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Chair's Report

Marcy Hogan Greer, FULBRIGHT & JAWORSKI, LLP, Austin

I hope you are all enjoying a wonderful summer and the Appellate Section's electronic format of the *Appellate Advocate*. We have received very positive feedback from our members. This is my last Chair's Report before I pass the torch to David Coale at the Annual Meeting this September.

Our big news is that the Texas Access to Justice Commission has awarded the Appellate Section the 2010 Pro Bono Service Award. This award is a real tribute to our many talented and dedicated volunteers who have made the Section's Pro Bono Program so successful in helping low-income Texans gain access and a voice in the appellate process. Our principal goals for the Program are: (1) to provide excellent legal representation to clients who cannot afford such services; (2) to offer experience to appellate attorneys who are willing to donate their time and gain opportunities, such as oral argument, that enhance their ability to become board certified or further hone their appellate skills; and (3) to provide assistance to the appellate courts in having important issues well-briefed and argued to facilitate the court's decisionmaking process. The Section will be recognized at the awards luncheon during the Local Bar Leaders Conference at the Westin Galleria in Houston on July 24, 2010, where Robert Dubose and Hannah Sibiski will accept the award on behalf of the Section.

Big kudos go to our Pro Bono Committee Co-Chairs, Robert Dubose, Brenda Clayton, Rey Rodriguez, and Mike Truesdale, and our Program Liaisons: Brenda Clayton, Austin Court of Appeals Pilot, and Hannah Sibiski, Houston Courts of Appeals Pilots, as well as our screening committee members—all of whom have been critical in the success of the pilots. I also want to recognize in particular McKay Cunningham for his instrumental work in developing the Supreme Court Pilot Program, as well as Steve Hayes and Rey Rodriguez for their work in expanding our pilot programs to the Fort Worth and Dallas Courts of Appeals.

Congratulations to Kim Phillips and Todd Smith on an excellent Corporate Counsel CLE Program that they put on last month in Austin. The speakers included a number of our Section members, as well as Chief Justice Wallace Jefferson; Judge Lee Yeakel; Justice Diane Henson; Judge Jeff Rose; Blake Hawthorne, Clerk of the Texas Supreme Court; Kim Phillips, Senior Litigation Counsel at Shell Oil Company; Catherine Morse, General Counsel of Samsung Austin Semiconductor, LLC; Marc Vockell, Senior Litigation Counsel at Dell; John Torres, Executive Vice President, Chief Legal Officer and Secretary of Lennox International; and Mary Nichols, Senior Vice President/General Counsel of Texas Mutual Insurance Company. The audience included a number of in-house counsel, Section members, and other attorneys in the community. It was a fabulous program. In

fact, one of the general counsels who was on one of the first panels ended up staying for the whole program, commenting that she learned a great deal that day.

We also had a great time at the State Bar Annual Meeting last month. Several judges and lawyers from other sections welcomed our renewed participation. David Coale, Scott Rothenberg, and I presented a panel discussion of recent decisions of broad interest, and one of our Section members stated that he really appreciated the opportunity to come to a Section CLE closer to his home. We also sponsored a talk by Professor David Dow of the University of Houston School of Law on his recently published and critically acclaimed book, *The Autobiography of an Execution*, which had a great turnout. A real treat was the Section's reception, co-hosted with the Appellate Section of the Tarrant County Bar Association. Thanks to Karen Precella for putting together such a delightful event.

Please make sure you have the Advanced Course and Annual Meeting on your calendars. The Advanced Course will be September 2-3 at the Four Seasons in Austin, and there will be an Appellate 101 (formerly Nuts and Bolts) course on September 1. Daryl Moore has done a terrific job of putting together an outstanding program again this year, so I hope you can make it. Information regarding Section scholarships can be found on the Section's website www.tex-app.org or by contacting Heidi Bloch at ebloch@mailbmc.com. The Annual Meeting will be on Thursday, September 2, at 4:30 p.m. right after the Advanced Course ends for the day. We will announce the winners of our fourth annual Appellate Song Lyrics Contest, and the winning entries will be performed live. The meeting will be followed by a cocktail reception honoring the judiciary, and we look forward to seeing you there.

The Editorial Board of the

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and council members of the

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Russ Hollenbeck, WRIGHT, BROWN & CLOSE, LLP, Houston

Questions by: **Russ Hollenbeck (RH)**
Answers by: **Justice (Ret.) Linda Thomas (LT)**

RH: I guess we'll start at the beginning. Where did you grow up, and where were you born?

LT: Well, I grew up in Dallas; I am a native Texan. I was born in East Texas but came to Dallas with my family as a child. I am a product of the Dallas Independent School District, went to college at UTA in Arlington, and law school at SMU here in Dallas, so I pretty well stayed local.

RH: How did you get interested in going to law school?

LT: I was a legal secretary, but this was back during the days long before we had paralegals and legal assistants, and I found myself interviewing witnesses, and going to the courthouse, and doing those sorts of things that's very traditional for paralegals to do today and, I thought, I could do this.

RH: So secretary was an understatement in terms of your skills.

LT: And certainly the pay was an understatement.

RH: Who were some of your SMU classmates?

LT: Insofar as classmates who are in the judiciary, Justice Joe Morris, who is on the Fifth Court of Appeals in Dallas; he and I were classmates in law school. Also Judge Mike Chitty, a district judge in Kaufman, and Judge Fred Biery, [Federal District Judge] in San Antonio.

RH: When you got out of school, where did you first start practicing law?

LT: My first job out of law school was as associate director of the legal clinic at SMU. At that time, the legal clinic was doing primarily family law. We did have some personal injury cases, but the caseload was mostly family law. Then I took what I call my "sabbatical." I went to work for the federal government in San Francisco with the Bureau of Alcohol, Tobacco, and Firearms, regulating the wine industry. So, I took many official government tours of the wineries.

RH: That sounds like a good deal.

LT: It was a great job. And then I came back to Dallas and officed with my former law firm and, then ultimately, became a partner in that firm. At that time it was Martin, Harrison & Withers.

RH: How long were you with them before you moved toward a judicial role?

LT: Well, I ran for judge in 1978 and went on the bench in 1979. That was the 256th, which was a Family District Court here in Dallas.

RH: How did you like that experience?

LT: I loved it. Of course, I had done a lot of family work, so that's where I had the background, and while I was there I became board certified. Family law is where I started getting involved in State Bar activities and CLE programs; so it was a good fit.

RH: Taking a little digression. There's been some discussion that maybe there should be a requirement that intermediate appellate court judges, or all judges, should be board certified in some specialty area. Do you have any thoughts on that issue?

LT: Well, I know that the purpose, or the stated purpose, is to try to reinforce, if you will, the qualifications of the Judiciary. I seriously question, in looking at the intermediate appellate court, because we do criminal, civil, family, probate, administrative, and everything in between, how does one specialty certification truly make you a better appellate judge? Certainly you would have a certain skill and a certain level of expertise in one area, but that doesn't mean that necessarily expertise in one area is going to help you be a better judge overall.

RH: What did you do after your tenure on the family court bench?

LT: I decided not to run for reelection, and I ran for the Dallas Court of Appeals, and that would have been 1986, and I went on the court January 1, 1987.

RH: The Governor has announced budget cuts for all state agencies, and I guess the judiciary is included in that. Since you're no longer on the bench, and maybe more free to comment on that, what is your opinion about that issue?

LT: I think that any cuts to the judiciary will result in the courts not being able to carry out their Constitutional responsibilities, and by that, I mean, all of the appellate courts. When looking at the high courts, as well as the intermediate courts, the primary costs are personnel items; in fact ninety-four to ninety-six percent of their budgets are salaries. So if cuts are made, the cuts will have to be

salaries, which means, people are going to either have to take a pay cut or you're going to have to start letting people go. When you're talking about cuts the size that the State has been talking about, the only place to cut are attorney's positions, because they're the only ones where you could generate the kind of money that the courts are being asked to cut.

RH: You couldn't really cut clerk's office personnel because the salaries aren't as high?

LT: And you can't layoff judges, and, so you're going to lose lawyers. And, the courts have been working for years to try to get an adequate staffing level to handle the increasing cases. There has not been an increase in the number of judges since the intermediate appellate courts got criminal jurisdiction, which I think was back about 1979 or 1980. There has been about a thirty-five percent increase in the number of cases being filed, so, the current judges are doing more work, and they can't continue to do more work without adequate resources. It's going to result in backlogs and people getting burned out. Not that I have an opinion on that.

RH: How would you describe the unique issues faced by a Chief Justice?

LT: Well, the biggest issues for any Chief are the budget and the legislative issues, and just the sheer number of reports and administrative responsibilities that a Chief has that the position did not require twenty years ago. For instance, during a legislative session, the majority of a Chief's time is spent dealing with budgets or other legislative issues, whether it's redistricting or a change that would somehow affect the way the courts do business, and I'm not talking about substantive law changes, I'm talking about just the procedural. There have been a tremendous number of changes in the last few years.

RH: What are some of the more memorable cases you had as a judge?

LT: Well, I think we all want to make a contribution to the jurisprudence of this state. And, I had a number of cases that involved issues of first impression, but the one I think I would single out is the opinion I authored known as the *Gill Savings Association*[1] case. In this case, I wrote the first state opinion that said that attorneys could charge as a part of their attorney's fees for the services of paralegals, and the opinion set out the criteria of what had to be established in order to for attorneys to be able to recover paralegal expenses, as part of an attorney's fee award. That, of course, was something that was personally important to me, because of my secretarial, paralegal background. But it was also important because it was time for Texas to move forward and recognize that

not all of the responsibilities of the case have to be handled by the attorney. They could be handled by someone else under their supervision. I viewed this as a win for the attorneys, paralegals, and the public. So, I think that was my personal favorite.

FN1. *See Gill Sav. Ass'n v. Int'l Supply Co.*, 759 S.W.2d 697 (Tex. App.—Dallas 1988, writ denied).

RH: I think I cited that case recently, in opposition to the other side's fee bill, because they did not prove what you said they needed to prove.

LT: I think the other thing that has been most rewarding for me is when children or even former litigants go out of their way to find me and thank me years later for decisions or things that I said or did that maybe they didn't understand, maybe they didn't even agree with at the time, particularly the children whose parents were going through some case in my court. I have had many of the children (now adults) come by to visit; they have given me invitations to their graduations, weddings, etc. Because of the number of years that I served, some of those persons are now attorneys, and it is nice to know that you might have served some positive role in a very difficult period for them.

RH: From time to time the topic comes up that the Legislature ought to redistrict the counties from which cases are appealed to the various courts of appeal. Do you have any opinion on that issue?

LT: Well, of course, you know that this comes up often in connection when lawyers are complaining about, "I don't want my case transferred to XYZ court. I elect the judges in Harris County; I want Harris County judges to hear my case. Or I elect the judges in Dallas County, and I want my cases heard by those judges."

RH: Sure.

LT: I can only speak to this issue as it affects the Fifth Court of Appeals in Dallas. If you took every county away from the Dallas Court of Appeals and left only Dallas County, the Dallas Court of Appeals would still have more new case filings than the statewide average; thus, there would still be a need to transfer cases from the Fifth Court to other intermediate courts throughout the state.

RH: The two issues are tied together—transfers and redistricting.

LT: Transfers and redistricting are tied because some people want to tie them. The response is that changing the geographic regions piecemeal is not going to change the transfer system—it doesn't change the fact that cases are going to

transferred. Admittedly, rearranging the deck chairs changes other things, the most prominent being the political dynamics of which party will be successful at the ballot box. Again focusing solely on the Fifth Court, removing the other counties from the geographic region would have a tremendous impact on the political dynamics, but it's not going to have an impact on the fact the Dallas Court of Appeals would still have more new cases filed than the statewide average. So, why do it? Second of all, I have maintained for more than sixteen years that transferring cases is not the answer. The solution is to quit transferring around the state, and at the same time, give the transferor courts—Dallas, Houston, Beaumont, Tyler, or whatever court is transferring out—give those courts additional resources and allow them the opportunity to handle their respective dockets. I know that the Fifth Court of Appeals doesn't want to transfer their cases out. I also know that the Houston courts do not want to transfer.

RH: You probably got to see a lot of oral arguments. Do you think there should be more or fewer oral arguments? Do you think the time allotted should be about what it is now or a little bit more or maybe a little bit less?

LT: I think the courts are going to need to continue to exercise discretion as to which cases get oral argument. I'm not familiar with the time of the other courts; I know that in Dallas it is twenty minutes per side and five minutes for rebuttal, which I think in ninety-nine percent of the case is sufficient time. I loved oral argument, but the Fifth Court was actually one of the first courts that started restricting oral argument. The Court had a panel of judges who made a decision that a case, either yes gets oral argument or no, doesn't. This was not an easy decision for the Court, but it was rather recognition that, that's the sacrifice that had to be made in order to be able to process the increased number of cases that were coming into the system.

RH: Pulling back that curtain for a bit, how would the decision get made about whether to grant or not grant oral argument?

LT: It was made by a panel of judges that would meet as needed. If it is a factual sufficiency point, probably oral argument isn't going to help the judges that much. It's a matter of going through the record. Now, if it's a case of first impression, there is a greater need for oral argument. The bottom line is that it primarily it depended upon the type of case and the issues that were being raised.

RH: When a case comes into the Dallas court, is it automatically assigned to a panel or to a particular judge? How did the operating procedures of that court funnel that case through the system?

LT: The case is not assigned to a panel of judges for final decision until it becomes "at issue," which means a complete record and briefs. All pre-submission matters are determined by rotating motions' panel of judges. Everything that requires judicial decision-making prior to the case being "submitted" for final decision was done by that rotating panel.

RH: How is the decision made after submission or after oral argument as far as who's going to write the opinion?

LT: At the Fifth Court, when I was there, we had what we called, "a picking order." That's different than "pecking" order; with picking order, a judge is either first, second, or third pick. If you're first pick, conventional wisdom would be that you would pick the simplest case on the docket for that submission date. If you are second, likewise, and then third, you get what nobody else wants. The "picking order" rotates, which means that if you're third one week, then you're going to be second the next week, and then first the next week. The theory behind this system is that at the end of a term, the judges have the same number of first, second, and third picks; thus, the difficulty of the cases is spread throughout the court.

RH: Any oral arguments stand out to as particularly great or particularly not so great?

LT: I can't think of a particular argument that stands out. However, I can think of one thing that universally was a bad idea every time I saw it, and that was where a side would split their argument. Invariably, that was not a good idea because whoever went first always went over and the second individual would barely get to say their name.

RH: Any other tips for advocates appearing in front of the Dallas court or other courts?

LT: All you really need to remember is that you need to know the law, and you need to know your record. And, it is amazing how many people forget this important fact. I think that that is absolutely critical because if you're granted oral argument, you need to be in a position to demonstrate to that court where something is or is not in the record, and if you get asked a question of, "Where am I going to find that in the record?" "Um, well, you know, I haven't looked at this since my brief was filed." That's not a particularly effective oral argument.

RH: It doesn't help the Court.

LT: It doesn't help the Court, and I always say, particularly in advocacy, I maintain that appellate attorneys are trying to sell ideas, and they're trying to sell their ideas or their position to a group of professional buyers—the judges. The attorneys need to remember that those judges sitting up there want to know certain things. "What are you asking this court to do? Have other courts been asked to do the same thing? If so, what did they do? If so, is this case the same as or different from that situation?"

RH: Tell us about your product that you're selling.

LT: That's right. "Have you sold this product to other courts? Did they buy it? If they didn't, how is this one different?" So, that's what you're doing.

RH: Any advice you would give about brief writing?

LT: I think of briefs in terms of "ABC"—accurate, brief, and clear. Accuracy is a key. If you misrepresent the record or you misrepresent the case, I don't care how well written the brief is, you're just toast.

RH: You immediately lose credibility at that point?

LT: Right. On the "pet peeves," this is a peeve that I have, and that is footnotes, particularly footnotes that are three-quarters of the page and, of course, the font is smaller. It automatically leads one to jump to the impression that you're doing that to try to get around the page limits. And I question how seriously the information in that footnote is really received by the judges.

RH: Do you have a position on the eternally raging topic of whether to put case citations in the body or in footnotes at the bottom of the page?

LT: You know, I'm one of those for putting it in the body. I don't like to go up and down. So, I'm one of those old fogies that says, keep it right up here so I can just read it.

RH: Who would you say were mentors for you in your legal practice?

LT: I would definitely say it's John Withers, Sr. He was my boss when I was a secretary.

RH: A "para-secretary"?

LT: A para-secretary. John Withers has been my campaign treasurer for thirty-one years, so he's kept me out of trouble with the ethics people, by filing the reports timely and accurately. But most importantly in watching John practice law, I gained a true respect for—always remember that these are real cases to the individual. They may sound like a lot of other cases that you've had or you've heard, but it's the only one as it relates to these folks. And whatever happens, allow them to maintain their dignity and respect. So that has certainly stayed with me. Insofar as mentors on the bench, certainly Annette Stewart. Judge Stewart was a Family District Judge when I was starting out, and she was a court reporter who went on to be a judge, then she was on the court of appeals before I got there, so she's always been one that I have admired and have gone to when I've had issues. So, I would say those two.

RH: There's been lots of discussion and commentary about changing the way Texas elects its judges. Do you have any opinion about whether we should change the current system?

LT: Yes, I do have an opinion, and I'm going to share it with the Legislature every time the issue comes up. The system needs to change. I don't care whether you're a Democrat or a Republican. If you're being swept into office because of a particular party affiliation, then there is no one looking at the qualifications and quality of the judging. Now, in small counties where you go to church with your judge, you see the judge at the high school football games, you see them at the drug store, or wherever, maybe the system is okay. But when you get into these large metropolitan areas where it doesn't matter how much money an individual spends, it's truly whether you have a "D" or an "R" after your name; it makes no sense. And if you could have the same judge running as a "D" when the Democrats are winning and running as an "R" when the Republicans are winning and then switching back to the "D" and winning again; why do we have that? Do I think judges should be accountable? I'm not advocating no accountability when I say that, I'm just saying that this partisan stuff as we currently do it is ridiculous. We're losing good judges. We're losing some good judges, number one, because they don't want to go through the political hassle anymore. It's expensive. You spend the better part of a year and a half, at least, raising money and campaigning. You can't take care of a docket whether you're a trial judge or an appellate judge when you're going through primary elections, and then perhaps a runoff and then a general election, and just the horrendous amount of money that's spent. Insofar as designing a system, the Legislature has looked at this a number of times. Maybe for those persons who keep insisting that "I want a choice," if you get into a position by appointment, maybe the first time you need

to run an election where people can run against you, and then continue with retention.

RH: Okay.

LT: There has to be a reason why so few states do it the way we do it, and when you think of a state—and here again, things that work in Henderson County, Texas don't necessarily work in Harris County, and so, the state is so large and so divergent that we need to recognize that and get away from this one size fits all. Single member districts would be the absolute worst thing we could do. That would be the only thing that would be worse, is if we went to single member district partisan elections, but that's the only way, I think, that it could be worse than what it is now. Again, not that I have an opinion.

RH: The Dallas Court of Appeals is a little bit of a maverick court insofar as its website is different from the other courts' websites. Does the Dallas court have any plan to change its website over to be similar to the other courts of appeals?

LT: Of course, I don't speak for the Fifth Court any longer. However, if I am asked by the Chief or the other judges, I would say, "No." I would suggest that the other thirteen intermediate courts rise to the same level as the Fifth Court website, so that they could have the functionality that Dallas enjoys. From what I have heard throughout the state, the Fifth Court website is more user-friendly, and it includes options that the other courts don't. I would suggest that the other courts move forward rather than suggesting that the Fifth Court move backwards.

RH: What parts of your career have you enjoyed the most or felt were the most satisfying?

LT: You know, I think the most satisfying parts have been my participation in continuing education. I have thoroughly enjoyed the continuing education that I've done with the Bar and other Bar Associations for attorneys, and the education I have done for judges, both the State of Texas judges, throughout the U.S., and even having the opportunity to go and teach judges in Russia and Siberia.

RH: What have you been doing lately, and what are your current plans?

LT: I'm still involved in dispute resolution. I took some time right after I retired and went back and actually took some mediation courses, kind of retooled, if you will. So I've been doing a large number of mediations. I have some arbitrations

scheduled and coming up. Staying quite busy on that, and I have am consulting on a number of cases. I'm also sitting as a visiting trial and appellate judge. Finally, I teach one course a semester at SMU Dedman School of Law.

RH: Anything else keeping you busy?

LT: Actually, I think that is probably enough.

APPELLATE SECTION ANNUAL MEETING AND APPELLATE LYRICS CONTEST

The State Bar of Texas Appellate Section is holding its Annual Meeting on Thursday, **September 2, 2010**. The meeting will take place at **4:25 p.m.**, immediately following the Advanced Civil Appellate Practice Course, at the Four Seasons Hotel in Austin, Texas.

The Annual Meeting will include a brief business meeting, and the performance of the winning entries of the Appellate Lyrics Contest. The meeting will be followed by a cocktail reception honoring the judiciary. Section Members receive one free drink ticket for the reception at registration and attendees of the meeting receive an additional ticket.

CALLING ALL APPELLATE SONGWRITERS!

In connection with the Annual Meeting, the Appellate Section is pleased to announce its fourth annual Appellate Song Lyrics Contest. Contestants must change the lyrics of a well-known song to give it an "appellate" touch. The winning entries will be performed live by a "professional" singer at the annual meeting.

Prizes include gift certificates for restaurants, stores, and State Bar CLE programs. Winning song lyrics will be published on the Section website and in The Appellate Advocate.

APPELLATE SONG LYRICS CONTEST RULES

1. All song lyrics must relate in some loose fashion to appellate law, appellate courts, or the appellate community. Lyrics may be for all or part of any well-known song.

2. No more than one entry may be submitted per contestant.

3. All entries must be sent by email to macey.stokes@bakerbotts.com by **5:00 p.m.** on Monday, **August 16, 2010**. (The deadline has been extended).

4. By submitting an entry, a contestant: (1) certifies that the submitted work is original; and (2) grants a non-exclusive license to the Appellate Section to read, use, and publish the work in any form of oral, print, or electronic medium.

5. Any entrant who is not a dues-paid member of the Appellate Section on September 2, 2010 is ineligible to win prizes. Any Appellate Section officer, member of the Annual Meeting Committee, or Appellate Song Lyrics Contest Judge is ineligible to win prizes. Persons who are ineligible to win prizes may still submit entries, which may be read at the awards ceremony and printed thereafter.

6. Winners will be announced with much hoopla at the Appellate Section Annual Meeting on September 2, 2010 in Austin. The choice and number of prizes will be within the unfettered discretion of the judges. Decision of the judges is final and unappealable. Contestants need not be present to win. Offer void where prohibited by law.

Inherent Judicial Power and the Principles of Appellate Review

Stacy R. Obenhaus, GARDERE WYNNE SEWELL, LLP, Dallas

INTRODUCTION

The state took Betty W.'s three children away from her—said she hadn't properly cared for them—and in a subsequent lawsuit the trial court terminated all parent-child relationships. Betty appealed, arguing that the trial court should have given her a continuance so she'd have time to get counseling and qualify to get her children back. The court of appeals noted that Betty had sought a continuance both before and after trial but hadn't put this issue in a timely "statement of points for appeal" as required by the Family Code to preserve the issue for appeal. Yet the court of appeals addressed the issue anyway, ruling that the Family Code rule violated the Texas Constitution's "separation of powers" doctrine because it "unduly interferes with our substantive power as an appellate court" to determine preservation of error in the lower court. *In re D.W.*, 249 S.W.3d 625, 640, 645 (Tex. App.—Fort Worth), *pet. denied per curiam*, 260 S.W.3d 462 (Tex. 2008). In other words, the legislature had encroached upon "judicial power" the Texas Constitution granted to the court in its capacity as an *appellate* court.

The Texas Constitution vests in various Texas courts the "judicial power" of Texas government. TEX. CONST. art. V, § 1. However, when Texas courts define "judicial power," they usually do so in terms of trial court powers—e.g., "the power to (1) hear evidence; (2) decide issues of fact raised by the pleadings; (3) decide relevant questions of law; (4) enter a final judgment on the facts and the law; and (5) execute the final judgment or sentence." *State v. Williams*, 938 S.W.2d 456, 458-59 (Tex. Crim. App. 1997) (quoting *Armadillo Bail Bonds v. State*, 802 S.W.2d 237 (Tex. Crim. App. 1990)). But the Texas Constitution also grants judicial power to appellate courts, as suggested with a broader definition of judicial power: "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for a decision." *Morrow v. Corbin*, 122 Tex. 553, 558, 564, 62 S.W.2d 641, 644, 646 (1933); *see also Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979).

What is notable about *D.W.* is that the court of appeals there viewed the "judicial power" in this broader sense, as encompassing principles of *appellate* decision-making. The court based its decision in large part on precedent from the Texas Court of Criminal Appeals providing that, under the Texas Constitution's separation of powers clause, the legislature can't encroach on judicial power. According to this precedent, the Legislature can't pass laws that "infringe upon the substantive power of the Judicial department under the guise of establishing 'rules of court,' thus rendering the separation of powers doctrine meaningless." *Meshell v. State*, 739 S.W.2d 246, 255

(Tex. Crim. App. 1987); *see Langever v. Miller*, 124 Tex. 80, 76 S.W.2d 1025, 1035-38 (1934). This precedent jealously guarded appellate courts' right to address unpreserved error—providing, for example, that if the appellate court in an obscenity case decided that material "may not be either factually or constitutionally obscene, it would be free to decide either of those issues, pursuant to its inherent judicial powers, even though such issue was not raised on appeal." *Davis v. State*, 658 S.W.2d 572, 582 (Tex. Crim. App. 1983) (en banc).

A petition for review from the decision in *D.W.* gave the Supreme Court of Texas an opportunity to assert the judicial power in this context, but the court dismissed the petition, albeit with a notation that the court "neither approve[s] nor disapprove[s]" the holding on the constitutional issue. *In re D.W.*, 260 S.W.3d 462, 462 (Tex. 2008). In a subsequent case raising the same issue, the court decided the matter under the rules of procedure, without addressing the constitutional question. *See In re M.N.*, 262 S.W.3d 799, 802 (Tex. 2008). When the court later addressed the constitutionality of the "statement of points" legislation, the court struck it down as violating due process under the particular circumstances of that case, thus avoiding a direct confrontation with the legislature over the scope of judicial power. *See In re J.O.A.*, 283 S.W.3d 336, 339 (Tex. 2009).

The court of appeals opinion in *D.W.* indirectly raises an issue rarely explored in the case law or the commentaries—namely, the nature and scope of "judicial power" unique to Texas appellate courts. A review of Texas case law, and a more general exploration of established ideas of "inherent judicial power," suggests that the judicial power the Texas Constitution grants to Texas appellate courts gives those courts unique *appellate* court powers and provides a legal basis for adopting and applying substantial and important principles of appellate review. What follows is a brief (and necessarily limited) exploration of this issue.

I. Inherent Judicial Power Under The Texas Constitution

The Texas Constitution has always divided the "powers" of Texas government among three departments—executive, legislative, and judicial. TEX. CONST. art. II, § 1; *see* TEX. CONST. OF 1845, art. II, § 1; REPUB. TEX. CONST. OF 1836, art. I, § 1, *reprinted in* 1 *H.P.N. Gammel, The Laws of Texas 1822-1897*, at 1069, 1069 (Austin, Gammel Book Co. 1898). The constitution vests the *judicial* power in the Supreme Court of Texas, the Texas Court of Criminal Appeals, the courts of appeals, and various lower courts. *See* TEX. CONST. art. V, § 1. The judicial power encompasses both express grants of judicial power, as set forth in the Texas constitution and statutes, and implied and inherent powers. According to the Supreme Court of Texas, these latter powers, though not expressly authorized by the constitution, are "woven into the fabric of the constitution

by virtue of their origin in the common law and the mandate of" the separation of powers clause. *Eichelberger*, 582 S.W.2d at 398. The *inherent* judicial power "is not derived from legislative grant or specific constitutional provision, but from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities." *Id.* The power includes powers a court needs "to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity." *Id*. (citing *Nevitt v. Wilson*, 116 Tex. 29, 285 S.W. 1079 (1926)). Citing precedent from the Supreme Court of Texas, the Texas Court of Criminal Appeals has embraced essentially identical notions of inherent judicial power, subject to limitations peculiar to this court's separate constitutional grant of jurisdiction. *See State v. Johnson*, 821 S.W.2d 609, 612 (Tex. Crim. App. 1991).

The legislature has acknowledged that the courts have unspecified powers arising from their status as courts. TEX. GOV'T CODE ANN. § 21.001 ("A court has all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders, including authority to issue the writs and orders necessary or proper in aid of its jurisdiction."). The courts have occasionally enumerated these powers, including among them fairly noncontroversial matters such as the power to regulate the practice of law, *State Bar of Texas v. Gomez,* 891 S.W.2d 243, 245 (Tex. 1994), to dismiss cases for want of prosecution, *Veterans' Land Bd. v. Williams*, 543 S.W.2d 89, 90 (Tex. 1976), and to ensure that judicial proceedings are adversarial, *Public Utility Comm'n v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988). *See generally Eichelberger*, 582 S.W.2d at 398 n.1. However, the courts are generally cautious about defining the "judicial power" too broadly, noting for example that "the Texas Constitution expressly grants the legislature ultimate authority over judicial administration," *In re State ex rel. O'Connell*, 976 S.W.2d 902, 911 (Tex. App.—Dallas 1998, no pet.), but also noting that "the power to regulate the administration of the courts does not permit legislative encroachment on substantive judicial powers," *State v. Williams*, 938 S.W.2d 456, 459 (Tex. Crim. App. 1997) (suggesting that priority of various litigants on a court's docket is a matter of court administration).

But for appellate courts—as for all courts—these inherent powers are subject to important qualifications in the constitutional scheme. For example, the legislature can and does regulate appellate courts' *jurisdiction*. *See* TEX. CONST. art. V, §§ 3, 3-b, 5, 6; TEX. GOV'T CODE ANN. §§ 22.001-.002, 22.220-.221; TEX. CIV. PRAC. & REM. CODE ANN. § 51.014; TEX. CODE CRIM. PROC. ANN. arts. 4.01, 4.03, 4.04; *id.* art. 44.45.

In addition, the highest courts' *rule-making powers* are ultimately subject to some form of legislative control or direction. *See generally* Bruce L. Dean, *Rule-Making in Texas: Clarifying the Judiciary's Power to Promulgate Rules of Civil Procedure*, 20 ST. MARY'S L.J. 139, 186-87 (1988) (suggesting that "unique elements of an independent

judiciary, elected judges, and a strong separation of powers has shaped the history of Texas rule-making" and would support action by Supreme Court of Texas in asserting "exclusive non-reviewable rule-making power"). Thus, the Supreme Court of Texas can promulgate rules "not inconsistent with the laws of this state," and the legislature can delegate rulemaking power to that court and the Court of Criminal Appeals "subject to such limitations and procedures as may be provided by law." TEX. CONST. art. V, § 31; *see Few v. Charter Oak Fire Ins. Co*., 463 S.W.2d 424, 425 (Tex. 1971); *Johnstone v. State*, 22 S.W.3d 408, 409 (Tex. 2000). The Legislature grants the courts ample rulemaking authority consistent with the constitutional grant, so long as the rules don't conflict with substantive law or infringe substantive rights. *See, e.g.*, TEX. GOV'T CODE ANN. §§ 22.003, .004, .108, .109 (West 2004); TEX CODE CRIM. PROC. ANN. § 44.45(c) (West 2006).

The legislature has addressed certain matters that courts consider to be within their inherent power—for example, regulating courts' authority to punish for contempt, TEX. GOV'T CODE ANN. § 21.002, authorizing the Supreme Court of Texas to determine its own jurisdiction, *id.* § 22.001(d), or regulating the practice of law (e.g., by directing the Supreme Court of Texas to "exercise administrative control" over the state bar), *id.* § 81.011. Of course, legislative actions such as these may merely *confirm* inherent judicial powers and thus be cumulative of those powers—i.e., the courts could do it anyway, even without express legislative authorization. *See, e.g.*, *Nevitt v. Wilson*, 116 Tex. 29, 33, 285 S.W. 1079, 1082 (1926); *Coleman v. Zapp*, 105 Tex. 491, 494, 151 S.W. 1040, 1041 (1912) (noting that state statutes providing for *nunc pro tunc* revision of court judgments "are only cumulative of this inherent power of the courts to have their records at all times speak the truth"). Thus, within the "separation of powers" scheme, such statutes may or may not limit inherent judicial powers that courts would claim the sole right to exercise under the constitution.

On the other hand, the Texas Constitution leaves some matters within the courts' sole powers. That constitution expressly gives the superior courts exclusive power to determine their own jurisdiction, TEX. CONST. art. V, §§ 3(b), 5(c), and promulgate rules for reviewing questions of state law certified from a federal appellate court, *id.* § 3-c(b). The Texas Court of Criminal Appeals can promulgate rules for convening en banc to hear capital cases and other cases provided by law. *Id.* § 4(b). That court also has power to issue writs to enforce its jurisdiction, without regulation by the legislature. *Compare id.* § 3(a), *with id.* § 5(c) (granting the court "power to issue such other writs as may be necessary to protect its jurisdiction or enforce its judgments"). Inherent powers arguably arise from these express grants of narrow authority, rendering those powers beyond direct control by the Legislature.

This is not an exhaustive listing of the constitutional limitations on the courts' inherent powers. It merely illustrates that what might otherwise be within the realm of

the courts' inherent powers under the Texas Constitution is *expressly* limited in various ways. This means that Texas courts may not have the same range of "inherent judicial power" that courts in other jurisdictions have, under their constitutional schemes, and it also means that powers the Texas courts have traditionally exercised without regulation by the legislature may nevertheless be subject to such regulation.

II. Principles of Appellate Review Within The Inherent Power

As noted above, Texas courts have occasionally described the nature of "judicial power" in general and have enumerated some specific "inherent powers" that derive from the judicial power. What Texas courts have rarely done, however, is acknowledge the inherent judicial powers unique to appellate jurisdiction. Likely the courts have had little reason to do so, but a review of the case law reveals important and substantial principles of appellate review that comprise appellate courts' unique inherent powers.

First, and most notably, the judicial power encompasses the principle that courts are the final arbiters of "what the law is." This principle encompasses both development of the common law and the interpretation of statutes. This principle is not one within the exclusive realm of the appellate courts; trial courts, too, must interpret statutes and apply the common law. But certain doctrines place this principle more properly within the realm of inherent appellate powers. These doctrines include the appellate courts' discretion to apply stare decisis, *Sw. Bell Tel. Co. v. Mitchell*, 276 S.W.3d 443, 448-49 (Tex. 2008), to follow or modify the "law of the case," *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1987), and to give decisions prospective application only, *see Carrollton Farmers Branch I.S.D. v. Edgewood I.S.D.*, 826 S.W.2d 489, 518-19 (Tex. 1992). These are doctrines of inherent appellate court power, not expressly granted in the constitution or statutes, and not exercised by trial courts. Texas appellate courts limit their power in this area—for example, they may defer to agency interpretations of statutes, *Pub. Util. Comm'n v. Gulf States Utils. Co*., 809 S.W.2d 201, 207 (Tex. 1991), or consider opinions of the Attorney General as "persuasive" authority, *Holmes v. Morales*, 924 S.W.2d 920, 924 (Tex. 1996). Such deference is apparently a matter of judicial discretion, not express constitutional mandate.

Second, and perhaps as a corollary to the above, inherent judicial power of the appellate courts encompasses the principle of *judicial review* of legislative action—the idea that courts may declare that legislation violates the constitution. *Morrow*, 122 Tex. at 563, 62 S.W.2d at 646 ("The power to determine the constitutionality of a statute or order, etc., is certainly within the appellate power of the revisory courts . . . ."); *Hanks v. City of Port Arthur*, 121 Tex. 202, 206, 48 S.W.2d 944, 945 (1932) (invalidating ordinance based on state constitution's "open courts" provision). The Supreme Court of Texas

finds such authority in the Separation of Powers clause of the Texas Constitution: "The final authority to determine adherence to the Constitution resides with the Judiciary." *West Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 563 (Tex. 2003) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-78 (1803)); *see also Love v. Wilcox*, 119 Tex. 256, 267, 28 S.W.2d 515, 520 (1930). Trial courts can exercise judicial review, too, but the appellate courts have refined the doctrine by, for example, adopting rules of constitutional construction, *LaSalle Bank Nat'l Ass'n v. White*, 246 S.W.3d 616, 619 (Tex. 2007); *Bell v. Low Income Women*, 95 S.W.3d 253, 262 (Tex. 2002), and declining to address constitutional issues if a case can be decided on other grounds, *VanDevender v. Woods*, 222 S.W.3d 430, 432 (Tex. 2007); *In re M.N.*, 262 S.W.3d 799, 805 (Tex. 2008) (Willett, J., dissenting) (criticizing court for not addressing constitutional issue head-on).

Third, the inherent judicial power of the appellate courts encompasses various principles required to regulate the appellate process, principles not expressly governed by rules of appellate procedure. Thus, the appellate courts apply various *presumptions* in the course of appellate review. *See Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 783 (Tex. 2005) (presuming that a pretrial hearing in a civil case was nonevidentiary); *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 771 (Tex. 2003) (presuming that a jury followed the instructions in the charge); *Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987) (accord); *Bennett v. Cochran*, 96 S.W.3d 227, 229 (Tex. 2002) (presuming that, in the absence of a complete record, the omitted portions of the record support a lower court's decision); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 689 (Tex. 1990) (accord); *O'Neal v. State*, 826 S.W.2d 172, 173 (Tex. Crim. App. 1992) (accord). The appellate courts maintain, alongside legislative rules of statutory construction, a tradition of applying common law rules of statutory interpretation. *See, e.g.*, *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003); *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000); *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990). In original proceedings the appellate courts apply principles of equity (unclean hands and laches—principles not established by rule or statute), *see Axelson Inc. v. McIlhany*, 798 S.W.2d 550, 552 n.2 (Tex. 1990); *Callahan v. Giles*, 137 Tex. 571, 575, 155 S.W.2d 793, 796 (1941), and continue to develop standards for deciding what constitutes an "adequate" remedy by appeal, *see In re McAllen Med. Ctr. Inc*., 275 S.W.3d 458, 464-49 (Tex. 2008); *In re Prudential Ins. Co.*, 148 S.W.3d 124, 136-37 (Tex. 2004). In many ways, the appellate courts fill in perceived gaps in the rules of procedure—for example, ruling that a motion to extend time for appeal is "necessarily implied" with an otherwise untimely notice of appeal, *see Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997), or generally running their dockets so as to foster administrative efficiency, *see Bomar v. Walls Reg'l Hosp.*, 971 S.W.2d 670, 671 (Tex. App.—Waco 1998, no pet.) (exercising "plenary authority" to reinstate appeal during the period of the court's plenary power).

Fourth, the appellate courts define and apply the fundamental tools of appellate review: the "standard of review" (i.e., the standard for determining lower court error) and the "scope of review" (the part of the record the appellate court will consider in applying the standard of review). *See, e.g.*, *In re C.H.*, 89 S.W.3d 17, 25-26 (Tex. 2002) (announcing standard for reviewing factual sufficiency of evidence where the burden of proof at trial is by clear and convincing evidence); *In re J.F.C.*, 96 S.W.3d 256, 268-29 (Tex. 2002) (defining scope of review in reviewing for legal sufficiency of evidence where the burden of proof is by clear and convincing evidence). Some would argue that the Legislature, having ultimate rulemaking authority, could regulate such matters—though it doesn't appear that the issue has arisen, and certainly courts in other jurisdictions believe that such matters are peculiarly within the inherent powers of the judiciary. *See, e.g.*, *In re Dortch*, 199 W. Va. 571, 578, 486 S.E.2d 311, 318 (1997) ("This standard of review is consistent with our inherent power to define, regulate and control the practice of law in this State . . . ."); *State v. Thurman*, 846 P.2d 1256, 1266, 1271-72 (Utah 1993) (observing that court has "inherent supervisory authority over all courts of this state" and invoking that authority to establish appropriate standards of review); *Armstrong v. Roger's Outdoor Sports, Inc.*, 581 So. 2d 414, 421 (Ala. 1991) (invalidating legislation that "intruded upon the appellate court's function, which inherently includes observing a certain deference based upon the trial court's ability to observe the witnesses . . . .").

The standard of review may appear so fundamental to appellate review as to quite clearly lie within the inherent judicial power. *See, e.g.*, *Taylor v. State*, 948 S.W.2d 827, 831 n.6 (Tex. App.—San Antonio 1997, pet. ref'd) ("If the appellate standard of review changed every time the legislature changed the quantum of proof in a statute, our appellate review jurisprudence would be hopelessly unpredictable."). Indeed, Texas courts freely and unilaterally refine standards of review. *See, e.g.*, Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 LEWIS & CLARK L. REV. 233, 258-65 (2009) (arguing that Texas Court of Criminal Appeals altered its "factual sufficiency" standard of review three times within a decade). That doing so is within the appellate courts' inherent power may well have a constitutional basis; review of findings for "factually insufficient" evidence is indirectly affirmed by the provision in the Texas Constitution prohibiting such review by the highest state courts. *See* TEX. CONST. art. V, § 6 (providing that decisions of the courts of appeals "shall be conclusive on all questions of fact brought before them on appeal or error").

Three observations are in order here. First, the above is only illustrative of the "inherent" judicial powers unique to Texas appellate courts. One could undoubtedly list many others. Second, even if these powers are ultimately subject to legislative control, to the extent the legislature has not spoken, the courts must necessarily rely on their inherent powers to develop a system of appellate review. Third, some inherent powers

are governed, to varying degrees, in the rules of appellate procedure. But in large part the rules of procedure only provide parameters for applying established principles of appellate review that have long been evolving outside the rulemaking process.

III. Possible Implications Of Texas Appellate Courts' Inherent Judicial Powers

Texas appellate courts have traditionally been reluctant to rest their decisions on their inherent judicial power. The highest courts wish to avoid accusations of "judicial activism." *Compare In re Doe*, 19 S.W.3d 346, 350 (Tex. 2000) (warning that ignoring legislative intent would constitute judicial activism), *with id.* at 368 (Hecht, J., dissenting) ("We are not judicial activists, say the justices in today's majority . . . 'The lady doth protest too much, methinks.'"); *see also Haynes v. State*, 273 S.W.3d 183, 189 n.14 (Tex. Crim. App. 2008) (arguing that "the rule applied in this case should be changed through the legislative or rule-making process rather than through judicial activism").

That reluctance is understandable in a culture where even *judges* will describe supposed judicial activism by analogizing to the ravings of wild beasts. *See FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1817 (2009) ("There is no reason to magnify the separation-of-powers dilemma . . . by letting Article III judges—like jackals stealing the lion's kill—expropriate some of the power that Congress has wrested from the unitary Executive."). Of course, sometimes judicial activism may be the only responsible course of action for an enlightened judiciary. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 892 (2010) ("It is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications."); *id.* at 919 (Roberts, J., concurring) ("This approach is based on a false premise: that our practice of avoiding unnecessary (and unnecessarily broad) constitutional holdings somehow trumps our obligation faithfully to interpret the law . . . [W]e cannot embrace a narrow ground of decision simply because it is narrow; it must also be right.").

