Tatums stated a false cause of death, shrouded Paul's suicide in secrecy, intended

to mislead and deceive the readers, and may have wanted to conceal Paul's mental illness and their own failure to intervene. The court noted that the Tatums submitted enough evidence to raise a genuine fact issue regarding whether they believed what they said in the obituary was true, did not intend to mislead or deceive anyone, and did not believe Paul suffered from mental illness. Thus, because the evidence raised a genuine fact issue that the column's gist was neither true nor substantially true, the court found that Blow's and DMN's traditional and no-evidence summary judgment grounds addressing truth and substantial truth could not support the trial court's judgment.

The court went on to note that even assuming the investigations by the police and the medical examiner were "official proceedings," the column did not purport to report about those proceedings and did not mention those proceedings, nor report any statements or findings made in the course of those proceedings. Thus, the column did not qualify for the official proceeding privilege. The court also found that the fair comment privilege did not apply since the comments were not based on substantially true facts. The court also declined to find that the column was an unverifiable opinion and therefore was actionable. The court found that the Tatums were not limited purpose public figures and that they must prove only negligence to recover compensatory damages. The court then concluded that the evidence raised a genuine fact issue as to negligence and actual malice.

The court dismissed the Tatums' DTPA claim finding that the "information" that DMN allegedly failed to disclose to the Tatums (i.e., that Blow had a controversial practice of attacking obituaries) did not concern the service they bought (i.e., the obituary itself). The court reversed the trial court's summary judgment to the extent it ordered the Tatums to take nothing on their libel and libel *per se* claims. The court affirmed the judgment to the extent it ordered the Tatums to take nothing on their DTPA claims. The court remanded the case for further proceedings consistent with its opinion.

Defamation/Texas Citizens Participation Act

***Bedford v. Spassoff*, No. 02-15-00045-CV, 2016 Tex. App. LEXIS 1465 (Tex. App.—Fort Worth Feb. 11, 2016, pet. filed).**

The Second Court of Appeals held that a trial court erred by denying a motion to dismiss under the Texas Citizens Participation Act in a defamation lawsuit arising out of a Facebook® post in which the lawsuit sought damages for business disparagement, intentional infliction of emotional distress, tortious interference, and breach of contract claims; however, the trial court did not err by denying the motion to dismiss the libel claim.

Darin Spassoff ("Spassoff") was the sole owner and president of 6 Tool, LLC, formerly known as Dallas Dodgers Baseball Club, LLC d/b/a Dallas Dodgers Baseball ("Dodgers"), a youth baseball organization. The son of Stephen and Autumn Bedford was a member of the Dodgers baseball team. On September 12, 2014, Stephen Bedford sent Spassoff the following text message: "My name is [Stephen] and I need to speak to [you] ASAP to give you a chance to make something right before I start hitting your social media sites." Spassoff called Stephen, who explained that his wife had had an extramarital affair with the Dodgers' batting coach. Stephen demanded a refund of the $1,000 participation fee that had been paid for the Fall 2014 season. Later that same day, Stephen sent Spassoff a number of other text messages, including one in which he questioned the ethics of the Dodgers organization and threatened to display a sign at their games. Stephen subsequently forwarded to Spassoff a copy of a message that had been posted on Facebook® using Autumn Bedford's account. The post "reviewed" the Dodgers, gave the organization one out of five stars, and stated, "Be very careful. One of the coaches put my son on the team an[d] then started calling and texting my wife. This coach is a home wrecker and the club stands behind him. I guess that's the kind of lessons they plan on teaching the kids. Very unethical and from talking to the executives they don't

plan on changing. Please stay away!!!!!!!!!!!!!!!!!"

The Dodgers and Spassoff sued the Bedfords complaining about the Facebook® post and asserted claims against both Stephen and Autumn for libel and business disparagement. Additionally, Spassoff asserted a claim against Stephen for intentional infliction of emotional distress ("IIED"). The Dodgers asserted a claim against Stephen for tortious interference with an existing contract or, alternatively, a claim against Autumn for breach of contract. The Bedfords timely filed a motion to dismiss based on the Texas Citizens Participation Act ("TCPA"), asked that Spassoff and the Dodgers be sanctioned, and that the Bedfords recover their reasonable attorneys' fees. The trial court denied the Bedfords' motion to dismiss.

On appeal, the Bedfords argued that they met their initial burden under the TCPA to show that all of Spassoff's and the Dodgers' claims were predicated on communications made in connection with a matter of public concern—i.e., an issue related to the Dodgers' provision of youth baseball coaching services in the marketplace. The court of appeals agreed.

The Bedfords also argued that Spassoff and the Dodgers failed to establish a prima facie case for each essential element of their claims. The court of appeals agreed, in part, and held that Spassoff and the Dodgers failed to assert any argument or analysis in an effort to meet their burden as to their business disparagement, IIED, tortious interference, and breach of contract claims. As a result, the trial court erred by denying the Bedfords' motion to dismiss those claims. However, the court held that Spassoff and Dodgers did meet their burden as to their libel claim because the gist of the Bedfords' Facebook® post, when construed as a whole and in light of the surrounding circumstances, was that the Dodgers and Spassoff condone adultery. As such, the post was "not a simple, unflattering statement of opinion. It [was] a degrading comment, it challenge[d] Appellees' integrity, it ha[d] the potential to inflict financial injury upon the Dodgers, and it [was] verifiably false." As Spassoff testified in his affidavit, neither Spassoff

nor the Dodgers condone or approve of adultery. Spassoff also testified via affidavit that Stephen sent him numerous text messages or emails and created the Facebook® post before he could gather information and conduct an internal investigation into Stephen's accusations, which could arguably support the contention that Stephen was at least negligent in publishing defamatory information.

The court also noted that the Facebook® post could qualify as defamation *per se* that could potentially inflict injury upon the Dodgers' business, which could entitle a plaintiff to recover general damages without proof of any specific loss. By accusing Spassoff and the Dodgers of condoning adultery, Stephen indirectly accused them of lacking a peculiar or unique skill that is necessary for the proper conduct of the Dodgers' business.

The court held that Spassoff and the Dodgers met their burden to establish by clear and specific evidence a prima facie case for each essential element of their libel claim. As such, the trial court erred by denying the Bedfords' motion to dismiss Spassoff's and the Dodgers' business disparagement, IIED, tortious interference, and breach of contract claims, but it did not err by denying the Bedfords' motion to dismiss the libel claim.

In a dissent, Justice Walker said that, because as a matter of law the elements of libel could not be established concerning either of the written statements, the trial court also erred in failing to dismiss Spassoff's and the Dodgers' libel claim. Justice Walker stated that, as a matter of law, Stephen's email to Spassoff could not form the basis of the Dodgers' libel claim because the email was not published to a third party. As a result, the Dodgers failed to meet their burden of establishing a prima facie case for the essential element of publication in their libel claim arising from the email. Concerning the Facebook® post, Justice Walker stated that the Dodgers failed to establish a prima facie case for the required elements that (1) a statement in the post was defamatory and (2) they suffered damages. In support of her dissent, Justice Walker said the statements were made in a post on a Facebook® page after Stephen gave the Dodgers a one-star rating. A consumer's rating of a

business and comments supporting the rating are designed to be an expression of that one consumer's experience with and opinion of the business. Then, Stephen ascribed his opinion as to why a coach put his son on the team––as pretext to start calling and texting his wife. Whether the coach called and texted Autumn Bedford was an objectively-verifiable fact and was true. However, why a player is placed on a team, whether a coach was a "home wrecker" or whether the Dodgers "stand behind" the coach, were opinions and not objectively-verifiable facts. Further, Stephen's statements about the kind of lessons that the Dodgers teach its players and whether the Dodgers' business conduct was ethical were not objectively-verifiable. As such, according to Justice Walker, Stephen's post was, at most, opinionated criticism.