Nevertheless, that appellate courts wield an inherent "judicial power" peculiar to the exercise of appellate jurisdiction is undisputed, and that reality has implications with regard to the development and application of the principles of appellate review. Three such implications are suggested below.

A. Inherent power is a critical tool for resolving important issues of appellate review

As discussed above, certain mechanisms and principles of appellate review are based not on rule or statute but on the appellate court's inherent power deriving from the grant in the Texas Constitution of the judicial power in general and of appellate jurisdiction in particular. As a result, in resolving issues of appellate review the appellate courts should not hesitate to rely on their inherent power—or admit that this

is what they are doing. Defining the standard and scope of review is one obvious example. *See, e.g.*, *City of Keller v. Wilson*, 168 S.W.3d 802, 809-28 (Tex. 2005) (discussing scope of review for legal insufficiency points); *Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998) (asserting that "a standard of review is more than just words; rather, it embodies principals regarding the amount of deference a reviewing tribunal accords the original tribunal's decision"). But the importance of acknowledging the courts' reliance on their inherent power may be better illustrated with one less obvious example—the power of appellate courts to issue a mandate to lower courts and to determine the effect that mandate has in the lower courts.

Because the appellate court's judgment is not self-executing, the mandate serves a function similar to that of the writ of execution a trial court issues to enforce its judgment. The mandate is issued by the appellate court and delivered to the trial court, serving both as official notice of the appellate court's decision and as a command to duly execute that court's judgment. *See Lewelling v. Bosworth*, 840 S.W.2d 640, 642 (Tex. App.—Dallas 1992, orig. proceeding). Texas statutes have long regulated the appellate courts' practice of issuing the appellate mandate. *See* TEX. REV. CIV. STAT. ANN. arts. 1768, 1773 (Vernon 1962) (repealed); Act approved Apr. 2, 1874, 14th Leg., R.S., ch. 42, § 9, 1874 Tex. Gen. Laws 49, 51, *reprinted in* 8 *H.P.N. Gammel, The Laws of Texas 1822-1897*, at 51, 53 (Austin, Gammel Book Co. 1898). But Texas statutes did not institute the mandate as a tool of the appellate courts; rather, as older federal case law illustrates, appellate courts had long used the mandate to direct lower courts to comply with the superior court's judgment. *See Sibbald v. United States*, 12 Pet. (37 U.S.) 488, 492, 9 L. Ed. 1167, 1169 (1838); *In re Sanford Fork & Tool*, 160 U.S. 247, 255, 16 S. Ct. 291, 293 (1895). Indeed, as Texas courts have noted, *see Chambers v. Hodges*, 3 Tex. 517, 529 (1848), the practice by which a superior tribunal issued its "mandate" to a lower court can be traced back to even older practices in the English House of Lords, *see* Matthew Hale, THE JURISDICTION OF THE LORDS HOUSE, OR PARLIAMENT, CONSIDERED ACCORDING TO ANCIENT RECORDS 160 (printed for T. Cadell, jun. and W. Davies, (successors to Mr. Cadell), London: 1796) ("If the judgment were affirmed or reversed in parliament, the ancientest course for the execution of such judgment was by remanding the record into the court where that judgment was given, viz. into the king's bench, with a mandate to the justices to issue execution accordingly . . . ."). Moreover, when the Supreme Court of Texas has explained its mandate powers, on some occasions it did so without express reliance on statute or precedent—indicating a conviction that the mandate's essence derives from the appellate court's inherent judicial power. *See, e.g.*, *Cobb v. Robertson*, 99 Tex. 138, 149, 87 S.W. 1148, 1149 (1905). Federal courts retain this understanding—namely, that in the absence of contrary rules, the power to regulate the mandate derives from the appellate courts' inherent judicial power. *See Briggs v. Pa. R. Co.*, 334 U.S. 304, 306 (1948) (noting that court's power "to act on its mandate after the term expires survives to protect the integrity of the court's own processes"); *Patterson v.*

Crabb, 904 F.2d 1179, 1180 (7th Cir. 1990) (noting that federal appellate courts' power to recall their mandate at any time "is well within the traditional authority of courts, properly described as inherent, to regulate procedures in them in the absence of legislatively prescribed rules").

In short, the mandate has its roots not in statutes or rules of procedure but in a common law practice appellate courts have long maintained in exercising their judicial power. This is an abstract point, but it could matter in Texas jurisprudence. In dueling concurring opinions, justices of the Supreme Court of Texas recently debated how to determine the effective date of an appellate court's decision: is it when the appellate court issues its judgment, or when it issues its mandate? But the debate largely centered on what the rules of procedure provide, and that was arguably too narrow a focus. *Compare Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 405, 409-11 (Tex. 2009) (Brister, J., concurring), *with id.* at 412-18 (Willett, J., concurring). The rules of procedure may regulate issuance of the mandate, but they did not institute it and do not dictate its effect. They are particular applications of the supreme court's rulemaking authority, but they don't encompass the entirety of the appellate courts' power as a superior tribunal to direct lower court proceedings. The more fundamental issue in the above debate, and the better focus, is the appellate courts' inherent judicial power *as appellate courts* to command lower courts to obey them. That focus would not only be more accurate conceptually, but it would also give the appellate courts wider discretion to fashion and define principles of review that protect the "dignity, independence and integrity" of the appellate process. *Eichelberger*, 582 S.W.2d at 398.

B. Disregarding legislative regulation of appellate decision-making is a plausible exercise of the judicial power

A second implication is that, given the unique deployment of the judicial power in the task of appellate review, a potential arises for improper legislative encroachment on that judicial power. No doubt the Texas Constitution has expressly subjected the judicial power to at least limited legislative control. The Supreme Court of Texas has power to promulgate "rules of administration not inconsistent with the laws of this state" and "rules of civil procedure for all courts not inconsistent with the laws of the state," and the legislature "may delegate to the Supreme Court or Court of Criminal Appeals the power to promulgate such other rules as may be prescribed by law or this Constitution, subject to such limitations and procedures as may be provided by law." TEX. CONST. art. V, § 31(a), (b), (c). The courts have routinely suggested that these provisions largely give the legislature ultimate control over appellate court procedures. *See, e.g.*, *Stillman v. Hirsch*, 128 Tex. 359, 367, 99 S.W.2d 270, 273 (1936) ("The Constitution leaves the regulation of appeals very largely to the Legislature."). On the other hand, the courts have cautioned that the legislature's rule-making authority does not permit the

Legislature "to infringe upon the substantive power of the Judicial department under the guise of establishing 'rules of court,' thus rendering the separation of powers doctrine meaningless." *Meshell v. State*, 739 S.W.2d 246, 255 (Tex. Crim. App. 1987); *see also Langever v. Miller*, 124 Tex. 80, 76 S.W.2d 1025, 1035-38 (1934) (legislative power to enact procedural guidelines could not support substantive invasion of court's ability to enforce valid prior judgment).

The review of Texas case law in Section II above suggests that many principles and mechanisms of appellate review are derived not from statute but from a common law tradition, i.e., from inherent judicial power arising from the Texas Constitution's express grant of judicial power. No doubt some of those principles and mechanisms have been subsumed in the rules of appellate procedure. But if the legislature has the constitutional power to grant broad rule-making authority, then arguably the legislature can take that authority away and control all aspects of appellate review—unless there exist principles and procedures so fundamental to the function of appellate courts that they must be deemed part of the essential "judicial power" that, under the Separation of Powers clause, is immune from direct legislative supervision. *Cf.* Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write Into the Federal Rules of Evidence*, 57 TEXAS L. REV. 157, 179-86 (1979) (arguing that, due to "the constitutional grant of the judicial power to the courts and a determination that some evidence rules are 'inherent' in that power," federal courts may on occasion disregard explicit Congressional directives in the Federal Rules of Evidence).

That this issue is not simply theoretical is suggested not only by the decision in *D.W.* but also by a broader review of other state courts' jurisprudence. For example, in *Thoe v. Chicago, M. & St. P. Ry. Co.*, 181 Wis. 456, 195 N.W. 407 (1923), the court cited that state's separation of powers doctrine in striking down a statute that precluded trial courts from directing a verdict in jury cases. *Id.* at 408-09. The court held that whether "evidence is legally sufficient" to sustain a verdict "is for the court to determine in the exercise of the powers conferred upon it by the Constitution." *Id.* at 410. Similarly, in *State v. Lowther*, 7 Haw. App. 20, 740 P.2d 1017 (1987), an intermediate appellate court held that a statute authorizing use of breathalyzer test evidence in drunk driving cases could not preclude the defendant from offering expert testimony challenging the test results. The court cited due process guarantees but also relied on authority to the effect that the legislature could not determine what constitutes "conclusive proof of an issue of fact" because determining the sufficiency of evidence to sustain a conviction is "a judicial function." *Id.* at 25, 740 P.2d at 1021. More recently, the Supreme Court of Kentucky decided that the legislature could not mandate the admission of collateral source payments in any civil trial, since it is up to the courts rather than the legislature to determine "when evidence is relevant to an issue of fact which must be judicially determined . . . ." *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 576 (Ky. 1995). The court

held that "as a rule of practice and procedure, the present statute is constitutionally defective under the separation of powers doctrine." *Id.* at 578; *see also Denson v. State*, 711 So. 2d 1225, 1228-30 (Fla. Ct. App. 1998) ("Under separation of powers, we conclude that the legislature is not authorized to restrict our scope or standard of review in an unreasonable manner that eliminates our judicial discretion to order the correction of illegal sentences and other serious, patent sentencing errors.").

The decision in *D.W.* shows that similar disputes could arise between the Texas judiciary and the Texas legislature. Are there others? It's interesting to note one area in which the legislature has "established" standards governing the appellate process (as opposed to regulating appellate jurisdiction): that of punitive damages. In this area, the legislature defined what constitutes "clear and convincing evidence" and directed the courts of appeals, if they uphold or disturb a finding or award regarding liability for or an amount of exemplary damages, to issue an opinion explaining the reasons for doing so. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 41.001(2), 41.013 (West 2008). Is this proper legislative supervision of the courts, or does it violate "separation of powers"? Arguably, the issue is moot because the Supreme Court of Texas had already defined "clear and convincing evidence" the same way and had previously instructed courts of appeals to explain such decisions. *See Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 31 (Tex. 1994); *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979). Thus, these statutes might be, as explained in *Nevitt v. Wilson*, 116 Tex. 29, 285 S.W. 1079 (1926), cumulative of the court's inherent powers. The question arises, however, whether it may be peculiarly within the inherent judicial power of appellate courts to define a standard of proof or to direct a lower court to explain the reasons for its decision. *See, e.g.*, *In re Columbia Med. Ctr. of Las Colinas, Subsidiary LP*, 290 S.W.3d 204, 207 (Tex. 2009) ("We direct the trial court to specify its reasons for disregarding the jury's verdict and granting a new trial, to the extent it did so."); *cf.* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 223 (2001) (arguing that due to the courts' inherent powers, federal statutes prescribing a standard of proof for federal courts are per se unconstitutional).

C. Appellate courts could aggressively employ the judicial power to defend courts' independence vis-à-vis other departments of government

A third implication is that the courts, in the task of appellate review, exercise a unique and powerful weapon in protecting judicial independence under the doctrine of separation of powers. If that constitutional doctrine is more than words on paper, it is necessary that "each branch must be given weapons of defense against the others in order to retain the bulk of its allotted power." 1 THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 98 (George D. Braden, ed., Texas Advisory Comm'n on Intergovernmental Relations, 1977). Fully exploring the judiciary's weapons

in this regard is beyond the scope of this article, yet mechanisms of appellate review undoubtedly give courts peculiar means of resisting encroachment by the other departments of Texas government.

First, the appellate courts have the power of judicial review. The appellate courts can use that power to invalidate selected legislative or executive action—construing the doctrine of judicial restraint as they see fit. Second, the appellate courts can issue decisions affecting legislative or executive action whenever they choose to issue them—no express constitutional limit on that power exists (except that governing the time to decide a motion for rehearing in the supreme court—*see* TEX. CONST. art. V, § 31(d)). Thus, the courts have the power to indefinitely delay decisions important to the executive and legislative branches. Third, appellate courts in original proceedings have ample discretion to refuse—with little or no comment—the issuance of a writ of mandamus or prohibition. Fourth, appellate courts have "judicial power" to determine their jurisdiction—even to decide incorrectly. The appellate courts could thus decide they do not have jurisdiction over selected disputes that may be important to another department—and thus decline to enforce laws important to that department.

In short, if the appellate courts so chose they could selectively restrict access to the courts by the executive department, and by construing statutes or regulations broadly or narrowly, severely restrain and/or effectively prohibit the enforcement of important legislative policies that came before the courts. The courts have a number of inherent powers at their disposal in this regard. Among other things, they can narrowly construe the record, narrowly or broadly construe preservation of error rules, liberally apply the sufficiency of evidence standards, and liberally exercise a power to remand for further proceedings. While the legislature might have some power to require a decision within a certain time, or to impose certain legal standards (such as the requirement that certain statutes be "liberally construed" to promote their underlying purpose), the legislature simply does not have the power to require a particular decision in a particular case.

Texas appellate judges aren't likely to engage in such inter-department warfare—for a number of reasons, not least of which are that: (1) they, too, are elected officials and thus subject to negative public opinion that might arise from such "raw" exercise of a "robust" judicial power; and (2) such action could exacerbate a dispute with another department, as where the Legislature responds by threatening court salaries or budgets. The point is, however, that even with a judiciary closely regulated by the legislature, the appellate courts retain potent means of resisting the other two departments and, in extreme circumstances, have more potential influence over those other departments than judges will openly acknowledge. In short, the principles of appellate review are a powerful component of Texas courts' overall inherent judicial power.

CONCLUSION

The appellate courts in Texas have unique inherent judicial power arising from the Texas Constitution's express grant of the "judicial power" in general and appellate jurisdiction in particular. The portion of the judicial power within the grant of appellate jurisdiction encompasses the authority to formulate and apply principles of appellate review and is not exhausted by the promulgation of rules of appellate procedure, but includes principles outside those rules. The appellate courts historically and routinely exercise this inherent judicial power, and properly so under the Texas Constitution. These courts could exercise the power more broadly, if they so chose, and in many cases the only apparent obstacle to a broader exercise of these powers is (1) the courts' own restraint, or (2) the courts' narrow interpretation of that power. If they so chose, in the exercise of their appellate jurisdiction the Supreme Court of Texas and the Texas Court of Criminal Appeals could properly exercise a more robust judicial power, and within recognized historical limits of that power such action should be no more suspect—as "judicial activism," for example—than the exercise of plenary power by the executive or legislative departments within their own "separate body of magistracy" set forth in the Texas Constitution.

Appellate Section Wins the Access to Justice 2010 Pro Bono Service Award!

Since 2001, the Texas Access to Justice Commission has endeavored to address the wide disparity in opportunities for low-income individuals to gain access to justice in Texas. Each year, the Commission honors a State Bar section or bar organization with the Pro Bono Service Award, which recognizes the creation of a self-sustaining pro bono project that motivates lawyers from specialized practice areas to provide pro bono legal assistance directly to poor Texans.

This year, the Commission has selected the Appellate Section as the recipient of the 2010 Pro Bono Service Award for the formation of the Section's Pro Bono Pilot Programs at the Texas Supreme Court, the Houston Courts of Appeal, the Austin Court of Appeals, and the forthcoming programs at the Dallas and Fort Worth Courts of Appeal.

Congratulations to all the Section members who have worked so hard to establish and foster the Section's Pro Bono Pilot Programs! It is through their selfless dedication, as well as that of the attorney volunteers, that this effort has proved to be so indispensable to those it is designed to serve. For their leadership and dedication to this effort, particular recognition is due the following Section members who serve as Program Chairs, Pilot liaisons, or Screening Committee members:

Brenda Clayton, Wade Crosnoe, McKay Cunningham, Alan Daughtry, Robert Dubose, Karl Hays, Marcy Hogan Greer, Sarah Holland, Steve Hayes, Daryl Moore, Russell Post, Laurie Ratliff, Rey Rodriguez, Kent Rutter Hannah Sibiski, Mike Truesdale, and Amy Warr.

Mohawk: *Limited Interlocutory Review of Federal Court Orders to Disclose Potentially Privileged Attorney-Client Information*

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INTRODUCTION

The United States Supreme Court recognizes the attorney-client privilege as "one of the oldest recognized privileges," meant to encourage attorneys to "provide candid advice and effective representation" and to further "broader public interests in the observance of law and administration of justice." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 606 (2009) (internal quotations omitted). In spite of the privilege's pedigree, however, the proper method for immediate appeal of a federal court order requiring disclosure of information potentially protected by that privilege had not been as well-settled. The Supreme Court recently decided that review is not available under the *Cohen* collateral order doctrine, and, unlike Texas state courts, mandamus review of such disclosure orders has been traditionally unavailable. This article explores the contrast between state and federal law, the options available in the face of a federal court order to disclose potentially privileged attorney-client information, and open questions as to whether *Mohawk* applies in other privilege contexts.

I. THE TEXAS APPROACH

In the early 1990s, the Texas Supreme Court confirmed the inability to cure discovery errors is one circumstance that is often sufficiently "extraordinary" to justify mandamus relief. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding). "This [inability to cure the error] occurs when the trial court erroneously orders the disclosure of privileged information which will materially affect the rights of the aggrieved party, such as documents covered by the attorney-client privilege or trade secrets without adequate protections to maintain the confidentiality of the information." *Id.* at 843. Similarly, an erroneous ruling that precludes the "missing" discovery from being made part of the appellate record may also be sufficiently extraordinary to justify interlocutory relief by mandamus. *Id.* at 843-44. For example, a protective order that precludes a deposition or prevents production of documents such that the evidence will not become part of the record. *Id.* By interlocutory review of erroneous disclosure and overbroad protective orders, a balance is struck between protecting privileged information and ensuring adequate discovery.

Recent cases indicate the Texas Supreme Court continues to review erroneous disclosure orders by mandamus. *See, e.g., In re Weekley Homes, L.P.*, 295 S.W.3d 309

(Tex. 2009) (orig. proceeding) (harm from order to produce hard drives for forensic search for deleted emails could not be remedied on appeal); *In re Jorden*, 249 S.W.3d 416 (Tex. 2008) (orig. proceeding) (depositions precluded by statute cannot be "untaken" or cured on appeal); *In re Ford Motor Co.*, 211 S.W.3d 295, 298 (Tex. 2006) (orig. proceeding) ("[W]e have repeatedly held [an] appeal is inadequate when a trial court erroneously orders the production of confidential information or privileged documents"). In addition, an agreed interlocutory appeal might be available if the district court enters an order for interlocutory appeal and: (1) the parties agree that the underlying order involves a controlling question of law to which there is a substantial ground for difference of opinion; and (2) an immediate appeal may materially advance the ultimate termination of the litigation. TEX. CIV. PRAC. & REM. CODE § 51.014(d).

II. THE BUILD-UP TO THE *MOHAWK* CIRCUIT SPLIT

In the federal system, the review of erroneous disclosure orders has been less clear. As in state court, the courts of appeals have jurisdiction over "final decisions of the district courts." 28 U.S.C. § 1291. Discovery orders generally are not reviewable until final judgment. *See Church of Scientology of Ca. v. United States*, 506 U.S. 9 (1992) (holding discovery order not appealable absent defiance resulting in contempt order from which appeal may be taken).[1] Under the collateral order doctrine, however, important prejudgment orders that are collateral to the main action may be reviewed under section 1291, even though they do not technically constitute final decisions. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Given the difficulty of other avenues of interlocutory review in federal court, parties often sought interlocutory review of an order mandating disclosure of potentially privileged information under the collateral order doctrine. A Circuit split resulted. Three Circuits held that rulings on the attorney-client privilege are reviewable under section 1291.[2] Five other Circuits reached the opposite conclusion.[3]

> **FN1.** Certain types of federal discovery orders may be considered final and appealable, particularly when the proceeding is *only* for discovery. *See, e.g., Phillips v. Beierwaltes*, 466 F.3d 1217 (10th Cir. 2006) (orders under 28 U.S.C. section 1782 on application for discovery in this country for proceeding in another country "are considered final and appealable); *Ash v. Cort*, 512 F.2d 909 (3d Cir. 1975) (holding order of deposition to perpetuate testimony under Rule 27 final and appealable); *United States v. McWhirter*, 376 F.2d 102 (5th Cir. 1967) (discovery in aid of execution under Rule 69 considered final and appealable).

FN2. *See In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1087-88 (9th Cir. 2007); *United States v. Phillip Morris Inc.*, 314 F.3d 612, 617-21 (D.C. Cir. 2003); *In re Ford Motor Co.*, 110 F.3d 954, 957-64 (3d Cir. 1997).

FN3. *See Boughton v. Cotter Corp*., 10 F.3d 746, 749-50 (10th Cir. 1993); *Texaco Inc. v. La. Land & Exploration Co.*, 995 F.2d 43, 44 (5th Cir. 1993); *Reise v. Bd. of Regents of Univ. of Wis. Sys.*, 957 F.2d 293, 295 (7th Cir. 1992); *Chase Manhattan Bank, N. A. v. Turner & Newall, PLC*, 964 F.2d 159, 162-63 (2d Cir. 1992); *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 643-44 (Fed. Cir. 1991).

III. *MOHAWK*

An employment dispute case from Georgia presented the Supreme Court with the opportunity to resolve the split. *See Mohawk*, 130 S. Ct. at 603. In the middle of class action litigation in the hiring of undocumented workers, Mohawk Industries received an email from Norman Carpenter, a shift supervisor in its Georgia plant, concerning the employment of such workers. *Id.* Company officials arranged a meeting between Carpenter and outside counsel in the class action suit, where Carpenter alleges he was pressured to disavow his allegations. *Id*. Carpenter refused and was subsequently terminated by the company. *Id*. Carpenter responded by suing Mohawk in federal court, alleging wrongful termination under federal and state law. *Id*.

The meeting between Carpenter and Mohawk's outside counsel quickly became the subject of both lawsuits. *Id*. at 603-04. Responding to Carpenter's discovery requests, Mohawk asserted the attorney-client privilege. *Id*. at 604. But in response to the class action plaintiffs, Mohawk claimed that the meeting was part of an investigation into Carpenter's "misconduct" in wrongfully employing undocumented workers in violation of Mohawk policy. *Id*. at 603-04. The judge presiding over Carpenter's suit interpreted these representations as a waiver of the privilege and granted Carpenter's motion to compel disclosure. *Id*. at 604.

Mohawk sought appellate review of the order, but the Eleventh Circuit dismissed the appeal for lack of jurisdiction, holding that the discovery ruling did not qualify as a collateral order under *Cohen*. *Id*. The court of appeals likewise denied Mohawk's contemporaneously filed mandamus petition. *Id*.

IV. RESOLVING THE SPLIT: NO SECTION 1291 JURISDICTION OVER ATTORNEY-CLIENT PRIVILEGE RULINGS

Focusing on the third prong in *Cohen*—whether the order at issue is reviewable—the Supreme Court affirmed, concluding "collateral order appeals are not necessary to

ensure effective review of orders adverse to the attorney-client privilege." *Id*. at 606. In so doing, the Court acknowledged the importance of the privilege, but gave greater attention to the "crucial question": whether deferred review "so imperils the interest as to justify the cost" of immediate appeal. *Id*.

The Court expressed concern over the potential "institutional costs" that would flow from extending appellate review to attorney-client privilege rulings, including increased delay of district court proceedings and added caseload burdens for appellate courts. *Id*. at 608. In contrast, the Court discounted the likelihood that attorneys and their clients would be chilled by the "remote prospect of an erroneous disclosure order, let alone [by] the timing of a possible appeal." *Id*. at 607. Instead, the "breadth of the privilege and the narrowness of its exceptions" outweigh "the small risk that the law will be misapplied." *Id*. And, even in such circumstances, the Court expressed its confidence in the ability of appellate courts to "remedy the improper disclosure of privileged material" on postjudgment appeal "in the same way they remedy a host of other erroneous evidentiary rulings." *Id*. at 606-07. Notably, however, review on appeal may be hindered by a lack of prejudice, mootness, or harmless error hurdle to relief.

V. THE POST-*MOHAWK* LANDSCAPE

In addition to available remedies for improper disclosure, the Court was influenced by the availability of alternative avenues of review when needed in special circumstances. Thus, although it closed the door on appellate review under the collateral order doctrine, the Court identified and left open several other alternatives for special circumstances:

- **Certified Interlocutory Appeal—**As the Court recognized, Section 1292(b) allows district courts to certify for appellate review interlocutory orders involving "a controlling question of law" whose resolution would "materially advance the ultimate termination of the litigation." *Id*. at 607. Where a privilege ruling involves "a new legal question or is of special consequence," the Court encouraged district courts "not [to] hesitate" in certifying the appeal. *Id*. But even where a district court certifies an appeal, the court of appeals has discretion to refuse to hear the appeal. 28 U.S.C. § 1292(b) ("The Court of Appeals . . . may thereupon, *in its discretion*, permit an appeal to be taken") (emphasis added). The district and appellate court must agree on the "new legal question" or "special consequence."

- **Mandamus Petition—**Under similarly unusual circumstances, for instance where a disclosure order amounts to a clear abuse of discretion or results in manifest injustice, mandamus review may be available. *Mohawk*, 130 S. Ct. at 607. As the Fifth Circuit has recognized, however, obtaining mandamus relief from privilege orders is difficult. *See, e.g., In re Occidental Petroleum Corp.*, 217 F.3d 293, 295-96 (5th Cir. 2000) (mandamus relief requires a showing of "clear and indisputable error" that is "irremediable on ordinary appeal"). A dispute over the trial court's factual determinations in reviewing the privilege, untethered to any dispute over the law applied, will generally not be enough. *Id*. at 296; *see also In re Whirlpool Corp.,* 597 F.3d 858 (7th Cir. 2010) (mandamus standards not lessened merely because collateral order appeal unavailable after *Mohawk*). *But cf. In re United States,* 590 F.3d 1305 (Fed. Cir. 2009) (citing *Mohawk* but exercising mandamus jurisdiction, although upholding trial court's disclosure order).

- **Defy the Court Order—**Alternatively, attorneys and clients can protect privileged information by defying a court order. To the extent the court responds with a criminal contempt order, immediate review of the disclosure order will then become available. *Mohawk*, 130 S. Ct. at 608. This review may come at too high a price, however, for most attorneys and their clients.

- **Obtain Protective Orders—**Under Federal Rule of Civil Procedure 26(c), a court can restrict the disclosure of the privileged material to "limit the spillover effects of disclosing sensitive information." *Id*. But if the court did not consider the information privileged, the court may be disinclined to enter such an order.

In addition to these avenues recognized by the Court in *Mohawk*, litigants facing an adverse ruling on the attorney-client privilege should also consider the following:

- **Federal Rule of Evidence 502(a)—**If the adverse privilege ruling is based on a finding of waiver, Rule 502(a) protects communications that remain undisclosed unless the waiver is intentional and the undisclosed matter relates to the same subject and should be considered together with the disclosed matter. FED. R. EVID. 502(a); *see* Ronald J. Hedges and Jeane A. Thomas, *Mohawk Industries and E-Discovery*, *in Digital Discovery & E-Evidence Report* (Jan. 1, 2010) [hereinafter *Mohawk Industries and E-Discovery*].

- **Federal Rule of Evidence 502(d)—**Before complying with a disclosure order, litigants should seek a nonwaiver order under Rule 502(d) to protect against a finding of waiver based on compliance with the court order. FED. R. EVID. 502(d); *see Mohawk Industries and E-Discovery*, *supra*.

VI. OPEN QUESTIONS AFTER *MOHAWK*

Although collateral order review is unavailable in most attorney-client disclosure order contexts, the Court postponed the resolution of several open questions, including:

- **Other Common-Law or Rule-Based Privileges—**The Court inquired at oral argument why anti-disclosure policies were more important for the attorney-client privilege as compared to trade secrets, work product or other privileges. *Mohawk* Transcript 2-3, 5, 11, 17, 23. Indeed, some Circuits have applied the *Cohen* doctrine to other privilege issues. *See, e.g., Agster v. Maricopa County*, 422 F.3d 836 (9th Cir. 2005) (allowing collateral order appeal related to discovery for which county invoked state statutory peer review privilege); *In re Carco Elecs.*, 536 F.3d 211 (3d Cir. 2008) (recognizing collateral order appeal of trade secrets disclosure order). Although the Court was careful to restrict its analysis in *Mohawk* to the attorney-client privilege, if that beneficial and longstanding privilege does not qualify for review under the collateral order doctrine, other common-law or rule-based doctrines are unlikely to either, at least absent a showing of a unique need for protection. *See United States v. Textron, Inc.*, 577 F.3d 21 (1st Cir. 2009) (*en banc*), *cert. denied*, __ U.S. __, 2010 WL 2025148 (May 24, 2010) (refusing to review First Circuit holding that tax workpapers were not privileged); *Hernandez v. Tanninen*, No. 09-35085, 2010 WL 1882304, at *1 (9th Cir. May 12, 2010) ("The reasoning of *Mohawk* . . . applies likewise to appeals of disclosure orders adverse to the attorney work product privilege."). Thus, *Mohawk* may lead to predominant resolution of the most common privilege questions at the district court level with interlocutory appellate involvement only in extraordinary circumstances.

- **Constitutional or Statutory Rights and Privileges—**Whether the *Mohawk* bar to collateral order appeal applies to constitutional-based rights or privileges may be an open question. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994)

("Where statutory and constitutional rights are concerned, 'irretrievabl[e] los[s]' can hardly be trivial, and the collateral order doctrine might therefore be understood as reflecting the familiar principle of statutory construction that, when possible, courts should construe statutes (here Section 1291) to foster harmony with other statutory and constitutional law."). At least one court recognized *Mohawk* left an open question in the First-Amendment-privilege context, but relied on its mandamus jurisdiction to resolve the issue. *See Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010) (noting that some of *Mohawk*'s reasoning carries over to First Amendment privileges, but citing several differences such as its constitutional grounding).

- **Governmental Privileges—**Similarly, in its *amicus* brief, the United States argued the collateral order doctrine should apply to certain governmental privileges due to "their structural constitutional grounding under the separation of powers," their "relatively rare invocation," and their "unique importance to governmental functions." *Mohawk*, 130 S. Ct. at 609 n.4. In other words, unlike the routine, "every day" attorney-client privilege issues, these governmental privileges—such as the Presidential communications or state secrets privileges—rise to the level of special circumstances by the very nature of the subject. The Court declined to reach the issue. *Id*.

- **Nonparties—**One court recently noted "a division in the circuits on the question of a nonparty's right to immediately appeal a discovery order. It is unclear whether our circuit's approach to this question [that allows immediate review] . . . survives the holding and rationale of *Mohawk Industries*." *Sandra T.E. v. S. Berwyn Sch. Dist.*, 600 F.3d 612, 618 (7th Cir. 2010) (involving attorney-client privilege and work-product doctrine as to nonparty). The court highlighted the issue for the future but did not resolve it. *Id. Cf. Sec. & Exch. Comm'n v. Merrill Scott & Assocs., Ltd.*, 600 F.3d 1262 (10th Cir. 2010) (allowing collateral order appeal of modification of protective order as to nonparty when no showing that right to post-judgment appeal was available).

- **Rules Change—**With its very last sentence, the Court left the door (slightly) open for the possibility of expanded appellate review in the future: "Any further avenue for immediate review of such

> rulings should be furnished, if at all, through rulemaking, with the opportunity for full airing it provides." *Id*. at 609. The April 2010 Agenda Materials for the Advisory Committee on Rules of Appellate Procedure included a discussion of whether any rulemaking response to *Mohawk* was appropriate by defining the decision as final or providing for interlocutory appeals, but the committee concluded that too little empirical data yet exists to determine the need for and impact of broadening an immediate right of appeal.

CONCLUSION

The contrast between available interlocutory review of erroneous orders of disclosure of potentially privileged information in state and federal court is stark. In Texas, mandamus jurisdiction (and agreed interlocutory appeal in some cases if necessary) is generally available to correct an erroneous order to disclose privileged information of various types, including attorney-client or trade-secret information. In federal court after *Mohawk*, however, interlocutory review under the collateral order doctrine is unavailable in the attorney-client privilege context, and mandamus review is generally difficult (although some circuit courts troubled by the disclosure may invoke their mandamus jurisdiction). The reach of *Mohawk* in other contexts is not clear, but it may ultimately include other common-law or rules-based privileges or doctrines including trade secrets and work product, may not reach constitutional or statutory based privileges or orders applied to nonparties. As a result, practitioners in federal court should make careful use of protective and nonwaiver orders in the district court, and appellate practitioners should bear in mind these distinctions when assessing the availability of or crafting briefing in an interlocutory appeal of disclosure orders or when making a record of harm for ordinary appeal to complain of the erroneous production of privileged information.

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Recurring Themes in Preserving Error in Civil Cases

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INTRODUCTION

Almost every practicing trial attorney knows, or should know, that in order to properly preserve error one must make an objection and obtain a ruling from the trial court either expressly, impliedly, or by operation of law. Although this concept is simple, the same error-preservation mistakes continue to recur. This paper will address some of the reoccurring themes in preserving error in civil cases.

I. Any objection must be timely made in order to properly preserve error

The most fundamental aspect of preserving error is that the party must make a timely and specific objection or request in order to allow the trial court a reasonable opportunity to address the objection or request and make a ruling. TEX. R. APP. P. 33.1(a); TEX. R. EVID. 103(a); *Osterberg v. Paca,* 12 S.W.3d 31, 55 (Tex. 2000); *Moreno v. State,* 38 S.W.3d 774, 776 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Celotex Corp. v. Tate,* 797 S.W.2d 197, 201 (Tex. App.—Corpus Christi 1990, no writ).

One of the most common mistakes made in preserving error is not timely objecting to objectionable evidence. TEX. R. EVID. 103(a)(1); TEX. R. APP. P. 33.1; *Clark v. Trailways, Inc.,* 774 S.W.2d 644, 647 (Tex. 1989); *Lemons v. EMW Mfg. Co.,* 747 S.W.2d 372, 373 (Tex. 1988); *Celotex,* 797 S.W.2d at 201.; *Haney v. Purcell Co., Inc.,* 796 S.W.2d 782, 788 (Tex. App.—Houston [1st Dist.] 1990, writ denied). An objection to evidence submitted at trial must be made as soon as the reason for the objection becomes apparent or else it is waived. TEX. R. EVID. 103(a)(1). Again, the concept that a party must make a timely objection is fairly straightforward and simple black-letter law. The failure to timely object, however, is still one of the most common mistakes made during trial. For example, consider the following exchange from a welfare fraud case in which the defense was attempting to paint the state agency as incompetent:

> Q. Ms. Supervisor, are you aware that Mr. Keel, the Texas State Auditor, in his findings concluded that ninety-two percent of the supervisors of the Texas Health & Human Services had not completed one or more required training courses?
>
> A. No, I wasn't aware of that.
>
> Q. You weren't aware of that? Aren't you a supervisor at the Texas Health and Human Services Commission?

A. I certainly am.

Q. Are you aware that Mr. Keel in his audit findings determined that eighty-seven percent of supervisors, such as yourself, had not completed the management-training course?

A. I did not know that.

Q. Are you aware that Mr. Keel in his audit findings, conducted a survey of supervisors such as yourself, determined that thirty-nine percent of the supervisors strongly disagreed or disagreed that they had received adequate training? Were you aware of that finding?

A. I wasn't aware of that.

Q. Were you aware that Mr. Keel concluded in his audit that fifty-seven percent of your employees had not completed one or more training courses?

A. I wasn't aware of that either.

Q. Were you aware that Mr. Keel's audit concluded that forty-four percent of the Texas Health and Human Services Commission's employees did not complete the overview training?

A. I didn't know that either.

Q. Were you aware that Mr. Keel's audit findings concluded that thirty-four percent of Texas Health and Human Services Commission's employees had not completed employee orientation?

A. I wasn't aware of that.

OBJECTION: Your Honor, I'd like to object to the relevancy of this line of questioning.

Counsel's relevancy objection, made after seven questions were asked on the topic, was made too late to properly preserve error as to the first six questions. *See, e.g., Boulle v. Boulle*, 254 S.W.3d 701, 709 (Tex. App.—Dallas 2008, pet. denied); *Sececa*

Res. Corp. v. Marsh & McLennan, Inc., 911 S.W.2d 144, 152 (Tex. App.—Houston [1st Dist.] 1995, no writ) (holding that any error was waived when witness testified at great length before trial counsel objected to the line of questioning on the basis of relevancy).

Consequently, even though an objection was made, it did not preserve error with respect to the first six questions. Conversely, an objection was required after each question in order to preserve error in the absence of a running objection. *Boulle*, 254 S.W.3d at 709. Merely objecting to "this line of questioning" may sound good on television, but it does not properly preserve error as to the questions previously asked and answered without objection. Counsel's relevancy objection was simply not timely made in order to preserve error as it pertains to the first six questions.

II. An objection must be raised each and every time the objectionable evidence is offered or else the objection is waived

Another common mistake is the failure to object each and every time the objectionable evidence is offered. When a party makes an objection to certain evidence and obtains a ruling, but does not object when the same evidence is later introduced, the party waives its objection in the absence of a proper running objection. TEX. R. APP. P. 44.2(b); *McFarland v. State,* 845 S.W.2d 824, 840 (Tex. Crim. App. 1992); *Johnson v. State,* 803 S.W.2d 272, 291 (Tex. Crim. App. 1990), *overruled on other grounds by Bingham v. State*, 915 S.W.2d 9 (Tex. Crim. App. 1994); *Mancorp, Inc. v. Culpepper,* 802 S.W.2d 226, 230 (Tex. 1990); *Richardson v. Green,* 677 S.W.2d 497, 501 (Tex. 1984); *Sosa v. Koshy,* 961 S.W.2d 420, 428 (Tex. App.—Houston [1st Dist.] 1997, writ denied).

Picking up with our previous example, the following questions were asked immediately after counsel's relevancy objection was overruled:

> Q. Were you aware that Mr. Keel's audit findings determined that the Texas Health and Human Services Commission is in minimum compliance with the requirements as it pertains to determining whether employees meet the minimum job requirements? Were you aware of that?
>
> A. No, I wasn't.
>
> Q. Were you aware that Mr. Keel's audit determined that the Texas Health and Human Services Commission failed to complete employee evaluations for seventy-four percent of their employees? Were you aware of that?
>
> A. No, I wasn't.

Counsel was required to renew the relevancy objection to these questions about the auditor's report in order preserve error for appeal. The prior objection preserves nothing for appeal with regard to the subsequent questions. Consequently, in the absence of proper running objection, counsel must object each and every time objectionable evidence is offered if he or she wishes to preserve error.

Additionally, a trial court's ruling sustaining an objection can likewise be waived when counsel fails renew his objection each and every time the objectionable evidence is offered. Counsel must protect his ruling by objecting each and every time the evidence is offered in order to preserve error. *See* TEX. R. APP. P. 44.2(b); *McFarland,* 845 S.W.2d at 840; *Richardson v. Green,* 677 S.W.2d 497, 501 (Tex. 1984).

III. Failing to properly obtain specific running objections waives the error

Of course, it is not always advisable to object to each and every question or piece of evidence simply because it is objectionable. Trial counsel must make split-second decisions with regard to whether he should object. Repeated or constant objections alienate the judge and the jury and frankly, some evidence is simply not worth objecting to because it is just not that important. However, if the evidence is important, and counsel does not want to risk alienating the judge and jury with repeated and constant objections, counsel may obtain a running objection from the court. Running objections are routinely requested, but usually fail to properly preserve error.

A running objection must be specific and unambiguous. *Volkswagen of Am. v. Ramirez,* 159 S.W.3d 897, 907 (Tex. 2004); *Killebrew v. State,* 746 S.W.2d 245, 247 (Tex. App.—Texarkana 1987, pet. ref'd) (generalized running objection will not proper preserve error in most circumstances). Also, a running objection to certain evidence does not preserve error when similar, but slightly different evidence is introduced. *Richardson v. Green,* 677 S.W.2d 497, 501 (Tex. 1984) (holding that running objection to first interview of child did not apply to recording of second interview).

Additionally, careful attention needs to be paid to running objections made to witness testimony. Generally, in a jury trial, a running objection to a specific witness's testimony does not preserve error if similar evidence is elicited from other witnesses unless the trial court grants a specific request that the running objection applies to similar evidence from all witnesses. *Huckaby v. A.G. Perry & Son, Inc.,* 20 S.W.3d 194, 203 (Tex. App.—Texarkana 2000, pet. denied); *see also In re A.P.,* 42 S.W.3d 248, 260 (Tex. App.—Waco 2001, no pet.), *disapproved on other grounds by In re J.F.C.*, 96 S.W.3d 256 (Tex. 2002) (unless it is otherwise clear on the record, a running objection extends only to the witness during whose testimony the objection is made and to a particular subject); *White v. State,* 784 S.W.2d 453, 455 (Tex. App.—Tyler 1989, no pet.) (same).

Therefore, if similar evidence is introduced from other witnesses, counsel either needs to (1) object to each and every objectionable question or response; (2) obtain a second running objection to the evidence elicited from the second witness; or (3) obtain a running objection that applies to similar evidence from all witnesses. *Id.; see also Ford v. State,* 919 S.W.2d 107, 113 (Tex. Crim. App. 1996) (running objection clearly stated that it applied to "all witnesses"); *Davis v. Fisk Elec. Co.,* 187 S.W.3d 570, 578-88 (Tex. App.—Houston [14th Dist.] 2006), *rev'd on other grounds,* 268 S.W.3d 508 (Tex. 2008). In a bench trial, however, a running objection that is clearly made is effective for all evidence from all witnesses. *Commerce, Crowdus & Canton, Ltd. v. DKS Constr., Inc.,* 776 S.W.2d 615, 620 (Tex. App.—Dallas 1989, no writ).

The best practice, at least technically speaking, is to assert an objection and obtain a ruling each and every time objectionable evidence is introduced. The realities of trial practice, however, may require the use of a running objection. Counsel should err on the side of caution and be as specific as possible when asserting a running objection should a running objection be necessary to properly preserve error.

IV. Failing to obtain an adverse ruling waives the error

Another common mistake in error preservation is not pursuing an adverse ruling when inadmissible evidence is presented to the jury. The most common example is when counsel makes an objection to a particular question and before the court can sustain the objection, the witness states an answer. Another common example is when opposing counsel makes an improper statement in the presence of the jury. In these situations, counsel must make a number of objections to the trial court and obtain an adverse ruling in order to properly preserve error.

First, counsel must obviously make an objection to the inadmissible evidence. Counsel preserves error if the court overrules the objection. *Lone Star Ford, Inc. v. Carter,* 848 S.W.2d 850, 854 (Tex. App.—Houston [14th Dist.] 1993, no writ). The issue with preserving error in this context arises when the trial court sustains the initial objection. Consider the following hypothetical jury argument in a personal injury case:

> Ladies and gentlemen of the jury, feel free to award Paul Plaintiff $1,000,000 for his pain and suffering in this case because David Defendant has $1,000,000 in liability insurance coverage that will pay any amount you may award Paul—
>
> OBJECTION: Counsel impermissibly mentions insurance in violation of Rule 411 of the Texas Rules of Evidence.
>
> THE COURT: Your objection is sustained.