Justice Walker also stated that the Dodgers failed to meet their burden of establishing a prima facie case for the essential element of damages from Stephen's post. As such, the trial court was required to dismiss the Dodgers' libel claim unless Stephen's post was defamatory *per se* so that general damages were presumed. However, Stephen's post did not impute sexual misconduct to either Spassoff or the Dodgers, did not charge either plaintiff with the commission of a crime, and did not accuse either of having a loathsome disease. Thus, the only remaining question was whether the post injured Spassoff or the Dodgers in their occupation or profession. In this case, Stephen's Facebook® post did not accuse Spassoff or the Dodgers of lacking any skill related to baseball or to running a baseball organization. Further, the Dodgers provided no argument or analysis explaining how Stephen's post falls within the category of defamation *per se*. A statement disparaging the Dodgers for not preventing a batting coach from engaging in an extramarital affair or for not disciplining such a coach in some unidentified manner was not the disparagement of a character or quality that was essential to the business of operating a baseball club. At most, it was a general disparagement. For these reasons, Justice Walker could not agree with the majority that Stephen's Facebook® post, even if defamatory, was so

egregious and obviously injurious to the reputation of Spassoff and the Dodgers that damages to Spassoff's reputation or to the Dodgers could be presumed as a matter of law.

***Entravision Commc'ns Corp. v. Salinas*, No. 13-13-00702-CV, 2016 Tex. App. LEXIS 536 (Tex. App.—Corpus Christi Jan. 22, 2016, pet. filed).**

The Thirteenth Court of Appeals held that trial court erroneously denied a motion to dismiss under the Texas Citizens Participation Act when the communication at issue was a matter of public concern and the defendant met its initial burden of showing that the defamation claims were based on, related to, or were in response to the outlet's exercise of the right of free speech.

Jesus Everado Villarreal Salinas ("Salinas"), the Mayor of Reynosa, Mexico and Arturo Villarreal Tijerina ("Arturo"), Salinas' father, filed suit against Entravision Communications Corporation and Marianele Aguirre (collectively "Entravision"), Entravision-Texas G.P. LLC ("ETGP") and Entravision Holdings, LLC ("EH"), alleging defamation *per se* and defamation *per quod*. The basis for the suit arose out of a statement posted on May 17, 2013 by Entravision on the Facebook® page of Noticias 48, a television media outlet. The Facebook® post, read:

> Architect Arturo Villarreal, father of the Mayor of Reynosa, Tamps. Everardo Villarreal Salinas,—according to Unofficial sources—Was Arrested with a Very Important Sum of Money, here [in] the Rio Grande Valley, More details at 5:00 o'clock pm. We'll be waiting for you.

A picture of Arturo and Salinas appeared below the subject post.

Entravision, ETGP, and EH subsequently filed a motion to dismiss, asserting that (1) the lawsuit fell within the protection of the Texas Citizens Participation Act ("TCPA"); and (2) Everardo could not establish a prima facie case for defamation as required by the TCPA. More specifically, Entravision's motion

alleged that Arturo was a public figure as well as the father of Salinas and that Salinas was the Mayor of Reynosa, Mexico. Entravision argued that "[t]he possibility that authorities had detained someone (in this case, [Arturo], a former secretary of urban development and public works for Reynosa who has also been involved in the chamber of commerce and other organizations in the city) with a large sum of money is certainly a matter of public concern."

The motion to dismiss also argued that Salinas was not entitled to bring a defamation suit because the allegedly defamatory statement concerned Salinas' father and not Salinas. The motion did not seek to dismiss Arturo's claim.

After the filing of the motion to dismiss, Salinas and Arturo filed a motion to non-suit ETGP and EH. The trial court granted that motion and dismissed ETGP and EH with prejudice, thereby effectively denying the motion to dismiss by operation of law when it failed to act on the motion within the prescribed time. On appeal, Entravision contended that the trial court erred in denying their motion to dismiss brought pursuant to the TCPA and in not awarding attorney's fees, costs, and expenses to Entravision when Salinas non-suited co-defendants ETGP and EH after the motion to dismiss was filed but before the hearing on the motion.

The court held that Entravision made the communication in connection with a matter of public concern. Specifically, the court said the communication implicated concerns of community well-being or that it involved issues related to a public official or public figure. The court further held that Entravision met its initial burden of showing that Salinas' defamation claims were based on, related to, or were in response to the outlet's exercise of the right of free speech, such that the TCPA applied to those claims. The court also held that an ordinary person would perceive the "gist" of the Facebook® article as concerning Salinas' father and his activities, and it would not entail any inference that Salinas was involved in any criminal wrongdoing with his father or that he was a corrupt and criminal politician. The court declined to award Entravision

the attorney's fees it sought based on its non-suit argument on behalf of ETGP and EH since neither was before the court on appeal and Entravision did not claim to have standing to complain on their behalf. The court remanded for entry of judgment dismissing Salinas' claims against Entravision and for a determination of court costs, reasonable attorney's fees, other expenses, and sanctions, if any, as authorized by statute.

***Tex. Campaign for the Env't v. Partners Dewatering Int'l, LLC*, No. 13-14-00656-CV, 2016 Tex. App. LEXIS 537 (Tex. App.—Corpus Christi Jan. 21, 2016, no pet.).**

The Thirteenth Court of Appeals affirmed the dismissal of a business disparagement claim under the Texas Citizens Participation Act because evidence of malice was lacking. However, the court held that there was sufficient evidence to support a claim for tortious interference so the trial court's dismissal of such claims was erroneous.

Partners Dewatering International, LLC ("PDI") was a grease and grit trap processing business. On November 1, 2008, PDI entered into an operating lease agreement with Rio Hondo for a liquid waste dewatering facility with Rio Hondo ("Rio Hondo Contract"). This contract was similar to an existing contract that PDI had entered into with the City of LaCoste ("LaCoste") in 2000 ("LaCoste Contract").

Under its terms, the Rio Hondo Contract continued for ten years to October 31, 2018, with an initial five-year term that could be extended for an additional five years if PDI was not in material default. According to the contract, a material default occurred if "three (3) times after having been given notice of a breach, it remains uncorrected for three (3) days. In the event of such a breach [Rio Hondo] may terminate this Agreement." And if Rio Hondo ceased to operate the dewatering system for its intended purpose, the agreement "shall automatically terminate." The Rio Hondo Contract provided that PDI would apply for the proper permits and registrations to establish, operate, and maintain a liquid waste dewatering facility located within Rio Hondo's already-established water

treatment plant. The contract also stated that PDI "shall at no time receive, create or store any hazardous or toxic waste in the operation or maintenance of the Facility in the Plant."

From 2010 through 2012, the Texas Campaign for the Environment ("TCE"), an Austin-based non-profit organization, was involved in a campaign to terminate PDI's LaCoste Contract; the campaign was unsuccessful. In September 2012, TCE's Executive Director, Robin Schneider ("Schneider") received public notice from the Texas Commission of Environmental Qualify ("TCEQ") that PDI had plans to obtain a registration from the TCEQ to take commercial loads of waste to the Rio Hondo wastewater treatment plant, as it did in LaCoste. TCE included Rio Hondo in its canvassing in the Rio Grande Valley. According to PDI, TCE employees and representatives made multiple false statements to Rio Hondo residents about PDI's operations at the Rio Hondo and LaCoste facilities.