Even though counsel's objection was properly sustained, he has not preserved anything for appeal with regard to opposing counsel's impermissible mention of liability insurance. Counsel must continue to pursue an adverse ruling from the trial court in order to preserve error. Counsel must next request that the trial court to instruct the jury to disregard the improper evidence. *State Bar of Tex. v. Evans,* 774 S.W.2d 656, 658 n.6 (Tex. 1989). Counsel waives any complaint on appeal with respect to the improper evidence if he does not request the trial court to instruct the jury to disregard the improper evidence. *Id.*

If the trial court refuses to instruct the jury to disregard, then error has been properly preserved. If the trial court instructs the jury to disregard, then counsel must make a motion for a mistrial in order to properly preserve error. *Hur v. City of Mesquite,* 893 S.W.2d 227, 231 (Tex. App.—Amarillo 1995, writ denied). *But see Hur v. City of Mesquite,* 916 S.W.2d 510, 511-12 (Tex. App.—Amarillo 1995, no writ) (on rehearing, court of appeals appears to back off from its previous position that a motion for mistrial is necessary to preserve error).

The only exception to the rule that counsel must pursue an adverse ruling is if the error in submitting the improper evidence is incurable. *Living Centers of Texas, Inc. v. Penalver*, 256 S.W.3d 678, 680 (Tex. 2008); *Evans,* 774 S.W.2d at 658 n. 6. Counsel, however, can expect a waiver argument on appeal if he does not properly object at trial and obtain an adverse ruling. Therefore, the better practice is to make the proper objections and pursue an adverse ruling rather than risk the possibility of a court of appeals holding that the party waived any right to complain about the submission of the evidence on appeal by not obtaining an adverse ruling.

V. Failing to obtain a ruling from the trial court on the record waives the error

Perhaps the most fundamental aspect of preserving error, besides making a timely objection or request, is obtaining a ruling from the trial court. The concept sounds simple enough—there must be an adverse ruling from the trial court from which a party may appeal. In practice, the failure of a party to obtain a ruling is a reoccurring theme.

There are several situations in which a party commonly fails to obtain a ruling. The first is when a party makes a timely and specific objection at trial, but the trial court does not rule on the objection. This can happen for any number of reasons. A specific example of this is when an objection is made, and the judge requests the attorneys to approach the bench. The attorneys present their arguments to the judge, who realizes that the particular issue is going to require a full discussion on the record. The judge then excuses the jury and allows the attorneys to argue their positions. Once the attorneys complete their argument, the judge states that he will take the matter under

advisement. The judge states that he needs a break, and the parties take a brief recess. Following the break, the objecting attorney fails to obtain a ruling and thus, preserves nothing for appeal. *See, e.g., Taveau v. Brenden*, 174 S.W.3d 873, 879 (Tex. App.—Eastland 2005, pet. denied) (holding error was waived where trial court delayed ruling until after jury began deliberations, which was too late).

Another example is when a timely objection is made and the trial court advises counsel to "move it along," or "do you have any more questions for this witness," or something to that effect. *See*, *e.g., Stevens v. State*, 671 S.W.2d 517, 521 (Tex. Crim. App. 1984) (en banc) (holding that "move along" is not an adverse ruling); *Sands v. State*, 64 S.W.3d 488, 491 (Tex. App.—Texarkana 2001, no pet.) (holding error waived where court told defendant he would carry the objection along with the case, and defendant did not thereafter seek a ruling).

An example from our welfare case referenced above:

Q.	And at the interview, it is more important that she states all of her income?
A.	That's correct.
OBJECTION:	Argumentative.
OFFERING ATTORNEY:	I don't have any further questions.
THE COURT:	Any recross?
OBJECTING ATTORNEY:	Very brief recross.

Here, counsel must obtain a ruling on his objection. Counsel must respectfully request that the trial court make a ruling even though the judge is expressly some unwillingness to make a ruling. Counsel cannot be intimidated or afraid to request a ruling out of fear of alienating the judge. It is counsel's job to secure a ruling, and if done respectfully, almost all judges will give you a ruling.

Another example is the "vague" ruling sometimes given by judges. Specifically, the judge, in response to an objection, will express some concern about the evidence such as, "I don't know if you can ask the witness that question," or ask questions of counsel with regard to the admissibility of the evidence, or instruct the attorney to "move it along." The judge, however, fails to give an express ruling on the record. Again, counsel needs to respectfully press the judge for a ruling in order to ensure that there is no misunderstanding with regard to whether error was properly preserved. *See, e.g., Ramirez v. State,* 815 S.W.2d 636, 643 (Tex. Crim. App. 1991) (judge's

statement that witness should answer "if she knows" did not properly preserve error); *Bushell v. Dean,* 803 S.W.2d 711, 712 (Tex. 1991) (trial court's expression of concern did not properly preserve error); *Mayberry v. State,* 532 S.W.2d 80, 84 (Tex. Crim. App. 1976) (judge's statement that the jury will recall the evidence was not a ruling that properly preserved error); *Wal-Mart Stores, Inc. v. Reece,* 32 S.W.3d 339, 347 (Tex. App.—Waco 2000), *rev'd on other grounds,* 81 S.W.3d 812 (Tex. 2002) (trial court's request that the parties abide by pretrial motions did not preserve error); *Guyot v. Guyot,* 3 S.W.3d 243, 246 (Tex. App.—Fort Worth 1999, no pet.) (a ruling recorded on the court's docket sheet did not preserve error); *Murillo v. State,* 839 S.W.2d 485, 493 (Tex. App.—El Paso 1992, no pet.) (trial court's response, "you may proceed," did not preserve error).

Even though there is a growing body of caselaw with regard to implied rulings preserving error, the best practice is to obtain a clean and unequivocal ruling from the trial court on the record in order to save the hassle of arguing on appeal that an implied ruling was made by the trial judge.

VI. Failing to obtain rulings on objections to summary judgment evidence *may* waive error

Another situation that commonly arises where a party fails to properly preserve error is when the party fails to obtain a ruling on its objections to summary judgment evidence. It is not uncommon to see a laundry list of objections to summary judgment evidence. It is also not uncommon to see a proposed order submitted by that same party that fails to address the objections the party made to the summary judgment evidence. Preserving error in a summary judgment context is generally no different than preserving error at trial—a party must make a timely and specific objection and obtain a ruling on the objection. *See City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d 671, 677 (Tex. 1979); *Roadside Stations, Inc. v. 7BHF, Ltd.,* 904 S.W.2d 927, 932 (Tex. App.—Fort Worth 1995, no writ).

There are exceptions to the rule that a ruling must be obtained with respect to affidavits containing defects in substance, but again, the best practice is to obtain a ruling on the record in order to avoid the hassle of arguing an exception to the general rule. *See, e.g., Coastal Transp. Co. v. Crown Cent. Pet. Corp.,* 136 S.W.3d 227, 233 (Tex. 2004) (conclusory expert testimony does not require an objection in order to preserve error); *Brown v. Brown,* 145 S.W.3d 745, 752 (Tex. App.—Dallas 2004, pet. denied) (no objection is required to preserve error when an affidavit exclusively relies upon facts contained in a missing exhibit); *Hou-Tex, Inc. v. Landmark Graphics,* 26 S.W.3d 103, 112 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (no objection is necessary to preserve error with regard to unsubstantiated legal conclusions); *Dillard v. NCNB Tex. Nat'l Bank,*

815 S.W.2d 356, 360-61 (Tex. App.—Austin 1991, no writ) (conflicts in movant's summary judgment evidence that raise a fact issue cannot support a summary judgment, even in the absence of an objection); *Harley-Davidson Motor Co. v. Young,* 720 S.W.2d 211, 213 (Tex. App.—Houston [14th Dist.] 1986, no writ) (unsubstantiated factual conclusions do not require an objection). It is preferable, from a strategy standpoint and from a time standpoint, to obtain rulings on all objections. Doing so will make your life much easier.

VII. Failing to preserve error when a trial court denies a motion to strike for cause in *voir dire*

A Harris County trial court judge wrote that he has only seen two attorneys properly preserve error with regard to a trial court's denial of a party's motion to strike a veniremember for cause. Randy Wilson, *Why Can't Lawyers Preserve Objections,* Vol. 69, No. 4, TEX. BAR J. 316, 318 (April 2006). This revelation is surprising, as preserving error from a trial court's denial of a motion to strike is fairly straightforward.

The procedure for preserving error as a result of a trial court's denial of a motion to strike for cause is set forth in *Cortez v. HCCI–San Antonio, Inc.,* 159 S.W.3d 87 (Tex. 2005) and in *Hallett v. Houston Northwest Medical Center,* 689 S.W.2d 888 (Tex. 1985). The first obvious step is for the party to make a motion to strike a veniremember for cause. If the motion for strike is denied, the moving party must use one of its peremptory challenges on the objectionable juror. Next, the moving party must exhaust all of its remaining peremptory challenges. Finally, the party must notify the trial court that a specific objectionable veniremember remains on the jury panel after it uses all of its peremptory strikes. If the questionable veniremember actually serves on the jury, error has been preserved with regard to the denial of the motion to strike for cause.

An example of the proper way to preserve error with regard to a trial court's denial of a motion to strike for cause is as follows:

> ATTORNEY: Your Honor, our challenge for cause with regard to Juror Number Three has been overruled. Please be advised that my client is now using one of her peremptory challenges on Juror Number Three. Also, please be advised that we have used all of our peremptory challenges, as noted by the strike list we have submitted to the Court. Had the Court granted our motion to strike with respect to Juror Number Three, we would have used one of our peremptory challenges on Juror Number 20. Juror Number 20 is an objectionable juror that is remaining on the panel.

VIII. A party may not rely on objections made by a co-party unless there is an agreement on the record to do so that is accepted by the trial court on the record

It is not uncommon for a case to proceed to trial against multiple defendants, with one defendant being the "target defendant." At trial, the "target defendant" may more or less take the "lead." Likewise, there may be multiple plaintiffs with one of the plaintiffs' counsel more or less taking the lead.

Error preservation challenges arise when one of the attorneys for a side asserts an objection. Parties aligned with the objecting attorney have at times assumed that the objection by the objecting attorney preserves error for all of the parties on that side of the litigation. This assumption is erroneous. *See, e.g., Wolfe v. E. Tex. Seed Co.,* 583 S.W.2d 481, 482 (Tex. App.—Houston [1st Dist.] 1979, writ dism'd) (each party must its own objections to evidence if it wishes to properly preserve error).

The objection by the objecting attorney will only preserve error for his specific client. Each party is responsible for making their own objections and obtaining their own rulings. *Id.* Specifically, a party cannot rely upon a co-party's objection unless all of the parties agree that an objection by one side will preserve error for all of the parties on that side and the trial court accepts the agreement on the record. *Celotex Corp. v. Tate,* 797 S.W.2d 197, 201-02 (Tex. App.—Corpus Christi 1990, writ dism'd by agreement). Consequently, unless there is an agreement that is accepted by the trial court on the record that an objection by a side constitutes an objection by all parties on that side of the litigation, then each party must make their own individual objections and of course, obtain a ruling on their objections.

IX. Failing to reassert a motion for directed verdict at the close of all evidence if new evidence has been admitted waives the error

In nearly every trial this author has been a part of, a party has made a motion for directed verdict following the plaintiff's case-in-chief, only to have the trial court deny the motion. The motion for directed verdict and the denial of the motion preserves error for appeal, provided the movant does not introduce additional evidence.

If the movant produces additional evidence after the denial of the motion for directed verdict, the movant is required to reassert the motion for directed verdict at the close of all the evidence or else it waives an error arising out of the trial court's denial of the previously asserted motion for directed verdict. *1986 Dodge Pickup v. State,* 129 S.W.3d 180, 183 (Tex. App.—Texarkana 2004, no pet.). Too often, the party who has made a motion for directed verdict following the close of the plaintiff's case-in-

chief fails to reassert the motion after introducing additional evidence. Doing so fails to preserve this issue for appeal.

Additionally, too often counsel assumes that they do not have to assert a motion for directed verdict in a bench trial. This assumption is incorrect, as a party is required to assert a motion for directed verdict and obtain a ruling in the same manner as in a jury trial in order to properly preserve error for appeal. *Horton v. Horton,* 965 S.W.2d 78, 86 (Tex. App.—Fort Worth 1998, no pet.).

X. Failing to make a record of objections and argument made during the informal jury charge conference can waive errors arising during the conference

Preserving error with respect to the trial court's jury charge is one of the more challenging and confusing aspects of litigation. As a starting point, counsel needs to make sure that their objections and requests are on the record, as well as the trial court's rulings. Again, this sounds simple enough and rather elementary, but problems in making a record still occur. The reason for this failure to make a record arises out of the manner in which the charge conference is typically handled by the trial court. A trial court will usually hold an informal charge conference with the attorneys. The attorneys will discuss their objections, their requests, and present their arguments to the judge—all of which are off of the record. The judge then rules on the objections and requests during the informal charge conference off the record.

The problem in preserving error arises when the parties go back on the record to memorialize their objections and the court's rulings. Too often, an objection does not get stated on the record or a party does not obtain a ruling on an objection or request on the record, which waives any error. Counsel needs to make sure that all objections, requests, and arguments that were discussed during the informal conference make their way on to the record, as well as the trial court's rulings. *See Verret v. American Biltrite, Inc.*, No. No. 2-04-244-CV, 2006 WL 2507318, at *2 (Tex. App.—Fort Worth Aug. 31, 2006, pet. denied) (mem. op.). On more than more occasion counsel was certain that an objection was made, only to discover the objection was not made on the record during the formal charge conference, which waived any error.

Conversely, problems can also arise when the trial court conducts what is essentially an informal charge conference on the record, while insisting that the informal conference serve as the formal conference. In *Wackenhut Corrections Corp. v. De la Rosa*, the Thirteenth Court of Appeals made the following comment about the way the charge conference was handled:

> Analyzing the charge complaints has been made exceedingly complex due to the record's lack of clarity. On September 14 and 15, 2006, while the

> trial was ongoing, the trial court held a hearing on the record where the parties discussed their disagreements about the charge. At first, the parties appeared to believe this hearing constituted an informal charge conference during which both parties would attempt to assist the court in crafting the charge. Shortly after beginning the hearing, however, the trial court made it clear that it considered this hearing to be the "formal" charge conference. Due to the numerous disagreements between counsel regarding the charge, this "formal" charge conference was nothing short of chaotic. For example, the trial court interspersed a few of its rulings during the parties' arguments, but it reserved many of its rulings until the end of the hearing, by which time the parties and the court apparently became confused about what rulings had been made or had yet to be made. This resulted in more discussions with the court about issues that one party or the other understood to be previously determined. With that background, and with much chagrin, we proceed to determine whether Wackenhut preserved its complaints about what ultimately became the final charge.

305 S.W.3d 594, 610-11 n.16 (Tex. App.—Corpus Christi 2009, no pet.). Thus, if the informal charge conference is conducted on the record, you should be aware of the record you are making, keep track of any rulings made by the trial court during the conference, and if necessary, restate your objections and the rulings clearly after the final charge has been drafted.

XI. Failing to properly preserve error with the submission of the jury charge waives the error

A complete discussion of the mechanics of objecting to the charge and any omission from the charge is beyond the scope of this paper. However, there are a couple of concepts that every trial counsel should be aware of.

First, counsel must object when the trial court submits an erroneous or defective question, instruction, or definition in order properly preserve error. *Equistar Chems., L.P. v. Dresser-Rand,* 240 S.W.3d 864, 868 (Tex. 2007).

Second, if the trial court omits a question upon which the party has the burden of proof, the party must submit a request that the question to be included in the charge in order to properly preserve error. *W. O. Bankston Nissan, Inc. v. Walters,* 754 S.W.2d 127, 128 (Tex. 1988). All independent grounds of recovery and defenses are waived if the question is omitted and not conclusively established as a matter of law. TEX. R. CIV. P. 279.

Third, if the trial court omits an instruction or request submitted by a party, the party must make a written request for the instruction or request—a party cannot dictate a requested instruction into the record. TEX. R. CIV. P. 274; 278; *Fairfield Estates L.P. v. Griffin,* 986 S.W.2d 719, 724 (Tex. App.—Eastland 1999, no pet.).

Fourth, in multi-party cases, each party is required to make their own objections to the charge, as a party is not permitted to adopt another party's objections. *C. M. Asfahl Agency v. Tensor, Inc.,* 135 S.W.3d 768, 795-96 (Tex. App.—Houston [1st Dist.] 2004, no pet.). Likewise, a party cannot adopt an objection from one question or instruction and apply it by reference to other questions or instructions. TEX. R. CIV. P. 274.

Finally, counsel must ensure that the trial court rules on all objections and requests before the court reads the charge to the jury. *Id*. at R. 272. Once the charge is read to the jury, any error in its submission is waived if the trial court has not made a ruling on the party's objection or request.

XII. Failing to make a record of the harm caused the erroneous admission of evidence

One of the most frustrating aspects of error preservation is when you have made a timely, specific, and proper objection, and obtained a ruling from the trial court on the record, only to have the court of appeals hold that any error in the admission of the evidence was harmless. Consequently, counsel must be mindful of establishing harm and making a record of harm in order to have any sort of realistic chance of overcoming a harmless error analysis on appeal. *See* Russell Post, *Preservation of Harm: A New Approach to an Old Problem,* Chapter 17.1, 19th Annual Advanced Evidence and Discovery Conference (April 2006).

Counsel should take affirmative steps to make a record of the harm caused by the erroneous admission of the evidence at the time of his objection and discuss the harm that will result. *Id.* Establishing a record of harm is critical if counsel wishes to have a realistic chance of prevailing on appeal, as the harmless error rule, applied with the abuse of discretion review for the admission of evidence, renders nearly every attack on trial management rulings a herculean task. *Id.* (citing Lynne Liberato, et al, *Reasons for Reversal in the Texas Court of Appeals,* 44 S. TEX. L. REV. 431, 442-43 (2003) ("It was similarly rare that the courts of appeals reversed on the basis of any other complaint concerning the manner in which the trial was conducted. In the eyes of the court of appeals, few trials are so seriously flawed that reversal is required.")).

In order to constitute harmful error, the erroneously admitted evidence must have (a) probably caused the rendition of an improper judgment or (b) probably prevented the appellant from properly presenting the case to the court of appeals. TEX.

R. APP. P. 44.1. With regard to the erroneous admission of evidence, the appellant must "demonstrate that the judgment turns on the particular evidence admitted." *Nissan Motor Co. v. Armstrong,* 145 S.W.3d 131, 144 (Tex. 2004).

How exactly does one make a record of the harm caused by the improper admission of evidence will vary from case-to-case. For example, it has been suggested that counsel can make a record of harm by predicting that opposing counsel will stress the objectionable evidence in closing argument. *See* Post, *supra*; *see also Nissan Motor Co.,* 145 S.W.3d at 144 ("[W]e have sometimes looked to the efforts made by counsel to emphasize the erroneous evidence."). Therefore, counsel can show harm by relying upon the emphasis placed on the evidence by opposing counsel. If the evidence at issue was emphasized by opposing counsel in *voir dire,* in his opening statement, and throughout the duration of trial, the more likely a showing of harm can be established.

Another example of preserving harm is by presenting extrinsic evidence to the trial court in support of the objection. Specifically, it has been suggested that in cases involving facts that tend to repeat themselves, i.e., mass tort litigation, counsel could use verdicts from other cases in which the objectionable evidence was admitted as a means of predicting harm. *Id.* Specifically, counsel can present to the court evidence of the difference in the size of verdicts between cases in which the objectionable evidence was allowed and in cases in which the objectionable evidence was excluded. *Id.* A particular example would be the admission of the testimony of a particular expert witness—counsel could show that in cases in which his testimony was allowed typically had much larger verdicts than the cases in which his testimony was excluded.

Another weapon for preserving harm is the use of academic literature with regard to the effects of certain types of evidence on juries. *Id.* Making a record of harm in this manner provides the party "with real ammunition rather than relying on speculation" when challenging the trial court's decision to admit improper evidence on appeal. *Id.*

CONCLUSION

Preserving error is one of the most challenging tasks for any trial attorney, who must be primarily concerned with persuading the finder of fact to side with his client. Error preservation, however, is not something that should be taken lightly or done haphazardly. It is a helpless feeling to be correct on the law, only to have waived any complaint on appeal due to the failure to properly preserve error.

Section 41.0105—Dealing with the Emerging Majority Rule in the Real World

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INTRODUCTION

In 2003, as part of tort reform, the Texas Legislature enacted section 41.0105 of the Civil Practice and Remedies Code. At that time, the Legislature likely had no idea that this thirty-two-word, one-sentence-provision would generate so much debate in the Bar, or that nearly seven years later that debate would rage on, often sparking emotionally-charged discussions on how to apply the statute in real world litigation.[1] After all, the statute plainly states it is a limit on the amount of damages a claimant can recover for medical or health care expenses. Pretty simple, right? Unfortunately, no. The statute also plainly indicates it is an evidentiary provision. So, litigants and courts have struggled with how to apply the statute at trial. Should a plaintiff be required to present its medical bills, including all write-offs or reductions from insurance, Medicare, or the like, to the jury? Or should the plaintiff present the total amount billed without write-offs so the jury can determine if the billed expenses were reasonable and necessary, and the trial court can reduce the award to account for write-offs, if any, post-trial?

> **FN1:** *See, e.g.*, Judge Randy Wilson, *An Enigma Shrouded in a Puzzle*, 71 TEX. BAR J. 812, 813, 816 (Nov. 2008); Judge Gisela D. Triana-Doyal, *Another Take on "Actually Paid or Incurred,"* 72 TEX. BAR J 16, 17 (Jan. 2009).

It appears the emerging majority rule is for the trial court to apply section 41.0105 as a post-trial damages cap. This article will summarize the current state of Texas law related to section 41.0105, and then examine the pitfalls of following what appears to be the emerging majority rule.

I. Section 41.0105—Limit on Evidence, Post-Trial Damages Cap, or Both?

If you try cases or handle appeals involving medical expenses, then you are probably intimately familiar with section 41.0105, which states:

> Evidence Relating to Amount of Economic Damages
>
> In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.

TEX. CIV. PRAC. & REM. CODE § 41.0105. The plain language of the section shows that it is a provision relating to evidence (i.e., "Evidence Relating to Amount of Economic Damages"), and also a limitation on the recovery of damages (i.e., "recovery . . . is limited . . . ."). Therein lies the problem addressed in this article.

At trial, there is often a two-part debate. First, parties debate whether a plaintiff is entitled to recover expenses that were written-off, deducted, or otherwise forgiven by the service providers even though Texas courts have consistently held section 41.0105 bars recovery of such expenses because they will never be paid or incurred by—or on behalf of—the plaintiff.[2] The more challenging questions arise in the second part of the debate; namely, should the judge or the jury make the ultimate determination of what expenses are recoverable? The majority of Texas courts are asking the jury to decide whether the total amounts billed, without reference to write-offs, were reasonably and necessarily incurred. The trial court then applies section 41.0105 as a damages cap post-verdict. This dual approach has created challenges for preserving error for both plaintiffs and defendants; has led to odd, windfall judgments; and, in the authors' opinion, is the wrong way to handle this issue.

> **FN2** *E.g., Matbon, Inc. v. Gries*, 288 S.W.3d 471, 481 (Tex. App.—Eastland 2009, no pet.) ("Amounts that a health care provider subsequently writes off its bill do not constitute amounts actually incurred by either the claimant or the claimant's insurer because neither the claimant nor the insurer will ultimately be liable for paying these amounts."); *Tate v. Hernandez*, 280 S.W.3d 534, 541 (Tex. App.—Amarillo 2009, no pet.) (opining "*compensation* is the ultimate purpose of our system of jurisprudence" and "[b]ecause Hernandez's medical bills were discharged in bankruptcy, recovery of said sums by Hernandez is not necessary to *compensate* him for his injuries" and are, therefore, barred from recovery by section 41.0105); *see also* cases cited *infra* note 5.

II. The Emerging Majority Rule

Six of the fourteen intermediate Texas courts of appeal have issued opinions addressing damages under section 41.0105, with the Amarillo court leading at three opinions on the issue.[3] Several federal district courts have also opined on the application of section 41.0105.[4] From these cases, a two-part majority rule has emerged:

1. Medical expenses written-off or otherwise deducted from a claimant's medical bills are not recoverable, including debts discharged in bankruptcy.[5]

2. Evidence of expenses actually paid or incurred need not be presented to the jury and the trial court should apply the limitation post-trial.[6]

FN3. *Matbon, Inc.*, 288 S.W.3d at 481(holding section 41.0105 does not allow recovery of amounts initially incurred but ultimately written-off); *Escabedo v. Haygood*, 283 S.W.3d 3, 7 (Tex. App.—Tyler 2009, pet. granted) (holding evidence of expenses initially incurred constitutes no evidence of expenses recoverable under section 41.0105 as actually paid or incurred and noting medical bills reflecting only charges initially billed should be excluded from evidence at trial as irrelevant to the proper measure of damages); *Tate*, 280 S.W.3d at 540 n.7, 541 (holding debts discharged in bankruptcy are not actually incurred and are, therefore, not recoverable and confirming that the 41.0105 should be applied post-verdict as a damages cap); *Irving Holdings, Inc. v. Brown*, 274 S.W.3d 926, 931, 932 (Tex. App.—Dallas 2009, pet. denied) (holding damages must be reduced post-trial by the percentage of the claimant's responsibility under section 33.012 and then may be reduced further pursuant to section 41.0105 if the damages still exceed the amount actually paid or incurred); *Mills v. Fletcher*, 229 S.W.3d 765, 769, n.3 (Tex. App.—San Antonio 2007, no pet.) (plurality opinion holding expenses written off are not recoverable per section 41.0105, and noting the Legislature intended to abrogate the collateral source rule when it enacted section 41.0105); *see also Wackenhut Corr. Corp. v. De la Rosa*, 305 S.W.3d 594, 646-47 (Tex. App.—Corpus Christi 2009, no pet.) (holding uncontradicted evidence that EMS charges were billed without evidence the bill was actually paid "conclusively established" the claimant incurred the charges in accordance with section 41.0105); *Fuentes v. Schooling*, No. 07-07-00118-CV, 2008 Tex. App. LEXIS 9001, at *2 (Tex. App.—Amarillo Dec. 3, 2008, no pet.) (mem. op.) (holding the trial court erred by reducing amount of medical expenses found by the jury under section 41.0105 because the amount found by the jury was less than the amount actually paid or incurred); *Gore v. Faye*, 253 S.W.3d 785, 790 (Tex. App.—Amarillo 2008, no pet.) (holding section 41.0105 should be applied post-verdict, and determining the trial court did not abuse its discretion by denying defendant's request to present evidence of amounts written off).

FN4. *Tello v. United States*, 608 F. Supp. 2d 805, 809 (W.D. Tex. 2009) (applying legislative history of section 41.0105 to hold damages for lost household services are not pecuniary or economic in nature unless there is evidence of actual payments to replace the lost services, and thus,

evidence of the loss of service "resulted in direct financial loss to the survivors"); *see also Tholcken v. United States*, No. 4:07CV139, 2008 U.S. Dist. LEXIS 47947, at *2 (E.D. Tex. June 19, 2008) (reducing total amount of medical expenses found to be reasonable and customary by the amounts written-off per section 41.0105); *Contreras v. KV Trucking, Inc.*, No. 4:04-CV-398, 2007 U.S. Dist. LEXIS 70140, at *5-6 (E.D. Tex. Sept. 21, 2007) (denying defendant's motion to exclude evidence of medical expenses not actually paid); *Goryews v. Murphy Exploration & Prod. Co.*, No. V-06-01, 2007 U.S. Dist. Lexis 57719, at *12-13 (S.D. Tex. Aug. 8, 2007) (reducing amount of medical expenses to the amount actually paid on the plaintiff's behalf); *Coppedge v. K.B.I., Inc.*, No. 9:05-CV-162, 2007 U.S. Dist. LEXIS 48407, at *8-9 (E.D. Tex. July 3, 2007) (granting plaintiff motion in limine to exclude evidence of write-offs and holding section 41.0105 should be applied post-verdict); *Self v. Wal-Mart Stores, Inc.*, No. 2:05-CV-301, 2007 U.S. Dist. Lexis 49662, at *3-4 (E.D. Tex. Apr. 5, 2007) (granting plaintiff's motion in limine as to evidence of expenses written-off or otherwise deducted from medical bills).

FN5. *Matbon, Inc.*, 288 S.W.3d at 481; *Haygood*, 283 S.W.3d at 7; *Tate*, 280 S.W.3d at 541; *Mills*, 229 S.W.3d at 769; *see also Tholcken*, 2008 U.S. Dist LEXIS 47947, at *2; *Goryews*, 2007 U.S. Dist. LEXIS 57719, at *12-13. *But see Wackenhut*, 305 S.W.3d at 646-47.

FN6. *Irving Holdings*, 274 S.W.3d at 931, 932; *Tate*, 280 S.W.3d at 540, n.7 (re-confirming section 41.0105 should be applied "post-verdict, as a cap to recoverable damages"); *Gore*, 253 S.W.3d at 790; *see also Contreras*, 2007 U.S. Dist. LEXIS 70140, at *5-6; *Coppedge*, 2007 U.S. Dist. LEXIS 48407, at *8-9; *Self*, 2007 U.S. Dist. LEXIS 49662, at *3-4.

A. The emerging majority rule in practice—*Gore* and *Irving Holdings*

Two cases illustrate the potential for inequitable and downright odd results when the jury decides the gross amount of medical expenses that are reasonable and necessary, and the court applies section 41.0105 post-verdict.

1. *Gore v. Faye*

First, the opinion in *Gore v. Faye* provides some support for litigants to completely avoid the application of section 41.0105. There, the Amarillo Court of Appeals determined trial courts are not required to present section 41.0105 evidence to the jury and held the trial court did not abuse its discretion by excluding such evidence. *Gore*, 253 S.W.3d at 790. Although the appellant did not appeal the trial court's failure

to apply an off-set post-verdict, that decision necessarily impacts whether the initial decision to exclude the evidence constitutes an abuse of discretion. Yet, the Amarillo court did not address that connection, instead opting to affirm on narrow grounds.

In *Gore*, the trial court denied the defendant's requests to present evidence of medical write-offs to the jury, but assured the defendant that its offer of proof would be considered and applied post-verdict. *Id*. at 787-788. The trial court affirmatively stated that the application of section 41.0105 was "a post-verdict pre-judgment matter," and that the court would consider the testimony post-verdict and pre-judgment. *Id*. at 788. The plaintiff presented evidence that she incurred $8,086.10 in gross medical expenses, and defendant's offer of proof showed that approximately $5,749.00 of that amount was actually paid or incurred. *Id*. But the jury awarded only $6,391.10. *Id*.

Despite its prior assurances, the trial court refused to apply the section 41.0105 evidence post-verdict because the amount awarded by the jury was less than the total requested by the plaintiff. *Id.* The trial court decided that "it was not feasible to accurately offset the past medical charges according to *Gore*'s section 41.0105 evidence," and, instead, awarded the plaintiff $6,391.10 less the plaintiff's percentage of fault. *Id*. In other words, the plaintiff recovered more than she could have recovered had the court applied section 41.0105 or had the jury been provided section 41.0105 evidence.

The plaintiff was essentially allowed to have her cake and eat it too while the defendant was led astray by the court's assurance that the Section 41.0105 evidence would be applied post-verdict. Although the Amarillo Court of Appeals affirmed the judgment solely based on its determination that trial courts are permitted to exclude evidence of offsets to the plaintiff's past medical expenses from the jury's purview, the potential impact of the opinion is much further reaching because it potentially allows courts to exclude section 41.0105 evidence both during trial and post-verdict. Such a result is inequitable and leaves litigants without any sense of security regarding how these issues will be handled.

2. *Irving Holdings v. Brown*[7]

Irving Holdings is also troubling. There, the Dallas Court of Appeals determined any reduction of damages based on a plaintiff's proportionate responsibility should be calculated *before* the court applies section 41.0105. *Irving Holdings*, 274 S.W.3d at 931, 932. The jury found that the plaintiff and the defendant were each negligent and the percentage of responsibility for each was fifty percent. *Id.* at 928. The jury also found the Plaintiff's past medical expenses totaled $89,000. *Id.* Defendant's insurer

established outside of the jury's presence that only $45,429.95 of the total expenses were actually paid. *Id.*

> **FN7.** The Texas Supreme Court's denial of the petition for review in this case does not reflect that the Court agrees with this opinion. By denying, rather than refusing, the petition, the Texas Supreme Court indicates that it "is not satisfied that the opinion of the court of appeals has correctly declared the law in all respects." TEXAS RULES OF FORM, App. B (Texas Law Review Ass'n et al. eds., 10th ed. 2003).

In rendering judgment, the trial court first reduced the gross medical expenses found by the jury (i.e., $89,000) by the plaintiff's fifty percent responsibility and determined that the plaintiff was entitled to recover, at most, $44,500 in medical expenses. *Id.* at 929. Because that amount was less than the expenses actually paid, the trial court did not apply section 41.0105 to further reduce the amount of medical expenses. *Id.*

The court of appeals affirmed:

> [S]ection 41.0105 must be applied after all other calculations limiting or reducing the amount of recoverable damages to determine whether the damages attributable to medical or health care expenses that are otherwise recoverable—without regard to section 41.0105—fall above or below that section's limitation . . . . If the resulting damage amount is not greater than the amount "actually paid or incurred," then section 41.0105's limitation is satisfied and no further reduction in the amount of those damages recoverable is necessary.

Irving Holdings, 274 S.W.3d at 931. To reach this conclusion, the court opined applying section 41.0105 first would treat that provision as a limit on damages rather than a limit on recovery, and would allow a tortfeasor that is fifty percent responsible for the accident to pay only 25% of the medical expenses found by the jury. *Id.*

It is the latter determination that turns the statute on its head and leads to an improper windfall for the plaintiff. In this case, section 41.0105 limited the plaintiff's recovery of medical expenses to no more than $45,429.95, the expenses actually paid on his behalf. The $89,000 found by the jury could not be recovered by plaintiff and should have been treated as a fictitious number showing simply that the jury determined that all of the care received by plaintiff were reasonably and necessarily incurred as a result of the accident. By applying section 33.012 first, the court of appeals ignores the fictitious nature of the jury finding. Contrary to its analysis, the resulting judgment leaves the defendant paying nearly 100% of the plaintiff's

recoverable medical expenses even though the defendant is only fifty percent responsible for the accident. That result is certainly not what the Legislature had in mind when it enacted section 41.0105. *See, e.g., Tate*, 280 S.W.3d at 536 (noting section 41.0105 and similar statutes were intended to limit the recovery of personal injury plaintiffs).

B. The current minority view—*Escabedo v. Haygood*

The Tyler Court of Appeals took the opposite approach in *Escabedo v. Haygood*, 283 S.W.3d 3 (Tex. App.—Tyler 2009, pet. granted) ("*Haygood*"). Following a car wreck, Haygood sought, among other damages, his past medical expenses. *Haygood*, 283 S.W.3d at 4-5. Before trial, Escabedo moved to exclude any evidence of medical or health care expenses that were written-off and were, thus, "in excess of the amount actually paid or incurred by or on behalf of [Haygood]." *Id.* She based this request on section 41.0105 and argued evidence of the total amount billed would address an incorrect measure of damages and would constitute no evidence of the medical expenses actually paid or incurred by Haygood or on his behalf. *Id.* at 5. The trial court denied Escabedo's motions, granted Haygood's request that evidence of reductions in the total billed be excluded, and allowed Haygood to present evidence of the total amount billed without regard to any offsets. *Id.*

It was undisputed the total billed was $110,069.12 and that $82,294.69 had been written off by Haygood's providers as required by Medicare. *Id.* In other words, Haygood and Medicare had actually paid or incurred only $27,774.43. *Id.* The jury assessed the full amount of $110,069.12 as past medical care expenses, and the trial court rendered judgment on that amount. *Id.* Escabedo sought judgment notwithstanding the verdict, arguing the evidence of the full amount billed related to an improper measure of damages and, therefore, constituted no evidence of the expenses actually paid or incurred. *Id.* at 5-6. The trial court denied that motion. *Id.* at 6.

The Tyler Court of Appeals reversed, holding section 41.0105 is "a measure of damages [that] not only limits the amount of damages recoverable, but also affects the relevance of evidence offered to prove damages." *Id.* at 7. The court determined bills showing only the amounts "initially incurred" (i.e., initially billed prior to any deductions) "are irrelevant and should be excluded at trial." *Id.* The court also held such evidence is legally insufficient as to the correct measure of damages (i.e., "the amount actually paid or incurred by or on behalf of the claimant."). *Id.* The court sustained Escabedo's legal sufficiency point, reversed the judgment as to the amount of medical expenses, and suggested a voluntary remittitur to reflect the amount actually paid or incurred. *Id.* at 8.

The Texas Supreme Court granted Haygood's petition for review but has not yet set an argument date. Haygood argues, in part, that the court of appeals' decision eliminates the requirement that a claimant prove that the expenses were reasonable and necessary. As amicus curiae National Association of Mutual Insurance Companies aptly noted, that should not be the case:

> Section 41.0105 *supplements*—rather than supplants—the "reasonable and necessary" measure of damages. *See* TEX. CIV. PRAC. & REM. CODE § 41.0105 (*"In addition to any other limitation under law . . . ."*) (emphasis added). Claimants still must present evidence that any medical expenses they seek to recover are reasonable and necessary. Nothing in Section 41.0105 states otherwise. Section 41.0105 merely requires that claimants also present evidence that any "reasonable and necessary" expenses were "actually paid or incurred" by or on behalf of the claimants. *Id.*

(Brief at 5, *available at* http://www.supreme.courts.state.tx.us/ebriefs/09/09037705.pdf). Indeed, excluding evidence of amounts "initially incurred" at trial, or removing the question of past medical expenses from the jury altogether, would avoid many of the pitfalls discussed below.

III. Potential Pitfalls of the Post-Trial Majority Rule

The post-trial application of Section 41.0105 is appealing because it eliminates the apparent conflict between the statute on the one hand, and the collateral-source doctrine and prohibition of evidence of insurance on the other. Despite its surface appeal, however, the post-trial application of section 41.0105 has several pitfalls. These problems arise in three areas: (1) plaintiff's proof in light of the pattern charge; (2) proportionate responsibility; and (3) pre-existing conditions.

A. Plaintiff's Proof

With respect to plaintiff's proof, the problem is evident. The trial court is actually resolving a fact issue in a jury trial. In other words, a jury is not allowed to determine the amount of expenses actually paid or incurred and whether these amounts are reasonable or necessary. The idea that disputed evidence of the plaintiff's recoverable damages would not be presented to the jury is not contained in the statute or legislative history. One would think that had the legislature intended to work such a significant change to trial procedure, it would have said as much. On the contrary, section 41.0105 is entitled "Evidence Relating to Amount of Economic Damages." If the statute acts as a simple damages cap, this title is meaningless, bordering on ludicrous.

It is true that some remedies such as injunctions, disgorgement, and other equitable remedies are the exclusive province of the trial court. But even in those cases, the jury is allowed to resolve disputed fact questions. It is no answer to assume that, because the jury has decided a higher amount is reasonable, a lower amount must also be reasonable. There may be a legitimate dispute regarding the amount of expenses actually paid or incurred. And as discussed below in more detail, the jury may have determined certain expenses were unreasonable and unnecessary, or simply not caused by the defendant's conduct. By simply applying section 41.0105 mechanically after trial, the trial court cannot excise any rejected or reduced amounts absent a jury finding on each expense.

Additionally, when the parties dispute whether past medical expenses were actually paid or incurred by or on behalf of the plaintiff, the suggested pattern charge advises the jury to find the amount of past medical expenses actually paid or incurred.[8] How can a jury find the correct amount without evidence of the proper measure of damages? Obviously, for this question to be submitted, there must be evidence of the amount actually paid or incurred admitted at trial. If the evidence admitted at trial reflects only the amount billed for past medical expenses, this would be insufficient to answer the question—as the court of appeals held in *Haygood*.[9] Either evidence of the amount of expenses actually paid or incurred should be admitted during trial or the pattern charge should not be used.

FN8. COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 8.2 cmt. (2008).

FN9. *Haygood*, 281 S.W.3d at 7.

B. Proportionate Responsibility

Applying section 41.0105 post-trial also creates a problem with proportionate responsibility under chapter 33 of the Civil Practice and Remedies Code. The problem arises by applying the percentage of responsibility finding to the fictional amount of damages found by the jury based on past medical bills. This problem is demonstrated by the following example.

Assume the jury is presented with medical bills in the amount of $1,000, of which $600 was actually paid or incurred. The jury finds the plaintiff 20% responsible. Under the post-trial approach, $800 is the maximum amount plaintiff can recover under Chapter 33.[10] If one assumes a single defendant, that defendant is liable for $800. After the court applies section 41.0105, plaintiff recovers $600, the maximum amount plaintiff could recover regardless of her own negligence. This is the result in *Irving Holdings* described above. This holding is untenable in light of the legislature's clear

intent to reduce plaintiff's recoverable damages by the percentage of plaintiff's responsibility. Whether one considers section 41.0105 an evidentiary rule as in *Haygood*, or a damage cap as in most of the other cases, any application that obviates the plaintiff's percentage of responsibility must be rejected.

FN10. TEX. CIV. PRAC. & REM. CODE § 33.012.

C. Pre-Existing Conditions

Finally, even if one ignored the issues discussed above, the pre-existing condition problem dooms the post-trial application of section 41.0105. Consider the following hypothetical. Plaintiff has medical bills totaling $1,000 of which $600 were actually paid or incurred. At trial, defendant argues that some of the treatments in the bills were unreasonable or unnecessary because they were the result of pre-existing conditions, or, were at least conditions not caused by the defendant's conduct. The jury finds $800 in past medical expenses. Assuming no negligence on the plaintiff's part, under the post-trial rule, the plaintiff recovers $600. But what about the jury's reduction? Did the jury accept the defendant's argument that some of the treatments were unreasonable or unnecessary, not the result of the defendant's conduct, or both? If so, which expenses were rejected? Which amounts were unreasonable? What treated conditions were pre-existing? Without a line-item finding on each disputed expense, there is no way to tell. It is simply unfair for defendants not to receive the benefit of the jury accepting its argument that some of the conditions treated were not caused by the defendant's conduct.

It is no solution to have the trial court simply reduce the recoverable amount by the same proportion as that awarded by the jury. In the hypothetical above, because the jury awarded 80% of the amount billed, the trial court would reduce the amount actually paid or incurred by 20%, thus leaving the plaintiff to recover $480. But this solution is not fair to the plaintiff because the jury might have reduced some of the expenses by different amounts, and some of the expenses rejected by the jury may have already been significantly reduced in the amount actually paid or incurred. Therefore, a mechanical reduction could disproportionately reduce plaintiff's ultimate award. The bottom line is that, without a jury finding on each disputed expense, it is impossible for the parties or an appellate court to determine what expenses were reduced or rejected.

However, in some cases, submitting a granulated charge regarding medical expenses would be daunting for the parties and the jury. A more straight-forward approach, and one that fits Texas' broad form charge practice, is to allow the jury to determine the amount actually paid or incurred and whether that amount—not a fictional billed amount—was reasonable and necessary. The PJC does not address this scenario, but such a submission would look like this:

a. Reasonable expenses of necessary medical care actually paid or incurred by or on behalf of Paul Payne in the past.

Answer: _____

IV. Practical Advice for Preserving Error

Despite the problems discussed above, there are several procedures that plaintiffs and defendants can invoke to protect their rights and preserve error for appeal.