TCE asked citizens to write letters to the TCEQ and other city and state officials expressing their concerns about PDI. TCE acknowledged, on appeal, that the efforts of its organizers generated thirty-six letters to the Mayor, City Commissioners, area state legislators, and the TCEQ. In addition, two state representatives requested a public meeting for discussion of the new waste facility. According to PDI, "prior to the TCE coming into Rio Hondo, there was no public opposition and City officials had no concerns over PDI's contract with the City or its plans to operate the dewatering facility at the City's wastewater treatment plant."

After a public meeting on January 13, 2013, the Rio Hondo City Council met privately with PDI. According to PDI, Carter Mayfield, the Director of Finance and financial analyst for PDI, averred that after the January 13th meeting City Council member Gerald Hertzog "said that he felt like the deal had gone 'sour.' And that we should just walk away. . . . He said that it didn't matter [if PDI's leaving would be the best thing for Rio Hondo] at this point, that the 'environmental group' had people all wound up over this." The TCEQ held its public meeting

in Rio Hondo on January 17, 2013. On February 17, 2013, Rio Hondo held a City Council meeting where the decision was made to "cancel" the Rio Hondo Contract. On February 28, 2013, Rio Hondo sent a letter to the TCEQ informing it of the cancellation of PDI's contract.

PDI filed suit against TCE and Schneider alleging tortious interference with an existing contract between PDI and Rio Hondo and business disparagement. PDI's petition alleged that TCE employees and representatives made multiple false statements to Rio Hondo residents about PDI's operations at the Rio Hondo and LaCoste facilities. Further, PDI claimed that Schneider said PDI did not comply with Texas law and accused PDI of taking advantage of small cities. PDI also said that TCE took credit for Rio Hondo cancelling the Rio Hondo Contract.

TCE and Schneider filed a motion to dismiss, arguing that the TCPA protected its actions. They argued that the lawsuit was based on, related to, or was in response to the TCE's exercise of the right to free speech, right to petition, or right to association. On appeal, PDI did not dispute that TCE and Schneider met their burden to show that the lawsuit was based on or related to the exercise of those constitutional rights. Instead, PDI argued that it met its burden to avoid dismissal under the TCPA by establishing "by clear and specific evidence a prima facie case for each essential element" of its claims.

PDI offered evidence that Schneider, who knew of the Rio Hondo Contract or who had knowledge of facts that would lead a reasonable person to conclude that a contract existed, received notice from the TCEQ that PDI planned to register to take waste to the Rio Hondo wastewater treatment plant. During September 2012, TCE was canvassing in the Rio Grande Valley, including Rio Hondo. The organizers of the canvass went door-to-door in downtown Rio Hondo and outlying neighborhoods near the plant. Posts on TCE's website explained that the organizers had informed residents of their right to request a public meeting and had asked residents to write letters to their state legislators to request a public meeting

on PDI's pending TCEQ registration. TCE and Schneider also asked citizens to sign a "statement in support" and to write letters to TCE and other city and state officials expressing their concerns about PDI. TCE and Schneider explained in the posts that "[w]e need our City Commissioners to take a stand for our air, water and community by getting out of this deal!" PDI offered evidence that representatives of the TCE appeared at public meetings, at times taking control of the meeting, talking about how no one wants PDI in Rio Hondo and instructing the public on how to participate effectively at the meetings. City council members believed that the "environmental group" had people "all wound up" over the Rio Hondo Contract. PDI's evidence also sets out that TCE and Schneider were involved in the campaign against PDI's Rio Hondo facility from at least 2012, after TCE's unsuccessful 2010-2012 campaign against PDI's facility in LaCoste, through the termination of the Rio Hondo Contract in early 2013.

The court of appeals found that the evidence was sufficient as a matter of law to establish a given fact—intentional interference—if it is not rebutted or contradicted. The court also found that PDI provided clear and specific evidence that the TCE's acts were a substantial factor in bringing about the termination of the contract—satisfying its burden on the component element of cause in fact. The court also concluded that PDI's evidence satisfied the minimum requirements of the TCPA as to the damage element.

TCE argued that Rio Hondo enjoyed statutory immunity from liability when it terminated the Rio Hondo Contract because the contract was not for "goods and services." Therefore, its actions could not be actionable interference if Rio Hondo was induced to do something it had the right to do. However, the court noted that Rio Hondo waived immunity because the Rio Hondo Contract contemplated, in part, "the provision of [a] service to Rio Hondo [by PDI] under the statute." Thus, TCE could have interfered, and its interference was arguably actionable.

However, the court found that PDI had not shown clear

and specific proof that TCE and Schneider made the allegedly defamatory statements with malice, and therefore did not sustain their burden of proof on the malice element of its business disparagement claim.

For these reasons, the court affirmed dismissal of the business disparagement claim because evidence of malice was lacking. However, the court held that PDI's claim for tortious interference alleging that an environmental group had induced a city to breach an operating lease agreement for a liquid waste dewatering facility, the facility's operator established a prima facie case for each essential element because the city's waiver of immunity from suit meant actionable interference with the contract could occur. Accordingly the court overruled the trial court's dismissal under the TCPA.

Healthcare Liability Claim/Expert Reports

***Tenet Hosps. Ltd. d/b/a Sierra Med. Ctr., v. Bernal*, No. 08-14-00181-CV, 2015 Tex. App. LEXIS 11850 (Tex. App.—El Paso Nov. 8, 2015, no pet.).**

The Eighth Court of Appeals reversed a trial court order denying a motion to dismiss because of an inadequate expert report and remanded the case to the trial court to consider granting a thirty day extension to cure a deficient report.

On August 26, 2011, Dr. Hector Flores ("Dr. Flores") performed surgery at Sierra Medical Center to repair the mitral valve in Margarita Medrano's ("Medrano") heart. During the course of the procedure, a Swan-Ganz catheter was placed in Medrano's left subclavian vein. Two days later, two Tenet nurses unsuccessfully and repeatedly pulled on the catheter in an attempt to remove it from Medrano. Medrano's daughter observed Medrano screaming in pain during the attempts. Dr. Flores subsequently examined Medrano and also unsuccessfully attempted to remove the catheter. After Medrano underwent imaging, Dr. Flores determined that another surgery was necessary for the controlled removal of the catheter. The next day, August 29th, Dr. Flores performed surgery to remove the

catheter, which, it was discovered, had been inadvertently sutured in place during the first surgery. Plaintiffs allege that during the second surgery, the anesthesiologist, Dr. James B. Boone ("Dr. Boone"), prematurely pulled on the stitched catheter and tore Medrano's heart, which when coupled with the ensuing negligence of Dr. Flores in reaction to the crisis, resulted in hemorrhage and multi-organ failure, leaving Medrano in critical condition. On September 1st, Dr. Robert Santoscoy ("Dr. Santoscoy") performed a third surgery on Medrano to repair her torn superior vena cava. The surgery was deemed "technically successful." However, Medrano died two and one-half months' later, allegedly due to complications arising from the August 29th surgery.

Sandra Bernal and other plaintiffs ("Plaintiffs") brought wrongful death and survival claims arising from Medrano's death. Plaintiffs sued Dr. Flores, Dr. Santoscoy, and Tenet Hospitals Limited d/b/a Sierra Medical Center ("Tenet"), but not the anesthesiologist, Dr. Boone. Plaintiffs alleged that Tenet was vicariously liable for the negligence of Dr. Boone under the theory of ostensible agency and vicariously liable for the negligence of its nurses under the doctrine of respondeat superior.

As required by the Texas Civil Practices and Remedies Code, Plaintiffs served the expert reports of: (1) Dr. Thomas Jay Berger ("Dr. Berger"), who addressed the wrongful death claims arising from the alleged negligence of Dr. Flores and Dr. Boone; and (2) Nurse Elisabeth Ridgely ("Nurse Ridgely"), who addressed the survival claims for Medrano's pain arising from the actions of the Tenet nurses in their attempted removal of the Swan-Ganz catheter. Tenet objected to the expert reports and sought the dismissal of Plaintiffs' claims. Tenet contended in part that Nurse Ridgely's report could not support the survival claims because she could not opine as to causation. Tenet contended in part that Dr. Berger's report could not support the wrongful death claims because his report did not mention the hospital or implicate its behavior. The trial court denied Tenet's motion to dismiss

The court held that the expert reports were insufficient as to a hospital's liability for nurses' actions in a health care liability claim arising from the death of a patient following surgery to repair the mitral valve because the reports did not establish that nurses' persistent pulling on the patient's catheter caused additional pain. The court further held that the Plaintiffs could not rely on lay testimony to establish such connection. The court also held that a doctor's expert report was not rendered insufficient as to a hospital's vicarious liability by its failure to mention the hospital or implicate its behavior because the report could be analyzed only with respect to the doctor's actions and there was nothing in the record rebutting the allegation that the doctor was acting as the hospital's ostensible agent.

The court concluded that because Nurse Ridgely could not provide an opinion on causation concerning the nurses' actions, and because Dr. Berger did not provide that opinion, the Plaintiffs failed to present any expert opinion on causation to support their survival claims against Tenet. However, the court remanded the case to the trial court to consider granting a thirty-day extension to cure Dr. Berger's report noting that the standard for granting a thirty-day extension to cure a deficient report was lenient and available as long as the report contains a statement of opinion by an individual with expertise indicating that the claim asserted by a plaintiff against a defendant has merit. In doing so, the court noted that the trial court should be lenient in granting thirty-day extensions and must do so if deficiencies in an expert report can be cured within the thirty-day period.

Mandamus/Dominant Jurisdiction

***In re Fort Apache Energy, Inc.*, ., No. 05-15-01159-CV, 2015 Tex. App. LEXIS 12707 (Tex. App.—Dallas Dec. 16, 2015, orig. proceeding [mand. denied]).**

The Fifth Court of Appeals held that the trial court did not abuse its discretion when it denied a petition for writ of mandamus seeking to abate a trial court proceeding while a similar previously-filed proceeding remained pending in

another county.

Huddleston Exploration Limited Liability Company ("Huddleston") and Fort Apache Energy, Inc. ("Fort Apache") entered into a Participation Agreement and an Operating Agreement in June 2012. These agreements required Huddleston to pay 65% of the drilling and completion costs of a certain mineral well. Fort Apache contends that Huddleston defaulted, which resulted in the parties meeting in Kendall County in October 2014 to execute a further Payment Agreement in which Huddleston promised to pay its past due obligations pursuant to a payment schedule or risk triggering remedies available to Fort Apache under the Operating Agreement.

In November 2014, Fort Apache sued Huddleston in Kendall County, Texas alleging that Huddleston breached the Payment Agreement and sought a court order transferring Huddleston's interest in the well to Fort Apache. Huddleston answered the Kendall County suit, but two months later sued Fort Apache and the other relators in Dallas County. After amending its Dallas County pleading twice, Huddleston alleged that (i) Fort Apache had breached the Participation Agreement and the Operating Agreement, (ii) Fort Apache and relator Bloxsom committed breach of fiduciary duty, fraud, and negligent misrepresentation, and (iii) Huddleston was entitled to an accounting from Fort Apache, Bloxsom, and relator Drilling Risk Management, Inc.

The parties litigated venue selection issues in both courts. The Kendall County court refused to transfer venue to Dallas County. Thereafter, Fort Apache asked the Dallas County court to abate the case because the Kendall County court had dominant jurisdiction over the controversy. The Dallas County trial court denied that motion. In March 2015, the Dallas County court set its case for trial on February 22, 2016. In June 2015, the Kendall County court set its case for trial on March 14, 2016. Fort Apache filed a petition for writ of mandamus in September 2015, about six weeks after the Dallas County court denied relators' motion to abate.

The court denied Fort Apache's petition. The majority held that it could not conclude that the trial court's docket control order, which included an "Initial Trial Setting" for February 22, 2016, amounted to the kind of direct interference with the jurisdiction of the Kendall County Court, which has set the case for jury trial on March 14, 2016, that warrants mandamus relief under current Texas law. The court held that, while the Texas Supreme Court had granted mandamus relief in a case with conflicting trial settings in *Perry v. Del Rio*, the circumstances in that case were "significantly different" than those in this case. The majority stated that "[o]nly the supreme court, not the two different courts of appeals to which the redistricting cases would be appealed, could timely determine which of the two courts had the dominant jurisdiction to proceed because the deadline simply did not leave room for normal appellate remedies."

The majority also could not conclude that the advent of the balancing test mandated by *In re Prudential* permitted it to disregard directly controlling precedent that has never been overruled by the Texas Supreme Court. According to the majority, "it is the prerogative of the supreme court to overrule its own decisions if it determines the reasons have been rejected by another line of decisions." Accordingly, the court denied Fort Apache's request for mandamus relief.

In a dissent, Justice Whitehill stated that the trial court clearly abused its discretion because Fort Apache established that the Kendall County court possessed dominant jurisdiction over this controversy because: (1) the two lawsuits involved were inherently interrelated; (2) the same parties were involved (or could easily be added) in both lawsuits; and (3) the claims and defenses in both suits arise from and relate to the same set of agreements and transactions. Also, the Dallas County trial court's order setting the case for trial one month before the Kendall County case was set to be tried actively interfered with the Kendall County court's dominant jurisdiction. Further, a refusal to correct the trial court's clear abuse of discretion by mandamus presented a strong likelihood of wasted public and

private resources alike since the parties would be required to be put through the effort and expense of preparing and trying a case that "will result in a judgment almost certainly subject to reversal on appeal." Accordingly, Justice Whitehill would have granted Fort Apache's petition.

Fifth Circuit Update

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Bankruptcy

***Garner v. Knoll, Inc. (In re Tusa-Expo Holdings, Inc.)*, 811 F.3d 786 (5th Cir. 2016)**

Tusa Office was a retail dealer of office furniture manufactured by Knoll. The companies' Payment Agreement provided that Tusa need not pay Knoll until after Tusa was paid by its customers, and granted Knoll a first-priority security interest in all Tusa's present and after-acquired assets, including accounts receivable. Tusa ran into financial difficulty after an ill-fated acquisition of a used furniture dealer. Tusa obtained a line of credit from Textron Financial and granted Textron a first security interest. Knoll agreed to subordinate most of its interests to Textron's, but maintained its first priority status in certain accounts receivable. Tusa's customers began paying directly into a "lockbox" account controlled by Textron but owned by Tusa. Those funds included proceeds from the accounts receivable in which Knoll had first priority. Textron would withdraw funds from the lockbox, apply the funds to increase Tusa's credit limit, and then advance funds to Tusa that Tusa used to pay Knoll.