First, the plaintiff should make an effort to get a pre-trial stipulation as to the amount actually paid or incurred. While a stipulation would not necessarily relieve the plaintiff of the burden to establish the expenses were caused by the defendant's conduct, or that they were reasonable and necessary, it would remove the *amount* from the jury's consideration. Of course, if the defendant failed to file an opposing affidavit under chapter 18 of the Civil Practice and Remedies Code, all of the expenses are considered reasonable and necessary leaving only causation for the jury.[11]

FN11. TEX. CIV. PRAC. & REM. CODE § 18.001(b).

Second, if the amount of certain expenses is disputed, plaintiffs should consider presenting invoices to the jury describing the treatments at issue without revealing the amount billed. This would nullify a defendant's objection to plaintiff's initial medical bills because the care is relevant even if the gross amount is not. The plaintiff could then present the amount actually incurred for the disputed treatment to the jury without raising the specter of insurance.

Third, if the defendant disputes the amount of expenses, or causation related to certain expenses, the plaintiff should move for partial summary judgment under Rule 166a(g) to establish the amount of past medical expenses actually paid or incurred as a matter of law. Even if the trial court denied the motion, the disputed fact issues would be exposed, and the plaintiff could tailor its evidence at trial and the jury charge accordingly.

On the other side of the case, the defendant should start by filing an opposing affidavit under chapter 18 so as to require plaintiff to prove that past medical expenses are reasonable and necessary. This presents a dilemma for plaintiffs. Plaintiffs must decide whether to present evidence of the amounts actually paid or incurred and risk injecting insurance into the case, or rely solely on medical bills and risk an objection to the charge, or worse, insufficient evidence of the proper measure of damages as in *Haygood*.

Second, if the trial court excludes evidence of expenses actually paid or incurred, defendants should make an offer of proof regarding the proper amounts. Defendants should only proffer the evidence it would have offered, omitting any disputed expenses. This allows a court of appeals to modify the judgment—or, as in *Haygood*—suggest remittitur to the proper amount of damages.

Third, defendants should object to the pattern charge if plaintiffs present no evidence of expenses actually paid or incurred. Defendants should also object to any non-pattern charge that does not require a finding of expenses actually paid or incurred. In either case, plaintiffs are forced to present evidence of expenses actually paid or incurred or risk reversible error requiring a new trial as to liability and damages.[12]

FN12. TEX. R. CIV. P. 44 (prohibiting new trial on damages only when liability is contested).

Most of the issues raised herein could be solved by simply requesting separate blanks in the jury charge for disputed expenses. That way, the plaintiff retains the jury's finding on all reasonable and necessary expenses, and defendants obtain the benefit of the jury's finding on the disputed expenses. In the end, the final judgment would accurately reflect the jury's findings while harmonizing section 41.0105 with Chapter 33.

CONCLUSION

While the overwhelming trend is to treat section 41.0105 as a damages cap and apply it to the jury's award post-trial, this approach presents a myriad of problems. Without evidence at trial of the amount of past medical expenses actually paid or incurred, the plaintiff's proof will not square with the pattern jury charge, proportionality under Chapter 33 will be more difficult to determine, and, in the event the jury awards less than the amount sought by the plaintiff, defendants will not receive the benefit of any successful pre-existing condition argument. For these reasons, and considering its title, section 41.0105 is best viewed as a measure of damages. Therefore, evidence of past medical expenses actually paid or incurred should be presented at trial. This procedure solves the problems discussed herein, and works no prejudice as long as the evidence of past medical expenses does not allow the jury to

ascertain the existence of insurance.[13] While *Haygood* may be an outlier, its reasoning is sound, and any rejection or revision to its holding will require a response to the problems created, yet unaddressed, by the majority rule.

> **FN13.** Indeed, it is questionable whether the existence of insurance would be prejudicial at all in light of the fact that medical insurance and discounted bills are a fact of life in America today. *See, e.g., Daughters of Charity Health Servs. of Waco v. Linnstaedter*, 226 S.W.3d 409, 410 (Tex. 2007) ("Few patients today ever pay a hospital's full charges, due to the prevalence of Medicare, Medicaid, HMOs, and private insurers who pay discounted rates.").

"You Can't Handle The Truth!"—Appellate Courts' Authority To Dispose Of Cases Without Written Opinions[1]

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INTRODUCTION

Federal courts of appeal can affirm or reverse a district court's order or judgment without a written opinion explaining the reasoning of their decision. Federal Rule of Appellate Procedure 36 provides that a clerk must enter a judgment "after receiving the court's opinion" or "if a judgment is rendered without an opinion, as the court instructs." FED. R. APP. P. 36(a)(1), (2). Some federal courts of appeal have local rules that govern when they can issue a judgment without an opinion. *See* FED. CIR. R. 36; 1ST CIR. R. 36(a); 4TH CIR. IOP 36.3; 6TH CIR. R. 36; 10TH CIR. R. 36.1. Generally, these rules require a panel to be unanimous on the result and in agreement that there is no jurisprudential purpose in issuing an opinion. Accordingly, those courts routinely dispose of appeals, either after briefing or upon a motion to dismiss, by simply issuing a judgment or by issuing a judgment and a one-line opinion. As an extreme example, some courts have dismissed cases and issued sanctions for filing a frivolous appeal without providing an opinion describing how the appeal was frivolous.

I. "Summary Disposition" Practice

Before going further, this practice must be put into context. A party has no constitutional right to appeal, and the existence of the right to appeal and the parameters of that right find their roots in statutes and rules. *See Furman v. United States*, 720 F.2d 263, 264 (2d Cir. 1983). Moreover, due to docket concerns, the United States Supreme Court has previously expressed its concern that courts of appeal be able to handle their dockets by issuing judgments without opinions. *See Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972). Not surprisingly, the courts of appeal that have addressed this issue have held that they have the authority to decide cases without issuing an opinion. *See Furman*, 720 F.2d at 264; *United States v. Baynes*, 548 F.2d 481, 483 (3d Cir. 1977); *NLRB v. Amalgamated Clothing Workers of Am., AFL-CIO, Local 990*, 430 F.2d 966, 971-72 (5th Cir. 1970). The majority of the states similarly allow courts of appeal to decide an appeal without issuing an opinion. *See* Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions As Informational Regulation,* 58 FLA. L. REV. 743, 761 (2006). Some states call this process a "summary disposition." *See, e.g.*, KAN. R. APP. P. 7.041; N.H. S. Ct. R. 25; N.D. R. App. P. 35.1; OKLA. S. Ct. R. 1.201; UTAH R. App. P. 30-31.

But there is a difference between whether a court *must* issue an opinion informing the parties why the court affirmed or reversed the case and whether a court *should* issue such an opinion. Either by constitution, rule, or common law, some states require appellate courts to issue opinions that provide content as to why the court either affirms or reverses a case. *See, e.g.,* OHIO R. APP. P. 1.201; TEX. R. APP. P. 47.1, 63; WIS. CT. APP. IOP VI(5); *B.E.T., Inc. v. Bd. of Adjustment*, 499 A.2d 811, 811 (Del. 1985); *People v. Garcia*, 118 Cal. Rptr. 2d 662, 667 (Cal. Ct. App. 2002). For example, in Texas, an appellate court "must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal." TEX. R. APP. P. 47.1, 63; *Gonzalez v. McAllen Med. Ctr., Inc.*, 195 S.W.3d 680, 682 (Tex. 2006). Moreover, by Texas common law, if an appellate court holds that a verdict is not supported by factually sufficient evidence, the court must detail all the relevant evidence and explain how it outweighs evidence supporting the verdict or how the verdict is so against the great weight and preponderance of the evidence that it is manifestly unjust. *See Maritime Over-seas Corp. v. Ellis*, 971 S.W.2d 402, 407 (Tex. 1998); *see also Citizens Nat'l Bank in Waxahachie v. Scott*, 195 S.W.3d 94, 96 (Tex. 2006) (holding that an appellate court may not reverse a lower court judgment by "merely saying that the court has reviewed all the evidence and reach[ed] a conclusion contrary to that of the trier of fact" but must explain with specificity why it has substituted its judgment for that of the trial court).

Other states that allow for summary dispositions still require a court of appeals to at least disclose the prior dispositive precedent that disposes of the appeal in the order. *See, e.g.*, KAN. R. APP. P. 7.041; LA. R. CT. APP. 2-16.2; OKLA. S. Ct. R. 1.201. A few states differentiate between affirming a trial court, in which case an appellate court would not have to provide a reason for the affirmance, and reversing a trial court, in which case the appellate court must provide some reason for the reversal. *See, e.g.,* COLO. R. APP. P. 35(e); N.H. S. Ct. R. 25; N.D. R. APP. P. 35.1.

Explaining why courts should provide reasons for their decisions, the Texas Supreme Court recently stated:

> We [previously] held that a trial court may, in its discretion, grant a new trial "in the interest of justice." However, for the reasons stated above, we believe that such a vague explanation in setting aside a jury verdict does not enhance respect for the judiciary or the rule of law, detracts from transparency we strive to achieve in our legal system, and does not sufficiently respect the reasonable expectations of parties and the public when a lawsuit is tried to a jury. Parties and the public generally expect that a trial followed by a jury verdict will close the trial process. Those expectations may be overly optimistic, practically speaking, but the parties

> and public are entitled to an understandable, reasonably specific explanation why their expectations are frustrated by a jury verdict being disregarded or set aside, the trial process being nullified, and the case having to be retried.

In re Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P., 290 S.W.3d 204, 213 (Tex. 2009). Commentators have provided the following reasons why appellate courts should issue opinions that provide the parties with a basis for a court's decision: (1) opinions provide an "informational regulation" that places a check on judicial behavior; (2) opinions provide a mechanism by which parties are better positioned to act in response; (3) opinions require a court to justify its decision in a more systematic, logical way; (4) opinions assure parties that their participation in the justice system was meaningful; and (5) opinions provide a party with a more meaningful opportunity for further review by a higher court. *See* Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions As Informational Regulation,* 58 FLA. L. REV. 743, 743 (2006). Indeed, there is a far less chance that the United States Supreme Court would accept a petition for writ of certiorari from a court of appeals' judgment where there is no opinion. *See Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (Court ordered Fifth Circuit to issue an opinion with reasons so that the Court could determine whether to accept a petition).

II. Potential Solutions and Problems

Given the variety of approaches, an amendment to the Federal Rules of Appellate Procedure should be discussed. Perhaps the courts of appeal should issue an opinion in every case that would provide at least a succinct statement of the reasons behind the disposition. This would not require that every opinion be a lengthy published opinion that discusses every issue in the case. There are many alternatives that address the courts' docket concerns yet provide the parties some indication of the courts' basis for their rulings.

Of course, there are potential constitutional problems even with a court of appeals resolving an appeal with an opinion or statement that is not precedent. *See Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000), *vacated as moot on other grounds*, 235 F.3d 1054 (8th Cir. 2000). As one court has stated, concerns regarding the courts' dockets should not outweigh the judiciary's duty to properly adjudicate:

> We do not have time to do a decent enough job, the argument runs, when put into plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to

> do a competent job with each case. If this means that backlogs will grow, the price must still be paid.

Id. at 904.

CONCLUSION

Though there has been a plethora of commentary regarding the propriety of appellate courts issuing non-precedential, unpublished opinions, there has been considerably less written about the common practice of simply not writing an opinion at all. It would seem that constitutional problems with the practice of using non-precedential, unpublished opinions would apply equally to a non-precedential disposition without an opinion.

You Say Yes, I Say No: Federal Circuit Splits That Impact Texas Lawyers

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INTRODUCTION

Federal circuit splits are a lot like intra-family disagreements: you may not realize a dispute exists until you've walked into the midst of it. A thorough knowledge of the law in the circuit having jurisdiction over your case will not necessarily reveal a split of authority in other circuits. Advance knowledge about these conflicts can be useful at all levels of litigation: in the district court (*e.g.*, laying the groundwork for an appeal), in the court of appeals (*e.g.*, pursuing a decision of first impression in your circuit or seeking *en banc* rehearing), and even in seeking relief in the United States Supreme Court.

This paper covers some of the federal circuit splits that Texas appellate lawyers may encounter in their practice. Each issue is presented in the form of a question that some circuits answer "yes," and others answer "no." As a bonus, we also mention one circuit split recently resolved by—gasp—legislative action.

For additional discussion of issues that are percolating in the federal circuit courts, please join us at the American Bar Association Appellate Judges' Education Institute this November 18-21 in Dallas. The Institute brings together appellate lawyers, staff attorneys, and judges from across the country for useful and thought-provoking presentations by top-notch speakers. For more information, please visit the Institute's website at http://www.law.smu.edu/AJEI/Home.

I. Is a stay of the underlying action required upon an appeal from denial of a motion to compel arbitration?

When a federal court denies a party's motion to compel arbitration, the Federal Arbitration Act allows for an automatic appeal. 9 U.S.C. § 16(a)(1)(C). But that statute does not specify whether the interlocutory appeal has the effect of staying the underlying proceeding while the appellate court decides the appeal.

Courts have split as to whether a stay is required or whether it is optional. Courts holding that the stay is required, so long as the appeal is not frivolous, include the Third, Seventh, Tenth, and Eleventh Circuits. *See Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 215 n.6 (3d Cir. 2007); *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 474 (10th Cir. 2006); *McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1162 (10th Cir.

2005); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251, 1253 (11th Cir. 2004); *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997). The D.C. Circuit has taken the issue one step further, holding the stay is automatic barring a finding that the interlocutory appeal is frivolous. *Bombadier Corp. v. Nat'l R.R. Passenger Corp.*, No. 02-7125, 2002 WL 31818924, at *1 (D.C. Cir. Dec. 12, 2002). Courts holding that the district court may grant the stay, but that a stay is optional, include *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 53-54 (2d Cir. 2004); *Britton v. Co-Op Banking Group*, 916 F.2d 1405, 1411-12 (9th Cir. 1990); and *Hill v. Peoplesoft USA, Inc.*, 341 F. Supp. 2d 559, 560-61 (D. Md. 2004) (district court in otherwise undecided Fourth Circuit). The only court within the Fifth Circuit that appears to have addressed the issue is *Trefny v. Bear Stearns Sec. Corp.*, 243 B.R. 300, 309 (Bankr. S.D. Tex. 1999). That court noted the Seventh Circuit's approach, but employed a four-factor analysis as to whether the case should be stayed pending appeal.

The source of the conflict is the United States Supreme Court's decision in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). In that case, the Court stated that the filing of a notice of appeal is an event of jurisdictional significance and that "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously." *Id.* The common phrasing used to describe the situation following the filing of an interlocutory appeal is that the "district court is divested of jurisdiction upon the filing of the notice of appeal with respect to any matters involved in the appeal" but that the district court "may still proceed with matters not involved in the appeal." *Taylor v. Sterrett*, 640 F.2d 663, 667-68 (5th Cir. 1981). As explained in Moore's Federal Practice treatise, this phrasing is not precisely correct. "The principle is not derived from the jurisdictional statutes or from the rules. It is a judge-made doctrine, designed to promote judicial economy." 20 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 303.32[1] (3d ed. 2009).

The disagreement between the courts of appeals is the question of what, very precisely, is being appealed. For the courts which decide the stay should be granted so long as the appeal is not frivolous, the issue before the court of appeals is "[w]hether the case should be litigated in the district court," and it views that question as the mirror image of the question presented in the appeal. *Bradford-Scott*, 128 F.3d at 506. The Ninth Circuit, on the other hand, views the issue of arbitrability as being something that is separate from the merits of the case. *Britton*, 916 F.2d at 1412.

As a result of these different viewpoints, appellate courts such as the Tenth Circuit have established a system by which, upon the filing of a motion to stay, the district court determines whether the appeal is frivolous. *See McCauley*, 413 F.3d at 1162. If the appeal is not frivolous, then the district court must grant the motion to stay. *Id.* On the other hand, courts such as the Ninth Circuit have determined that the

district court can exercise its discretion with respect to a motion to stay and that the court is not required to grant such a motion, even when the appeal is not frivolous. *Britton*, 916 F.2d at 1412.

II. Is a party asserting waiver of the right to arbitrate required to demonstrate prejudice?

Waiver is commonly defined as the "intentional or voluntary relinquishment of a known right . . . ." BLACK'S LAW DICTIONARY 1580 (6th ed.). It is generally unilateral, requiring nothing of the party in whose favor it is made. *Id.* Nevertheless, when a party asserts waiver of a right to arbitration, a majority of circuits—First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth, and Eleventh—require the asserting party also to demonstrate prejudice. *See Hooper v. Advance Am., Cash Advance Ctrs. of Mo., Inc.*, 589 F.3d 917, 920 & 923 n.8 (8th Cir. 2009) (requiring prejudice and collecting cases); *Petroleum Pipe Ams. Corp. v. Jindal Saw, Ltd.*, 575 F.3d 476, 480 (5th Cir. 2009); *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 921 (9th Cir. 2009); *Crossville Med. Oncology, P.C. v. Glenwood Sys., L.L.C.*, 310 Fed. App'x 858, 859 (6th Cir. 2009); *Forrester v. Penn Lyon Homes, Inc.*, 553 F.3d 340, 343 (4th Cir. 2009); *Zimmer v. CooperNeff Advisors, Inc.*, 523 F.3d 224, 231 (3d Cir. 2008); *In re Tyco Int'l Ltd. Secs. Litig.*, 422 F.3d 41, 46 (1st Cir. 2005); *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1315-16 (11th Cir. 2002); *Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 888 F.2d 696, 701 (10th Cir. 1989). The Seventh and D.C. Circuits do not require a showing of prejudice. *See Khan v. Parsons Global Servs., Ltd.*, 521 F.3d 421, 425 (D.C. Cir. 2008); *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390 (7th Cir. 1995); *see also Grumhaus v. Comerica Secs., Inc.*, 223 F.3d 648, 650-51 (7th Cir. 2000).[1]

> **FN1**. Although the Seventh Circuit does not require proof of prejudice to the party asserting waiver, the Court has noted that, in cases where waiver is a close question, such proof "should weigh heavily" in deciding whether a case should be sent to arbitration. *Cabinetree of Wis.*, 50 F.3d at 391; *see also Grumhaus*, 223 F.3d at 653. Thus, even where prejudice is not a *required* element of waiver, it may be a component of proof that the party asserting waiver finds useful (or, if lacking, a missing component that the party seeking arbitration should identify).

The added requirement of prejudice is not supplied by the Federal Arbitration Act or any established exception to general waiver principles. Rather, the imposition of a higher waiver standard in the arbitration context appears to arise from: (1) the vigorous policy favoring arbitration; (2) the disfavor of waiver in the arbitration context; (3) the presumption against waiver in the arbitration context; and/or (4) the heavy burden of proof on the party asserting waiver. *See, e.g.*, *Park Place*, 563 F.3d at 921; *Walker v. J.C.*

Bradford & Co., 938 F.2d 575, 577 (5th Cir. 1991); *Shinto Shipping Co., Ltd. v. Fibrex & Shipping Co.*, 572 F.2d 1328, 1330 (9th Cir. 1978); *Hilti, Inc. v. Oldach*, 392 F.2d 368, 371 (1st Cir. 1968). In light of these policies and presumptions, the First Circuit observed that "we do not think that the evidence of inconsistent action or delay is strong enough to justify findings of waiver or default . . . ." *Oldach*, 392 F.2d at 371. Under this rationale, a court "must be convinced not only that the [responding party] acted inconsistently with that arbitration right, but that the [party asserting waiver] was prejudiced by this action before we can find a waiver." *Shinto Shipping*, 572 F.2d at 1330.

In taking the opposite approach, the Seventh Circuit observed that "in ordinary contract law, a waiver normally is effective without proof of consideration or detrimental reliance." *Cabinetree of Wis.*, 50 F.3d at 390. At least one court that *does* require a showing of prejudice has likened the right to arbitration to "any other contract right." *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th Cir. 1986) (stating that "[t]he right to arbitration, like any other contract right, can be waived"). The D.C. Circuit correctly observed that the "strong federal policy in favor of enforcing arbitration agreements" is founded on contract enforcement principles, rather than a preference for arbitration *per se*. *National Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987). Thus, there is a solid foundation for the minority courts' position that waiver of the right to arbitration should not require proof of prejudice.[2]

> **FN2**. The D.C. Circuit did note that, although the strong policy favoring enforcement of arbitration agreements does not support creation of an additional prejudice requirement, it would require that, if there is any ambiguity as to the scope of a party's waiver, such ambiguity be resolved in favor of arbitration. *National Found.*, 821 F.2d at 774.

Even where prejudice is an element of waiver, it may overlap with the "inconsistent act" prong. For instance, the Fifth Circuit has stated that substantial invocation of the litigation process qualifies as "the kind of prejudice . . . that is the essence of waiver." *Petroleum Pipe*, 575 F.3d at 480 n.2. This type of "overlap" may have prompted the Seventh Circuit's observation that "[o]ther courts require evidence of prejudice—but not much." *Cabinetree of Wis.*, 50 F.3d at 390.

III. Does "manifest disregard" provide any basis for vacatur of an arbitration award made under the Federal Arbitration Act?

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the United States Supreme Court addressed a particular question: can parties contract for enlarged review of arbitration

awards beyond the limits imposed by statute? 552 U.S. 576, 583-88 (2008). The petitioner, Hall Street, argued that private parties have the right to contract for review beyond the scope of the Federal Arbitration Act (9 U.S.C. §§ 10, 11) just as courts have the right to enlarge the scope of review judicially. *Id.* at 584-85. Pointing to the judicially created "manifest disregard of the law" ground for vacatur sanctioned by the Supreme Court in *Wilko v. Swan*, Hall Street argued "if judges can add grounds to vacate (or modify), so can contracting parties." *Id.* at 585 (citing *Wilko*, 346 U.S. 427, 436-37 (1953)).

The Supreme Court rejected this extrapolation and drew a line in the sand between judicial opinions and private contracts. *Id.* at 585-86. The Court found that Hall Street's proposed extension "is too much for *Wilko* to bear." *Id.* at 585. As between the statutory grounds and those created by private contract, the Court decided that the statutory categories are exclusive. *Id.* at 586-87. Rather than resolving the issue, this conclusion teed up a new question: is manifest disregard still a valid basis for vacatur as a component of one or more grounds stated in the Federal Arbitration Act? To the extent there has been any doubt that this remains an open question, the United States Supreme Court spoke to the issue earlier this year, stating in another opinion that "[w]e do not decide whether 'manifest disregard' survives our decision in *Hall Street* . . . as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* ("*Stolt-Nielsen*"), 130 S. Ct. 1758, 1768 n.3 (2010).

If the Supreme Court wished to abrogate manifest disregard completely, the Court easily could have stated in *Hall Street* that the doctrine no longer exists, or could have confirmed in *Stolt-Nielsen* that manifest disregard did not survive *Hall Street*. Instead, the Court mused in *Hall Street* about the meaning of *Wilko*'s manifest disregard language. *Hall Street*, 552 U.S. at 585. Was it meant to name a new ground for review; or was it a re-expression of the statutory grounds? *Id.* If a re-expression, was it a collective reference to multiple section 10 grounds; or instead, was it "shorthand" for subsections authorizing vacatur when the arbitrators committed misconduct or exceeded their powers? *Id.* Whatever the meaning, the Court rose above the fray, noting that "we, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment . . . ." *Id.* (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)). Thus, in *Hall Street*, the Court rejected an interpretation of manifest disregard as a blessing on enlarged review by contract and as an independent ground for vacatur. *Id.* at 586-88. But the Court refrained from rejecting manifest disregard entirely. *See id.*

Although certainly a strict approach (*i.e.*, the statute does not use the words "manifest disregard") is understandable, it is more logical to conclude that an

arbitrator's manifest disregard of the law invokes or satisfies one or more of the statutory grounds. The statutory grounds include situations: (a) where the award was procured by undue means; (b) where the arbitrators were guilty of any misbehavior by which the rights of any party have been prejudiced; and (c) where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10(a)(1), (3), & (4). This latter ground—where the arbitrators exceeded their powers—is most commonly identified as encompassing manifest disregard. *E.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* ("*Stolt-Nielsen I*"), 548 F.3d 85, 95 (2d Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1758 (2010); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir.), *cert. denied*, 130 S. Ct. 145 (2009); *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 269 (7th Cir. 2006).

Manifest disregard rises to this high level of misconduct. It is more than a failure to correctly interpret or apply the law. It requires, at a minimum, that the arbitrator knew of applicable, controlling law and either ignored it or refused to apply it. *E.g.*, *Comedy Club*, 553 F.3d at 1290; *Stolt-Nielsen I*, 548 F.3d at 95. At that level, the arbitrators have "failed to interpret the contract at all." *Wise*, 450 F.3d at 269. This infraction, going to the heart of the arbitrators' duties, should satisfy at least one of the statutory grounds for vacatur.

Moreover, all of the statutory grounds concern "conduct to which the parties did not consent when they included an arbitration clause in their contract." *Id.* (quoted as "entirely consistent with *Hall Street*" in *Stolt-Nielsen I*, 548 F.3d at 94-95). It cannot be said that parties who agree to arbitration consent to the arbitrators' manifestly disregarding the law. *Stolt-Nielsen I*, 548 F.3d at 95.

The Seventh Circuit has long characterized manifest disregard as a judicial manifestation of the statutory ground authorizing vacatur "where the arbitrators exceeded their powers." *See Wise*, 450 F.3d at 268-69. In addition, the Second and Ninth Circuits have concluded after *Hall Street* that manifest disregard remains a valid basis for vacatur. *Comedy Club*, 553 F.3d at 1281; *Stolt-Nielsen I*, 548 F.3d at 94-95. The Ninth Circuit considered its holding to be a continuation of its pre-*Hall Street* interpretation of manifest disregard as an example of arbitrators' exceeding their powers. *Comedy Club*, 553 F.3d at 1290 (citing *Kyocera Corp. v. Prudential-Bache T Servs.*, 341 F.3d 987, 997 (9th Cir. 2003) (en banc)). The Second Circuit reached its conclusion by characterizing the manifest disregard doctrine as a judicial gloss on the statutory grounds for vacatur.[3] *Stolt-Nielsen I*, 548 F.3d at 94-95. In reviewing for manifest disregard as a component or interpretation of a statutory ground, courts still look to pre-*Hall Street* case law to determine its contours. *See, e.g.*, *id.*; *MasTec N. Am., Inc. v. MSE Power Sys., Inc.*, 581 F. Supp. 2d 321, 325 (N.D.N.Y. 2008).

FN 3. Although the Supreme Court later reversed the Second Circuit's judgment, the Court (as mentioned above) expressly refrained from reviewing or reversing the Second Circuit's analysis or conclusion that manifest disregard remains a basis for vacatur under one or more statutory grounds. *Stolt-Nielsen*, 130 S. Ct. at 1768 n.3 & 1777.

The First, Third, Fourth, and Tenth Circuits have acknowledged the open question, but have not ultimately decided it.[4] *See Kashner Davidson Secs. Corp. v. Mscisz*, 601 F.3d 19, 22 (1st Cir. 2010); *Raymond James Fin. Servs., Inc. v. Bishop*, 596 F.3d 183, 193 n.13 (4th Cir. 2010); *Bapu Corp. v. Choice Hotels Int'l, Inc.*, No. 09-1011, 2010 WL 925985, at *3 (3d Cir. Mar. 16, 2010); *Andorra Servs., Inc. v. Venfleet, Ltd.*, 355 Fed. App'x 622, 627 n.5 (3d Cir. 2009); *Hicks v. Cadle Co.*, 355 Fed. App'x 186, 195-97 (10th Cir. 2009). With regard to the First Circuit, some courts have cited dicta in a 2008 case—*Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008)—as suggesting that circuit has rejected manifest disregard. *E.g.*, *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1323 (11th Cir. 2010); *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 355 n.4 (5th Cir. 2009); *Stolt-Nielsen I*, 548 F.3d at 94. However, *Ramos-Santiago* (which involved an arbitration provision *not* governed by the FAA) simply characterized the *Hall Street* decision as holding that "manifest disregard of the law is not a valid ground for vacating or modifying an arbitral award in cases brought under the Federal Arbitration Act." 524 F.3d at 124 n.3. Later, the First Circuit clarified that "[w]e have referred to the issue in dicta, *see Ramos-Santiago* . . . , but have not squarely determined whether our manifest disregard case law can be reconciled with *Hall Street*." *Kashner Davidson*, 601 F.3d at 22. The First Circuit did not reach the issue in *Kashner Davidson*, and the question remains unresolved in that circuit.

FN 4. The Eighth Circuit has stated the general proposition that "[a]n arbitral award may be vacated only for the reasons enumerated in the FAA," citing *Hall Street*, but has not addressed the underlying issue or given any real insight into whether it considers manifest disregard as falling within the scope of a "reason enumerated in the FAA." *See, e.g.*, *Crawford Group, Inc. v. Holekamp*, 543 F.3d 971, 976 (8th Cir. 2008).

The question also appears to be unresolved in the Sixth Circuit. *Compare Martin Marietta Materials, Inc. v. Bank of Okla.*, 304 Fed. App'x 360, 362-63 (6th Cir. 2008), *with Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. App'x 415, 418-19 (6th Cir. 2008). On November 14, 2008, a Sixth Circuit opinion held that manifest disregard remains a basis for vacatur after *Hall Street*. *Coffee Beanery*, 300 Fed. App'x at 418-19; *see also Dealer Computer Servs., Inc. v. Dub Herring Ford*, 547 F.3d 558, 561 n.2 (6th Cir. 2008) (in opinion issued four days after *Coffee Beanery*, stating that manifest disregard provided non-statutory ground for vacatur, with "but see" citation to *Hall Street*). Approximately

one month later, however, a Sixth Circuit opinion treated the question as unresolved, citing to other circuits' opinions on the issue, but not to *Coffee Beanery* (or *Dealer Computer*). *Martin Marietta*, 304 Fed. App'x at 362-63. One week after that, another Sixth Circuit opinion acknowledged that "*Hall Street*'s reference to the 'exclusive' statutory grounds for obtaining relief casts some doubt on the continuing vitality of [manifest disregard]" as a basis for vacatur, but again left the question open. *Grain v. Trinity Health* , 551 F.3d 374, 380 (6th Cir. 2008).[5] The use of the qualifier "some" renders the panel's statement about *Hall Street* relatively useless as a predictor of the Sixth Circuit's ultimate answer to the question.

> **FN 5.** Although different panels decided *Martin Marietta* (Circuit Judges Batchelder, Gilman and Sutton) and *Grain* (Circuit Judges Rogers, Sutton and McKeague), both opinions were authored by Judge Sutton. *See Grain*, 551 F.3d at 376; *Martin Marietta*, 304 Fed. App'x at 361.

The *Coffee Beanery* opinion has several distinctive aspects that call into question whether the Sixth Circuit will use the same rationale to reach its final answer. Chiefly, the opinion, which was decided by a panel that included a visiting justice, relies on a unique analysis that does not characterize manifest disregard as a version or interpretation of a statutory ground. *See Coffee Beanery*, 300 Fed. App'x at 415, 418-19. Thus, it is unclear what decision the Sixth Circuit ultimately will make, and on what rationale that decision will be based.

At the other end of the spectrum, the Fifth Circuit has stated that, "[i]n the light of the Supreme Court's clear language that, under the FAA, the statutory provisions are the exclusive grounds for vacatur, manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected." *Citigroup Global*, 562 F.3d at 358. The use of qualifying language—*i.e.*, an "independent, nonstatutory" ground—could be taken as an indication that the concept of manifest disregard still may support vacatur if presented as a statutory ground, such as the arbitrator's exceeding his powers. However, the Fifth Circuit's underlying analysis included a review of opinions such as *Stolt-Nielsen I* and *Comedy Club*, and appeared to reject their approach of folding manifest disregard into that statutory ground. *See id.* at 356-57. In addition, the Fifth Circuit expressly instructed that "the term [manifest disregard] itself, as a term of legal art, is no longer useful in actions to vacate arbitration awards." *Id.* at 358.

Similarly, the Eleventh Circuit has unequivocally stated that manifest disregard is "no longer valid in light of *Hall Street*." *Frazier*, 604 F.3d at 1324. In *Frazier*, the manifest disregard ground was asserted by the appellant as, and treated by the circuit court as, wholly independent of the statutory grounds. *See id.* (listing manifest

disregard ground separately from statutory grounds, holding that judicially-created bases for vacatur were invalid, and concluding that the lower court was required to confirm the award since the appellant "has failed to demonstrate the existence *of any of the statutory grounds* for vacating or modifying the arbitrator's award"). Yet, the Eleventh Circuit relied heavily on the Fifth Circuit's opinion in *Citigroup*, "agreeing with the Fifth Circuit that the categorical language of *Hall Street* compels" the conclusion that manifest disregard is no longer valid.

This issue appeared on the brink of resolution in *Stolt-Nielsen*, and it is unclear how soon another opportunity will arise for the United States Supreme Court to provide the definitive answer.[6]

> **FN 6.** For a broader examination of *Hall Street*'s impact on review of arbitration awards, including additional discussion about the circuit courts' and district courts' varying approaches to manifest disregard as a basis for vacatur, see Brandy M. Wingate, V. Elizabeth Kellow, *Review of Arbitration Awards After* Hall Street (State Bar of Texas Advanced Civil Appellate Course Sept. 11, 2009).

IV. Does an appealing plaintiff in a qui tam case in which the government has not intervened have sixty days to file a notice of appeal?

The federal courts of appeals disagree regarding the time permitted for filing a notice of appeal in *qui tam* cases in which the government has not intervened. The Fifth, Seventh, and Ninth Circuits have held that the appealing plaintiff has sixty days to appeal; the Second and Tenth Circuits have held the plaintiff has only thirty days to file its notice of appeal. *See United States ex rel. Eisenstein v. City of N.Y.*, 540 F.3d 94, 96 (2d Cir. 2008) (thirty days); *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004) (sixty days); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999) (sixty days); *United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100, 1102 (9th Cir. 1996) (sixty days); *United States ex rel. Petrofsky v. Van Cott, Bagley, Cornwall, McCarthy*, 588 F.2d 1327, 1329 (10th Cir. 1978) (thirty days).

The issue arises out of the nature of a *qui tam* case. A False Claims Act can be commenced in one of two ways: (1) by the federal government; or (2) by a private person for the United States Government and in the name of the government, which is called a *qui tam* action. 31 U.S.C. § 3730(a), (b)(1). If a private person files the action, the government has sixty days to decide to intervene in the action and prosecute it. 31 U.S.C. § 3730(d)(1). If the government does so, the private person receives a percentage of the recovery. *Id.* If the government refuses to intervene, the private person can prosecute the lawsuit and will get a larger percentage of the recovery if he

prevails, but the majority of the recovery will still go to the government. *Id.* at § 3730(d)(2). The government can also seek to intervene after the first sixty days have elapsed, but it can do so only upon a showing of good cause. *Id.* at § 3730(c)(3). Even if the government does not intervene, it may request copies of pleadings and deposition transcripts, may pursue alternative remedies, and must give its written consent to the suit's dismissal. *Id.* at § 3730(b)(1), (c).

The deadline for filing a notice of appeal depends on whether the government is a party to the case. In a normal civil action, the notice of appeal must be filed with the district clerk "within 30 days after the judgment or order appealed from is entered." FED. R. APP. P. 4(a)(1)(A). That deadline changes when the government is a party. "When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered." *Id.* at R. 4(a)(1)(B). The Advisory Committee's Notes from 1946 state that the additional time is given to the government to decide whether to appeal because its institutional decision-making practices require additional time and that, in fairness, the time should be extended for the other parties when the government is a party. The term "party" is not defined in any of these statutes or rules.

The first court to consider whether an appealing relator had thirty or sixty days to appeal was the Tenth Circuit. *Van Cott*, 588 F.2d at 1329. In that case, the Tenth Circuit decided that the government's name on the pleading was a mere statutory formality and that the relator did not merit the additional time given to the government to appeal. It determined that the relator would only have thirty days to appeal and that it was not prejudiced because it knew that the government had disclaimed the right to participate.

The Ninth Circuit was the next court to consider the issue and arrived at the opposite conclusion: it held that the relator had sixty days to appeal. *Hughes Aircraft*, 98 F.3d at 1102. As the Ninth Circuit put it, that Circuit had "a choice between an intercircuit conflict, and some tension with [its] own established circuit law." The problem was that the Ninth Circuit had already determined that the parties had sixty days to appeal in actions brought under the Miller Act because those actions were also brought in the name of the United States. *Id.* Because the government's name was "on all papers as the plaintiff" in a *qui tam* action, the government would receive most of the recovery, and the court was concerned that the parties be able to easily determine their time to appeal, the Ninth Circuit determined that the sixty-day deadline should apply.

For a while, the other appellate courts considering this issue followed the Ninth Circuit's lead, deciding that the relator had sixty days to file its notice of appeal even

though the government had not intervened in the case. *See Ou*, 368 F.3d at 775 (Seventh Circuit); *Epic Healthcare*, 193 F.3d at 308 (Fifth Circuit). They noted, for example, that the Tenth Circuit had not addressed the contention that the government is a party, albeit that it was represented by the relator. *Epic Healthcare*, 193 F.3d at 307.

In 2008, however, the Second Circuit rejected the sixty-day rule in favor of deciding that the relator had only thirty days to appeal when the government had declined to intervene. *United States ex rel. Eisenstein*, 540 F.3d at 96. It determined that being a "real party in interest" did not make the government a "party." *Id.* at 98. It further felt that the rationale for giving the government additional time to appeal—"to account for the slow machinery of government when the United States is a party responsible for prosecuting the action"—did not apply in this context. *Id.* at 99. The Second Circuit, like the Tenth Circuit, felt that the government's participation was "tangential or nominal" and a statutory formality. *Id.* at 101.

And, finally, there is the Second Circuit's warning to all counsel involved in an appeal of a *qui tam* action. It warned that "counsel of minimal competence will take pause upon reading Rule 4(a) to consider whether the United States was actually a 'party' to the action." *Id.* at 101. "Even if doubt existed, any reasonable counsel would allay these concerns by sensibly filing a notice of appeal within 30 days." *Id.* Undoubtedly, filing the notice of appeal within thirty days of the entry of judgment is the better approach, regardless of the circuit the relator may be filing in.

V. Is an intervenor as-of-right required to establish independent Article III standing?

This question arises from circuit courts' attempts to reconcile Article III requirements with the right to intervene conferred by Federal Rule of Civil Procedure 24(a)(2). Article III's "case or controversy" provision requires that, in order to qualify as a party with standing to litigate, a person first must show an invasion of a legally protected interest that is concrete and particularized and actual or imminent. *E.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). An interest shared generally with the public at large is not sufficient to establish Article III standing. *Id.* On the other hand, Rule 24(a)(2) provides that, on timely motion, a court "must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." FED. R. CIV. P. 24(a)(2). Rule 24(a)(2) does not expressly include Article III standing as a predicate to the right to intervene. *See id.* The United States Supreme Court has recognized that a question exists as to whether a party seeking to intervene as of right must satisfy not only the

requirements of Rule 24(a)(2), but also the requirements of Article III. *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986). However, the Court has not resolved the issue. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 233 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 124 S. Ct. 876 (2010).

Circuit courts have reached different conclusions when answering the question on their own. The Second, Fifth, Sixth, Tenth, and Eleventh Circuits all concluded that an intervenor is required to meet only Rule 24(a)(2)'s requirements. *San Juan County v. United States*, 503 F.3d 1163, 1171-72 (10th Cir. 2007) (en banc) (adopting reasoning of panel opinion at *San Juan County v. United States* ("*San Juan County I*"), 420 F.3d 1197, 1203-05 (10th Cir. 2005)); *United States v. Tennessee*, 260 F.3d 587, 595 (6th Cir. 2001); *Dillard v. Chilton County Comm'n*, 495 F.3d 1324, 1330 (11th Cir. 2007) (per curiam), *cert. denied sub nom. Green v. Chilton County Comm'n*, 128 S. Ct. 2961 (2008); *Ruiz v. Estelle*, 161 F.3d 814, 830-32 (5th Cir. 1998); *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978); *see also MasterCard Int'l, Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 389 (2d Cir. 2006) (stating requirements to intervene as of right). In these circuits, the intervenor as-of-right under Rule 24(a)(2) can "piggyback" on to the main parties' Article III standing in joining the case. *See City of Colorado Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1079-80 (10th Cir. 2009). The rationale is that Article III standing serves primarily to guarantee the existence of an overall justiciable case or controversy. *Ruiz*, 161 F.3d at 832; *see also Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991). Thus, Article III does not impose its standing requirements on each and every party in a case (*i.e.*, does not require intervenors to possess "standing"). *Ruiz*, 161 F.3d at 832.

On the other hand, the Seventh, Eighth, and D.C. Circuits have concluded that a Rule 24(a)(2) intervenor also must satisfy the standing requirements of Article III. *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 833 (8th Cir. 2009); *Jones v. Prince George's County*, 348 F.3d 1014, 1017 (D.C. Cir. 2003); *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 465 (7th Cir. 1998); *Solid Waste Ag. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996). The Eighth Circuit treats Article III as a "bedrock requirement" for all parties to a lawsuit. *See, e.g.*, *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996). The D.C. Circuit has incorporated Article III into Rule 24(a)(2), holding that the rule's requirement of "an interest relating to the property or transaction which is the subject of the action . . . impliedly refers not to any interest the applicant can put forward, but only to a legally protectable one." *S. Christian Leadership Conference v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984). Another rationale for requiring a demonstration of Article III standing is that "a Rule 24 intervenor seeks to participate on an equal footing with original parties to the suit." *City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994).

Although a Rule 24(a)(2) intervenor may not enjoy "piggyback" standing in these latter circuits, the intervenor may be able to take advantage of the "all for one and one for all approach" when multiple parties concurrently seek to intervene. The D.C. Circuit has observed that, once one Rule 24(a)(2) intervenor establishes both the Rule 24 and Article III requirements, the remaining intervenors need not establish the Article III requirements independently "when it makes no difference to the merits of the case." *Military Toxics Project v. E.P.A.*, 146 F.3d 948, 954 (D.C. Cir. 1998). However, the Eighth Circuit has observed that "an Article III case or controversy, once joined by intervenors who lack standing, is—put bluntly—no longer an Article III case or controversy." *Mausolf*, 85 F.3d at 1300. Thus, the Eighth Circuit considers an Article III case or controversy as one where "*all* parties have standing, and a would-be intervenor, because he seeks to participate as a party, must have standing as well." *Id.* (emphasis added).

Be aware that, despite some commentary in judicial opinions and treatises, the Ninth Circuit has *not* officially decided this question. *Compare Prete v. Bradbury*, 438 F.3d 949, 955 n.8 (9th Cir. 2006) (noting open question), *with San Juan County I*, 420 F.3d at 1204-05 (stating that Ninth Circuit uses piggyback rule). The confusion arises from a 1991 Ninth Circuit opinion stating in one sentence that an intervenor under Rule 24(a)(2) need only meet the Rule 24 criteria. *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991), *vacated by Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). That opinion was later vacated by the United States Supreme Court. *Arizonans for Official English*, 520 U.S. at 80. Thus, the Ninth Circuit treats *Yniguez* as "wholly without precedential authority" and considers the Rule 24(a)(2)/Article III issue as undecided. *Prete*, 438 F.3d at 955 n.8 (regarding undecided question); *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1305 n. 5 (9th Cir. 1997) (regarding lack of precedential value). Because the *Yniguez* opinion stated the panel's conclusion about Rule 24(a)(2) standing requirements in one sentence, without discussion or analysis, it is unclear whether the Ninth Circuit will reach the same conclusion if it decides the question (again) before the United States Supreme Court puts the issue to rest. *Compare, e.g.*, *United States v. Carpenter*, 526 F.3d 1237, 1240 (9th Cir. 2008) (stating that intervenors had an "interest [that] was sufficient to allow them to intervene under Federal Rule of Civil Procedure 24(a) and to satisfy any requirements of Article III standing"), *with Yniguez*, 939 F.2d at 731 (stating that an intervenor need only meet the applicable Rule 24 criteria).