A transferee of funds from a deposit account takes the funds subject to any security interest in the funds themselves.

Tusa eventually filed for Chapter 11 bankruptcy. The trustee sought to avoid certain payments to Knoll on the basis that they were preferences. The bankruptcy court held that the transfers were not preferences under 11 U.S.C. § 547(b) because the trustee had not established that Knoll had received more from the payments than it would have received in a Chapter 7 liquidation. The district court affirmed, and the trustee appealed.

The Fifth Circuit affirmed. The crux of the issue was

whether Knoll maintained its perfected security interest in the proceeds of Tusa's accounts receivable as they worked their way through the lockbox and Textron to Tusa. If the security interest survived that process, then the transfers were not preferences because Knoll would have received the funds—the proceeds of Tusa's accounts receivable—in a Chapter 7 liquidation.

The trustee argued that Texas UCC § 9.332 stripped Knoll's security interest because "[a] transferee of funds from a deposit account takes the funds free of a security interest in the deposit account" under that section. Knoll, however, argued that § 9.332 only stripped the funds of an interest in the *account*, not an interest in the *funds* themselves. The Fifth Circuit agreed with Knoll, holding that funds transferred from a deposit account remain subject to a perfected security interest in the funds.

***Krueger v. Torres (In re Krueger)*, 812 F.3d 365 (5th Cir. 2016)**

The Fifth Circuit joined other courts holding that a debtor's bad faith during the bankruptcy process can justify dismissal for cause under § 707(a) of the Bankruptcy Code, even if other provisions of the Code might address some of the bad faith conduct. That section allows a court to prevent ongoing dishonest or vexatious conduct. A court may consider the debtor's entire course of conduct before, during and after filing a Chapter 7 petition in determining whether to dismiss a case for cause. In the case at issue, the record supported the bankruptcy court's findings that the debtor filed bankruptcy for illegitimate purposes, misled the court and other parties, and engaged in bad litigation practices, including perjury and threatening witnesses. The bankruptcy court therefore did not abuse its discretion in dismissing the case.

A bankruptcy court may dismiss a case for cause based on the debtor's bad faith conduct.

Class Action

***Arbuckle Mountain Ranch of Tex., Inc. v. Chesapeake Energy Corp.*, 810 F.3d 335 (5th Cir. 2016)**

Arbuckle Mountain Ranch sought to certify a class of "post-foreclosure owners of disputed oil and gas interests" in an action against oil and gas leaseholders, arguing that their leases terminated upon foreclosure. The defendants removed the action to district court, and the district court remanded based on the "local controversy exception" to the Class Action Fairness Act.

The "local controversy exception" provides that federal courts should decline jurisdiction over class action cases that involve purely local issues. The exception requires, among other things, that two-thirds of the putative class hail from "the State in which the action was originally filed." Unfortunately, the *Arbuckle* petition included two mutually exclusive definitions of the class. The first applied only to current mineral interest owners (the "narrow class"), while the second applied to current *and former* owners (the "broad class"). The narrow class was more than two-thirds Texan, but the broad class was not. Remand was only appropriate, therefore, under the narrow class definition.

When a class-action petition includes two incompatible definitions of the class, courts should look to the definition that "formally identifies the class" that the plaintiff seeks to certify.

The Fifth Circuit reversed, holding that the broad class definition controlled. While Arbuckle argued that the narrow class definition should control because it came earlier in the petition, the Fifth Circuit rejected that approach. Instead, the Fifth Circuit adopted the second definition because the petition itself identified the broad class when asking the court to certify, while the narrow class definition was only used to introduce the issues in the petition. While one count in the complaint seemed to be appropriate only in the narrow context, the Fifth Circuit held that the resulting ambiguity was to be resolved in favor of

federal jurisdiction, and that Arbuckle had therefore not proven that the local controversy exception applied.

Employment

***Cannon v. Jacobs Field Servs. N. Am., Inc.*, No. 15-20127, 2016 WL 157983 (5th Cir. Jan. 13, 2016)**

Jacobs Field Services revoked a field engineer job offer to Michael Cannon after learning that he had a rotator cuff impairment that prevented him from lifting his right arm above the shoulder. Cannon sued under the Americans with Disabilities Act, but the district court granted summary judgment for JFS, finding that Cannon could not provide he was disabled or a qualified individual.

The Fifth Circuit reversed, holding that the district court failed to take into account the expanded definition of "disability" in 2008 amendments to the ADA. Those changes made it easier for people with disabilities to obtain ADA protection. The 2008 Act clarified that the Supreme Court and the EEOC had interpreted the "substantially limits" standard to be more demanding than Congress intended and that standard should therefore be construed in favor of broad coverage. EEOC regulations implementing the 2008 Amendments concluded that the inquiry should be whether an impairment substantially limits the ability "to perform a major life activity as compared to most people in the general population." The Fifth Circuit found evidence that Cannon's injury qualified as a disability under the new standard, as lifting and reaching are included as major life activities under the ADA.

Amendments to the Americans with Disabilities Act broaden the definition of "disability" and cover individuals regarded as having an impairment.

In any event, JFS's belief that Cannon's injury resulted in substantial impairment, even if mistaken, was an additional reason why the 2008 amendment supported a finding that Cannon was disabled. The ADA covers not only someone

who is disabled, but those subjected to discrimination because they are regarded as having an impairment, whether or not the impairment limits or is perceived to limit a major life activity. Once again, there was evidence that JFS officials perceived Cannon's shoulder injury to be an impairment. Although a closer question, the Fifth Circuit concluded that summary judgment was also improper on the question of whether Cannon was qualified for the field engineer position. The Fifth Circuit therefore reversed and remanded for further proceedings.

***Fairchild v. All Am. Check Cashing, Inc.*, 811 F.3d 776 (5th Cir. 2016)**

In December 2011, Ambrea Fairchild started working at All American Check Cashing as a manager-trainee and was paid hourly. In March 2012, All American promoted Fairchild to manager, a salaried position. However, in September 2012, after All American issued Fairchild several written complaints regarding her performance, it demoted Fairchild back to the manager-trainee position. In November 2012, Fairchild told All American that she was pregnant. On January 23, 2013, All American terminated Fairchild. Fairchild filed suit against All American, alleging it violated Title VII, as amended by the Pregnancy Discrimination Act, by firing her because she was pregnant and violated the Fair Labor Standards Act by failing to pay her overtime. The district court granted All American's motion for a directed verdict on both claims.

The Fifth Circuit affirmed. In deciding the FLSA overtime claim, the Fifth Circuit relied on its decision in *Newton v. City of Henderson*, that an employee cannot prevail on an FLSA overtime claim if that "employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work." The Fifth Circuit found that Fairchild had failed to establish that All American had constructive knowledge that she had been working overtime during the time periods at issue. All American's overtime policy prohibited hourly employees from working overtime without prior approval, and required that all employees accurately report

all working hours through its timekeeping system. Fairchild, like the plaintiff in *Newton*, ignored All American's policy and procedures because she neither sought authorization to work overtime nor reported alleged hours through the timekeeping system. The Court also disagreed with Fairchild's argument that All American had implicit knowledge that she worked overtime hours through its computer usage records, which showed when she "clocked out." The Court held that the standard is whether All-American *should have known*, and All American's "mere access" to the information did not prove it had constructive knowledge.

The Fifth Circuit next turned to Fairchild's pregnancy-based sex discrimination claim under Title VII. Fairchild alleged that the short proximity in time between when All American learned that she was pregnant and her discharge showed that the company's decision was discriminatory. Deciding an issue of first impression, the Fifth Circuit found that proximity alone—between the employer learning of the employee's pregnancy and termination—was not enough to establish pretext. The record was replete with legitimate, nondiscriminatory reasons for Fairchild's termination, including: her contentious relationship with her manager; problems she caused regarding store morale and customer service; and repeated performance-related problems that resulted in warnings, including a citation issued after she informed All American of her pregnancy. Therefore, under *McDonnell Douglas*, the burden shifted back to Fairchild to show that a reasonable trier of fact could conclude that All American's offered reasons were pretextual. To meet this burden, Fairchild had to "put forward evidence rebutting each of the nondiscriminatory reasons the employer articulates." Fairchild failed to do so, as her only evidence was temporal proximity. The Court found that, "suspicious timing" alone—

Temporal proximity between an employer learning of an employee's pregnancy and her termination, on its own, is insufficient to establish pretext for purposes of a pregnancy-based sex discrimination claim.

absent other evidence of discriminatory motive—was not sufficient to establish pretext. Accordingly, All American was entitled to judgment as a matter of law.

***Flynn v. Distinctive Home Care, Inc.*, 812 F.3d 422 (5th Cir. 2016)**

Rochelle Flynn, a pediatrician, contracted to provide clinical pediatric services at a medical center at an air force base in San Antonio. Her agreements with one and then a subsequent Air Force contractor provided that she was an independent contractor and the contractors would have no right to control the manner in which she provided medical services. Around the same time Flynn was diagnosed with Asperger's Syndrome, concerns about her performance were raised by government officers. Flynn asked for accommodations, which the Government denied. The Air Force contractor then informed Flynn that she would not be retained as an independent contractor. Flynn sued the Air Force contractors for employment discrimination under Section 504 of the Rehabilitation Act. The district court granted summary judgment for the defendants, finding that Flynn could not sue for discrimination under the Rehabilitation Act because she was an independent contractor.

An independent contractor can sue for employment discrimination under Section 504 of the Rehabilitation Act.

Deciding an issue of first impression, the Fifth Circuit reversed, finding that an independent contractor may sue for employment discrimination under Section 504 of the Rehabilitation Act. It was undisputed that Flynn could not sue under Title I of the Americans with Disabilities Act, as that Title only allowed a plaintiff to sue if the plaintiff was an employee. The Fifth Circuit determined that Section 504(d), which provides that standards used to determine whether Section 504 had been violated shall be the same standards applied under Title I of the ADA, did not incorporate that limitation in Title I of the ADA. Noting a circuit split on the

question, the Fifth Circuit sided with the Ninth and Tenth Circuits that the Rehabilitation Act did not require a defendant to be the plaintiff's employer as defined by the ADA. Section 504 was not limited to the employment context, but instead prohibited discrimination in any program or activity receiving federal financial assistance. Importing Title I's requirement that there be an employer-employee relationship would conflict with the plain language of the Rehabilitation Act, which broadly authorized discrimination suits against a wide variety of entities, not just employers. The Fifth Circuit further agreed with the Ninth and Tenth Circuits that the Rehabilitation Act adopted only substantive standards to determine what conduct violated the Act, not the definition of who is covered by the Act. The Fifth Circuit therefore vacated and remanded for further proceedings.

Federal Law

Seth B. ex rel. Donald B. v. Orleans Par. Sch. Bd., 810 F.3d 961 (5th Cir. 2016)

The Individuals with Disabilities Education Act establishes a process by which school districts and parents collaborate to develop individualized educational programs for students with disabilities. As part of this process, school districts evaluate students to assess any disabilities and determine their educational needs, and parents are afforded the right to an independent educational evaluation (IEE) at public expense if the IEE meets certain criteria.

Seth B. attended public school in New Orleans. He had been diagnosed with autism and was identified as a child with a disability under the IDEA. Seth's parents sent a request to the Orleans Parish School Board for an IEE, which the board granted and offered up to $3,000 on the condition the IEE complied with Louisiana Bulletin 1508 (LB 1508), the state-mandated evaluation criteria. After receiving Seth's IEE, the School Board responded to Seth's parents by letter outlining 31 ways the IEE allegedly did not meet LB 1508 criteria. Several

months later, Seth's parents sent the board invoices from the IEE for more than $8,000 and requested reimbursement. The board denied reimbursement based on the noncompliant evaluation and the fact that some invoices appeared unrelated to the IEE. Seth and his parents requested an administrative due process hearing from an administrative law judge, who ruled against them, and then sought review in federal district court pursuant to the IDEA. The district court ultimately granted summary judgment for the School Board.

Parents who disagree with a school district's evaluation of their child may seek an independent education evaluation and is entitled to reimbursement at public expense if the evaluation substantially conforms to criteria used by the school district in its evaluation.

The Fifth Circuit vacated and remanded to the district court for analysis under a substantial compliance standard. The Fifth Circuit first noted that it had never articulated the standard of review for the appeal of a district court's determination that an IEE did not merit reimbursement. Recognizing the district court's ruling turned in large part on the interpretation of educational regulation, with some analysis on the factual questions of whether the IEE and School Board's conduct conformed to those regulations, the Fifth Circuit determined it would review the ruling de novo, but examine the underlying factual findings for clear error.

The Court first held the School Board did not waive its right to refuse reimbursement by failing to initiate a hearing or unnecessarily delaying in complying with its duties under the IDEA. The plain text of the regulation did not require the agency to "initiate" or "request" the hearing, and parents' rights can be vindicated just as well in a hearing initiated by them as in one initiated by the school district. Second, the Court held Seth's parents were not denied their procedural rights when the district court placed the burden of persuasion on them. Analyzing this issue of first impression, the Fifth Circuit reasoned that the regulations did not require the district court to hold an evidentiary hearing where witnesses

testify and are cross-examined.

Finally, the Fifth Circuit analyzed whether the IEE failed to meet agency criteria precluding reimbursement. The degree of compliance necessary for an IEE to meet the criteria is not explicitly defined in the IDEA. The substantial compliance standard had already been employed in other IDEA contexts, and the Fifth Circuit was persuaded that the substantial compliance standard also sufficed in the IEE context. Because the district court did not squarely address that factually specific question, the Fifth Circuit remanded for analysis under that standard subject to a reimbursement cap of $3,000, which Seth's parents were aware of and failed to demonstrate unique circumstances by which they could exceed that cap.

***Tina M. v. St. Tammany Par. Sch. Bd.*, No. 15-30220, 2016 WL 723352 (5th Cir. Feb. 23, 2016)**

Tina and Shannon M. challenged a change proposed by the St. Tammany Parish School Board to their minor son's Individualized Education Program under the Individuals with Disabilities Education Act. The changes provided that their son would receive in-home tutoring and would no longer attend classes at the school. The parents disagreed and requested a due process hearing regarding the change to the educational plan. After the hearing, the Administrative Law Judge issued a ruling granting the parents' request for a stay-put order, which would allow the child to continue in-class education until a decision was reached on the merits of the dispute about the proposed change. The parties then reached a settlement, and the ALJ terminated the matter pursuant to the parents' request. The parents then sued, seeking attorneys' fees under the IDEA. The district court awarded the parents attorneys' fees, holding that they were prevailing parties because they obtained a "stay-put" order under the IDEA.