Practitioners also should recognize that, even where it is unquestionably embraced, the "piggyback" rule has its limits. The foundation of the intervenor's presumed standing is the notion that the existing parties already established the Article III requirements in the lawsuit. Thus, at the point in the litigation at which the intervenor enters the case under Rule 24(a)(2), there still must be a justiciable case or

controversy. *City of Colorado Springs*, 587 F.3d at 1081; *Dillard*, 495 F.3d at 1330; *see also Ruiz*, 161 F.3d at 830. If the original parties have settled or otherwise are not currently adverse parties in the litigation, then the intervenor is required to establish independent Article III standing, regardless of the "right" provided in Rule 24(a)(2). *City of Colorado Springs*, 587 F.3d at 1081; *Dillard*, 495 F.3d at 1330; *see also Ruiz*, 161 F.3d at 830. Furthermore, absent an existing dispute between the original parties, a Rule 24(a)(2) intervenor is required to establish independent Article III standing even if the district court has retained jurisdiction over a consent decree or for other enforcement purposes. *City of Colorado Springs*, 587 F.3d at 1081; *Dillard*, 495 F.3d at 1336.

VI. The circuit split regarding the deadline to apply to appeal under CAFA has been resolved

The Class Action Fairness Act allows appellate review of a district court order granting or denying a motion to remand a class action. 28 U.S.C. 1453(c)(1). As initially written, section 1453(c)(1) set the deadline to apply for such an appeal "*not less than* 7 days after entry of the order." *Id.* (emphasis added). The literal meaning of this language gave an appellant an unlimited period in which to apply for appellate review, so long as the application was filed on or after the seventh day after the order was signed.

The circuits split on their interpretation of the deadline. The majority of circuits threw over the plain language and read "less" to mean "more." *See Estate of Pew v. Cardarelli*, 527 F.3d 25, 28 (2d Cir. 2008); *Morgan v. Gay*, 466 F.3d 276, 277-79 (3d Cir. 2006); *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Servs., Inc.*, 435 F.3d 1140, 1145-46 (9th Cir. 2006); *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1093 n. 2 (10th Cir. 2005); *Miedema v. Maytag Corp.*, 450 F.3d 1322, 1326 (11th Cir. 2006). The Seventh Circuit chose to read the statute according to its plain language. *Spivey v. Vertrue, Inc.*, 528 F.3d 982, 983-85 (7th Cir. 2008). The Court reasoned that the fact "[t]hat Congress has written a deadline imprecisely, or even perversely, is not a sufficient reason to disregard the enacted language. . . . Turning 'less' into 'more' would be a feat more closely associated with the mutating commandments on the barn's wall in Animal Farm than with sincere interpretation." *Id.* at 984. In mid-2009, the Fifth Circuit indicated its inclination to adopt the Seventh Circuit's approach, but avoided a decision and added its voice to the general chorus urging that "Congress might wish to correct this apparent error in drafting." *Admiral Ins. Co. v. Abshire*, 574 F.3d 267, 272 n.4 (5th Cir. 2009).

And, indeed, Congress finally did correct the problem. Effective December 1, 2009, section 1453(c)(1) has been amended to allow appellate review "if application is made to the court of appeals *not more than* 10 days after entry of the order." 28 U.S.C.

1453(c)(1) (emphasis added); Pub. L. No. 111-16, 123 Stat. 1607, 1608-09. The additional change from seven to ten days comports with the "days are days" approach now employed by the Federal Rules of Civil and Appellate Procedure.

CONCLUSION

Different circuit courts have different ideas about how things should be done. Certainly, you need to know whether and how your circuit has handled an issue. But even if your circuit has spoken, identifying a split can assist in crafting your argument from the district court forward and educating your client about potential appellate issues. Moreover, as seen above, a circuit court's "final answer" on an issue may be subject to re-evaluation or even dueling panels. Until the United States Supreme Court steps in to answer these questions, uncertainty lingers. In the words of Sergeant Phil Esterhaus of *Hill Street Blues* fame, "Hey, let's be careful out there." *Memorable quotes for "Hill Street Blues,"* IMDB, http://www.imdb.com/title/tt0081873/quotes (last visited July 29, 2010).

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ANTITRUST LAW

***Am. Needle, Inc. v. Nat'l Football League*, No. 08-661, 2010 WL 2025207 (May 24, 2010)**

In this antitrust case, the Supreme Court held that, although the thirty-two teams of the National Football League (NFL) had some areas of common interest, they were ultimately independent actors capable of the kind of concerted action falling within the scope of the Sherman Act.

In the early 1960s, the teams comprising the NFL formed NFL Properties to market and license their intellectual property. Until 2000, NFL Properties granted nonexclusive licenses to various manufacturers, allowing them to sell goods bearing the team's colors and logos. Under that approach, American Needle obtained a nonexclusive license to sell hats for all thirty-two teams. But in December 2000, NFL Properties granted an exclusive license to Reebok International and thereafter refused to renew American Needle's license.

American Needle sued, alleging that this arrangement violated antitrust law under the Sherman Act. The district court granted summary judgment in favor of the NFL, finding that the teams and the league should be considered a single entity. The Seventh Circuit affirmed, concluding that the teams had a shared interest to collectively produce and promote NFL football.

The Supreme Court, however, reversed and remanded for review under the Rule of Reason. Antitrust liability under the Sherman Act applies to contracts, combinations, and conspiracies in restraint of trade. Under longstanding Supreme Court precedent, such agreements embody concerted action directed toward anticompetitive, rather than routine business, ends. The Court emphasized that this analysis is functional, not formal. Thus, a single entity comprised of multiple competitors could trigger antitrust liability. Likewise, legally separate entities working together for appropriate purposes could be acceptable under antitrust law. The key is whether there is concerted action

that joins otherwise separate decisionmakers in a manner that deprives the market of independent actors.

Applying this analytical framework to the arrangement between the teams, the NFL, and NFL Properties, the Court concluded the various entities were capable of antitrust violations. According to the Court, the teams—each of which independently owned its intellectual property—were independent actors capable of competition in the intellectual property market. Although they had a partial unity of interest in the success of the league as a whole, their interests were not wholly united. Thus, the arrangement deprived the market of independent actors and independent sources of decisionmaking and should have been reviewed under the antitrust "Rule of Reason."

ARBITRATION

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010)

In this arbitration case, the Court held an arbitration panel exceeded its authority by relying on policy reasons to grant a right to class arbitration and concluded that the underlying maritime contract did not support class arbitration.

Stolt-Nielsen operates parcel tankers, cargo boats that contain separately chartered compartments used to ship liquids in small quantities. AnimalFeeds contracted with Stolt-Nielsen to ship fish oil and other raw ingredients around the world. The parties' agreement was memorialized in a maritime contract known as a charter party, which mandated arbitration under the Federal Arbitration Act (FAA).

When a criminal investigation revealed that Stolt-Nielsen and others in the parcel tanker industry had engaged in a price-fixing conspiracy, AnimalFeeds sought to file a class action lawsuit. The suit was eventually transferred to an MDL court in Connecticut, where controlling precedent in a similar lawsuit determined that the antitrust dispute was subject to arbitration.

AnimalFeeds sought class arbitration, and the parties agreed to have a panel resolve the preliminary question of the availability of class arbitration, having stipulated to the panel that the charter party was silent on the issue. The panel concluded in favor of class arbitration, and although the district court reversed, the Second Circuit reinstated the panel decision, holding that it was not reached in manifest disregard of applicable law.

The Supreme Court reversed, determining that class arbitration was not available. First, the Court reviewed the panel opinion and concluded it exceeded the arbitrators' power. According to the Court, the parties' stipulation regarding the charter party's silence on class arbitration should have led the panel to consider the effect of the FAA and controlling law in the absence of an intent by the parties. Instead, the panel relied on panel decisions granting class arbitration in other contexts, as well as its own interpretation of good policy. The Court held that this constituted an overreach of the panel's powers.

The Court then turned to the underlying question of arbitrability. Looking to prior precedent, the Court concluded class arbitration is not available unless there is a basis in the underlying contract for concluding that the parties agreed to class arbitration. In light of the parties' stipulation of contractual silence on the matter, the Court held that class arbitration was unavailable.

Justice Ginsburg, joined by Justices Stevens and Breyer, dissented on several grounds. First, she argued the Court lacked jurisdiction to decide the appeal given that the panel decision governed a preliminary, rather than a final, matter. Moreover, the panel's ruling did not exceed the power granted by the parties, which was to determine the availability of class arbitration. Finally, the dissent challenged the basis for the Court's determination on arbitrability, pointing out that arbitrators could limit class proceedings based on the terms of the contract. Justice Sotomayor did not participate in the proceedings.

BANKRUPTCY LAW

U. Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367 (2010)

The Court held a bankruptcy court's confirmation of a debtor's bankruptcy plan was not void, even though the plan discharged part of the debtor's student-loan debt without his having followed the required procedures of initiating an adversary proceeding and obtaining an undue-hardship determination.

Respondent Espinosa took out four student loans in 1988 and 1989; in 1992 he filed a Chapter 13 bankruptcy petition. Chapter 13 allows a debtor to develop a plan to repay their debts. It allows the discharge of student loan debts, but only if the debtor shows undue hardship in an adversary proceeding against the creditor, which he initiates by serving the creditor with a summons and complaint. Espinosa filed a plan

that proposed to discharge some of his student loan debt (the interest), but did not institute the required adversary proceeding. The creditor received notice of the plan, but did not object to it or appeal after the plan was confirmed. Espinosa paid off his student-loan principal by 1997, and the bankruptcy court then discharged his interest.

Years later, the creditor sought to collect the unpaid interest. In 2003, Espinosa moved to enforce the 1997 discharge; the creditor filed a cross-motion under Federal Rule of Civil Procedure 60(b)(4), seeking to declare the confirmation order void. The creditor argued that the order was void because Espinosa had not followed the rules requiring an undue-hardship finding, and that its due process rights had been denied because it had not been served with a summons and complaint. The bankruptcy court ruled in favor of Espinosa; the district court reversed and ruled for the creditor; the Ninth Circuit reversed the district court and held that: (1) while the order might have been erroneous, it was not void; and (2) there was no due-process violation because the creditor received actual notice of the plan and failed to object.

The Court unanimously affirmed the Ninth Circuit's ruling in an opinion by Justice Thomas. It began by noting Rule 60(b)(4) relief is not a substitute for an appeal, but instead is available only in the case of jurisdictional error or a deprivation of due process. The defect alleged was concededly not jurisdictional. It also did not rest on a deprivation of due process because, while the debtor had not complied with the Bankruptcy Rules' procedural requirement to serve the creditor with a summons and complaint, the creditor had received actual notice of the proposed plan, which unquestionably satisfied the creditor's constitutional due process rights. Finally, the Court rejected the creditor's (and the Government's) argument that the grounds for relief under Rule 60(b)(4) for voidness should be expanded to include the lack of statutory authority to confirm a plan without a finding of undue hardship.

***Milavetz, Gallop & Milavetz, PA v. United States*, 130 S. Ct. 1324 (2010)**

In this challenge to recent revisions to the Bankruptcy Code, the Court held that lawyers qualify as "debt relief agencies" and that the provisions of the Code regulating the advice and advertizing activities of debt relief agencies, when narrowly interpreted, do not violate the Constitution.

In 2005, Congress passed revisions to the Bankruptcy Code, which, among other things, designated a group of professionals working in the bankruptcy field as "debt relief agencies" and imposed limitations on the advice that such agencies can render

and the form in which such agencies can advertize. A law firm specializing in bankruptcy work filed a preenforcement lawsuit seeking declaratory relief that attorneys did not fit within the scope of "debt relief agencies" and that the limits on advice and advertizing were unconstitutional. The district court agreed with the plaintiffs on all grounds; the Eighth Circuit affirmed on the advertizing provision but reversed as to the meaning of "debt relief agency" and the constitutionality of the advice provision.

Reviewing all three grounds, the Supreme Court reversed on the advice provision but otherwise affirmed the Eighth Circuit. First, the Court reviewed the definition of "debt relief agency" and held that, under the Code, the term includes any person providing bankruptcy assistance and specifically refers to certain actions, such as providing legal representation, which can only be done by lawyers. Second, the Court employed a narrow reading of the advice provision, holding that it restricts a debt relief agency from advising debtors to incur debt "because the debtor is filing for bankruptcy." Having narrowed the scope of the provision, the Court found it to fit within the structure of other provisions preventing or punishing bankruptcy abuse and upheld the provision. Finally, with regard to the advertizing provision, the Court determined that the standard for commercial speech applied, and given the evidence of deceptive acts in the legislative record, upheld the provision as reasonably related to the governmental interest.

Justice Scalia and Justice Thomas each filed a separate concurrence. Justice Scalia's concurrence took the Court to task for relying on legislative intent when the "unambiguous" language of the statute was enough to reach the result. Justice Thomas acknowledged that the Court properly applied the commercial speech standard but argued that the practice of applying a different standard to commercial speech was inappropriate and the holding in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985) should be revisited.

CIVIL PROCEDURE

***Shady Grove Orthopedic Assocs. v. Allstate Ins.* Co., 130 S. Ct. 1431 (2010)**

The Supreme Court held a New York law prohibiting class actions for suits seeking statutory penalties did not preclude a federal court sitting in diversity from hearing the case under Rule 23 of the Federal Rules of Civil Procedure.

The plaintiff (Shady Grove) filed a diversity suit against Allstate in federal district court seeking unpaid statutory interest from the late payment of benefits. Shady Grove sought relief on behalf of itself and of a class of all others to whom Allstate owed interest. The district court determined that New York law prohibits class actions that seek to recover a "penalty." The court further determined that statutory interest is a "penalty" under New York law, and therefore held that the suit could not go forward as a class action. Finding that the individual plaintiff's claim did not meet the amount-in-controversy requirement, the district court dismissed the action. The Second Circuit affirmed, finding that the New York law was not in conflict with Rule 23 of the Federal Rules of Civil Procedure because the two statutes address different issues.

In an opinion by Justice Scalia, the Court reversed. The Court found Rule 23 answered the question in dispute because it provides clear conditions for when a class action may be maintained in federal court. The Court held New York law attempts to answer the same question as the federal rule, and therefore there is a direct conflict between the two laws. The Court concluded that Rule 23 controls as long as it falls within the statutory authorization of the Rules Enabling Act (REA).

In a plurality opinion by Justice Scalia, in which the Chief Justice, Justice Thomas, and Justice Sotomayor joined, he stated the REA controlled the validity of Rule 23. He noted that Rule 23 was valid under the statute, because insofar as it allows plaintiffs to join claims against the same defendants it does not alter any substantive rights. Justice Scalia recognized that allowing class action suits to proceed in federal court when they are prohibited in state court will lead to forum shopping; he noted, however, that this was an inevitable result of a uniform system of federal procedure.

In an opinion by Justice Scalia, in which the Chief Justice and Justice Thomas joined, he addressed the concurrence by asserting the determination of whether a rule violates the REA should be based on an examination of the procedural nature of the federal rule, and not the substantive nature of the state rule with which it conflicts.

Justice Stevens concurred in part and concurred in the judgment. He agreed with the Court that the New York rule conflicted with Rule 23. However, he asserted that when a state procedural rule was significantly intertwined with a state substantive right or remedy, the application of a federal rule that would limit that right violates the REA. Because he determined that the New York law at issue in this case was not so intertwined with a substantive right, he agreed that federal rule governed.

Justice Ginsburg, joined by Justice Kennedy, Justice Breyer and Justice Alito, dissented. She disagreed with the Court that the New York law conflicted with Rule 23, asserting that the New York rule addresses the remedies available to a party in a class action, whereas the federal rule provides conditions relevant to the certification of a class. Thus, because she found no conflict, she stated that Erie should control, requiring the application of state law to prevent forum shopping and protect important state regulatory policies.

CIVIL RIGHTS

Perdue v. Kenny A. ex rel. Winn, 130 S. Ct. 1662 (2010)

The Supreme Court held an attorney fee award in a civil rights action may be enhanced beyond the lodestar amount only when "extraordinary circumstances" justify doing so, reversing a decision of the Eleventh Circuit and an underlying district court opinion that had approved a fee enhancement

The underlying lawsuit was a class action on behalf of children in Georgia's foster care system; their lawyers sued alleging violations of their constitutional rights, and the suit was resolved by mediation and a consent decree. Because of the lawsuit's success, the lawyers were entitled to fees under 42 U.S.C. section 1988, which allows fees to the prevailing party in civil rights actions. The lawyers submitted a $14 million fee request, which included $7 million in hourly charges and a $7 million lodestar enhancement. The district court cut the lodestar to $6 million based on vagueness and excessive billing, but then enhanced that award by seventy-five percent. The district court's reasons were that counsel had not been paid during the representation, that counsel had had to advance expenses during the litigation, and that reimbursement was completely contingent on success. The district court also noted the attorney's high level of skill and the extraordinarily favorable result they had achieved. The Eleventh Circuit affirmed. The Supreme Court, in an opinion by Justice Alito, disagreed and reversed the Eleventh Circuit's decision.

The majority opinion noted the lodestar approach, which looks primarily to prevailing market rates in the relevant community, has become the dominant approach in the federal circuits for assessing fees under section 1988. It then reviewed six "important rules" established by the Court's cases on attorney fees in civil-rights cases, the sum of which is that the lodestar is the presumptively reasonable fee measure, an enhancement is available only in exceptional circumstances, and an enhancement can only be justified when the applicant carries its burden to show by specific evidence that it is justified by factors that are not subsumed in the lodestar calculation. It then reviewed circumstances that could allow an enhancement. Superior attorney performance could suffice only when there was objective evidence to tie the attorney's performance to a rate higher than the lodestar. Delay in reimbursement for expenses could suffice only when the amount of enhancement is calculated using an objective measure, such as a standard rate of interest. Delay in payment of fees could suffice only when the delay was unanticipated, or unjustified—in contrast to the run of the mill case, in which any attorney taking it on will expect to be paid only if successful and only at the end of the case. Applying these standards, the Court found that the district court's seventy-five percent enhancement was unjustified by objective calculations and specific evidence substantiating the need for and amount of the enhancement. Justice Breyer dissented, joined by Justices Stevens, Ginsburg, and Sotomayor.

COPYRIGHT LAW

Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237 (2010)

The Supreme Court held that registration of a copyright under the Copyright Act, while a precondition to filing suit, is not a jurisdictional limitation, and that therefore a federal district court in New York had the power to consider and approve a settlement of a class-action copyright lawsuit even though some of the class members had not registered their copyrights.

The underlying lawsuit is a copyright dispute arising from the reproduction of freelancers' copyrighted works in online databases and print publications. In *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), the Court had held that owners of online databases infringed the copyrights of six freelance authors by reproducing them electronically without permission. After *Tasini*, a number of lawsuits raising similar claims were brought. They were consolidated in the Southern District of New York.

The Copyright Act provides that no civil action for infringement can be brought until the copyright owner registers the copyright claim. 17 U.S.C. §§ 411, 501. The consolidated complaint alleged that the named plaintiffs each owned at least one registered copyright on an article they had freelanced for a newspaper or magazine. The proposed class, however, included both registered owners and unregistered owners.

Because of the case's "growing size and complexity," it was sent to mediation. Freelancers, publishers, databases, and insurers negotiated over the course of three years and finally reached a settlement that was intended "to achieve a global peace in the publishing industry." The parties moved the district court to certify a class for settlement and to approve the settlement agreement. Ten freelancers, including Muchnick, objected—though lack of jurisdiction was not among their objections. The district court overruled the objections, certified the class, approved the settlement as fair and reasonable, and issued final judgment.

On appeal, the Second Circuit sua sponte raised the question of subject-matter jurisdiction. The circuit court questioned whether the district court lacked jurisdiction to hear (and approve the settlement of) claims brought by unregistered holders. All the parties argued that there was no lack of jurisdiction, but the circuit court disagreed, holding that the lack of registration was a jurisdictional defect.

The Supreme Court reversed in an opinion written by Justice Thomas. The Court reasoned that, while registration is a precondition to being able to file a copyright suit, it is not a jurisdictional requirement. The Court noted its recent line of cases, reaching back to *Kontrick v. Ryan*, 540 U.S. 443 (2004), distinguishing between "jurisdictional conditions" and mere "claim-processing rules," and its explanation, in *Arbaugh v. Y & H Corp*., 546 U.S. 500, (2006), that "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." Applying that approach, the Court concluded that the statute did not clearly state that the registration requirement is jurisdictional. It also rejected the argument that the historical treatment of the relevant statutory section as "jurisdictional" meant that it actually is jurisdictional. Justice Ginsburg wrote an opinion concurring in part and concurring in the judgment, which Justices Stevens and Breyer joined. Justice Sotomayor did not participate. The case now returns to the Second Circuit for that court to review the district court's approval of the settlement on its merits.

CRIMINAL LAW

***Johnson v. United States*, 130 S. Ct. 1265 (2010)**

In this case, the Supreme Court determined a simple battery under Florida law did not constitute a "violent felony" under a federal statute allowing enhanced penalties against repeat felons.

Curtis Johnson pleaded guilty to the federal crime of knowing possession of ammunition as a previously-convicted felon. The government sought an enhanced penalty under another statute which applied to criminals who had previously been convicted of three "violent" felonies. Johnson did not dispute that two previous convictions qualified as violent felonies, but he did dispute whether his conviction for simple battery under Florida law qualified. The district court found that it did, and the Eleventh Circuit affirmed.

The Supreme Court reversed, holding that Florida's simple battery did not involve the use of physical force. The Court first acknowledged that Florida's interpretation of its own simple battery felony controlled. Under Florida law, simple battery was defined as actually and intentionally touching or striking an individual or intentionally causing an individual bodily harm. The record did not demonstrate the grounds for Johnson's conviction, so the Court looked to the least of the three grounds for conviction—actual and intentional touching, which could be satisfied even by the most nominal touching without consent. The Court then turned to the definition of "violent felony" under the federal statute, concluding that the definition of violence as involving "physical force" implied the use of powerful force or force capable of causing injury. Finding that this definition fit both the common meaning of force and the context of the statute itself, the Court concluded that simple battery under Florida law fell short of the degree of force required under the federal statute.

Justice Alito, joined by Justice Thomas, dissented, reasoning the common law traditionally defined battery as the "intentional application of force," thus bringing battery squarely within the statutory definition of "violent felony" as the "use of physical force." The dissent also argued that "violent felony" as used in the statute was a term of art that specifically included nonviolent crimes such as burglary and extortion. Reasoning that these crimes were included because they increased the likelihood of responsive violence, the dissent argued that battery, which also increases the risk of violence, should also be included.

***Bloate v. United States*, 130 S. Ct. 1345 (2010)**

Addressing the Speedy Trial Act, the Supreme Court held that time granted to prepare pretrial motions is not automatically excludable from the statute's seventy-day limit between indictment and trial. Time to prepare pretrial motions may only be excluded when a district court grants a continuance based on appropriate findings under 18 U.S.C. section 3161(h)(7).

Taylor James Bloate was indicted and convicted on drug and firearm charges. Prior to trial, the district court granted Bloate's motion for an extension of time to file pretrial motions. However, Bloat chose not to file a pretrial motion, instead waiving of any pretrial motion at the expiration of the extension period. Bloate later moved to dismiss the indictment claiming that the seventy-day limit had elapsed. The District Court excluded the extension granted to file pretrial motions from its calculation and denied the motion. On appeal, the Eighth Circuit affirmed and joined the majority of intermediate courts holding that pretrial motion preparation time is automatically excludable under 18 U.S.C. section 3161(h)(1), which excludes "delay resulting from other proceedings concerning the defendant" as long as the district court "specifically grants time for that purpose."

The Supreme Court reversed. Writing for the Court, Justice Thomas examined subsection (h)(1) and found that (h)(1)(d), which excludes "delay resulting from any pretrial motion, from the filing . . . through the conclusion of the hearing . . . or other prompt disposition[,]" governed the automatic excludability of all proceedings concerning the defendant involving pretrial motions. Determining that the period of automatic exclusion provided by (h)(1)(d) is triggered only upon filing, the Court held that the extension granted to Bloate was not automatically excludable because the period "precedes the first day upon which congress specified such delay may be automatically excluded."

Justice Ginsburg concurred, noting the Court did not address the government's contention that Bloate's waiver was a pretrial motion that initiated an excludable period. Ginsburg encouraged the Eighth Circuit to consider the argument on remand.

Justice Alito dissented, joined by Justice Beyer. The dissent argued the enumerated subsections were illustrative not exhaustive and that this delay was covered by the general rule of (h)(1). The dissent also noted that it was anomalous that a prosecution request for additional time to respond to a pretrial motion was automatically excludable, but that a defense request for additional time to file was not.

Justice Thomas responded that subsection (h)(7) could mitigate any "strange result" from the Court's interpretation by allowing a trial court to exclude pretrial continuances if the trial court issued findings that "the ends of justice" served by the continuance outweighed the "interest of the public and the defendant in a speedy trial[.]"

***United States v. O'Brien*, 130 S. Ct. 2169 (2010)**

The Supreme Court held that, under 18 U.S.C section 924(c), the determination that a firearm is a machinegun is an element of the crime that must be proved to the jury beyond a reasonable doubt, and not a sentencing factor to be proved to the judge by a preponderance of the evidence.

The defendants were indicted on multiple counts relating to the attempted armed robbery of an armored car. Counts three and four of the indictment charged offenses under section 924(c). Count three charged the defendants with using a firearm in furtherance of a crime of violence, a crime which carries a five-year mandatory minimum sentence. Count four charged the defendants with using a machinegun in furtherance of a crime of violence, a crime which carries a thirty-year mandatory minimum sentence under section 924(c)(B)(ii). The government moved to dismiss count four, but subsequently argued that section 924(c)(B)(ii) was a sentencing enhancement provision that should be considered by the judge at sentencing. The district court dismissed count four, but rejected the government's argument regarding the sentencing enhancement, holding that the machinegun provision was an element of a crime and that, therefore, the fact that a weapon was a machinegun needed to be indicted and proved to a jury. The First Circuit affirmed, holding that the machinegun provision was an element of a crime that needed to be proven beyond a reasonable doubt.

In an opinion by Justice Kennedy, the Supreme Court affirmed. The Court looked to its decision in *Castillo v. United States*, 530 U.S. 120 (2000), which held the machinegun provision of section 924(c) was an element of a crime and not a sentencing enhancement. In *Castillo*, the Court examined the language and structure of the statute, tradition, the risk of unfairness, the severity of the sentence, and the legislative history and determined that these factors weighed in favor of finding the provision to be an element of a crime. The Court noted the criminal statute had been amended since *Castillo*; however, it determined that the amendment did not alter its interpretation. The Court found that, while the amended structure of the statute now appeared more consistent with interpreting the machinegun provision as a sentencing factor, the other considerations examined in *Castillo* still favored a finding that the provision constituted an element of a crime.

Justice Stevens concurred in the opinion, asserting *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) and *Harris v. United States*, 536 U.S. 545 (2002) should be overruled, and the Court should hold that any fact considered by a judge in imposing a more severe sentence than he would otherwise have the discretion to impose should be considered an element of the offense.

Justice Thomas concurred in the opinion, asserting any sentencing factor that raises the minimum or maximum for the range of punishment imposed should be considered an element of the crime.

***United States v. Marcus*, 130 S. Ct. 2159 (2010)**

Relying on prior precedent delineating the scope of the plain error rule, the Supreme Court held that conviction on the basis of the trial court's failure to issue a limiting instruction did not constitute plain error.

Glenn Marcus was indicted and found guilty on counts of unlawful forced labor and sex trafficking based on his activities between January 1999 and October 2001. On appeal, he argued for the first time that his conviction could not stand because the jury considered evidence predating passage of the statute on which both charges were based. The Second Circuit agreed and reversed the conviction, holding that, although the conviction would still be valid if based in part on postenactment conduct, the mere possibility that it depended exclusively on preenactment conduct constituted plain error requiring reversal.

The Supreme Court reversed, concluding that the Second Circuit's plain error standard was too permissive. Under the Court's interpretation of the plain error rule, an error must affect the appellant's substantial rights. But an impact on a constitutional right is not enough—the error must qualify as a "structural error" impacting the framework under which the trial court proceeds. Here, the error stemmed from a failure to issue a limiting instruction to the jury based on the date of statutory enactment, and, according to the Court, charge error does not constitute structural error because such errors do not always affect the framework of the trial. As an independent ground for its decision, the Court also concluded that the error at issue did not cast doubt on the fairness, integrity, or reputation of the judicial system, as required by the plain error rule.

In a lone dissent, Justice Stevens took issue with two aspects of the Court's decision. First, Justice Stevens pointed out most of the evidence as to sex trafficking, and some of the evidence as to forced labor, arose from the time period before the relevant statute was passed. Thus, according to Justice Stevens, the jury's consideration of this evidence created a likelihood that the conviction was based on a false impression of more illegal conduct than was actually committed—an error that prejudiced Marcus and undermined the integrity of the proceedings. Second, Justice Stevens argued the four-factor test for determining plain error is unnecessarily complicated and too far removed from the language of the federal rules. Justice Sotomayor did not participate in the proceedings.

***Robertson v. United States ex rel. Watson*, 130 S. Ct. 1011 (2010) (per curiam)**

> The Supreme Court dismissed as improvidently granted a case it had granted to attempt to answer the question "whether an action for criminal contempt in a congressionally created court may constitutionally be brought in the name and pursuant to the power of a private person, rather than in the name and pursuant to the power of the United States."

The case arose out of domestic violence in Washington, D.C. Wykenna Watson was assaulted by her boyfriend, Robertson, and got a restraining order. The U.S. attorney's office began a prosecution of Robertson at the same time. Robertson then violated the restraining order by assaulting Watson again. He pleaded guilty to the first assault in return for a plea deal under which the U.S. attorney agreed not to prosecute him for the second assault. Watson then brought a criminal contempt proceeding against Robertson for violating the restraining order, and the court found him guilty and sentenced him to prison time and a fine.

Robertson appealed based on the argument that only the "relevant sovereign," and not a private person, can bring a criminal contempt prosecution, and the federal government was barred from doing so by the plea deal over the first assault. The Court of Appeals for the District of Columbia rejected his argument, holding that the contempt prosecution was a "private action" and thus not subject to the government's agreement.

After oral argument, the Court dismissed the case as improvidently granted, apparently because the case raised a number of thorny questions about constitutional and statutory issues that were not squarely presented or preserved in the case.

Chief Justice Roberts wrote a dissent from the dismissal, joined by Justices Scalia, Kennedy, and Sotomayor. He argued the threshold question was clearly and cleanly presented, and that the court of appeals was clearly wrong to conclude that the contempt case was a "private action" because that holding contradicted the Court's precedents as well as longstanding American legal tradition making clear that criminal prosecution power can only be exercised by or on behalf of the sovereign.

EEOC

***Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010)**

The Supreme Court held that a plaintiff who does not file a timely EEOC charge challenging an employer's adoption of an employment practice may later assert a disparate impact claim in a timely charge challenging the employer's later application of that practice.

This case involved firefighter hiring in Chicago. Chicago gave a written exam in 1995. In 1996 it decided to draw candidates randomly from a list of those who scored better than 89. Those who scored below 65 had failed, while those scoring between 65 and 88 were kept on an eligibility list. The City then selected classes of applicants to advance from the list several times over the next six years, each time drawing from the "well-qualified" group.

Beginning in 1997, several African American firefighters who had scored in the qualified range filed discrimination charges with the EEOC claiming disparate impact discrimination in violation of Title VII. The district court certified a plaintiff class. The City moved for summary judgment on the grounds that the plaintiffs had failed to file an EEOC charge within 300 days "after the unlawful employment practice had occurred," as required by the statute as a precondition to filing a Title VII lawsuit. The district court rejected that argument and held that the City's continued reliance on the 1995 tests was an ongoing violation that made it timely to file a charge within 300 days of any given selection of candidates from off the list. The plaintiffs then won their case on the merits, but on appeal the Seventh Circuit reversed and held that the suit was untimely because the earliest EEOC charge was filed more than 300 days after the discriminatory act—the scoring and sorting of the scores into three bands.

The Supreme Court reversed unanimously in an opinion by Justice Scalia. The Court began by reframing the question as one of not whether the claim was timely, but

whether a claim was stated at all by the allegation that the use of the list itself violated Title VII. The Court then reasoned that, because drawing from the "well-qualified" list and excluding others each time selections were made was an "employment practice," each separate instance of selection using the list was an employment practice subject to challenge as causing an illegal disparate impact in violation of Title VII. Even though the decision to sort the list was made in 1996, there is no element of intent in a disparate-impact suit (in contrast to a disparate-treatment suit). Therefore, the plaintiffs' allegations based on each use of the list stated a claim, and the Seventh Circuit erred in holding that the plaintiffs' suit was time-barred.

EIGHTH AMENDMENT

Graham v. Florida, 130 S. Ct. 2011 (2010)

The Supreme Court held sentencing a juvenile offender to life in prison without parole for a nonhomicide offense violates the Eighth Amendment's Cruel and Unusual Punishment Clause.

The petitioner committed armed burglary and another crime at age sixteen. He pleaded guilty and received probation without adjudication of guilt, but then committed other crimes and was adjudicated guilty and sentenced to life in prison for the burglary. Under Florida law, he had no possibility of parole. He challenged his sentence as violating the Cruel and Unusual Punishment Clause, but the state appellate court affirmed.

The Court reversed in a 5-4 opinion by Justice Kennedy. The Court began by identifying two main types of cases that have considered whether a sentence was so disproportionate as to violate the Clause: (1) cases in which the court considers all the circumstances to determine whether a term-of-years sentence is disproportionate for a particular defendant; and (2) cases in which the court has applied certain categorical rules against the death penalty. Into this latter category fall the Court's recent decisions banning the death penalty for individuals with low intellectual functioning (*Atkins v. Virginia*, 536 U.S. 304 (2002)), juveniles (*Roper v. Simmons*, 543 U.S. 551 (2005)), and nonhomicide offenders (*Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008)). Because the claim here was one of categorical exclusion of life without parole for juvenile nonhomicide offenders, the Court applied the analysis developed in the categorical series of cases. That analysis considers two factors: first, objective indicia of social standards as expressed in legislative enactments and state practice, and, second, the independent judgment of the jurists hearing the case.

The Court first concluded that objective indicia demonstrate a consensus against the practice because, even though thirty-seven states, the District of Columbia, and the federal government allow sentences of life without parole for juvenile nonhomicide offenders, the actual imposition of such sentences is rare. Next, the Court reasoned the inadequacy of penological theory, the limited culpability of juveniles, and the seriousness of such sentences, all combine to support the Court's independent judgment that the sentence was cruelly and unusually disproportionate. Clarifying the scope of its new rule, the Court stated that it is not required that a juvenile, nonhomicide offender be guaranteed eventual freedom, but it is required that the offender have some meaningful opportunity for release based on maturity and rehabilitation. Finally, the Court noted in support of its decision that there is a strong international consensus against this sort of sentence.

Justice Stevens wrote a brief concurrence, joined by Justices Ginsburg and Sotomayor, to make the point that "[s]tandards of decency have evolved since 1980. They will never stop doing so." Chief Justice Roberts concurred in the judgment, agreeing that this particular sentence was cruel and unusual based on extant cases requiring proportionality review and holding that juvenile offenders are less culpable, e.g., Thompson v. Oklahoma, 487 U.S. 815 (1988), but disagreeing that there was any need for a new, categorical rule against such sentences.

Justice Thomas dissented, joined by Justice Scalia and Justice Alito in part, arguing the majority's analysis of the "objective consensus" factor was contrary to actual trends in legislation and sentencing, and that the independent-judgment factor of the analysis in general wrongly substitutes judicial moral opinion for democratic legislation, and in particular in this case wrongly for the first time extended a categorical ban on a punishment to a noncapital sentence. Justice Alito also wrote his own separate dissent.

***Sullivan v. Florida*, 130 S. Ct. 2059 (2010) (per curiam)**

In this appeal from a Florida state intermediate appellate court, the Supreme Court initially granted certiorari to address the question of whether the Constitution precluded life imprisonment without parole for a thirteen-year-old defendant in a nonhomicide case. After briefing and argument, the Court dismissed the writ of certiorari "as improvidently granted."

Joe Sullivan was convicted of sexual battery at age thirteen in 1989. After the Court decided *Roper v. Simmons*, holding capital punishment unconstitutional for defendants under eighteen, Sullivan filed a motion for post-conviction relief in state

court. 543 U.S. 551 (2005). The trial court dismissed the claim as barred by a state statute of limitations, generally imposing a two-year limitation on non-capital convictions. The court held that, because *Roper* did not apply to Sullivan's case, Sullivan was not entitled to proceed under an exception to the rule allowing an appeal where the law has created a new, fundamental constitutional right. The intermediate appellate court affirmed and refused to certify to case to the Florida Supreme Court.

Sullivan petitioned the Court for certiorari. The Court granted the petition and the case was briefed and argued to the court in 2009. In a single sentence opinion, the Court dismissed the writ of certiorari "as improvidently granted." Though the Court did not address the merits in this case, it simultaneously issued in *Graham v. Florida*, resolving the question presented by *Sullivan*, holding the Constitution does not permit a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime. 130 S. Ct. 2011 (2010). At oral argument, the State conceded that, if *Graham* created a new categorical constitutional rule, the exception to the statute of limitations, previously denied to Sullivan, would allow Sullivan to file a new post-conviction motion.

ENERGY LAW

***Mac's Shell Serv., Inc. v. Shell Oil Prods. Co*., 130 S. Ct. 1251 (2010)**

The Supreme Court held that a franchisee who does not abandon his franchise due to wrongful franchisor conduct and who signs and continues to operate under a franchise renewal agreement cannot recover for constructive termination or constructive nonrenewal under the Petroleum Marketing Practices Act (PMPA).

The defendant, Shell Oil, maintained petroleum franchise relationships with the plaintiffs. After several years, Shell, through its assignee, changed the terms of the franchise agreements by eliminating a rent subsidy and changing the method for calculating rent in renewal agreements. After these changes were made, the plaintiffs continued to operate their franchises and signed renewal agreements with Shell under the new terms.

The plaintiffs subsequently sued, asserting that by changing the terms of the agreements, Shell had engaged in constructive termination and constructive nonrenewal in violation of the terms of the PMPA. A jury found in favor of the plaintiffs. The defendants moved for judgment as a matter of law, arguing that there was no

constructive termination or constructive nonrenewal because the plaintiffs had not abandoned their franchise and had signed and continued to operate under the renewal agreements. The District Court denied the defendant's motions for judgment as a matter of law. On appeal, the First Circuit affirmed in part and reversed in part. The appellate court agreed with the lower court that the franchisees were not required to abandon their franchise in order to recover for constructive termination. However, the court held that the franchisees could not recover for constructive nonrenewal once they had signed a renewal agreement and operated under that agreement.

In an opinion by Justice Alito, the Court reversed in part and affirmed in part the judgment of the First Circuit and remanded the case for further proceedings. The Court first held that, under either an ordinary or technical interpretation, the word "terminate" in the PMPA requires that the franchisor force the franchisee to abandon his franchise. Thus, if the franchise is not abandoned, there is no termination under the PMPA. The Court further noted unfair conduct which does not force the end of a franchise can be remedied by state law, rather than by federal statute. Finally, the Court agreed with the First Circuit that the franchisees could not recover for constructive nonrenewal when they signed and continued to operate their franchise under the new agreement. The Court noted that, while the PMPA prohibits the unlawful failure to renew a franchise agreement, it does not prohibit the renewal of an agreement with less favorable terms.

ERISA

***Conkright v. Frommert*, 130 S. Ct. 1640 (2010)**

Looking to principles of trust law and the purposes underlying ERISA, the Supreme Court held courts must engage in deferential review of benefits plan interpretations rendered by ERISA plan administrators, even when the administrators' previous interpretations were held to be incorrect.

A group of employees at Xerox left the company in the 1980s and received a lump-sum payment from the Xerox pension plan. When they were later rehired, the pension plan administrator employed the "phantom account" method to account for the prior lump-sum distribution when calculating the employees' present benefits. Under this method, the administrator estimated the amount of growth that would have occurred had the prior distributions been retained in the plan, and then reduced the employees' present benefits accordingly.

The employees challenged the interpretation in federal court. The district court granted summary judgment in favor of the plan administrator, but the Second Circuit reversed, holding that the interpretation was unreasonable and that the employees were not given proper notice. On remand, the administrator submitted two new, alternative interpretations, but the district court rejected both in favor of a different approach favored by the employees. The Second Circuit upheld the decision.

The Supreme Court reversed, holding the administrator was entitled to deferential review of his second plan interpretation, at least where his first interpretation was an honest mistake. In reaching this decision, the Court began with settled law requiring deferential review of ERISA plan interpretations. The Court then looked to trust law to determine whether deference survives where a court initially rejects a trustee's actions. Finding the law "unsettled," the Court nevertheless found support for the proposition that deference survives unless a trustee acts in bad faith. The Court then looked to the purposes underlying ERISA, and found that continued deference to plan administrators in the face of one "honest mistake" would best serve the statutory interest in efficiency, predictability, and uniformity.

In dissent, Justice Breyer, joined by Justices Stevens and Ginsburg, took issue with three mistakes committed during the course of the proceedings. First, the dissenters pointed out the plan administrator's initial error in applying "phantom account" method. Second, they highlighted the mistake made by the district court when it initially upheld the "phantom account" method. And third, they took issue with the Court's decision as a misreading of trust law and disserving the purposes of ERISA. Specifically, the dissent argued that trust law allows, but does not require, deference in the face of a previously mistaken interpretation. The dissent also reasoned that the Court's opinion will result in inefficiency and will incentivize gaming of plan interpretations in favor of employers. Justice Sotomayor did not participate in the resolution of the case.

***Hardt v. Reliance Std. Life Ins. Co.*, 130 S. Ct. 2149 (2010)**

Addressing the attorney fees provision of ERISA, the Court held a party need not meet the "prevailing party" standard in order to be awarded fees by the trial court.

Bridget Hardt stopped working due to medical problems. She applied for long-term disability benefits from her employer's disability plan. Reliance Standard Life

Insurance Company ("Reliance"), the plan underwriter, granted certain short-term benefits but denied longer-term benefits because it determined that she was not totally disabled. Hardt exhausted her administrative remedies and sued Reliance in federal court. The District Court found that Reliance had not considered all of the medical information Hardt submitted. Noting that there was compelling evidence in the record of Hardt's disability, the trial court remanded to Reliance to consider the evidence and reconsider its determination. Reliance reconsidered and awarded Hardt benefits.