A stay-put order under the Individuals with Disabilities Education Act does not entitle a party to attorneys' fees.

The Fifth Circuit reversed, holding that a stay-put order

did not give prevailing party status to the parents. The order, based on the IDEA's stay-put provision, was not a ruling on the merits, but instead an automatic injunction that did not address the merits or permanently alter the legal relationship between the parties. Unlike a preliminary injunction, there was no requirement for a showing on the merits. Thus, the parents did not obtain prevailing party status and were not entitled to attorneys' fees.

Jurisdiction/Procedure

***Al Rushaid v. Nat'l Oilwell Varco, Inc.*, No. 15-20260, 2016 WL 660105 (5th Cir. Feb. 17, 2016)**

Al Rushaid Parker Drilling, Ltd. and others sued National Oilwell Varco, Inc. and others in Texas state court, alleging breach of contract and bribery. The case was removed to federal court based on an arbitration clause contained in a price quotation issued by NOV LP, one of the defendants. Despite the arbitration clause, the defendants did not seek to compel arbitration, but instead proceeded with discovery. When NOV Norway was later served, it promptly moved to compel arbitration based on a price quotation it issued. The district court denied the motion, but the Fifth Circuit reversed and remanded. On remand, the defendants jointly moved to compel arbitration based on both price quotations. Only NOV LP was a signatory to an arbitration clause. The district court found that NOV LP was contractually entitled to arbitration and therefore ordered arbitration within the Southern District of Texas.

The Fifth Circuit does not have jurisdiction over an interlocutory appeal involving an order compelling arbitration.

The Fifth Circuit first considered its jurisdiction, finding it had jurisdiction over the appeal as it pertained to the nonsignatory defendants because the district court order denied arbitration. However, the Fifth Circuit did not have jurisdiction to review interlocutory orders compelling arbitration. Even though the

order granting NOV LP's motion to compel arbitration within the Southern District of Texas also denied NOV LP's motion to compel arbitration before the ICC, the Fifth Circuit found that Section 16 of the Federal Arbitration Act prevented review. Nor could the Fifth Circuit exercise jurisdiction based on the collateral order doctrine. Because the Fifth Circuit lacked jurisdiction over NOV LP's appeal, the Court dismissed it.

Turning to the denial of the motion to compel arbitration and applying Texas law, the Fifth Circuit determined that the nature of the plaintiffs' claims indicated that they were not seeking direct benefits from the contracts containing the arbitration clauses. Thus, those arbitration clauses could not be enforced based on equitable estoppel principles.

***Bechuck v. Home Depot U.S.A., Inc.*, No. 15-20219, 2016 WL 624059 (5th Cir. Feb. 16, 2016)**

Stephan Bechuck sued Home Depot and the general manager of the store in Texas state court after allegedly sustaining injuries from a fall caused by a defective chair in a common area of a store. Home Depot removed the suit to federal court based on diversity jurisdiction, claiming that the store manager was fraudulently joined. Bechuck then received the court's permission to file an amended complaint that did not name the store manager and added Sales Managers Inc., alleging that SMI, doing business as Advantage Sales & Marketing, Inc., negligently failed to adequately assemble and inspect the chair. After serving SMI, Bechuck learned that Advantage Sales & Marketing, Inc., not SMI, distributed the chair, so Bechuck filed a second amended complaint with the court's leave, replacing SMI with ASM. After a pretrial conference, the trial court entered an order of partial dismissal, dismissing Bechuck's claims against Home Depot with prejudice.

Bechuck then filed a notice of voluntary dismissal without prejudice against ASM under Federal Rule of Civil Procedure 41(a)(1)(A)(i), noting that ASM had not filed an answer or summary judgment motion. The district court issued a final dismissal stating that Bechuck's claims against ASM were

dismissed without prejudice, claims against Home Depot were dismissed with prejudice, and if Bechuck sued Advantage for the same cause of action, he was required to do so in the same trial court. Bechuck filed a Rule 59(e) motion seeking to alter, amend or vacate the judgment, arguing that the district court erred in sua sponte dismissing claims against Home Depot with prejudice and in imposing the refiling restriction related to ASM. Home Depot did not object to an amended order of dismissal without prejudice. The trial court then entered a new order, dismissing Bechuck's claims against ASM and Home Depot without prejudice, but continued to impose the refiling restriction. Bechuck appealed.

The Fifth Circuit held that the district court lacked jurisdiction to impose the refiling restriction on ASM and, although it erred in dismissing Home Depot, that error was harmless because the dismissal was ultimately without prejudice. The Fifth Circuit further held that the refiling restriction with respect to Home Depot was an abuse of discretion. Once a plaintiff moves to dismiss under Rule 41(a)(1)(A)(i), the case effectively terminates. A trial court has no discretion to deny a right to dismiss or attach any conditions on that dismissal. Despite the loss of jurisdiction upon the filing of a Rule 41(a)(1)(A)(i) motion, a trial court retains inherent supervisory power to consider collateral issues such as costs, attorneys' fees, sanctions or a pre-filing injunction. Although a pre-suit filing injunction is close to a refiling condition, such an injunction was a permissible collateral issue because it served the same purpose to prevent abuse of the judicial process. Here, Bechuck had not displayed a pattern of vexatious behavior—it was his first suit and dismissal against ASM. There was no behavior to sanction, thus making the refiling limitation appear to be an impermissible condition. A Rule 41(a)(1) dismissal is meant to return the plaintiff to the position he was in if he had never brought the first suit. As to

A district court erred in attaching a refiling condition to a voluntary dismissal under Federal Rule of Civil Procedure 41(a).

the claims against Home Depot, the trial court's final order stated that the dismissal was on Bechuck's motion and the Fifth Circuit therefore interpreted it as falling under Rule 41(a)(1)(A)(ii) or (2). But Bechuck never asked for dismissal of his claims against Home Depot. And the refiling restriction created legal prejudice for Bechuck and Bechuck opposed that condition, making the dismissal without prejudice an appealable order. Although the district court abused its discretion in dismissing the claims against Home Depot, that error was harmless because it was without prejudice. Although a condition limiting subsequent suit in an original forum might be appropriate in certain narrow circumstances, there were no such justifications in the case at hand. There was no evidence of legal prejudice to Home Depot from a Rule 41(a)(2) dismissal without conditions. The Fifth Circuit therefore affirmed the judgment of dismissal without prejudice as to Home Depot and ASM, but removed the refiling condition.

***Weber v. PACT XPP Techs., AG*, 811 F.3d 758 (5th Cir. 2016)**

Peter Weber—a German expatriate living in the United States—worked as CEO of PACT, a German firm that did business primarily in the United States. Weber claims that from 2004 to 2008, he worked without compensation based on oral guarantees of payment upon the firm's profitability. In 2008, Weber and PACT entered into a written agreement that promised Weber profit shares and "special proceeds" earned in patent litigation. The agreement was written in German and included an forum selection clause. PACT fired Weber shortly after PACT won a large patent case, and refused to pay Weber from the proceeds. Weber sued for breach of contract, quantum meruit, and promissory estoppel. The trial court held that the clause required the parties to litigate in Germany and dismissed Weber's complaint for forum non conveniens.

The Fifth Circuit adopted a mixed standard of review for post-*Atlantic Marine* forum non conveniens rulings involving forum selection clauses.

On appeal, Weber urged the Fifth Circuit to review the trial court's ruling *de novo*, while PACT argued that the correct standard was abuse of discretion. The Fifth Circuit noted that the case law was mixed; *Piper Aircraft*'s forum non conveniens balancing test required an abuse of discretion analysis, but the Fifth Circuit's pre-*Atlantic Marine* forum selection clause cases called for de novo review. The court noted that it would be odd to review the district court's interpretation of a contract for abuse of discretion, and equally unusual to review its balancing of forum non conveniens factors de novo. The court, therefore, settled on a mixed test that reviewed the trial court's assessment of the forum selection clause de novo, but reviewed the subsequent balancing of forum non conveniens factors for abuse of discretion.

The Fifth Circuit applied Texas law to determine what substantive law governed the enforcement of the forum selection clause, and concluded that German law was proper. Under German law, the forum selection clause was mandatory, and under federal law, the clause was also enforceable. The Fifth Circuit agreed with the trial Court's balancing of the forum non conveniens factors, and therefore affirmed the dismissal.

Texas Law

Rowell v. Pettijohn, No. 15-50168, 2016 WL 825396 (5th Cir. Mar. 2, 2016)

In 1985, Texas and other states enacted anti-surcharge legislation to prohibit merchants from imposing a surcharge on buyers who use a credit card instead of cash, a check, or similar forms of payment. A group of Texas merchants claimed Texas's law violated free speech because it penalized them for characterizing pricing as a "surcharge," while at the same time not prohibiting them from characterizing pricing as a "discount" for non-credit-card transactions. Accordingly, the merchants argued the surcharge prohibition was a content-based speech regulation since the distinction between describing a price as "less than regular price" (i.e. discount) and describing a price

as "more when paid by credit card" (i.e. surcharge) was purely semantic and the mathematical result was the same. The merchants also challenged the law as unconstitutionally vague. The district court for the Western District of Texas dismissed the action for failure to state a claim and denied a preliminary injunction.

The Fifth Circuit affirmed. Before analyzing the Texas law, the Court noted a circuit split on other state anti-surcharging laws. Persuaded by the Second Circuit's reasoning in upholding New York's anti-surcharge law, the Fifth Circuit held Texas's law regulated conduct, not speech, and therefore did not implicate the First Amendment. The Court reasoned that Texas's law did not define "surcharge" or "discount," and a plain reading of the statute demonstrated the law focused solely on banning surcharges and was otherwise silent regarding other forms of pricing. While the Court conceded the merchants may have the same ultimate economic result if they apply the same amount in the form of a credit card surcharge that they apply as a cash discount, the law does not require that result. If the Texas legislature had wished to ban discounts, it could have done so. Further, merely speaking about the prices regulated by law does not transform it into a content-based speech restriction because the speech is merely incidental to the regulated economic conduct. Finally, the Court determined the law was not unconstitutionally vague because it could reasonably be understood to forbid only an extra charge for credit card purchases and was completely silent as to any other form of pricing.

The Texas Anti-Surcharge Law does not violate free speech under the First Amendment because the statute regulates conduct, not speech.

***Serafine v. Branaman*, 810 F.3d 354 (5th Cir. 2016)**

In 2010, Mary Serafine, a former psychology professor with an academic fellowship in psychology from Yale and a published dissertation in Genetic Psychology Monographs, ran for a Texas Senate seat. Serafine described herself as a "psychologist" on

her campaign website. The Texas State Board of Examiners of Psychologists sent Serafine a letter ordering her to stop using the title of "psychologist" and desist from providing psychological services under the Psychologists' Licensing Act because she was not licensed to practice as a psychologist in Texas. Serafine filed suit, claiming the Act infringed her political speech, commercial speech, equal protection rights, and right to earn a living and that the Act was vague, overbroad, and a prior-restraint. The district court rejected Serafine's claims, holding that the Act was a legitimate use of the state's police power and was reasonably tailored to further the State's interest in protecting the public from the unauthorized practice of psychology. Serafine appealed.

The Fifth Circuit struck down as unconstitutional a part of a Texas statute banning unlicensed people from providing psychological services.

The Fifth Circuit held that Section 501.003(b)(1) of the Act—under which a "person is engaged in the practice of psychology" if that person represents him or herself "to the public by a title or description of services that includes the work 'psychological,' 'psychologist,' or 'psychology'"—was unconstitutional as applied to Serafine's speech on her political campaign website. In particular, the speech on her website was not professional or commercial speech; it was political speech and therefore protected under the First Amendment. The Court further held that the Act was overbroad as written. The Fifth Circuit stated that "[t]he ability to provide guidance about the common problems of life—marriage, children, alcohol, health—is a foundation of human interaction and society, whether this advice be found in an almanac, at the feet of grandparents, or in a circle of friends." Because subsection (c) of the Act covered a significant amount of advice that is given outside the traditional context of psychotherapy, the Act chilled and prohibited protected speech and thus Section 501.003(c), and by implication, Section 501.003(b)(2), were unconstitutionally overbroad. In sum, the Fifth Circuit affirmed the district court's rejection of the prior-

restraint claim and reversed with respect to the constitutionality of Section 501.003(b)(1) as applied to Serafine's campaign speech and the overbreadth of Section 501.003(b)(2).

***Troice v. Proskauer Rose, L.L.P.*, No. 15-10500, 2016 WL 929476 (5th Cir. Mar. 10, 2016)**

Plaintiffs filed a class action against one of Allen Stanford's lawyers and the law firms where he worked, alleging that they aided and abetted Stanford's Ponzi scheme and conspired to thwart the SEC's investigation into that scheme. Plaintiffs based their claims on specific acts by the lawyer while he represented certain companies that Stanford used in his scheme. Defendants moved to dismiss the complaint as barred by attorney immunity under Texas law. The district court denied the motion, finding that Plaintiffs' allegations met a "fraud exception" to attorney immunity. Defendants appealed, and Plaintiffs moved to dismiss the appeal, arguing that the district court's order denying Defendants' motion to dismiss was not an appealable collateral order. While the appeal was pending, the Texas Supreme Court issued a decision holding that fraud was not an exception to attorney immunity under Texas law.

Attorney immunity under Texas law is a true immunity from suit, making the denial of a motion to dismiss on attorney immunity grounds reviewable under the collateral order doctrine.

The Fifth Circuit first determined that it had jurisdiction over the appeal under the collateral order doctrine because attorney immunity is a true immunity from suit, rather than just a defense to liability. The policies underlying attorney immunity were akin to those of other true immunities under Texas law. That attorney immunity is an affirmative defense only implicates the burden of proof, not whether it is a simple defense to liability. Further, Texas courts describe conduct subject to attorney immunity as not actionable. The Fifth Circuit could therefore review the district court's order denying Defendants' motion to dismiss.

Turning to the merits, the Fifth Circuit held that Defendants should have been granted attorney immunity under the Texas Supreme Court's recent decision, as the type of conduct alleged to be fraudulent fell within the scope of the attorney's representation of his clients. The Fifth Circuit rejected Plaintiffs' contention that attorney immunity only applies against party opponents and not third parties. Plaintiffs also waived their arguments that attorney immunity applies only in the litigation context and that the attorney's alleged conduct fell within a "crime exception" to attorney immunity, as they failed to raise those arguments below. The Fifth Circuit therefore reversed and rendered judgment that the case be dismissed.