Hardt then filed a motion for attorney fees under the ERISA fee shifting statute, 29 U.S.C section 1132(g)(1). The District Court evaluated the claim under the Fourth Circuit's test that required a party to be a "prevailing party" in order to award fees. Finding Hardt was a "prevailing party" the court awarded fees. The Fourth Circuit reversed, holding that Hardt was not a prevailing party because she did not obtain an enforceable judgment on the merits or a court ordered consent decree.

The Court looked to the plain language of the statute and determined that the prevailing party standard was not applicable. Writing for the Court, Justice Thomas noted that the statute, which allows a court to award fees "in its discretion . . . to either party[,]" did not include any reference to a prevailing party requirement. The court also pointed to the subsequent section—applicable to a limited subset of ERISA actions—that did refer to a "judgment in favor of [a multiemployer] plan." Because Congress showed it knew how to limit the availability of fees and had not done so in section (g)(1), the Court refused to read a prevailing party standard into the statute.

Having determined that the prevailing party requirement did not apply, the Court next considered what limitations did apply to a court's discretion under section (g)(1). The Court cited Ruckelshaus v. Sierra Club for the rule that when Congress does not indicate clearly that it "meant to abandon historic fee-shifting principles and intuitive notions of fairness" a fees claimant must demonstrate "some degree of success on the merits" and not merely a procedural victory. 463 U. S. 680 (1983). Reviewing the specifics of Hardt's case, the court held that Hardt had demonstrated some success on the merits.

Concurring in part and in the judgment, Justice Stevens agreed section (g)(1) did not include a prevailing party requirement and that the District Court was within its discretion to award fees to Hardt. However, Stevens objected to the application of Ruckelshaus to other statutory provisions because Ruckelshaus "turned to a significant extent, on a judgment about how to read the legislative history of the provision in question."

FAIR DEBT COLLECTION PRACTICES ACT

***Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 130 S. Ct. 1605 (2010)**

The Supreme Court held that the bona fide error defense under the Fair Debt Collection Practices Act does not apply to mistaken interpretations of the Act's legal requirements.

The defendant (Carlisle) sought foreclosure on a property owned by the plaintiff (Jerman). Carlisle served Jerman with a notice stating that the mortgage debt on the property would be presumed valid unless Jerman contested the debt in writing. Having already paid the debt in full, Jerman disputed the debt in writing, and the foreclosure suit was withdrawn. Jerman subsequently filed suit under the Fair Debt Collection Practices Act (FDCPA), asserting that the foreclosure notice violated the terms of the Act by stating that the debt would be presumed valid unless disputed in writing. The district court held that Carlisle's notice violated the FDCPA but concluded that the bona fide error provision of the Act shielded the defendant from liability. The Sixth Circuit affirmed, holding that section 1692k(c) of the FDCPA shields debt collectors from bona fide errors, including mistakes of law.

In an opinion by Justice Sotomayor, the Court reversed. The Court held the bona fide error defense of the FDCPA does not extend to mistaken interpretations of the legal requirements of the FDCPA. The Court reasoned that when Congress authorizes mistake-of-law defenses to particular statutes, it typically does so explicitly in the statutory language. The Court noted that the FDCPA contains no such explicit authorization for civil suits, even though the administrative penalty provisions of the Act provide clear language that allows for a mistake-of-law defense. The Court further noted that the FDCPA did not limit liability to "willful" violations, further undermining the applicability of a mistake-of-law defense. Additionally, the Court examined the legislative history and determined that Congress expressed no clear intent to incorporate a mistake-of-law defense to FDCPA liability. Finally, the Court acknowledged that this interpretation of the FDCPA places some burdens on attorneys representing debt collectors; however, it noted that these burdens are no greater than those imposed by codes of conduct and state statutes.

Justice Breyer concurred in the opinion. Noting the burdens placed on attorneys by the opinion, he discussed the ability of an attorney to seek an advisory opinion from the Federal Trade Commission before acting in good faith on that opinion.

Justice Scalia concurred in part and concurred in the judgment. He disagreed with the Court's use of case precedent interpreting the Truth In Lending Act as a guide for interpreting Congressional intent in incorporating similar language in the FDCPA. He also disagreed with the Court's reliance on selected portions of legislative history; however, he agreed with the Court's textual analysis of the statute.

Justice Kennedy, joined by Justice Alito, dissented. He asserted that the bona fide error exception language to the FDCPA was clear on its face and should be read to include legal errors. The dissent expressed concern over the negative impact the Court's interpretation of the FDCPA would have on attorneys representing debt collectors.

FALSE CLAIMS ACT

Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 130 S. Ct. 1396 (2010)

The Supreme Court held the False Claims Act's prohibition of qui tam actions based upon the public disclosure of information contained in "administrative" reports extends to bar actions based upon publicly disclosed information contained in state and local administrative reports.

Wilson, an employee of a special purpose governmental body, suspected that fraudulent claims were being filed with the federal government for compensation on a federally funded flood clean-up effort. Wilson alerted local and federal officials of her suspicions. Local, state, and federal bodies subsequently investigated the allegations, and several administrative reports on their findings were created. Several years later, Wilson filed a qui tam action alleging that the county conservation districts and local and federal officials filed false claims for compensation with the federal government in violation of the False Claims Act (FCA). The district court dismissed the qui tam suit for lack of jurisdiction, finding that Wilson did not refute the allegation that her action was based upon information publicly disclosed in state and local administrative reports. The Fourth Circuit reversed, finding that the FCA only prevented jurisdiction over suits that were based upon information publicly available in federal administrative reports and that a suit based upon information found in a state or local administrative report was not barred under the FCA.

In an opinion by Justice Stevens, the Supreme Court reversed the Fourth Circuit and remanded the case for further proceedings. The Court held the language of the FCA, prohibiting qui tam suits based upon information publicly disclosed "in a congressional, administrative, or Government Accounting office report," was not limited to federal administrative reports. The Court noted the text, legislative history, and policy of the FCA led to an interpretation that qui tam suits based upon publicly disclosed information in any state, local, or federal administrative reports are barred under the statute. The Court rejected the respondent's argument that, under the Court's ruling, local governments could insulate themselves from qui tam litigation by making low-profile disclosures in their own administrative reports. The Court noted that, even though such disclosures would bar qui tam suits, they would expose local governments to FCA liability in actions brought by the United States.

Justice Scalia concurred in part and concurred in the judgment. Scalia noted the majority was correct in holding that the text of the FCA includes state and local administrative reports. Thus, Scalia noted that the intent of Congress in passing the statute was irrelevant and should not be examined in determining the meaning of the statutory language.

Justice Sotomayor, joined by Justice Breyer, dissented. She disagreed with the Court's interpretation of the text of the statute, noting the doctrine of *noscitur a sociis* should apply and lead to an interpretation of the term "administrative" as barring qui tam suits based upon information contained only in federal administrative reports. She also noted that the history and policy behind the FCA required a more narrow interpretation of the statutory language.

FIRST AMENDMENT

United States v. Stevens, 130 S. Ct. 1577 (2010)

The Supreme Court held 18 U.S.C. section 48—criminalizing the creation, sale, or possession of certain depictions of animal cruelty—was substantially overbroad and invalid under the First Amendment.

Congress enacted 18 U.S.C. section 48 in response to the development of "crush videos." These videos depict the torture and killing of animals, often by being crushed underfoot. This case did not involve the sale of crush videos. Rather, Robert J. Stevens was indicted on three counts of violating section 48 in connection with his business and associated web site that sold videos of dogfights and of dogs attacking other animals.

Stevens challenged the constitutionality of section 48, arguing that it was facially invalid under the First Amendment. The trial court disagreed, holding that the speech was categorically unprotected. A jury convicted Stevens on all counts. The Third Circuit, in an en banc decision, reversed the trial court. It refused to create a new class of unprotected speech for depictions of animal cruelty and held that the statute could not survive strict scrutiny analysis.

On appeal, the Court considered whether the depictions for animal cruelty were categorically unprotected under the First Amendment. It rejected as "startling and dangerous" the argument that protection "depends upon a categorical balancing of the value of the speech against its societal costs" and held that depictions of animal cruelty are not categorically unprotected.

The Court then considered the validity of section 48 under the First Amendment. The statute bans depictions of animal cruelty, defining these depictions to include the killing or wounding of animals. The statue further required that the conduct be illegal where the creation, sale, or possession takes place. The Court noted this would render depictions of lawful conduct illegal if the depiction found its way to a jurisdiction that banned such conduct. As an example, the Court noted that, because hunting is illegal in the District of Columbia, "any magazine or video depicting lawful hunting" is covered by section 48 "so long as that depiction is sold within the Nation's Capital." The Court rejected the government's argument that section 48's exception for depictions that have serious scientific, educational, or historical value sufficiently narrowed the statute's reach because many depictions the government argued the exception covered were produced for entertainment purposes and were not covered. Because the presumptively impermissible applications of section 48—such as the banning of hunting material in the District of Columbia—far outnumbered the applications the government argued were permissible—banning crush and dogfighting videos—the Court held the statue unconstitutional as overbroad.

Justice Alito dissented, suggesting that interpreting the illegality requirement in section 48 as applying only to depictions of illegal "animal cruelty as defined by state law" would exclude the bulk of the depictions the majority cited from the scope of section 48. Further, the dissent claimed many of the depictions would also fall under section 48's exception for depictions that have serious scientific educational or historical value. Arguing that section 48 had a substantial core of constitutionally permissible applications—the prevention of crush videos and dogfight videos—the dissent determined that section 48 did not suffer from substantial overbreadth when the limited number of unconstitutional applications was compared to "plainly legitimate sweep" of the statute.

***Salazar v. Buono*, 130 S. Ct. 1803 (2010)**

In a procedurally complicated case challenging the display of a cross on federal land, and the subsequent federal transfer of the land in response to a court order requiring removal of the cross, the Supreme Court issued a fractured set of opinions, the effect of which was to let the cross stand, but none of which commanded the votes of five justices.

A cross was put up in the Mojave National Preserve in 1934 by the VFW, to honor American soldiers who had died in World War I. The respondent, Buono, a regular visitor to the preserve, sued claiming that the cross violated the Establishment Clause of the First Amendment. The district court initially concluded that Buono had standing, that the cross violated the Establishment Clause because it conveyed an endorsement of religion, and that the government should be enjoined to remove the cross. While the appeal from that decision was pending, Congress passed a statute directing the Secretary of the Interior to transfer the cross and the land where it stands to the VFW in exchange for privately owned land elsewhere. The Ninth Circuit then affirmed the district court's decision but did not address the effect of the statute. Buono then sued again for an injunction to block the land transfer through enforcement or modification of the original injunction. The district court held that the land transfer was an attempt to circumvent the original injunction and keep the cross on display and permanently enjoined the government from implementing the land-transfer statute. The Ninth Circuit again affirmed.

The Supreme Court reversed without a majority opinion. Justice Kennedy, joined by the Chief Justice and in part by Justice Alito, concluded Buono had standing to seek enforcement of the injunction. He did not reach the question whether Buono originally had standing to bring his suit based on his claim of offense at a religious symbol's presence on federal land because in his view that issue had been settled finally by the original case and Ninth Circuit appeal, which gave him a judicially cognizable interest in enforcing the injunction in his favor. Proceeding to the merits, he concluded the Congressional statute was entitled to deference and respect, as a legislative attempt to strike a balance between the original adjudication of a violation and the laudable purposes of the cross to honor fallen soldiers. He concluded the case should be remanded for the district court to consider whether congress's purposes in enacting the land-transfer statute had been improper, to consider the accomodationist approach adopted by Congress in response to the original judgment, and to consider the background and context of the cross.

Justice Alito wrote to express the view that remand was not necessary and that, instead, the record was sufficient to determine that the statute should be upheld as a solution that eliminated any appearance of religious sponsorship or endorsement by the federal government. Justice Scalia, joined by Justice Thomas, concluded Buono lacked Article III standing. Because the relief of invalidating the land-transfer statute went well beyond the original injunction, he reasoned, Buono needed Article III standing to pursue that additional relief, but he lacked standing because he had not alleged that he would be offended by the presence of the cross on private property.

Justice Stevens dissented, joined by Justices Ginsburg and Sotomayor, concluding the cross conveyed a message of governmental endorsement of religion and that the district court was right to expand its injunction to invalidate the land transfer because that transfer amounted to a violation of the injunction against the government permitting the display of the cross in that particular area of the desert. Justice Breyer dissented to express the view that, because the case was really just about the district court's interpretation of its own injunction (the larger question of an Establishment Clause violation having been settled) and because the law of injunction interpretation clearly (in Justice Breyer's view) allowed the district court to interpret its injunction to prohibit the land transfer, the case did not present a question worthy of the Court's consideration.

In an interesting postscript, shortly after the decision was issued the cross was stolen (it had been left in place, but covered by plywood, while the litigation was pending). A replacement was put up, but then taken down by the Park Service because the district court’s injunction remains in effect—for now.

FTCA

***Hui v. Castaneda*, 130 S. Ct. 1845 (2010)**

Addressing a circuit conflict over the availability of a *Bivens* action against officers and employees of the U.S. Public Health Service (PHS), the Supreme Court held that the plain language of 42 U.S.C. section 233(a) precluded any remedy other than that provided by the Federal Tort Claims Act (FTCA) against the United States. Finding that a *Bivens* action against the officer and employee was unavailable, the court reversed the judgment of the Ninth Circuit and remanded for further proceedings.

Immigration and Customs Enforcement (ICE) detained Francisco Castaneda at a correctional facility. Over the course of nearly a year in detention, Castaneda persistently sought treatment for a lesion on his penis. Ignoring the recommendation of specialists, defendants Dr. Esther Hui, the physician responsible for Castaneda's care, and Commander Stephen Gonsalves, a PHS administrator, denied a biopsy as an "elective" procedure until shortly before ICE discharged Castaneda. A post-discharge biopsy confirmed cancer. Medical treatment was unsuccessful, and Castaneda eventually died.

Before Castaneda died, he sued the United States under the FTCA and brought a *Bivens* action against the defendants. Hui and Gonsalves moved to dismiss the *Bivens* claims, arguing that section 233(a) gave them absolute immunity because it provides that the "remedy against the United States provided by sections 1346(b) and 2672 of title 28 . . . shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against [any PHS] officer or employee (or his estate) whose act or omission gave rise to the claim." The district court denied the motion, and the Ninth Circuit affirmed.

A unanimous Court reversed the Ninth Circuit. Writing for the Court, Justice Sotamayor premised her analysis on the text of section 233(a). Focusing on the broad meaning of "exclusive of any other civil action[,]" the Court held the language accommodated both "known and unknown" causes of action, including the subsequently developed *Bivens* cause of action for constitutional violations. The Court noted that Congress provided an exception to immunity for constitutional violations in the Westfall Act but had not done so in section 233(a). The Court also rejected a claim that section 233(a)'s reference to the Westfall Act incorporated the Act's immunity

exception. In rejecting this claim, the Court held that section 233(a)'s reference to the "remedy" of the Westfall Act limited incorporation only to those sections establishing the remedy.

HABEAS CORPUS

Kiyemba v. Obama, 130 S. Ct. 1880 (2010) (per curiam)

Due to developments regarding petitioners' detention, the Supreme Court vacated and remanded the D.C. Circuit's decision that release of Uighur detainees into the United States exceeded the habeas authority of the trial court.

Petitioners, 17 members of a Chinese Turkic Muslim minority, left China for Afghanistan in early 2001 due to alleged governmental oppression. When the United States began its military campaign in Afghanistan, petitioners fled to Pakistan where Pakistani officials handed them over to United States forces in return for a bounty.

Shortly after apprehension, petitioners were transferred to Guantanamo Bay, Cuba. Petitioners' cases followed a convoluted path, but by 2008, the executive branch no longer argued that any of the petitioners should be detained as military combatants. Because the threat of oppression in China prevented petitioners' repatriation, the executive branch pursued diplomatic resettlement elsewhere.

Petitioners brought a habeas petition. The district court determined that petitioners' continued detention was effectively indefinite and exceeded the executive branch's authority. The district court granted the petitioners' motion for release into the United States.

On appeal, the central issue was the relief granted: entry into the United States. The D.C. Circuit determined that the district court exceeded it habeas authority by ordering the release of petitioners into the United States outside the framework of immigration law.

While certiorari was pending, four of the petitioners were transferred to Bermuda. After the Supreme Court granted certiorari, six more petitioners were resettled in Palau. The remaining petitioners each received two offers of resettlement, two accepted an offer and five refused and remained at Guantanamo Bay.

In its per curiam opinion, the Supreme Court noted that "[t]his change in the underlying facts may affect the legal issues presented." The Court declined to rule in the case, citing its role as a court of review. It vacated the D.C. Circuit decision and remanded for the Circuit to "determine, in the first instance, what further proceedings in that court or in the District Court are necessary and appropriate for the full and prompt disposition of the case in light of the new developments."

***Renico v. Lett*, 130 S. Ct. 1855 (2010)**

The Supreme Court held the Michigan Supreme Court's application of federal double-jeopardy law was not unreasonable, and therefore habeas relief was not appropriate.

The defendant (Lett) was charged with first-degree murder and possession of a firearm. After a nine-hour trial, the jury deliberated for approximately four hours over the course of two days. During its deliberations, the jury sent the trial judge seven notes, one of which asked about the result if the jury could not agree. The judge asked the foreperson if the jury was hopelessly deadlocked, and after a brief exchange, the foreperson indicated that the jury was not going to reach a unanimous verdict. The judge then declared a mistrial. Lett's second trial resulted in a unanimous verdict, and he was convicted of second-degree murder after three hours of deliberations. Lett appealed to the Michigan Court of Appeals, arguing that the original trial judge erred by declaring a mistrial without any manifest necessity to do so. The Michigan Court of Appeals agreed and reversed the conviction. The Michigan Supreme Court reversed the Court of Appeals, holding that there was no violation of double jeopardy as long as the trial judge exercised sound discretion in concluding that the jury was deadlocked and that there was a manifest necessity for a mistrial. Lett petitioned for a writ of habeas corpus, arguing that the trial judge abused his discretion and that the Michigan Supreme Court unreasonably applied federal law in denying his double jeopardy claim. The district court agreed with Lett and granted the writ; the Sixth Circuit affirmed.

In an opinion by the Chief Justice, the Court reversed. The Court noted the question at issue under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was whether the Michigan Supreme Court unreasonably applied clearly established federal law when it determined that the trial court did not abuse its discretion by declaring a mistrial. The Court then reasoned that a trial judge is afforded great discretion in declaring a mistrial when he considers the jury deadlocked. The Court noted that there could be more than one plausible interpretation of the trial record, but there were also other reasonable interpretations of the record that would lead to the conclusion that the Michigan Supreme Court reasonably applied clearly

established federal law. Thus, the Court held the Michigan Supreme Court's interpretation of the record and its decision granting broad discretion to the trial judge were not objectively unreasonable, and therefore habeas relief was not appropriate.

Justice Stevens, joined by Justice Sotomayor and Justice Breyer, dissented. He examined the record and noted the brevity of deliberations and the uncertainty of the foreperson in declaring the jury unable to reach a unanimous verdict. Thus, he disagreed with the majority that the Michigan Supreme Court could have reasonably found that the trial court exercised sound discretion in declaring a mistrial.

***Jefferson v. Upton*, 130 S. Ct. 2217 (2010) (per curiam)**

The Supreme Court held that, under 28 U.S.C. section 2254(d), a federal court may presume the correctness of a state court's factual findings in a habeas action only if the federal court has considered all eight exceptions to that presumption.

The defendant (Jefferson) was convicted of capital murder. At his sentencing hearing, his attorneys failed to introduce any evidence of a head trauma that he had sustained as a child, which an expert indicated might have impacted his behavior and merited further testing. Jefferson sought habeas relief in state court, arguing ineffective assistance of counsel. The state court denied his petition in an opinion drafted by attorneys for the State pursuant to the court's ex parte request. The opinion itself contained errors regarding the testimony of witnesses who never testified in court. Jefferson then filed a federal habeas petition, arguing that the district court did not need to give deference to the state court because the process by which the state judge decided the case raised serious doubts about the decision. The district court agreed, noting that the state court's findings of fact are presumed to be correct unless one of eight enumerated exceptions applies. However, the district court did not disturb the state court's factual findings because it determined that Jefferson would prevail on his ineffective assistance of counsel claims even if those findings were accurate. The state appealed, and the Eleventh Circuit reversed, holding that the state court's findings were entitled to a presumption of correctness because the findings were fairly supported by the record.

In a per curiam opinion, the Court vacated the appellate court's judgment and remanded for further proceedings. The Court agreed with the district court that a state court's findings of fact are not presumed to be correct if one of eight enumerated exceptions applies. Among those exceptions are "that the applicant did not receive a full, fair and adequate hearing … or that the applicant was otherwise denied due process

of law … or unless … such a factual determination is not fairly supported by the record." The Court noted that the Eleventh Circuit had only considered the final exception in determining that the state court's findings were entitled to a presumption of correctness. The Court held the appellate court was required to consider the other seven possible exceptions to the presumption of correctness, including allegations of procedural improprieties in the proceedings below. Because the appellate court failed to consider all of the exceptions to the statute, the Court vacated its opinion and remanded for further consideration.

Justice Scalia, with whom Justice Thomas joined, dissented. He asserted the basis for the majority's decision was not raised in the briefs below nor was it raised in the petition for writ of certiorari. Thus, the dissent contended that the issue should not have been considered by the Court.

INEFFECTIVE ASSISTANCE OF COUNSEL

Padilla v. Kentucky, 130 S. Ct. 1473 (2010)

The Supreme Court held that a criminal defense lawyer provides constitutionally ineffective assistance of counsel when he does not tell a noncitizen client that pleading guilty to a crime can result in the client's deportation.

The petitioner is a native of Honduras who had been a lawful permanent resident of the U.S. for more than forty years. He pleaded guilty in Kentucky to transporting a large quantity of marijuana, and as a result became subject to deportation under federal law. Before pleading guilty, Padilla claims, his counsel told him not to worry about his immigration status because he had been in the country for so long. He took that advice before pleading guilty and claims he would have insisted on going to trial if he had known he would be deported based on his guilty plea. He sought postconviction relief from the Kentucky Supreme Court based on these arguments, but that court concluded that erroneous advice about deportation does not amount to ineffective assistance of counsel because it is merely a collateral consequence of conviction.

The Supreme Court reversed, holding erroneous deportation advice does amount to ineffective assistance of counsel. Justice Stevens wrote for the majority, which reasoned deportation is both a particularly severe penalty and one inextricably bound up with criminal conviction because of federal laws that make deportation essentially inevitable in the event of conviction of certain classes of crimes. It then applied the

Strickland v. Washington standard of whether the representation fell below "an objective standard of reasonableness," 466 U.S. 668 (1984), and concluded that prevailing professional norms supported the view that counsel must advise client about the risk of deportation. The majority responded to Justice Alito's contention that its rule would require criminal lawyers to master the complexities of immigration law by stating that, when the immigration consequences are unclear or complex, the defense lawyer need only advise a noncitizen client that conviction may carry adverse immigration consequences. The Court also rejected the Solicitor General's proposal that the rule be limited only to circumstances in which the criminal defense lawyer affirmatively gives incorrect advice about deportation consequences. The Court did not reach the question whether Padilla had been prejudiced by his counsel's mistake, because it had not been passed on below.

Justice Alito concurred, joined by Chief Justice Roberts, endorsing a more limited rule under which a criminal defense attorney need only refrain from giving unreasonably incorrect advice and advise his client to consult an immigration attorney about possible adverse immigration consequences. Justice Scalia dissented, joined by Justice Thomas.

INTERNATIONAL TREATIES

Abbott v. Abbott, 130 S. Ct. 1983 (2010)

Interpreting an international treaty governing child custody rights, the Supreme Court held one parent's *ne exeat* right of consent before the other parent may take the child to another country constituted a "right of custody" under the treaty, requiring return of the child to the country of residence.

Timothy Abbott, a British citizen, married Jacquelyn Vaye Abbott, an American citizen in 1992. During the course of an eleven-year marriage, Timothy's work as an astronomer took them first to Hawaii and then to Chile. While in Chile, the couple separated, and a Chilean court granted Jacquelyn custody of their only child, A.J.A., while granting Timothy regular visitation rights. Timothy was also granted a *ne exeat* right, which required Jacquelyn to obtain Timothy's consent before taking A.J.A. out of the country.

When Timothy obtained a British passport for A.J.A., however, Jacquelyn became concerned. Facing proceedings to expand Timothy's rights, Jacquelyn acted preemptively and relocated with A.J.A. in Texas. Timothy filed suit in a Texas federal

court, seeking A.J.A.'s return to Chile under the International Child Abduction Remedies Act (ICARA), a treaty to which the United States is a member. The district court concluded that Timothy's *ne exeat* right was not a "right of custody" under ICARA and thus did not entitle him to the return remedy. The Fifth Circuit affirmed.

Looking to the text of the treaty and related sources, the Supreme Court reversed. Under ICARA, the remedy of return applies where a child is wrongfully removed "in breach of rights of custody." "Rights of custody" are in turn defined as rights "relating to the care of the person of the child," particularly "the right to determine the child's place of residence." The Court concluded the scope of Timothy's *ne exeat* gave him rights over the place of A.J.A.'s residence, because Jacquelyn could not remove A.J.A. from Chile without Timothy's consent, and a right relating to A.J.A.'s care, because fundamental characteristics such as language, culture, and traditions flow from the decision of country of residence. The Court found support for its interpretation in the position of the U.S. State Department on the issue and similar rulings of foreign courts.

In dissent, Justice Stevens, together with Justices Thomas and Breyer, reasoned the *ne exeat* right fits more closely as a corollary to Timothy's "right of access" rather than a separate "right of custody." According to Justice Stevens' dissent, the decision to keep A.J.A. would not necessarily decide his language, culture, or traditions—any of which could be affected to decisions relating to schooling, religion, and many more, all of which lie with Jacquelyn. Moreover, the dissent drew on phrases used in ICARA to highlight a distinction between controlling the "State of habitual residence" and choosing the "place of residence of the child." It also pointed out that the State Department's stance on ICARA was of recent vintage and that the views of foreign courts were not universal nor were they based on identical fact patterns.

NECESSARY AND PROPER CLAUSE

United States v. Comstock, 130 S. Ct. 1949 (2010)

The Supreme Court held the Necessary and Proper Clause of Article 1 of the United States Constitution grants Congress the power to enact a civil commitment statute authorizing the continued commitment of certain federal prisoners after their sentence has been completed.

In 2006, the government instituted civil commitment proceedings against five of the respondents in the case pursuant to 18 U.S.C. section 4248. This statute authorizes

federal district courts to order the civil commitment of a person in the custody of the federal bureau of prisons if he has previously engaged in sexually violent behavior or molested a child; suffers from a serious mental illness; and is sexually dangerous to others because of that illness. In order for such a civil commitment to take place, the government must certify that the prisoner meets the conditions, and the government is then given an opportunity to prove its claims at a hearing. The statute requires that the prisoner be represented by counsel at this hearing and that he have an opportunity to present his case. Confinement may last until the State assumes custody of the person or the person's condition improves and he is no longer dangerous. The defendants moved to dismiss the proceedings on constitutional grounds, arguing, among other things, that Congress exceeded its powers in enacting the civil commitment statute. The district court agreed that Congress exceeded its powers in enacting the statute, and the Fourth Circuit affirmed.

The Court, in an opinion by Justice Breyer, reversed. The Court noted that, in order for a statute to be constitutionally authorized, the legislation must be rationally related to the implementation of a power enumerated in the Constitution. The Court then described the long history of federal involvement in mental health care for prisoners. Further, the Court explained the federal government is the custodian of its prisoners and as such has the power to protect others from dangers those prisoners pose. The Court determined that the statute does not invade the province of state sovereignty because the powers exercised under the statute are granted to Congress by Article 1 of the Constitution. Finally, the Court found the statute is narrow in scope and, therefore, is not a general police power unrelated to the enumerated powers of Article 1.

Justice Kennedy concurred in the judgment. He noted the rational basis test used in the context of the Commerce Clause must be based on empirical data. He further noted that federalism concerns do not disappear merely because a power is within the reach of the federal government.

Justice Alito concurred in the judgment, noting it is necessary and proper for Congress to enact legislation that protects the public from dangers created by the federal criminal justice system.

Justice Thomas dissented, with Justice Scalia joining in parts of the dissent. He asserted the statute does not execute an enumerated power, and therefore, he disagreed with the Court that the Constitution authorized Congress to enact section 4248.

SECURITIES LAW

***Jones v. Harris Assocs. LP*, 130 S. Ct. 1418 (2010)**

In this case, the Supreme Court interpreted the fiduciary duty imposed on mutual fund advisers by the Investment Company Act as preventing the charging of fees so disproportionately large that they have no reasonable relationship to the services rendered and thus could not have been the product of arms' length bargaining.

A group of shareholders in various mutual funds sued the funds' investment adviser under section 36(b) of the Investment Company Act, which allows fund investors to bring private causes of action for breaches of fiduciary duty. The shareholders alleged the adviser had charged disproportionate fees in violation of its duty. The district court granted summary judgment in favor of the adviser, holding that there was no fact issue on the amount of the fees where comparisons to fees charged by the same adviser to other clients and fees charged by other advisers to similar clients were both in the relevant range. The Seventh Circuit affirmed on other grounds, applying trust law principles to hold that so long as an adviser gives full disclosure and avoids deception, it cannot be held liable solely based on the size of the fee charged.

The Supreme Court vacated the judgment, holding the Seventh Circuit interpreted the fund adviser's fiduciary duty under an erroneous standard. The Court rejected the Seventh Circuit's standard based on trust law and instead adopted the standard first set forth by the Second Circuit in Gartenberg v. Merrill Lynch Asset Mgmt., Inc., 694 F.2d 923 (2d Cir. 1982). Under the Gartenberg standard, as modified by the Court, a duty-based challenge to an investment adviser's fees should focus on whether the fee charged is so large that it bears no relationship to the services rendered and thus could not have been reached via arm's length bargaining. According to the Court, this rule is in line with previous precedent interpreting fiduciary duty from the standpoint of arm's length bargaining. Furthermore, the Gartenberg test is consistent with the Investment Company Act's focus on the role of independent directors. Thus, the Court emphasized that the test does not impose a categorical rule governing relevant fee comparison and that the test does incorporate a sliding scale of deference to the mutual funds' independent directors dependent on the level of their involvement in evaluating and reviewing adviser fees.

In a lone concurrence, Justice Thomas agreed the proper approach to interpreting the Investment Company Act required deferential treatment to the actions of a mutual fund's independent directors, but disagreed with the express adoption of

the Gartenberg standard, which he argued allows for unduly loose review based on "fairness."

***Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784 (2010)**

In this case, the Supreme Court concluded that, for the purposes of limitations, a private securities fraud cause of action accrues at the earlier of a plaintiff's actual discovery of facts constituting the violation or when a reasonably diligent plaintiff would have discovered those facts. Further, the court held that facts constituting the violation include scienter—the intent to deceive, manipulate, or defraud.

The underlying case involves Merck & Company's marketing and sale of its pain-relief drug Vioxx. Shortly after Merck brought Vioxx to market in 1999, published studies began to suggest a connection between Vioxx and an increased incidence of heart attack. In 2004, Merck withdrew Vioxx from the market amid reports that Merck had actively fought to "keep safety concerns from destroying the drug's commercial prospects." In November of 2003, Richard Reynolds filed a section 10(b) securities fraud action and subsequently amended his pleadings to allege that Merck had defrauded investors by promoting explanations for Vioxx's higher risk of heart attack that Merck knew were false.

Merck argued that Reynolds' claim was barred by the two-year statute of limitations provided by 28 U.S.C. section 1658 (b)(1). The District Court agreed, finding that, prior to November of 2001, the existing studies and the history of Merck's interaction with the FDA regarding Vioxx put Reynolds on inquiry notice of the possibility that Merck had knowingly misrepresented facts about Vioxx. The Third Circuit reversed, holding that the pre-November 2001 events did not suggest the element of scienter and did not put Reynolds on inquiry notice.

The Court first addressed the text of the statutory limitations period, which begins the running of the limitations period "after the discovery of the facts constitution the violation[.]" The Court held that, though the language could be read to trigger running of limitations only after actual discovery of facts, the use of the word discovery, with its attendant legal and legislative history, indicated that the limitations period would also be triggered when a reasonably diligent plaintiff would have discovered facts constituting the violation. The court also rejected Merck's contention that inquiry notice would suffice, finding no support for inquiry notice in the language of the statute.

Merck also contended that "facts constituting the violation" did not include scienter. The court rejected this, noting that proof of scienter is necessary for recovery in a section 10(b) fraud cases and that Congress enacted special heightened pleading standards for section 10(b) fraud cases addressing state of mind. Examining the pre-November 2001 events, the Court found that none of the events revealed facts indicating scienter. Thus, Reynolds claim was not barred by the statute of limitations.

Justice Scalia, joined by Justice Thomas, concurred in part and in the judgment. He argued that the statute's reference to discovery included only actual discovery and not constructive discovery measured against a reasonable diligent plaintiff. Justice Scalia pointed to explicit congressional inclusion of a constructive discovery rule in the statute of limitations for claims under sections 11 and 12 of the Securities Act. He also suggested there was a rational reason for the difference. Claims under section 10(b), "which include scienter, are likely more difficult to discover" than claims under sections 11 and 12, which do not.

Justice Stevens also concurred in part and in the judgment. Stevens argued the issue of constructive discovery was not necessary to support the Court's judgment and that he would reserve judgment on that issue.

SIXTH AMENDMENT

Berghuis v. Smith, 130 S. Ct. 1382 (2010)

In this case, the Supreme Court reversed a Sixth Circuit grant of habeas relief because no clearly established Court precedent supported Petitioner's claim that a state court jury system violated his Sixth Amendment right to an "impartial jury drawn from sources reflecting a fair cross section of the community."

An all-white jury in a Michigan County Circuit Court convicted Diapolis Smith, an African-American, of murder and felony firearms possession. After conviction, Smith claimed that the county jury assignment system violated his Sixth Amendment right under *Taylor v. Louisiana*, because the system created an unreasonable underrepresentation of African-American jurors. 419 U.S. 522 (1975). The system assigned jurors to local district courts and, after filling district court needs, assigned the remaining jurors to the County Circuit Court. After Smith's jury had been selected, the county altered the assignment system for future cases because it believed that the

district courts "swallowed up most of the minority jurors" leaving the County Circuit Court with a jury pool that was not representative of the county.

A state trial court heard Smith's claim in an evidentiary hearing ordered by the Michigan Court of Appeals. In the hearing, Smith presented statistical evidence, and the court analyzed the disparity between the percentage of African-Americans in the jury-eligible population and the percentage in the County Circuit Court jury pool. The court also considered the mild decrease in the disparity in the period following the change to the assignment system. Smith also presented expert testimony indicating the underrepresentation was tied to social and economic factors. The trial court rejected Smith's claim, holding that African-Americans were underrepresented but that Smith presented insufficient evidence to show that the jury-selection process systematically excluded African-Americans.

After exhausting his state appeals, Smith filed a habeas petition in the federal system. The District Court dismissed the petition, but the Sixth Circuit reversed, finding that the jury selection system significantly reduced the number of African-Americans available for the County Circuit Court venires.

The Supreme Court reversed the Sixth Circuit, holding the state court decision was consistent with the fair-cross-section requirements of *Duren v. Missouri* and did not involve the unreasonable application of clearly established law that is required to grant a habeas petition. 439 U.S. 357 (1979). Though county officials believed the system excluded minorities, the Court held that Smith's evidence did not carry his burden to show that the selection system caused exclusion. With regard to the statistical data, the Court noted that unlike the petitioner in *Duren*, Smith advanced no comparative data between the county's system and other systems. The court held that "Smith's best evidence[,]" the mild decrease in disparity, was insufficient to support Smith's claim that the system caused exclusion.

Justice Thomas concurred in the result but indicated that he "would be willing to reconsider [the Court's] precedents articulating the 'fair cross section' requirement." Justice Thomas argued that the fair-cross-section requirement is difficult to "square with the Sixth Amendment's text and history."

Judge Renée McElhaney, 73RD DISTRICT COURT OF BEXAR COUNTY, San Antonio
Patrice Pujol, FORMAN PERRY WATKINS KRUTZ & TARDY LLP, Houston

APPELLATE

***Hidalgo v. Hidalgo*, 310 S.W.3d 887 (Tex. 2010) (per curiam)**

When existing precedent is overruled during the pendency of an appeal, it may be in the interest of justice to allow a party to supplement its briefing with new bases of appellate review.

Leila Hidalgo sought to enforce a provision of a divorce decree, which required her ex-husband to purchase life insurance. The trial court at first denied her motion ("Order 1"). Leila filed a motion to reconsider and, within its plenary jurisdiction, the trial court granted that motion, effectively granting Leila a new trial ("Order 2"). Almost three months later, the trial court reversed itself and in a third order ("Order 3") reinstated its ruling in Order 1 denying Leila's motion to enforce. Leila filed a petition for writ of mandamus to the Fifth Court of Appeals, arguing solely a procedural error: under *Porter v. Vick*, 888 S.W.2d 789, 789-90 (Tex. 1994), the trial court could not reinstate Order 1 more than seventy-five days after granting the original judgment. The court of appeals initially granted Leila's petition. But after the Supreme Court issued *In re Baylor Medical Center at Garland*, 280 S.W.3d 227, 230-31 (Tex. 2008) reversing *Porter*, the court of appeals affirmed Order 3, stating it would decline to consider substantive arguments of error because Leila had limited her petition to arguing procedural error. Leila filed a petition for review at the Supreme Court arguing Order 3 is substantively erroneous.

The Supreme Court analyzed the circumstances that would permit an appealing party to add a new basis for appellate review after an appellate court has already disposed of other appellate arguments. In a per curiam opinion, the Court held this case represented the rare occasion when, in the interest of justice, an appellate court should consider a new argument after issuing its opinion addressing all arguments previously raised. Leila's procedural argument on mandamus was valid when presented. But the Court overruled the existing precedent upon which Leila relied during the pendency of her mandamus proceeding. Under these circumstances, a party should be permitted to supplement the appellate briefing to assert other bases for appellate review. Thus,

without oral argument, the Court reversed the Fifth Court of Appeals and reversed the case to that court for consideration of Leila's new substantive arguments.

ARBITRATION

***In re Odyssey Healthcare, Inc*., 310 S.W.3d 419 (Tex. 2010) (orig. proceeding) (per curiam)**

An arbitration clause in a non-subscriber occupational injury benefit plan is enforceable. Most notably, neither the Tenth Amendment to the United State Constitution nor the Texas Labor Code invalidates an arbitration clause.

Guadalupe Morales worked as a hospice caregiver for Odyssey Healthcare in El Paso. She sued Odyssey and her supervisor, George Portillo, for negligence after falling in a patient's home. Odyssey, a workers' compensation non-subscriber, provided an "Occupational Injury Benefit Plan," in which Morales enrolled as a condition of her employment. Upon being sued, Odyssey moved to compel arbitration, relying on the plan's arbitration clause:

> All claims or disputes that cannot otherwise be resolved between the Company and you are subject to final and binding arbitration. This binding arbitration is the only method for resolving any such claim or dispute.
>
> * * *
>
> Unless otherwise agreed to in writing by the parties, the arbitrator selected by the parties . . . shall be selected from a panel of arbitrators located in Dallas County, Texas.

After a hearing, the trial court denied Odyssey's motion to compel arbitration, finding the arbitration provision forcing Morales to arbitrate in Dallas was unconscionable. The Eighth Court of Appeals denied Odyssey's mandamus petition.

The Texas Supreme Court held Morales failed to prove a valid defense against enforcing the arbitration agreement. Morales asserted four reasons why the arbitration clause was invalid and unenforceable. She first argued the clause was unconscionable because it mandated arbitration in Dallas County. However, the Court held nothing in

the agreement required arbitration in Dallas, but it instead provided only that the arbitrator be selected from a Dallas panel of arbitrators.

Morales next argued Texas Labor Code section 406.033(e)—the non-waiver provision of the Texas Workers' Compensation Act—defeated the arbitration provision. This statute provides that a "cause of action described in Subsection (a) may not be waived by an employee before the employee's injury or death. Any agreement by an employee to waive a cause of action or any right described in Subsection (a) before the employee's injury or death is void and unenforceable." The Court previously held section 406.033(e) did not render an arbitration agreement void.

Morales's third argument claimed the Federal Arbitration Act violated the Tenth Amendment by encroaching upon a state's power to enact and regulate its own workers' compensation system. But Morales made no showing to support this argument, and the Court had previously recognized a state has a Tenth Amendment power to enact and regulate its own workers' compensation system, and statutory claims under the Texas Workers' Compensation Act are arbitrable.

Finally, Morales argued the arbitration clause was not supported by consideration and was illusory for lack of mutual obligation. Mutual obligations existed under the agreement, so sufficient consideration supported the arbitration clause. Moreover, because the agreement limited Odyssey's ability to alter or terminate the arbitration clause, the arbitration agreement did not contain an illusory promise by Odyssey.

Based upon these holdings, the Supreme Court granted mandamus relief.

***E. Tex. Salt Water Disposal Co., Inc. v. Werline*, 307 S.W.3d 267 (Tex. 2010)**

The Texas General Arbitration Act permits an appeal from a trial court's order that denies confirmation of an arbitration award, vacates the award, and directs that the dispute be arbitrated anew.

East Texas Salt Water Disposal Company ("East Texas") employed Richard Werline as its operations manager. Under their written employment contract, if East Texas materially breached the contract, Werline had the right to terminate and receive two years' salary as severance pay. About halfway into the contract's five-year term, Werline gave notice of termination and demanded severance pay, claiming East Texas

changed his position and stripped him of his duties. East Texas denied this, asserting Werline quit. Per the contract, they arbitrated their dispute.

After a three-day hearing, the arbitrator found for Werline and awarded him severance pay, attorney fees, and costs. East Texas asked the trial court to vacate, modify, or correct the award. Instead of offering any grounds for this relief, East Texas argued the award was unfounded, so the arbitrator must have been biased. Although Werline objected these were not statutory grounds for vacating an arbitration award, he and East Texas submitted the verbatim record of the arbitration hearing to the court and proceeded to argue their dispute all over again. Ultimately, the trial court denied confirmation of the award, vacated it, and ordered a rehearing in which every material fact—and even the result itself—were already conclusively established against Werline. Werline appealed. The Sixth Court of Appeals reversed the trial court's judgment and rendered judgment confirming the arbitration award.

The Supreme Court held the Texas Arbitration Act (TAA) allows an appeal from a trial court order denying an arbitration award's confirmation and ordering new arbitration. The statute at issue was section 171.098(a) of the TAA, which allows a party to appeal an order under five circumstances, only two of which were pertinent to this appeal: orders "(3) confirming or denying confirmation of an award" and those "(5) vacating an award without directing a rehearing." The Supreme Court held the trial court's judgment denying confirmation of the arbitration award fit squarely under subsection (3). In so doing, the Court rejected East Texas's argument that subsection (5) withdraws jurisdiction granted under subsection (3). Each of the five subsections under section 171.098(a) constitutes an independent ground for appeal. As such, proper construction of the statute gives full, literal effect to both subsections (3) and (5). The Court therefore affirmed the judgment of the Sixth Court of Appeals.

Justice Willett issued a concurring opinion. He asserted a trial court order vacating the award and directing a rehearing was indistinguishable from an order denying confirmation—which is appealable under subsection (3). In addition, because the trial court made findings against Werline to be applied in the second arbitration, going forward on that arbitration before permitting the instant appeal would be a waste of time and expense because the parties would end up exactly where they are now.

Chief Justice Jefferson, joined by Justices Medina and Green, dissented from the majority, asserting that the trial court's order was interlocutory and, thus, ineligible for appeal. Had the court only vacated the arbitration award and refused to confirm it, the order would have been final and appealable. But, because the order went a step further and directed a rehearing, it was interlocutory. Moreover, based on the TAA's reliance

on civil court procedure, the order should be treated as the functional equivalent of one granting a new trial.

EMPLOYMENT LAW

***Presidio Indep. Sch. Dist. v. Scott*, 309 S.W.3d 927 (Tex. 2010)**

In this products liability case, the Supreme Court held the trial court abused its discretion by compelling discovery of documents without limiting the scope of the order to a reasonable time period.

Presidio Independent School District ("Presidio") terminated a teacher for violating Presidio's policy against corporal punishment. After an evidentiary hearing under the statutory administrative process, the teacher's termination was approved by the Presidio board. The teacher then filed a petition for review with the Commissioner of Education, who reversed the board's decision and held the teacher should be reinstated or paid one year's salary in lieu of reinstatement.

Presidio appealed, and both it and the teacher agreed to venue in Travis County. The Commissioner objected to the Travis County venue, arguing that, because he is a party to the appeal, Texas Government Code section 311.034 requires his consent to the venue. The Commissioner filed a plea to the jurisdiction on that basis, which the trial court denied. The court of appeals affirmed, but on rehearing, a divided panel agreed with the Commissioner.

Justice Guzman authored the opinion for the Supreme Court and held section 21.307(a)(2) of the Texas Education Code does not require the Commissioner's consent for an appeal to be heard in Travis County. That section, when read with section 21.304, provides that "either party"—meaning the teacher and the school district—may appeal the Commissioner's decision to a district court. Thus, according to the statutory framework, the Commissioner was not a true adverse party. Instead, he acted as a neutral arbiter reviewing a school district's disciplinary decision. Therefore, he is not within the scope of "either party" as contemplated by section 21.304 because, logically, he would not appeal his own decision.

The Court also rejected the Commissioner's argument that because he was a party to the appeal under section 21.307(c), he had a veto power on venue. Subsections (a) and (c) of 21.307 contemplate different objectives. While subsection (a) gives the teacher or school district the right to appeal and two venue options, subsection (c)

merely describes who must appear in the district court. As such, it was not a ground for the Commissioner's purported veto power.

Finally, the Court rejected the Commissioner's policy argument that allowing his veto power prevents forum-shopping by the losing party: "[W]e fail to envision a scenario in which forum-shopping occurs when both parties to the dispute agree to pursue the appeal in Travis County."

Based upon these holdings, the Court reversed the judgment of the Third Court of Appeals and remanded the case to the trial court.

EVIDENCE

***TXI Transp. Co. v. Hughes*, 306 S.W.3d 230 (Tex. 2010)**

An accident reconstruction expert's testimony is reliable when his measurements, observations, and calculations are tied to the physical evidence at the scene. However, admission of evidence concerning the illegal immigrant status of one of the parties to the accident was harmful error.

Several members of the Hughes family were killed when their vehicle collided with an eighteen wheel tractor-trailer rig heavily loaded with gravel. Kimberly Hughes drove her GMC Yukon westbound on a two-lane highway, while Ricardo Rodriguez drove the gravel truck eastbound. For reasons in dispute, Hughes crossed the center line into the eastbound lane, collided with the gravel truck, and another vehicle. The collision killed everyone in the Yukon except Hughes's infant grandson.

Hughes's husband and other family members sued Rodriguez and his employer, TXI, for the deaths. After a seven-day trial, a jury found that Rodriguez's and TXI's negligence proximately caused the accident, and awarded compensatory and exemplary damages. The trial court rendered judgment on the verdict. Although divided on the evidentiary issues, the Second Court of Appeals affirmed the trial court but set aside the award of exemplary damages.

Justice Medina authored the Majority opinion, addressing two issues: (1) whether Hughes's accident-reconstruction expert testimony was reliable; and (2) whether evidence that Rodriguez was an illegal immigrant was properly admitted for impeachment purposes. Ultimately, the Court held that the expert's testimony was

properly admitted, but evidence of Rodriguez's illegal status was both irrelevant and harmful error.

On the expert issue, TXI argued the testimony of Hughes's accident-reconstruction expert, Dr. Kurt Marshek, was unreliable because he made incorrect assumptions about gouge marks in the road and the placement of the vehicles at impact. Citing *Ford Motor Company v. Ledesma*, 242 S.W.3d 32 (Tex. 2007) and *Volkswagen of America v. Ramirez*, 159 S.W.3d 897 (Tex. 2004), the Court held Marshek's measurement, observations, and calculations were tied to the physical evidence at the scene, which in turn, supported his theory on how the crash occurred. As such, his opinions were reliable, and TXI's complaints about those opinions went to their weight, not their admissibility.

As for the evidence of Rodriguez's immigration status, the Court held it was irrelevant to the cause of the crash or the claims for negligent hiring or entrustment, even if TXI's failure to screen Rodriguez's immigration status furnished the condition that made the accident possible. Moreover, Rodriguez's statements about his immigration status were inadmissible because: (1) his immigration status was clearly a collateral matter; (2) they were evidence that should have been excluded because their relevance was substantially outweighed by their prejudice under Rule 403; and (3) courts have consistently rejected evidence of specific instances of conduct for impeachment purposes, no matter how probative. Basically, to counter the evidence of Rodriguez's clean driving record and his commercial driver's licenses from both Texas and Mexico, Hughes called attention to Rodriguez's illegal immigration status whenever he could. Admitting this evidence was harmful error, not only because its prejudice far outweighed any probative value, but also because it fostered the impression that Rodriguez's employer should be held liable because it hired an illegal immigrant. The Court therefore reversed the Second Court of Appeals' judgment and remanded the case for a new trial.

Justice Wainwright issued a concurring and dissenting opinion. While joining the Court's decision that admitting evidence of Rodriguez's immigration status was harmful error, Justice Wainwright expressed "serious concerns" about the admissibility of Dr. Marshek's opinions because he had not sufficiently addressed the testimony of five eyewitnesses who testified that they never saw the gravel truck in the westbound lane.

FORFEITURE

Texas v. $ 281,420.00, **No. 08-0465, 53 Tex. Sup. Ct. J. 741, 2010 WL 1933023 (Tex. May 14, 2010)**

In a forfeiture case, an individual in possession of a truck with money hidden in its axel is not entitled to the currency under a bailment theory or as "lost" or "mislaid" property.

Johnnie Mercado hired tow truck driver Gregorio Huerta to tow a truck from Alvin to Mercedes. When Mercado failed to arrive at an agreed location to escort Huerta to Mercedes, Huerta became suspicious that the truck was stolen and called authorities. Eventually, the truck was inspected by customs officers who, with Huerta's assistance, discovered $281,420 in the center axle. Huerta contacted Mercado to tell him about the truck and the money, but received no return telephone calls. Huerta later contacted a subordinate in law enforcement to inquire about a reward, but did not receive one.

After the money was discovered, the State, through the Hidalgo County District Attorney's Office, filed forfeiture proceedings against the truck and the currency under chapter 59 of the Code of Criminal Procedure. Mercado and the truck's actual owner, Jesus Pulido, were served with citation, but neither answered nor appeared. An attorney ad litem was appointed to represent Pulido's interest as the truck's registered owner. About one month after the State filed suit, Huerta intervened as the last person in possession of the currency when it was seized. According to Huerta, the currency was not contraband, Mercado and Pulido had abandoned any claims they held to the currency by failing to answer or appear, and Huerta's interest in the currency was superior to that of the State.

The jury found that the currency was not contraband, that Huerta was in actual or joint possession of the currency at the time of seizure, and that Huerta should be awarded $70,000 (roughly 25%) of the currency. The State moved for judgment notwithstanding the verdict, claiming the money was contraband and that Huerta did not have a valid legal claim to the currency. The trial court agreed, found the currency to be contraband, and ordered its forfeiture to the State. The Thirteenth Court of Appeals reversed, holding that the currency had not been shown to be contraband and that Huerta was entitled to the entire $281,420.

Because the State no longer contested the court of appeals' determination that the currency was not contraband, Justice O'Neill, writing for the Court, addressed only whether Huerta established his entitlement to the currency. Huerta first claimed he was entitled to the currency as a bailee because the property was abandoned while in his possession. However, he failed to establish a bailment as to the currency. To establish a bailment, Huerta needed to knowingly take property into his possession or control. Because Huerta did not knowingly take possession of the cash when the truck was entrusted to him, no bailment was created with respect to the money. Moreover, because Huerta contacted law enforcement seeking a reward, as opposed to the currency itself, he had no right to the money based upon simple abandonment.

The Court also rejected Huerta's argument based on the common law "treasure trove" or "finders keepers" doctrine. Declining to recognize the treasure-trove doctrine, the Court applied the common law distinctions of "mislaid" and "lost" property. Mislaid property includes "property which the owner intentionally places where he can again resort to it, and then forgets." The owner or occupier of the premises where the mislaid property is found is presumed to have custody of the property; this right to the property is superior to all except the true owner. Because Huerta did not own the "premises"—the truck—on which the currency was found, he could not establish entitlement to the money as mislaid property.

Huerta also failed to establish a right to the currency as lost property. "Lost" property includes "that which the owner has involuntarily parted with through neglect, carelessness or inadvertence." In contrast, where the owner parts with property in a deliberate, conscious, and voluntary effort to hide it—as opposed to parting with it out of carelessness or neglect—the property is mislaid. That the $281,000 was hidden in a truck axle foreclosed any argument that it was lost.

Rejecting each of Huerta's arguments, the Court reversed the Thirteenth Court of Appeals' judgment and remanded the case to the trial court, noting that the State could pursue the currency under an alternative proceeding.

JURISDICTION—FORUM NON CONVENIENS

***In re ENSCO Offshore Int'l Co*., No. 09-0317, 53 Tex. Sup. Ct. J. 710, 2010 WL 1818433 (Tex. May 7, 2010) (orig. proceeding) (per curiam)**

A suit by an Australian plaintiff against Dallas-based defendants involving a drilling rig accident off the shores of Singapore should be dismissed on forum non conveniens grounds and brought in Australia or Singapore.

Paul Merema was fatally injured while working aboard the ENSCO 104, a Liberian-flagged drilling rig docked at a shipyard facility in the territorial waters of Singapore. Paul, an Australian citizen, was employed by Total Marine Services (TMS) of Western Australia. His employment contract with TMS was governed by the laws of Western Australia. ENSCO Offshore International Inc. contracted with TMS for TMS to provide personnel for the drilling rig. The contract with TMS specified the laws of Western Australia applied and all matters between the parties were to be referred to arbitration in Perth, Western Australia. Paul's death was investigated by Singaporean authorities, including the Ministry of Manpower, the Police Coast Guard, the State Coroner, and the Ministry of Health. In addition, Singapore Test Services analyzed and tested the valve assembly involved in the incident.

Paul's wife, Margaret, filed suit in Western Australia against TMS. She then filed suit individually and on behalf of Paul's estate in Dallas County against the owner of the ENSCO 104, ENSCO Offshore International Co., ENSCO Offshore Co., and its parent company, ENSCO International Inc. (collectively, ENSCO). All defendants' corporate offices were in Dallas.

ENSCO filed a motion to dismiss for forum non conveniens (FNC), asserting no claimed act of negligence occurred in Texas. They also requested the trial court dismiss the case in favor of the jurisdictions of Singapore or Australia. Merema responded that ENSCO's negligent acts emanated from Dallas and that most of the statutory FNC factors supported keeping the suit in Texas. The trial court denied ENSCO's motion, and the Fifth Court of Appeals denied mandamus relief.

The Supreme Court held the trial court should have granted ENSCO's FNC motion. Both Singapore and Australia were viable alternative forums that provided an adequate remedy. In making this determination, the Court rejected Merema's arguments that ENSCO should have explained the trial procedures of a particular location, whether

Singapore or Australia, to show it was an adequate alternate forum. Such a showing, the Court said, was unnecessary.

In addition, maintaining the case in Texas would work a substantial injustice to ENSCO, due to the lack of compulsory process in Texas for reaching the vast majority of witnesses. The investigating officials and employees of the shipyard were in Singapore, and Paul's family, TMS, and its employees were in Australia. The vast majority of crew members working at the time of the incident were citizens of Australia or New Zealand.

Although Merema alleged acts of the ENSCO corporate management led in part to her husband's death, she failed to identify any corporate policy linked to the death, and her evidence was otherwise based on presumption. Thus, the connection to Texas was tenuous. Essentially, the case involved an injury in Singapore's territorial waters on a Liberian-flagged vessel to an Australian citizen employed by an Australian company. That the trial court had jurisdiction over the defendants because their offices were in Dallas was a separate issue from whether the case should be dismissed on FNC grounds.

Finally, the Court distinguished the level of proof required under a statutory FNC motion versus a common law FNC motion. Texas case law provides that under common law FNC analysis, a trial court should only disturb a plaintiff's choice of forum if the balance of factors strongly favors the defendant. In contrast, the Court noted the forum non conveniens statute does not contain similar requirements. As such, the Court conditionally granted the petition for writ of mandamus.

FORUM-SELECTION CLAUSE

***In re Laibe Corp*., 307 S.W.3d 314 (Tex. 2010) (orig. proceeding) (per curiam)**

A trial court must enforce a forum-selection clause unless the plaintiff carries its heavy burden to show enforcing the clause would deprive the plaintiff of its day in court.

Laibe Corp. ("Laibe") entered into a contract to sell a drilling rig to Jackson Drilling Services ("Jackson"). The purchase contract, prepared by Laibe and dated March 10, 2006, contained a forum-selection clause requiring the parties to litigate "all disputes arising under this contract" in Marion County, Indiana. After Jackson had problems with the rig and was dissatisfied with Laibe's repair and warranty work, it sued Laibe in Wise County, Texas. Laibe filed a motion to dismiss arguing the forum-selection clause

compelled suit in Indiana. The trial court denied the motion. In a three-sentence memorandum opinion, the Second Court of Appeals denied mandamus relief.

Citing its decision in *In re ADM Investor Services*, 304 S.W.3d 371 (Tex. 2010) (orig. proceeding), the Court reversed, holding Jackson failed to demonstrate a valid basis on which a trial court may, in its discretion, decline to enforce a forum-selection clause. First, Jackson argued enforcement of the clause would be unreasonable and unjust because the sale of the drilling rig was the subject of a January 10, 2006 invoice that did not contain a forum-selection clause. However, the March 10th purchase contract also contained a merger clause indicating that it was the final and binding agreement of the parties.

Jackson next argued that enforcing the forum-selection clause and requiring litigation in Indiana would be seriously inconvenient. Texas was where the invoice was signed and where the rig had problems; sending personnel to Indiana would be disruptive to Jackson's business. The Court rejected this argument because Jackson failed to show the inconvenience was so extreme as to deny the company its day in court.

Finally, Jackson argued that Laibe delayed in seeking mandamus relief. The trial court denied Laibe's motion to reconsider in an order signed December 19, 2008, and filed on December 22, 2008. Laibe filed its mandamus petition in the court of appeals on March 23, 2009. Laibe argued it did not receive a copy of the order until mid-January. The Court held a two-month delay in seeking mandamus relief was not necessarily unreasonable. It also noted Jackson failed to show a detrimental change in position between the time the trial court denied the motion for reconsideration and the filing of the mandamus petition.

The Court therefore conditionally granted the petition for writ of mandamus.

***In re Lisa Laser USA, Inc.*, 310 S.W.3d 880 (Tex. 2010) (orig. proceeding) (per curiam)**

A forum-selection clause setting venue for any dispute "arising out of" the distribution agreement in a specific state applies to claims for breach of contract of—and tortious interference relating to—a distribution agreement.

Lisa Laser USA ("Lisa USA") is affiliated with Lisa Laser Products, oHG ("Lisa Germany") and distributes medical lasers manufactured by Lisa Germany (collectively, "Lisa Laser"). Lisa USA entered into a distribution agreement with HealthTronics, Inc.

("HealthTronics"), making HealthTronics the exclusive distributor of Lisa Laser medical devices in the United States. The parties superseded their existing agreement two years later, adding Lisa Germany as a party. The new agreement included an exhibit containing a forum-selection clause designating California as the forum for any dispute "arising out of" the agreement. Within a year, the relationship between Lisa Laser and HealthTronics devolved, and HealthTronics sued Lisa Laser in a Travis County state district court for breach of contract and tortious interference. The tortious interference claim implicated HealthTronics's business relationship with its former employees relating to protecting HealthTronics's confidential information and maintaining its non-solicitation agreements. Lisa Laser filed a motion to dismiss, arguing the forum-selection clause required HealthTronics to pursue its claim in a California court. The trial court denied the motion, crediting HealthTronics's argument that the forum-selection clause applied only to disputes over sales by Lisa Laser and HealthTronics's claims arose from other aspects of the relationship between Lisa Laser and HealthTronics. The Third Court of Appeals denied Lisa Laser's petition for writ of mandamus.

The Supreme Court considered whether the language of the forum-selection clause, which stated California would be the proper venue for any dispute "arising out of" the distribution agreement, applied to claims for breach of contract and tortious interference. In a per curiam opinion, the Court began its analysis grounded in a "'common sense examination of the claims,'" and the plain language of the forum-selection clause, which stated California would serve as the forum "'over any dispute arising out of [the] agreement.'" The Court examined HealthTronics's claims and held each arose from Lisa Laser's obligations under the distribution agreement. Moreover the exhibit containing the forum-selection clause is a component of the entire agreement and, therefore, must be read with the rest of the agreement and applies to the entirety of the contractual relationship. The Court also rejected HealthTronics's argument that the forum-selection clause applies to Lisa Germany because of an amendment to the preamble of the distribution agreement referenced only Lisa USA. That amendment simply identified the buyer and seller and did not limit the forum-selection clause. Therefore, the Supreme Court conditionally granted the petition for writ of mandamus and directed the trial court to vacate its prior order and dismiss HealthTronics's case.

FIDUCIARY

***ERI Consulting Eng'rs, Inc. v. Swinnea*, No. 07-1042, 53 Tex. Sup. Ct. J. 683, 2010 WL 1818395 (Tex. May 7, 2010)**

When breach of fiduciary duty is proven, contract consideration is subject to possible equitable forfeiture.

Larry Snodgrass and J. Mark Swinnea were partners in two businesses, Malmeba Company, Ltd. ("Malmeba") and an asbestos abatement company, ERI Consulting Engineers, Inc. ("ERI"). Unbeknownst to Snodgrass, Swinnea created a third company that he intended to compete against ERI. Swinnea then sold Snodgrass and ERI his share in ERI in exchange for Snodgrass's interest in Malmeba and a sum of money. Swinnea then diverted business and investment opportunities from ERI to Air Quality Associates and Brady Environmental. When Snodgrass learned of the fraud, ERI sue Swinnea for fraud, statutory fraud, breach of contract, and breach of fiduciary duty. Snodgrass also alleged a conspiracy between Swinnea and Brady Environmental. The parties tried the case to the bench, which found for ERI and Snodgrass on all claims. The trial court awarded actual damages and, in recovery for fraud, equitable forfeiture—return of a portion of the amount Snodgrass paid for ERI, the value of Snodgrass's interest in Malmeba, and lease payments ERI made to Malmeba after the buyout. The Twelfth Court of Appeals reversed.

The Court considered several issues in this case, including whether equitable forfeiture for breach of a fiduciary duty includes disgorgement of contractual consideration, whether certain parol evidence was inadmissible, whether the defendant offered sufficient financial information to prove lost profits, and whether there is legally sufficient evidence of conspiracy.

Writing for the Court, Justice Green held a defendant who breached its fiduciary duty relating to a contract may be required, in equity, to return the contractual consideration to the plaintiff. The Court directed a trial court should consider the factors set forth in *Burrows v. Arce*, 997 S.W.2d 229, 243-44 (Tex. 1999), when considering whether to make such an award. The Court further held rent ERI paid to Swinnea through Malmeba was contractual consideration for the buy-out agreement. While testimony Snodgrass agreed to lease property from Malmeba as part of the buy-out is parole evidence, it is evidence of a collateral agreement that does not contradict the terms of the buy-out agreement. As such, the evidence is not barred and supports a

finding the lease payments are contractual consideration possibly subject to equitable forfeiture. The Court, therefore, reversed that portion of the Twelfth Court of Appeals' judgment setting aside the trial court's award ordering equitable forfeiture of almost all contractual consideration. Because the trial court did not take the *Burrows* factors into account, the Court directed the Twelfth Court of Appeals to remand this portion of the case to the trial court.

Turning to the lost profits evidence, the Court held ERI had provided sufficient evidence of lost profits. Because of his years of experience operating an asbestos abatement company, Snodgrass's testimony regarding the customary profit margin of an abatement project is competent. Moreover, Snodgrass offered extensive financial documents of ERI's revenues, which created sufficient evidence of a sum of lost profits, albeit less than the amount the trial court awarded. The Court therefore reversed the Twelfth Court of Appeals' judgment setting aside the lost profits award and remanded the issue to that court for consideration of a remittitur.

Finally, the Court held there is legally insufficient evidence of a conspiracy involving Brady Environmental. That company could not have proximately caused any of the damages awarded by the trial court as it did not exist when the Snodgrass and Swinnea entered into the buy-out agreement. As such, there is no evidence of an essential element of a conspiracy claim—damages proximately caused by the conspiracy. As such, the Court affirmed the Twelfth Court of Appeals' judgment as to this claim.

INSURANCE LAW—SUBROGATION

***Tex. Health Ins. Risk Pool v. Sigmundik*, No. 09-0722, 53 Tex. Sup. Ct. J. 770, 2010 WL 2136625 (Tex. May 28, 2010) (per curiam)**

The equitable "made whole" doctrine does not apply to contractual subrogation liens. An insurer has standing to intervene in a decedent's family's negligence suit when its insurance contract gives the insurer a lien on any judgment recovered by the decedent's estate.

Thomas Sigmundik was injured in an oilfield explosion and spent fifty-two days in the hospital before dying of his severe injuries. His insurer, Texas Health Insurance Risk Pool ("Texas Health"), paid nearly $337,000 in medical expenses. After Sigmundik died, his widow filed a negligence suit on behalf of herself, her two minor children, and

Sigmundik's estate. Texas Health intervened, seeking recovery of the medical expenses it paid. Texas Health based its intervention on an unambiguous subrogation provision in Sigmundik's health insurance policy. This subrogation provision extended to any recovery on behalf of Sigmundik's estate.

After settling the negligence suit for $800,000, Mrs. Sigmundik returned to court for a bench trial to allocate the settlement funds to herself, her children, and her late husband's estate. The court awarded the entire $800,000 to Mrs. Sigmundik and her children, finding they had not been "made whole" by the settlement. In so doing, the court concluded that equitable principles applied to Texas Health's contractual subrogation claim and that where "a subrogation claim[] works an injustice, it shall not be allowed." The Third Court of Appeals affirmed.

The Court reversed, holding the "made whole" equitable doctrine had no application in this case and could not override an insurance policy (i.e., contractual) subrogation clause. The insurance policy provided for a lien on any recovery by Sigmundik's estate. But by applying the "made whole" equitable doctrine to its allocation decision, the trial court improperly voided Texas Health's subrogation claim: "[T]he trial court could not cut the estate completely out of the settlement just because the estate's main beneficiary is an insurance company or, more to the point, because the trial court believed the surviving family needed the money more than the insurer."

In addition, the Court held Texas Health had standing to intervene in this case. Because the insurance policy contained an unambiguous subrogation provision, Texas Health was entitled to a distribution of the settlement funds, and intervention was the proper vehicle for preserving its rights. Accordingly, the Court reversed the Third Court of Appeals' judgment and remanded the case to the trial court to determine what portion of the settlement funds should be allocated to the estate.

***The Travelers Ins. Co. v. Joachim*, No. 08-0941, 53 Tex. Sup. Ct. J. 745, 2010 WL 1933022 (Tex. May 14, 2010)**

A nonsuit makes moot the merits of a case but does not divest the trial court of jurisdiction over the case. As such, a dismissal with prejudice erroneously entered after a nonsuit without prejudice is simply voidable and, if not set aside by direct attack, has res judicata effect.

Barry Joachim suffered damages in an accident with an uninsured motorist. He sued his insurers seeking coverage for those damages. Just before trial, he filed a notice of nonsuit without prejudice. Several weeks later, the trial court erroneously entered an order dismissing the case with prejudice. Joachim did not attempt to set that order aside. Later, Joachim filed a second suit against his insurers. They moved for summary judgment, arguing res judicata attached to the trial court's dismissal order and barred the second suit. The trial court granted the motion. The Seventh Court of Appeals reversed, holding the trial court's dismissal order was void.

The Court analyzed the effect of a nonsuit on the trial court's authority to enter further orders disposing of the nonsuited case. Justice Green delivered the opinion, holding the trial court's dismissal order was voidable, but not void. The Court reasoned the trial court had authority to enter the dismissal with prejudice. The nonsuit did not divest the trial court with jurisdiction but simply made moot the controversy that was the subject matter of the lawsuit. Because the dismissal order was only voidable, Joachim was required to directly attack the order to prevent it from becoming final. Joachim did not. So res judicata attached to the dismissal order and barred Joachim's second suit. Therefore, the Court reversed the Seventh Court of Appeals' judgment and rendered judgment for the insurers.

JURISDICTION—PERSONAL

***Spir Star AG v. Kimich*, 310 S.W.3d 868 (Tex. 2010)**

Texas has personal jurisdiction over a German manufacturer doing business in Texas through a Texas limited partnership that was the manufacturer's exclusive distributor in North and South America. The manufacturer specifically targeted Texas as a market for its products, and the plaintiff's injury arose from its purposeful availment of the Texas market.

Spir Star AG ("AG") is a German manufacturer that makes high pressure hoses and fittings. It is owned by three German citizens. In 1995, AG decided to exploit the Texas market and set up a distributorship called Spir Star Limited ("Limited"). Each month, Limited bought a maritime container full of AG's products that were shipped through the Port of Houston. Limited assembled the hoses and then sold them to customers in Texas and elsewhere. Title to the hoses passed to Limited in Europe. Limited accounted for 35% of AG's annual sales, although Limited and AG did not share profits or finances.

Louis Kimich was injured when an AG high-pressure hose struck him. He first sued his employer for premises liability, then Limited, and finally AG. The trial court denied AG's special appearance. The First Court of Appeals affirmed, holding AG established Limited in Texas and thus brought itself under Texas jurisdiction.

In an opinion authored by Chief Justice Jefferson, the Supreme Court held AG purposefully directed acts toward Texas. At the crux of the Court's reasoning was whether AG committed additional acts beyond placing its products in the stream of commerce that indicated its intent to serve the Texas market. It held that AG did. AG specifically targeted Texas as a market for its products and set up Limited to exclusively market its products here. When an out-of-state manufacturer like AG specifically targets Texas as a market for its products, that manufacturer is subject to a product liability suit in Texas based on a product sold here, even if the sales are conducted through a Texas distributor or affiliate. Moreover, Kimich's claim arose from AG's contacts with Texas—specifically, AG's intent to serve the Texas market and its purposeful acts to that end.

In addition, asserting personal jurisdiction over AG comports with traditional notions of fair play and substantial justice. Requiring AG to defend Kimich's claim in Texas would not pose an undue burden for the company. The fact that AG is headquartered in Germany cannot, by itself, defeat jurisdiction. Moreover, Texas has a significant interest in exercising jurisdiction over controversies arising from injuries a Texas resident sustains from products that are purposefully brought into the state and purchased by Texas companies. AG's burden to defend a suit in a foreign legal system is minimal and is outweighed by Kimich's and Texas's interests in adjudicating the dispute here.

Based upon these holdings, the Court affirmed the judgment of the First Court of Appeals.

***Zinc Nacional, S.A. v. Bouché Trucking, Inc*., 308 S.W.3d 395 (Tex. 2010) (per curiam)**

Simply sending products through a state does not create sufficient contacts by a merchant to create personal jurisdiction.

A Mexican company, Zinc Nacional, S.A. ("Zinc"), markets its paper product in three states, but not Texas. Still, the company has three Texas customers. One of its customers in New Mexico ordered the product, which Zinc arranged to be transported through Texas by a third party trucking company. The trucking company subcontracted part of the transport to a Texas trucking company. During transport, and while in Texas, the product shifted in the truck, and the truck overturned, injuring the driver. The driver sued the subcontractor, a Texas trucking company, which filed a third party petition against Zinc. The trial court denied Zinc's special appearance. The Eighth Court of Appeals affirmed, concluding that, by using a shipper it knew would transport Zinc's product through Texas, Zinc availed itself of Texas benefits and created minimum contacts for purposes of specific jurisdiction

In a per curiam opinion, the Court considered whether selling product that is to be transported through Texas creates minimum contacts to justify exercising jurisdiction over that seller. The Court held simply sending products through a state does not create sufficient contacts by a merchant to create personal jurisdiction. When a seller does not market in a state, simply the presence of its product in a state is not purposeful availment. Because there was no evidence Zinc attempted to market in Texas, and Zinc did not have offices, employees, agents, or representatives in Texas, the trial court did not have personal jurisdiction over Zinc. While Zinc has a few Texas customers and buys some raw materials from Texas, none of those items are related to the accident. The

Court therefore reversed the Eighth Court of Appeals' judgment. Because the intermediate appellate court had not considered whether the trial court had general jurisdiction over Zinc, the Court reversed and remanded the case to the Eighth Court.

JURISDICTION—SUBJECT MATTER

***Frost Nat'l Bank v. Fernandez*, No. 08-0534, 53 Tex. Sup. Ct. J. 609, 2010 WL 1526369 (Tex. Apr. 16, 2010)**

***The John G. & Marie Stella Kenedy Mem'l Found. v. Fernandez*, No. 08-0528, 53 Tex. Sup. Ct. J. 605, 2010 WL 1509668 (Tex. Apr. 16, 2010)**

***The John G. & Marie Stella Kenedy Mem'l Found. v. Fernandez*, No. 08-0529, 53 Tex. Sup. Ct. J. 607, 2010 WL 1509657 (Tex. Apr. 16, 2010)**

The probate court has dominant jurisdiction over bills of review pending in district court when the estates have been closed for a long time and the decedent died testate. The discovery rule does not apply to a bill of review seeking to set aside a probate judgment or claims by non-marital children asserting an inheritance or heirship claim.

Years after all proceedings regarding the estates of John G. Kenedy, Jr., Sarita Kenedy East, and Elena Kenedy (the "Estates") had been concluded, Ann Fernandez filed bill of review proceedings in county, district, and probate court seeking to set aside prior judgments and reopen estates. Fernandez alleged she is the daughter of John Kenedy and therefore was entitled to notice of all the suits involving the Estates, including a suit affecting John Kenedy's estate (the Humble Oil suit), a suit affecting East's estate (the Trevino will contest), and a suit regarding several of East's mineral royalty assignment (the Garcia royalty suit). The statutory probate court in Kenedy County transferred all the cases to itself and consolidated them into one proceeding. Subsequently, Fernandez filed two more bills of review in district court relating to prior judgments that affected John Kenedy's estate (the Humble Oil suit) and East's estate (the Trevino will contest).

When Fernandez moved to transfer these cases to the probate court, the beneficiary of East's estate, The John G. and Marie Stella Kenedy Memorial Foundation (the "Foundation"), and the beneficiary of Elena's estate, The John G. Kenedy, Jr. Charitable Trust (the "Trust"), filed a plea to the jurisdiction in the probate court. The probate court denied the plea. On mandamus, the Thirteenth Court of Appeals directed the probate court to vacate its transfer order.

In the meantime, Fernandez sought permission in the probate court to exhume John Kenedy's body, which the court granted. The Foundation and Trust sought mandamus relief at the Supreme Court, and the exhumation order was stayed.

The Foundation filed a motion for summary judgment in the Garcia bill of review, and both the Foundation and Trust filed motions in the Trevino and Humble Oil bills of review. They argued both that Fernandez lacked standing and that her claims are time-barred. The Foundation and Trust also sought an anti-suit injunction to prevent Fernandez from proceeding with the probate case. The district court issued temporary restraining orders, and ultimately permanent anti-suit injunctions. The district court also subsequently granted the Foundation's and Trust's motions for summary judgment.

Fernandez appealed each summary judgment order but limited her appeal of the anti-suit injunction to the order entered in the Garcia royalty case. The Thirteenth Court of Appeals reversed the summary judgment orders and abated the district court cases, holding that—as to the Trevino and Humble Oil cases—the probate court had dominant jurisdiction. The intermediate appellate court also reversed the anti-suit injunction entered in the Garcia bill of review.

The Court considered two issues in these iterations of the Kenedy-Fernandez dispute: whether the probate court has dominant jurisdiction over bills of review pending in district court when the estates have been closed for a long time and the decedent died testate, and whether the discovery rule applies to a bill of review seeking to set aside probate judgment or claims by non-marital children asserting an inheritance or heirship claim.

Justice Green authored the opinion of the Court and first concluded the district court had subject-matter jurisdiction over both the Humble Oil and the Trevino bills of review. Justice Green relied on Fernandez's pleadings, in which Fernandez alleged she is John Kenedy's child, triggering the district court's jurisdiction. Moreover, the district court had exclusive authority to consider Fernandez's bills of review of the Humble Oil and Trevino cases because it rendered the original judgments. While the district court had jurisdiction, the probate court did not. That court could not exercise jurisdiction over Fernandez's heirship claims because no open estate existed to which Fernandez's claim could be incident and John Kenedy did not die intestate. And because the probate court did not have jurisdiction over Fernandez's claim, there was no basis to abate the district court cases. The Court, therefore, reversed the Thirteenth Court's judgment that the probate court had jurisdiction and dominant jurisdiction over Fernandez's bills of review.

The Court next reviewed the district court's grants of summary judgment. As Fernandez conceded, she filed her heirship claims long after the four-year statute of

limitations period expired. The Court rejected Fernandez's contention that the discovery rule tolled limitations. The Court reasoned the strong public policy favoring finality of probate proceedings outweighs a non-marital child's interest in inheriting from a biological parent. Furthermore, it is not unconstitutional for a state to place reasonable limitations upon the inheritance rights of non-marital children in light of the strong public interest in finality. As such, the Court affirmed the district court's order granting the Foundation's and the Trust's motions for summary judgment.

Finally, the Court affirmed the Thirteenth Court's reversal of the district court's anti-suit injunctions. The Court, however, departed from the appellate court's basis for the setting aside the injunction. Rather, the Court explained that—as to the Humble Oil and Trevino bills of review—because the probate court lacked jurisdiction, Fernandez cannot pursue further litigation in the probate court. The Court explained another ground to affirm reversal of the anti-suit injunction issued in the Garcia bill of review. In that case, Fernandez did not appeal the district court's grant of summary judgment. That order dismissed Fernandez's heirship claim and precludes Fernandez from relitigating that issue. So as to all three bills of review, clear equity does not demand entry of an anti-suit injunction.

The Court, therefore, affirmed the Thirteenth Court's judgments reversing the anti-injuction suit, but reversed and rendered judgment reinstating the district court's grants of summary judgment dismissing Fernandez's claims.

***In Re United Servs. Auto. Ass'n*, 307 S.W.3d 299 (Tex. 2010) (orig. proceeding)**

The two-year deadline to file suit under the Texas Commission on Human Rights Act (TCHRA) is not a jurisdictional requirement. The savings clause of section 16.064 applies to TCHRA claims. However, the nonmovant bears the burden to establish he did not intentionally disregard proper jurisdiction in order to fall under the clause.

Brite sued United Services Automobile Association (USAA) in county court at law for employment discrimination. USAA filed a motion to dismiss, arguing Brite's claim exceeded the $100,000 jurisdictional limit of that court. Ultimately, the Supreme Court agreed and dismissed Brite's case. *United Servs. Auto. Ass'n v. Brite*, 215 S.W.3d 400 (Tex. 2007). Within sixty days of the Supreme Court's judgment, Brite refiled his case in district court. USAA filed a motion for summary judgment based on its contention that Brite's claim was time-barred, and the sixty-day tolling provision in section 16.064 of the

Civil Practice and Remedies Code did not apply. The trial court denied the motion. USAA filed a petition for writ of mandamus, which the Fourth Court of Appeals denied. USAA then sought mandamus relief from the Supreme Court.

The Supreme Court considered two issues: (1) whether the two-year deadline to file suit under the Texas Commission on Human Rights Act (TCHRA) is jurisdictional; and (2) whether Brite intentionally disregarded proper jurisdiction by first filing his claim in the county court at law. Writing for the Court, Chief Justice Jefferson held the two-year limitation is not jurisdictional. Revisiting the Court's characterization of the deadline in *Schroeder v. Texas Iron Works, Inc*., 813 S.W.2d 483, 487 n.10 (1991), Chief Justice Jefferson reasoned that such statutory filing requirements generally are not jurisdictional requirements, unless the Legislature expressly provides otherwise. Turning to the TCHRA two-year deadline, the Court concluded the statute does not evince a clear legislative intent for the requirement to be jurisdictional. Rather, the deadline is labeled as a statute of limitations. Limitations periods are affirmative defenses, not jurisdictional requirements. Moreover, federal courts interpreting Title VII have held that the two-year deadline is not jurisdictional. As such, the Court held the two-year deadline to file a lawsuit under the TCHRA is mandatory, but not jurisdictional.

Chief Justice Jefferson next turned to the application of section 16.064. As a threshold matter, the Court held that the savings clause applies to TCHRA claims. However, the Court held Brite intentionally disregarded the county court at law did not have jurisdiction over his claim as it clearly sought recovery for an amount in excess of the county court at law's monetary jurisdiction. The Court placed the burden on Brite—the nonmovant—to show in response to USAA's summary judgment allegation of intentional disregard that his decision to file in the wrong court was a mistake, not a strategic decision. So while the Court placed the burden on the nonmovant to disprove intentional disregard, the Court held the standard to be akin to that of *Craddock v. Sunshine Bus Lines, Inc*., 133 S.W.2d 124, 126 (Tex. 1939). The nonmovant must simply show that its decision was a mistake. In this case, Brite made a strategic decision to file in the county court at law. As such, he acted with intentional disregard and therefore is not entitled to avail himself of the savings clause.

To prevent the inefficiency of requiring a party to bear the cost of a second null trial, the Court held extraordinary circumstances to permit mandamus relief to set aside a denial of a motion for summary judgment. The Court, therefore, conditionally granted USAA's petition for writ of mandamus and directed the trial court to grant USAA's motion for summary judgment.

***Tex. Dept. of Ins. v. Reconveyance Servs., Inc.*, 306 S.W.3d 256 (Tex. 2010) (per curiam)**

In this case involving post-closing services, the Supreme Court held Reconveyance Services failed to properly plead its ultra vires action, and therefore, the Texas Department of Insurance maintained its sovereign immunity.

Reconveyance Services, Inc. ("Reconveyance") is a Washington state corporation that intended to provide "post-closing mortgage release services" in Texas. This service was designed to assure a new homeowner that the release of the original seller's mortgage was promptly filed, eliminating the preexisting lien on the property records, and clearing the property's title. Reconveyance's ability to sell these services in Texas required the approval of the Texas Department of Insurance and the Department's classification of this service.

In response to Reconveyance's inquiry, a Department representative said the service would be among the costs to be borne by title agents, and that the Department had already initiated disciplinary action against at least one title agent for charging a fee for services similar to Reconveyance's. As a result, title agents refused to list Reconveyance's service as an optional service to home buyers, which limited the company's potential customer base.

Reconveyance sued the Department under the Uniform Declaratory Judgments Act for a judicial declaration that Reconveyance's mortgage release services were not a part of closing the transaction and that these services could be offered for a fee by title companies or agents in Texas. The company alleged that the Department acted beyond its statutory authority in attempting to prohibit it from offering its services through title agencies. The Department filed a plea to the jurisdiction, which the trial court denied. The Third Court of Appeals affirmed, holding the trial court had jurisdiction because Reconveyance's pleadings sufficiently alleged an ultra vires action—an action alleging the Department had acted beyond its statutory authority in purporting to prohibit title companies and agents from charging a separate fee for the company's services.

The Supreme Court held Reconveyance pleaded an ultra vires action that—under the decision in *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009)—lacked subject-matter jurisdiction. *Heinrich* confirmed "suits to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity, even if a declaration to that effect compels the payment of money." But to qualify for this ultra vires exception, a suit must allege the state official acted without legal authority or

failed to perform a purely ministerial act. As a technical matter, the governmental entities remain immune, but not their officers in their official capacity. Thus, ultra vires suits must be brought against the government actor in his official capacity, not the governmental entity itself. Because Reconveyance sued only the Department rather than its officials, the Department retained its sovereign immunity, and Texas courts were without subject-matter jurisdiction to entertain Reconveyance's suit as pleaded. As such, the Court reversed and rendered judgment dismissing the suit.

MEDICAL LIABILITY ACT

Spectrum Healthcare Res., Inc. v. McDaniel, 306 S.W.3d 249 (Tex. 2010)

In a medical malpractice case, an agreement to extend the statutorily-mandated 120-day expert-report deadline must explicitly state the agreement was for that purpose. An agreed docket control order that included only a general discovery deadline for the production of expert reports is ineffective to extend the statute's specific threshold expert report requirement.

Janice McDaniel alleged her pelvis was broken while she received physical therapy at Brooke Army Medical Center in San Antonio. She and her husband sued the United States of America, Spectrum Healthcare Resources, Inc., and therapist Michael Sims in federal district court. When they failed to serve an expert medical report within 120 days as required by the Medical Liability Act (MLA), Spectrum and Sims filed a motion to dismiss. The court denied the motion, based on the McDaniels' argument that the MLA's procedural requirements did not apply in federal court. After granting the United States' summary judgment motion, the court dismissed the case as to the remaining defendants for lack of original federal jurisdiction.

The McDaniels then refiled their lawsuit against Spectrum and Sims in state court. The parties entered into an agreed docket control order (DCO) that set deadlines for designating testifying experts and producing expert reports. The order also permitted broad discovery to proceed immediately despite the MLA's discovery limitations. After the McDaniels again failed to serve an expert report within 120 days of filing suit, Spectrum moved to dismiss the case. In response, the McDaniels argued the agreed DCO extended the deadline for serving their expert reports, including the threshold report required under the MLA. The trial court disagreed and dismissed the case. Sitting en banc, a divided Fourth Court of Appeals reversed the trial court, holding

the agreed DCO unambiguously expressed the parties' intent to replace the statutory deadlines for serving all expert reports, including those required by the MLA.

Authoring the Majority opinion, Justice Green held the agreed-to yet generic DCO used below, which made no reference to the MLA's threshold expert report requirement but set deadlines for the parties to produce reports of all retained experts, did not establish the intent of the parties to extend the statutory expert medical report deadline. First, the MLA's threshold expert report was created as a substantive hurdle to screen out frivolous medical malpractice suits. Construing a DCO as establishing a deadline for serving the MLA's required expert report in the same way as any testifying expert report, without so much as referencing the MLA, would undermine the purpose of treating the threshold expert report differently. Moreover, not all retained expert reports are discoverable, so a generic DCO setting a deadline for producing "retained expert" reports must be more specific when purporting to extend the deadline for producing the MLA's threshold expert report. Finally, the ubiquity of agreed DCOs demands the adoption of a simple standard for extending the threshold expert report deadline that litigants can easily meet and courts can readily apply. As such, the Court reversed the Fourth Court of Appeals' judgment and rendered judgment dismissing the suit.

Chief Justice Jefferson, along with Justices O'Neill and Medina, dissented, reasoning the McDaniels would not have risked dismissal of their case had they known an agreed DCO containing expert report deadlines did not encompass all expert report deadlines. Rather than reinstate the trial court's dismissal, the Court should apply its bright-line rule prospectively, making it inapplicable to the McDaniels and others who complied with similar DCOs that appeared to alter the MLA's deadline.

***Methodist Healthcare Sys. of San Antonio, Ltd., L.L.P. v. Rankin*, 307 S.W.3d 283 (Tex. 2010)**

The ten-year statute of repose applies to a medical malpractice case in which a plaintiff belatedly discovers a *res-ipsa*-like injury.

After experiencing abdominal pain, Emmalene Rankin consulted a physician in July 2006 and learned that a surgical sponge had been left inside her during a November 1995 hysterectomy. In October 2006, Rankin filed a negligence suit against the hospital where the operation was performed, Southwest Texas Methodist Hospital, and two physicians, Robert and Wendell Schorlemer. The healthcare providers moved for

summary judgment under section 74.251(b) of the Civil Practice and Remedies Code, the ten-year statute of repose for healthcare liability claims. This statute provides:

> A claimant must bring a health care liability claim not later than 10 years after the date of the act or omission that gives rise to the claim. This subsection is intended as a statute of repose so that all claims must be brought within 10 years or they are time barred.

The trial court granted summary judgment, but the Fourth Court of Appeals reversed, holding the statute unconstitutional under the Open Courts provision.

The Supreme Court held that section 74.251(b)'s grant of absolute protection against indefinite potential liability does not violate the Texas Constitution. The Open Courts provision confers a constitutional right of access but not an everlasting one. The key purposes of a repose statute is to eliminate uncertainties under the related statute of limitations and to create a final deadline for filing suit that is not subject to any exceptions. In enacting the repose statute as part of the Medical Liability Act, the Texas Legislature made a fundamental policy choice: the collective benefits of a definitive cut-off are more important than a particular plaintiff's right to sue more than a decade after the alleged malpractice. By holding that all plaintiffs have a reasonable time in which to discover their injuries, the court of appeals' decision created a never ending exposure to liability that undermined the purpose of the statute. While the "ten-year repose period will weigh heavily on a small number of plaintiffs like Rankin, who belatedly discover a res-ipsa-like injury," a statute of repose, by design, will always bar some otherwise-valid claims. According to the Court, this is both the purpose and the price of repose. As such, the Court reversed and rendered judgment dismissing the suit.

***Walters v. Cleveland Reg'l Med. Ctr.*, 307 S.W.3d 292 (Tex. 2010)**

A plaintiff in a sponge case raised a fact question on the applicability of the Open Courts provision to her medical malpractice claim in which she challenged the two-year statute of limitations.

After a tubal ligation in December 1995, Tangie Walters began experiencing abdominal cramping and pain that progressively worsened over the next nine years. Despite multiple doctor visits to determine the cause, Walters' physical health deteriorated, having been diagnosed with a multitude of ailments. In April 1995, Walters saw her gynecologist, who discovered a lump in Walters's abdomen and

referred her to a surgeon. That surgeon ultimately uncovered a sponge that was encapsulated in fibrous tissue, suggesting it had been there for years.

In August 2005, Walters sued the healthcare providers that performed her tubal ligation, alleging that the sponge was responsible for the near-decade of medical problems she experienced since the 1995 procedure. The defendants moved for summary judgment, contending Walters's claim was barred by the two-year statute of limitations. The trial court agreed and granted summary judgment. The First Court of Appeals affirmed.

Following twenty-five-year-old precedent, Justice Willett held that the limitations statute did not bar Walters's claim. Sponge cases stand alone in the healthcare liability context. They rarely occur, they never occur absent negligence, and when they do occur, they are difficult to discover. Here, Walters raised a fact issue as to whether she discovered the sponge and brought her suit within a reasonable time, thus defeating summary judgment. Finally, the Court rejected the argument that the two-year limitations period was absolute in all circumstances. Treating the limitations statute as such would render the statute of repose meaningless: "There is no need for repose unless there exists a narrow class of claims that reach beyond the two-year limitations period." The Court, therefore, reversed the First Court of Appeals' judgment and reversed the case to the trial court.

PREMISES LIABILITY

***Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762 (Tex. 2010)**

While a bar owner or other premises owner generally does not owe a duty to its patrons to protect them from other patrons, or from other criminal acts by third parties, such a duty arises when the premises owner knows of foreseeable criminal activity that creates a risk of harm to invitees.

After an hour and a half of yelling, name-calling, pushing, and over aggressive behavior by several patrons in the Grandstand Bar at Del Lago resort, an all-out melee broke out. Smith was severely injured and sued Del Lago Partners, Inc. ("Del Lago") under a theory of premises liability. A jury found both Smith and Del Lago negligent. A divided Tenth Court of Appeals affirmed.

The Supreme Court considered whether Del Lago owed a duty to Smith under the circumstances of this case. For the Majority, Justice Willett held Del Lago assumed a

duty to its invitee, Smith. The Court explained, however, that a bar owner does not generally owe a duty to its patrons to protect them from other patrons, or from other criminal acts by third parties. However, relying upon *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749 (Tex. 1998), the majority held such a duty does arise when a bar owner, or any other premises owner, knows of foreseeable criminal activity that creates a risk of harm to invitees. Several factors examined in *Timberwalk*—proximity, recency, frequency, similarity, and publicity—are nonexclusive considerations for evaluating whether a duty exists for a premise owner to protect invitees from criminal activity. There was evidence in this case that put Del Lago on notice that an unreasonable risk of harm existed. For an hour and a half, Del Lago employees watched its patrons become more violent and threatening, but continued to serve them alcohol. The majority, therefore, concluded that Del Lago knew criminal activity was imminent and therefore had a duty to protect Smith.

The majority further held the evidence supported the jury's finding that Del Lago breached that duty by failing to have security monitor and intervene as the patrons became more aggressive and failing to train bar personnel how to address the circumstances. The majority rejected the argument that Del Lago owed no duty to Smith because he assumed the risk by joining the melee. By adopting comparative responsibility, Texas rejected the doctrine of assumption of the risk. The majority also found sufficient evidence that Del Lago's negligence caused Smith's injury. Finally, the majority held the case raised premises liability, rather than negligent activity, claims because Smith's complaint addressed Del Lago's failure to take action to keep him safe, not any affirmative conduct by Del Lago. As such, the majority affirmed the Tenth Court of Appeals' judgment.

Justice Wainwright dissented, explaining he believed the case presented a negligent activity rather than premises liability claim. Justice Wainwright supported his conclusion by noting that the alleged negligence involved Del Lago staffs' contemporaneous acts and omissions, not a condition of the premises. But the trial court submitted only a premises liability claim, and Smith did not appeal the trial court's refusal to submit a negligent activity claim. Justice Wainwright also concluded the risk of harm to Smith was not unreasonable. Del Lago had few instances of other bar fights. Moreover, alcohol-induced scuffles generally cause no more than minor injuries.

Justices Hecht and Johnson also dissented, each writing separate dissents in which the other joined. Justice Hecht explained Smith knew of the risk and reasonably could have avoided it. Because Smith could have avoided injury, Del Lago did not owe any duty to warn or keep him safe. Justice Johnson agreed with Justice Hecht that Del Lago owed no duty to Smith in regard to the melee. Justice Johnson also analyzed the evidence in light of the text of the jury question on premises liability, which required the

jury to find that Del Lago both failed to adequately warn Smith and failed to make the condition reasonably safe. Justice Johnson would have held the evidence showed Del Lago did not violate its duty to provide Smith an adequate warning. Warning Smith not to enter the melee would have been warning him of something he should have already known and that the evidence shows he would not have heeded anyway.

***Scott & White Mem'l Hosp. v. Fair*, 310 S.W.3d 411 (Tex. 2010)**

Naturally occurring ice that accumulates without the assistance or involvement of unnatural contact is not an unreasonably dangerous condition sufficient to support a premises liability claim.

After his wife's doctor appointment at Scott & White Memorial Hospital in Temple (the "Hospital"), Gary Fair went to retrieve the couple's car. Ice covered the parking lot, the roadway separating the parking lot from the Hospital, and the steps leading to the building. Fair slipped and fell on the roadway, and he and his wife sued the Hospital for his injuries. Arguing the accumulated ice did not pose an unreasonable risk of harm, the Hospital moved for summary judgment, which the trial court granted. The Third Court of Appeals reversed, holding the Hospital failed to "conclusively establish that the ice accumulation was in its natural state and was not an unreasonably dangerous condition."

Authoring the Court's opinion, Chief Justice Jefferson held Fair could not recover for premises liability. Although a condition on a premises owner's property, like a natural accumulation of ice or mud, can pose a risk, it does not, as a matter of law, present an unreasonable risk of harm. The Court had previously held dirt in its natural state and "[o]rdinary mud that accumulates naturally on an outdoor concrete slab without the assistance or involvement of unnatural contact" do not pose unreasonable risks of harm.

In this case, the Court rejected the Fairs' argument that ice should be treated differently because, unlike dirt and mud, icy conditions occur rarely in Texas. The Court noted both mud and ice pose the same risk of harm and both result from precipitation beyond a premises owner's control. Requiring premises owners to guard against wintery conditions would inflict a heavy burden because of the limited resources landowners likely have on hand to combat occasional ice accumulations. Moreover, ice is visible to the invitee, who is typically in a better position to take immediate precautions against injury.

The Court also held the Hospital established the ice was in its natural state. The summary judgment evidence showed an ice storm hit the area causing ice to accumulate on the Hospital's grounds, including the road where Fair fell. This included affidavit evidence of previous ice accumulations on the Hospital grounds and personal observations of the ice storm and accumulations on the road. Because the Fairs presented no controverting evidence the ice resulted from something other than the winter storm, the trial court properly granted summary judgment.

Finally, the Court rejected the Fairs' argument that two exceptions to the natural accumulation rule applied. The first exception was that a premises owner should be liable when it has "actual or implied notice that a natural accumulation of ice or snow on his property created a condition substantially more dangerous than a business invitee should have anticipated by reason of knowledge of the conditions generally prevailing in the area." The Hospital applied a de-icer that, according to the Fairs, made the ice more slippery and therefore "substantially more dangerous than a business invitee should have anticipated." The Court disagreed, holding there was no evidence the ice concealed any dangerous condition beneath it. Moreover, Fair already knew ice generally was slippery, with or without a deicer.

The second exception was that the natural accumulation rule does not apply when a landowner is "actively negligent in permitting or creating an unnatural accumulation of ice or snow." According to the Fairs' argument, the Hospital negligently applied the de-icer, causing the ice to refreeze, and thereby creating an unnatural accumulation. To prevail under this exception, application of the de-icer would have to convert the natural accumulation into an unnatural one. Because the de-icer is composed of a salt-like compound, the Court examined the decisions of other jurisdictions for guidance as to whether applying salt to a natural accumulation of ice renders the ice no longer natural. Ultimately, the Court held that salting, shoveling, or applying de-icer to a natural ice accumulation does not transform it into an unnatural one. To find otherwise would punish business owners who, as a courtesy to invitees, attempt to make their premises safe.

Based upon these holdings, the Court reversed the Third Court of Appeals' judgment and rendered judgment that the Fairs take nothing.

PROBATE

***In Re the John G. & Marie Stella Kenedy Mem'l Found., No. 04-0607, consolidated for oral argument with In Re Frost Nat'l Bank*, No. 04-0608, , 53 Tex. Sup. Ct. J. 602, 2010 WL 1526353 (Tex. Apr. 16, 2010) (orig. proceeding)**

A probate court may not order exhumation to determine paternity after an heirship claim is time-barred.

After filing untimely heirship claims, Fernandez requested an order from the probate court to exhume the body of John Kenedy to determine whether he was her biological father. Fernandez fashioned her request under Texas Health and Safety Code section 711.004(c), which permits a county court to order exhumation without consent upon satisfaction of specific notification requirements. The John G. and Marie Stella Kenedy Memorial Foundation (the Foundation) and The John G. Kenedy, Jr. Charitable Trust (the Trust) sought mandamus relief to prevent the exhumation. The Thirteenth Court of Appeals denied the petition for writ of mandamus. After the Foundation and Trust filed petitions at the Supreme Court, that Court stayed the exhumation orders.

The Court analyzed whether a probate court abused its discretion by granting a request to exhume a body to determine paternity for the purposes of an heirship claim when that claim is time-barred. The Court held that under the circumstances, the exhumation order was an abuse of discretion. As held by the Court in companion opinions issued April 16, 2010, Fernandez's heirship claims are time-barred and Fernandez has no judiciable interest to support exhumation. Moreover, the probate court does not have jurisdiction to order exhumation as there is no open probate matter that can serve as the basis for the order. Therefore, the Court held that the probate court's order of exhumation is void. The Court concluded that the order is an abuse of discretion and, because no adequate appellate remedy exists, the Court conditionally granted the petition for writ of mandamus.

PUNITIVE DAMAGES

***In re Columbia Med. Ctr. of Las Colinas, Inc.*, 306 S.W.2d 246 (Tex. 2010) (orig. proceeding) (per curiam)**

Statutorily-capped punitive-damage awards should be recalculated if the actual damages against which they are measured have been reduced on appeal.

In the underlying suit, the widow and sons of Robert Hogue, Jr. won a jury verdict on their medical malpractice claims against Columbia Medical Center ("Columbia"). The trial court and court of appeals awarded them economic and punitive damages. On appeal, the Supreme Court reversed the judgment of the court of appeals in part, vacating a portion of the economic damages for loss of inheritance. The remaining portions of the court of appeals' judgment were affirmed.

After the Court's mandate issued, Columbia attempted to tender payment to the Hogues. It subtracted the loss of inheritance damages and reduced the punitive damages amount based on the reduction of economic damages. The Hogues refused this payment. Columbia then moved the trial court to enter a modified final judgment that would effectuate the Supreme Court's mandate by: (1) reducing the economic damages award appropriately; and (2) reducing the punitive damages in compliance with the statutory cap under section 41.008(b) of the Civil Practice and Remedies Code. The trial court denied the motion. As a result, the amount of punitive damages awarded by the final judgment exceeded the statutory cap.

The Supreme Court granted Columbia's request for mandamus relief. Citing precedent, the Court held that statutorily-capped punitive damages awards are required to be recalculated when the actual damages against which they are measured are reduced on appeal. Although the Court's previous judgment in this case did not expressly address the amount of punitive damages, the statute capping punitive damages as measured against economic damages required a reduction in punitive damages as a matter of law. By failing to make this reduction, the trial court abused its discretion.

SOVEREIGN IMMUNITY

***Klein v. Hernandez*, No. 08-0453, 53 Tex. Sup. Ct. J. 693, 2010 WL 1818396 (Tex. May 7, 2010)**

A resident physician working in a hospital district as part of a residency program of a private but "supported medical school" is a "state employee" under chapter 312 of the Health and Safety Code and therefore is entitled to interlocutory appeal under section 51.014 of the Civil Practice and Remedies Code.

Geoffrey Klein was a resident physician in the residency program of Baylor School of Medicine, a private university. He was participating in a residency within the Houston Hospital District, a political subdivision of the state, when he provided obstetric services to Cynthia Hernandez. She sued Klein, claiming he committed malpractice. Klein filed a motion for summary judgment asserting sovereign immunity. Klein argued that he is immune from suit under chapter 312 of the Texas Health and Safety Code. The trial court denied Klein's motion. Klein filed an interlocutory appeal in the First Court of Appeals under section 51.014(a)(5) of the Civil Practice and Remedies Code. The First Court of Appeals dismissed the appeal, holding Klein is not a state employee and therefore does not fall under section 51.014(a)(5).

The Court analyzed the scope of the interlocutory appeal statute to determine whether a resident physician sued for providing medical services in a public hospital as part of his training at a private medical school qualifies as a state employee for the purposes of permitting him to immediately appeal a denial of summary judgment on immunity grounds. Justice Medina wrote the opinion for the majority, holding Klein was entitled to an immediate interlocutory appeal.

The majority held Klein qualified as the equivalent of a state employee under section 51.014(a)(5). Baylor—Klein's school—was a "supported medical school," receiving state funding through a contract with the Higher Education Coordinating Board. This characteristic made Baylor a "state agency" and Klein a "state employee" under chapter 312 of the Health and Safety Code for the purposes of enjoying sovereign immunity. Based upon this holding, the majority reversed the judgment of the First Court of Appeals and remanded the case to that court for consideration of the merits of Klein's appeal.

Justice Willett filed a concurring opinion, noting chapter 312 could be construed based upon its plain language. Therefore, Justice Willett disapproved of the majority's reliance upon extra-textual factors to construe it.

***Zimmerman v. Anaya*, No. 08-0580, 53 Tex. Sup. Ct. J. 702, 2010 WL 1818443 (Tex. May 7, 2010)**

A resident physician working in a hospital district as part of a residency program of a private but "supported medical school" is a "state employee" under chapter 312 of the Health and Safety Code and therefore is entitled to interlocutory appeal under section 51.014 of the Civil Practice and Remedies Code.

Like the plaintiff in *Klein*, Anaya sued a resident physician who provided medical services in a hospital district as part of a resident program at Baylor School of Medicine. Zimmerman attempted to pursue an interlocutory appeal of the trial court's denial of his summary judgment motion based upon sovereign immunity. The First Court of Appeals dismissed his appeal, finding Zimmerman did not qualify as a "state employee" entitled to file an interlocutory appeal.

As in *Klein*, the Court considered whether a resident physician working in a hospital district but as a student of a private medical school is a "state employee" under chapter 312 of the Health and Safety Code and section 51.014 of the Civil Practice and Remedies Code.

Following its opinion in *Klein*, the Court reversed the judgment of the First Court of Appeals and remanded the case to that court for consideration of the merits of Zimmerman's appeal.

***City of Dallas v. Carbajal*, No. 09-0427, 53 Tex. Sup. Ct. J. 715, 2010 WL 1818439 (Tex. May 7, 2010) (per curiam)**

A police report identifying the cause of an accident, but which does not expressly or impliedly fault a governmental entity for that cause, does not make the entity subjectively aware of fault under Civil Practice and Remedies Code section 101.101.

The City of Dallas excavated a road, leaving a gap. The City did not put up barricades to block drivers from entering into the road. When Carbajal drove into the gap and was injured, she sued the City without first filing a formal and timely proof of claim as required by section 101.101 of the Civil Practice and Procedure Code. When the City filed a plea to the jurisdiction complaining of the lack of formal notice, Carbajal argued the police report, which noted the absence of barricades, put the City on actual notice of its fault in the accident. Finding the City had actual notice, absolving Carbajal from the formal notice requirement under section 101.101, the trial court denied the City's plea. The Fifth Court of Appeals affirmed the trial court's order.

The Court analyzed whether a police report puts a governmental entity on actual notice of its fault when the report states the apparent cause of an accident and the governmental entity may have been responsible for the apparent cause. If the police report provides actual notice, a plaintiff is not required to give the governmental entity a formal notice of claim before filing suit.

In a per curiam opinion, the Court held the police report does not create actual notice. While the report identified a cause of the accident—there were no barricades blocking drivers from entering the excavated roadway—it did not expressly or impliedly fault the City for the absent barricades. Other entities could have created the problem. As such, the report did not make the City subjectively aware it was at fault for the accident. The Court reversed the Fifth Court of Appeals' judgment and rendered judgment for the City.

Jerry D. Bullard, ADAMS, LYNCH & LOFTIN, P.C., Grapevine
David F. Johnson, WINSTEAD P.C., Fort Worth

ARBITRATION

***Saxa, Inc. v. Office Condo. Ass'n, Inc.*, 312 S.W.3d 224 (Tex. App.—Dallas 2010, pet. filed)**

The Fifth Court of Appeals held the trial court erred in granting a summary judgment motion on the issue of whether third parties were proper parties to an arbitration proceeding when the scope of an arbitration agreement and claims and parties it encompassed were questions of substantive arbitrability that the contracting parties agreed would be decided by the arbitration panel.

This case involves an arbitration proceeding initiated by Saxa Inc. ("Saxa") against DFD Architecture Inc. (DFD) based on a written contract in which DFD agreed to design a professional office condominium complex for Saxa. The contract between Saxa and DFD contained an arbitration provision that required "[a]ny claim, dispute or other matter in question arising out of or related to" the contract "be subject to arbitration." The contract bound Saxa and DFD, as well as their partners, successors, assigns, and legal representatives "with respect to all covenants of this Agreement," but also provided it did not "create a contractual relationship with or a cause of action in favor of a third party" against either Saxa or DFD. Finally, the parties agreed that:

> No arbitration arising out of or relating to this Agreement shall include, by consolidation or joinder or in any other manner, an additional person or entity not a party to this Agreement, except by written consent containing a specific reference to this Agreement and signed by [Saxa], [DFD], and any other person or entity sought to be joined. . . . The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by the parties to this Agreement shall be specifically enforceable in accordance with applicable law in any court having jurisdiction thereof.

Saxa contends after the office complex was completed, the buildings sustained water damage. Saxa filed an arbitration proceeding against DFD and the construction contractor. Over DFD's objection, the arbitration panel allowed the Las Colinas Officer

Investors L.P. (LCOI), which purchased the property where the office complex was located, to join the arbitration. The Las Colinas Office Condominium Association, Inc. (the "Association"), who was responsible for the management, maintenance, and repair of the common areas of the condominiums, also sought to join the arbitration. After LCOI and the Association sought to join the arbitration, DFD filed a declaratory judgment action and sought injunctive relief from the trial court to prevent the joinder. The trial court granted DFD's motion for summary judgment on its request for declaratory relief and found that LCOI and the Association were not proper parties to the arbitration. Saxa, LCOI, and the Association appealed, claiming—among other things—that: (1) the trial court did not have authority to determine whether LCOI and the Association were proper parties to the arbitration; and (2) that LCOI and the Association were proper parties to the arbitration.

The court of appeals concluded that, because the contract between Saxa and DFD contained a broad arbitration clause purporting to cover all claims, disputes, and other matters arising out of or relating to the contract, it created a presumption of arbitrability.

Further, Saxa and DFD incorporated the Construction Industry Arbitration Rules of the American Arbitration Association into their contract, thereby giving the arbitration panel "the power to rule on its own jurisdiction, including any objections to the existence, scope or validity of the arbitration agreement." When the parties agree to a broad arbitration clause and explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation of such rules provide "clear and unmistakable evidence" of the parties' intent to delegate such issues to an arbitrator.

Finally, LCOI and the Association were attempting to assert a claim under the contract between Saxa and DFD as partners, successors, assigns, and legal representatives of Saxa. While DFD disputed that LCOI and the Association were entities with which it agreed to arbitrate under the arbitration agreement, the scope of the arbitration agreement and the claims and parties it encompassed were questions of substantive arbitrability that DFD and Saxa agreed would be decided by the arbitration panel. Accordingly, the court of appeals held that the trial court erred by granting DFD's motion for summary judgment on the issue of whether LCOI and the Association were proper parties to the arbitration. The case was remanded to the trial court for further proceedings.

BANKING—TORTS

***Clark v. Wells Fargo Bank, N.A.*, No. 01-08-00887-CV, 2010 Tex. App. LEXIS 4376 (Tex. App.—Houston [1st Dist.] June 10, 2010, no pet.)**

The First District Court of Appeals affirmed the trial court's entry of summary judgment. In this case, the court held a bank did not tortiously interfere with the plaintiff's inheritance rights or act with negligence with respect to CDs.

In this case, the court held that a bank did not tortiously interfere with inheritance rights or act with negligence with respect to CDs. In the nineties, Parker Williams purchased six CDs that totaled over $1.2 million and were marked as multi-party accounts with rights of survivorship. These CDs listed multiple parties with rights of ownership. In July 2004, the defendant informed Williams that the CDs were not fully covered by FDIC insurance. Williams then purchased six new fully insured CDs which were set up in her name only and did not have any right of survivorship language on the account agreements.

Williams then died intestate approximately one month later. The plaintiffs were not Williams's heirs under the laws of intestate succession, and would not receive any of the funds from the new CDs. The plaintiffs filed claims for tortious interference with inheritance rights and negligence against the defendant bank. The trial court granted the defendant bank a summary judgment.

On appeal, the court of appeals first held that, under Probate Code Section 448, the plaintiffs had no claim regarding Williams cashing in the original CDs. s Probate Code Section 448 provides "payments made from multi-party accounts to one or more of the individuals listed on the account discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership of the account as between the parties." TEX. PROB. CODE ANN. § 448. The appellate court held the bank was discharged from claims for the payment it made to Parker as a joint owner when it closed the original CDs: "To the extent that any of claimants causes of action relate to those original CDs or to actions take before the original CDs were closed, those claims are ruled by Section 448." *Clark*, 2010 Tex. App. LEXIS 4376 at *12-13. The court then turned to the plaintiffs' tort claims based on the bank's actions that occurred after the original CDs were closed.

The court acknowledged a claimant can have a tortious interference with an inheritance claim: "[o]ne who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." *Id*. at *14. The court held that, in order to have this cause of action, the claimant must present some evidence that he or she would in fact inherit or receive the property at issue but for the interference. The court held the plaintiffs did not provide any evidence that they actually had an interest in the new CDs such that they could sustain a cause of action for tortious interference. The court also held the claimants provided no evidence that Wells Fargo acted with intentional tortious conduct. The court therefore sustained the summary judgment on the tortious interference with inheritance claim.

The plaintiffs also claimed the bank was negligent when it failed to take sufficient steps to protect their inheritance rights when it opened the new CDs. The court held the plaintiffs did not establish the bank owed them a duty: "Claimants' pleadings reveal that all of the actions for which Claimants seek to recover on their negligence cause of action were directed at Parker Williams and related to the duties the bank owed to Williams." *Id*. at *17. The court concluded that there was no evidence that the bank owed any duties to the plaintiffs.

The Court distinguished the Texas Supreme Court's opinion in *A.G. Edwards & Sons v. Beyer*, 235 S.W.3d 704 (Tex. 2007). The Court noted that in *A.G. Edwards & Sons*, the father and daughter both sought to open a joint account and both signed the account agreement with right of survivorship. "The context of the language in the opinion makes it clear that the Court was referring to the duties arising out of the contract signed by Alicia and her father." *Clark*, 2010 Tex. App. LEXIS 4376 at *18. In contrast, the court held the claimants in *Clark* did not have any contractual relationship with the bank: "There is no evidence that they ever participated in the opening of the CDs or, as in Beyer, jointly executed any documents with Williams that would have given them any rights to the funds at issue." *Id*. at *19. Therefore, the appellate court affirmed the trial court's summary judgment.

CONTRACT—ATTORNEY FEES

***Dynegy, Inc. v. Yates*, No. 04-10-00041-CV, 2010 Tex. App. LEXIS 3556 (Tex. App.—San Antonio May 12, 2010, no pet.)**

The Fourth Court of Appeals reversed a judgment entered in favor of the plaintiff and rendered judgment in favor of the defendant on the basis the plaintiff could not recover benefit-of-the-bargain damages under a fraud claim because the contract out of which the damages arose was barred by the statute of frauds.

In this case, the court of appeals found an attorney's claim for breach of contract and fraud arising from an oral agreement by a company to pay the attorney fees for an officer was barred by the statute of frauds. Jamie Olis, a former officer of Dynegy, was indicted on multiple counts of securities fraud, mail and wire fraud, and conspiracy arising out of Olis's work on a complex financial transaction. Pursuant to its articles of incorporation, the Dynegy board of directors passed a resolution that authorized the advancement of attorney fees and expenses to certain officers, including Olis, who were under investigation for their roles in the transaction. After his indictment, Olis hired a criminal defense attorney named Terry Yates to defend him in the federal criminal prosecution and ongoing civil investigation by the SEC. Yates entered into a fee agreement with Olis that was in writing. Yates then talked to an in-house counsel for Dynegy, and Dynegy orally confirmed that it would reimburse and/or would pay for Olis's attorney fees. After paying the first two fee statements, Dynegy refused to pay a third and final invoice that amounted to $448,000 representing work performed for a nine-month period that included a trial. Yates filed suit directly against Dynegy to recover his unpaid attorney fees, as well as alleged breach of contract and fraudulent inducement claims.

After a three week trial, the jury found in favor of Yates on both claims and awarded $500,000.00 in actual damages for fraud, plus $2 million in punitive damages. The trial court entered judgment in favor of Yates based on the fraud damages.

Dynegy appealed the judgment based on its statute of frauds defense. The statute of frauds requires that certain types of promises or agreements, such as a promise by one person to pay the debt of another, be in writing and signed by the party to be charged. *See* TEX. BUS. & COM. CODE ANN. § 26.01(a), (b)(2) (Vernon 2009). Generally, whether a contract falls within the statute of frauds is a question of law

which the court reviews de novo. However, whether a particular case falls within an exception to the statute of frauds is generally a question of fact.

The court of appeals held Dynegy had the initial burden of proof to establish its statute-of-frauds affirmative defense. Yates argued that Dynegy failed to meet its burden by not moving for summary judgment or directed verdict on that ground and by not submitting a jury question on statute of frauds. The court of appeals agreed the statute of frauds is an affirmative defense that is waived if not pleaded, but found that Dynegy did not waive this defense because it did plead it, and asked for a judgment notwithstanding the verdict based on that same defense.

Further, the court found the evidence at trial established Dynegy was entitled to a statute of frauds defense as a matter of law. The court found that it was undisputed that Dynegy did not sign a written fee agreement with Yates. In fact, the only fee agreement was between Yates and Olis. The court stated that under the statute of frauds, a promise by one person to answer for the debt of another is not enforceable unless the promise or agreement, or a memorandum of it, is: (1) in writing; and (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him. Based on the record, the court concluded that Dynegy conclusively established the applicability of the statute of frauds, i.e., that Dynegy's oral promise to pay Olis's legal fees to Yates was a promise by one person to answer for the debt of another.

The court then looked to see if Yates had met his burden to establish an exception to the statute of frauds. Parties seeking to benefit from an exception to the statute of frauds bear the burden of pleading and proving an exception. Unless the evidence conclusively establishes an exception, a party must secure a favorable jury finding to the exception. The court found that Yates did not plead any exception to the statute of frauds. Moreover, Yates did not seek a jury finding regarding an exception to the statute of frauds. Therefore, the court found that Yates waived any such exception.

Notwithstanding waiver, the court reviewed whether Yates established any of three potential exceptions as a matter of law. First, Yates had argued the statute of frauds should not apply as a matter of law because the evidence showed he completely performed the contract. Under this exception to the statute of frauds, contracts that have been partially performed may be enforced in equity if applying the statute of frauds would amount to a virtual fraud on the party acting in reliance to the contract. The court found that this exception was not conclusively established by the record. The rationale underlying the application of the exception turns on proof that the plaintiff's performance is "unequivocally referable to the agreement and corroborative of the fact that a contract actually was made: that is, it must be conduct that could have been done

with no other design than to fulfill the particular agreement sought to be enforced." *Yates*, 2010 Tex. App. LEXIS 3556 at *16-17. The court held Yates could not meet this test because his proof of performance—his completed representation of Olis—was not unequivocally referable to the promise of Dynegy, but was equally referable to his contractual obligation to represent Olis.

Second, Yates argued the statute of frauds was inapplicable because the oral agreement was capable of being performed within one year and was, in fact, performed within one year. The court, however, found the argument failed because the exception was irrelevant to the type of statute-of-frauds defense asserted by Dynegy. The statute of frauds for a promise to guarantee a debt of another is distinct from the statute of frauds for promises that cannot be performed within a year.

Finally, Yates argued that, at the time Dynegy entered into the promise to pay Yates's legal bills for defending Olis, there was no debt. Rather, Dynegy's promise was a promise to reimburse Yates for his bills as they incurred. Therefore, Yates contended the statute of frauds did not apply. The court found this exception did not apply because Yates sued Dynegy based on Dynegy's promise to pay the debt of another—Olis's legal fees. The debt owed to Yates is not Dynegy's debt, but is Olis's debt. The statute of frauds was designed to apply to just such a situation. Therefore, the court found Dynegy established a statute-of-frauds defense as a matter of law, Yates failed to establish any exception, and the statute of frauds barred enforcement of the contract as a matter of law.

The court next turned to whether Yates's fraud action, under which he elected to recover, was also barred. Dynegy argued Yates cannot recover benefit-of-the-bargain damages under his fraud claim because the contract out of which the damages arose was barred by the statute of frauds. The court agreed and cited to previous Texas Supreme Court precedent that held the statute of frauds bars a fraud claim when the only damages sought are benefit-of-the-bargain damages arising out of the contract that is unenforceable under the statute of frauds. The court reasoned it would circumvent the statute of frauds if it determined a contract was unenforceable because of the statute, yet allowed a party to assert a fraud claim so as to recover the benefit of the unenforceable bargain. Therefore, the court found Yates's fraud claim seeking benefit-of-the-bargain damages was also barred. The court reversed and rendered judgment in favor of Dynegy.

EMPLOYMENT—LABOR

***Twigland Fashions, Ltd. v. Miller*, No. 03-07-00728-CV, 2010 Tex. App. LEXIS 1752 (Tex. App.—Austin March 11, 2010, no pet.)**

The Third Court of Appeals set aside a jury verdict on the basis that the plaintiff failed to present legally sufficient evidence that any sexual harassment by her supervisor rose to the level of altering the terms, conditions, or privileges of her employment or created an abusive working environment.

This case involves a hostile-work-environment sexual-harassment claim filed by a former store manager against Twigland Fashions arising out of the alleged conduct by Twigland's regional manager. Specifically, the plaintiff claimed a sexually hostile work environment existed based upon—among other conduct—her supervisor/regional manager giving her two full-body hugs, telling her that she owed him a kiss every time she made errors or had deficiencies at work, and telling her that he loved her. A jury awarded the plaintiff $12,000 in actual damages based on a hostile-work-environment theory of gender-based job discrimination.

On appeal, Twigland challenged the sufficiency of the evidence to support the fourth element of a hostile-work-environment sexual-harassment theory—i.e., whether any harassment by the supervisor/regional manager affected a "term, condition, or privilege" of the plaintiff's employment. The court of appeals began its analysis by examining the frequency or pervasiveness of the supervisor/regional manager's conduct. In that regard, the court noted the alleged harassment occurred on five days during only the final forty-nine days before the plaintiff's tenure at Twigland ended. Further, the court also referred to the plaintiff's admissions that her job performance had not been harmed by the supervisor/regional manager's conduct; that the supervisor never sexually solicited her, asked her to have sex, made a sexual advance toward her, or attempted to kiss her; and that she viewed her job as being more difficult and her being distracted from her job only when the supervisor was present in the store (which was only four days over a forty-nine day period).

The court of appeals set aside the jury verdict on the basis that the plaintiff failed to present legally sufficient evidence that any sexual harassment by her supervisor rose to the level of "altering the terms, conditions, or privileges of her employment and 'creat[ing] an abusive working environment." The court based its decision, at least in

part, on the infrequency of the supervisor's alleged conduct, the lack of relative severity of the conduct, and the limited degree to which it impacted the plaintiff's work performance. In so holding, the Court noted that "the point of a hostile-work environment sexual harassment claim under [Labor Code] 21.051 or Title VII is not to combat sexual harassment as an end in itself, however reprehensible such harassment may be, but to provide a remedy when sexual harassment rises to a level so 'extreme' and 'abusive' that it deprives the victim of equal opportunity in the workplace."

INSURANCE—VANDALISM COVERAGE

***Essex Ins. Co. v. Eldridge Land, LLC*, No. 14-09-00619-CV, 2010 Tex. App. LEXIS 3758 (Tex. App.—Houston [14th Dist.] May 20, 2010, no pet. h.)**

The Fourteenth Court of Appeals reversed a trial court judgment entered in favor of a policyholder and rendered judgment in favor of the insurance company after the Court concluded the policy excluded damage caused by or resulting from theft and the evidence established that all damage above the amount of the policy deductible was caused by or resulting from theft, and no exception to theft exclusion applied.

In this case, the court of appeals determined an insurance policy did not cover a loss from the theft of copper wiring and pipes. Eldridge owned a vacant building which once housed a grocery store. Eldridge insured this building with Essex Insurance Company. Essex's insurance policy had a provision that stated as follows, "Covered causes of loss means the following: vandalism, meaning willful and malicious damage to, or destruction of the described property. We will not pay for loss or damage: caused by or resulting from theft, except for building damage costs of the breaking in or exiting of the burglars." *Essex*, 2010 Tex. App. LEXIS 3758 at *2-3. Eldridge's property sustained considerable damage when intruders forced their way into the building and damaged sheetrock, ceiling tiles, electrical conduit boxes, and wall coverings. The burglars removed copper wiring and copper pipe from the building. Eldridge filed a claim with Essex seeking coverage for this damage under the policy. Essex denied the claim based primarily on policy exclusion for loss or damage caused by or resulting from theft. Furthermore, Essex took the position the value of the damage done from breaking in and exiting was below the deductible amount. Therefore, Essex denied the claim.

In a deposition, Eldridge's corporate representative acknowledged he did not see any damage in the building he believed was caused other than "during the process of

removing either copper piping or copper wiring or anything else from the building." *Id*. at *5. He further acknowledged that various types of specific damage that he was asked about were caused in the process and for the purpose of obtaining either copper pipes or copper wiring from the building.

Eldridge sued Essex after Essex denied coverage for damage to Eldridge's property. Both parties filed competing motions for summary judgment regarding coverage of the property damage. The trial court held for Eldridge and found the damages were covered under the policy. Essex appealed this judgment to the court of appeals.

The court of appeals stated the general policy dealing with the construction of insurance policies: "In applying ordinary rules of contract construction, [the Court's] ultimate goal is to ascertain the parties' intent as expressed in the language of the policy." *Id*. at *7. "In order to achieve this goal, [the Court] will examine and consider the entire writing in an effort to harmonize and give effect to all of the policy provisions so that none would be rendered meaningless." *Id*. Whether the policy is ambiguous is a matter for a court to determine. If a court determines the policy is susceptible to two reasonable constructions, then the court will construe the ambiguous insurance policy strictly against the insurer and liberally in favor of the insured.

After analyzing two different sets of cases from other jurisdictions dealing with similar vandalism coverage provisions, the court found the provision in this case was unambiguous and was not susceptible to two or more reasonable interpretations. The summary judgment evidence established that all damage above the policy deductible was caused by or resulting from theft. The theft exclusion governed unless the breaking-in exception applied. The Court found the breaking-in exception did not contemplate that breaking into fixtures (or walls, ceiling, and floor) for purposes of extracting pipe or wiring would fall within the exception.

The court held "causing building damage by breaking in contemplates the gaining of bodily entry into the interior space of the building, not knocking holes in walls once inside." *Id*. at *20-21. Ultimately, the court concluded the policy excluded damage caused by or resulting from theft, the evidence established that all damage above the amount of the policy deductible was caused by or resulting from theft, and no exception to the theft exclusion applied. The court therefore reversed and rendered judgment against Eldridge and for Essex.

SOVEREIGN IMMUNITY

***City of Balch Springs v. Hall*, No. 05-09-00984-CV, 2010 Tex.App. LEXIS 4344 (Tex. App.—Dallas June 10, 2010, no pet.)**

The Fifth Court of Appeals held the trial court erred in denying the City of Balch Springs' plea to the jurisdiction with respect to a personal injury claim when an off-duty police officer involved in an automobile accident was not acting in the course and scope of his employment at the time of the accident.

This case arose out of an auto accident involving an off-duty City of Balch Springs (the "City") police officer who was driving a City-owned police department vehicle, but was returning to a part-time security job at Wal-Mart. Jimmy Wayne Hall was driving a riding lawn mower with a trailer in tow on an unmarked, unlit Balch Springs roadway. Hall was struck from behind by the City police department vehicle. Hall's surviving spouse, Diana Hall Austin, filed suit against the City and Wal-Mart. The City filed a plea to the jurisdiction asserting governmental immunity from suit. The trial court denied the City's plea.

On the date of the accident, Jonathon Purifoy was a police officer employed by the City. Subject to certain restrictions, and with the approval of the City, off-duty police officers were permitted to be employed part-time with private employers. When not on-duty, Purifoy, as a part-time employee of Wal-Mart, provided security-related services at one of its retail stores. The City permitted off-duty police officers to check out a City patrol vehicle, if the vehicle was available, and park it at their off-duty job locations as a visible deterrent to criminal activity.

At the time of the accident, Purifoy was off-duty as a City police officer and clocked in at Wal-Mart as a part-time security employee. Purifoy was armed, wearing his City police uniform, and carrying his police badge. Purifoy was also operating a City-owned vehicle with the City's permission. In connection with obtaining the police vehicle, Purifoy provided the City's police dispatcher with his officer's identification number, thereby making Purifoy eligible to be called from his private, part-time work, and dispatched by the City in the event of an emergency situation.

Austin argues that, by virtue of a provision in the City's Police Department General Order (the "General Order") entitled "Responsibilities and General Conduct,"

which mandates a City police officer is "on-duty" twenty-four hours a day while within the City, Purifoy was acting within the scope of his employment at the time of the accident. In pertinent part, paragraph 4.02.05 of the Order provided:

> A. For the purpose of protecting life and property, officers shall always be prepared to act any time circumstances indicate their services are required. Officers are always considered on duty while in the City of Balch Springs.

However, the court of appeals held the fact that an off-duty police officer is subject to being called to service twenty-four hours a day while within City limits does not mean he is acting within the scope of government employment at all times while off-duty. In general, whether a person is acting within the scope of his employment depends on whether the general act from which an injury arose was in furtherance of the employer's business and for the accomplishment of the objective for which the employee was employed.

At the time of the accident, Purifoy was returning to the location of his private, off-duty employment. He had not been contacted by the police dispatcher to respond to a call or to engage in his official police officer duties, he was not responding to an emergency, such as a citizen in need of assistance, and he was not engaged in the law enforcement duty of preserving the peace. Further, the language of the General Order does not suggest that an off-duty police officer acts within the scope of his City employment when engaged in activities other than law enforcement responsibilities assigned to him by the City. Therefore, at the time of the accident, the court of appeals held Purifoy was acting in his off-duty capacity of providing security for a private employer and not as an on-duty City police officer.

The court of appeals held the trial court erroneously denied the City's plea to the jurisdiction because Purifoy was not engaged in a law enforcement duty at the time of the accident. Consequently, the court of appeals dismissed Austin's claims against the City for lack of subject-matter jurisdiction.

***City of El Paso v. Bustillos*, No. 08-08-00244-CV, 2010 Tex. App. LEXIS 3739 (Tex. App.—El Paso May 24, 2010, no pet.)**

The Eighth Court of Appeals affirmed the trial court's denial of a city's plea to jurisdiction in residents' declaratory judgment action for violation of their constitutional rights because suit was not barred by governmental immunity.

This case involved an appeal from the denial of a plea to the jurisdiction by the City of El Paso (the "City") in a suit for declaratory relief that also alleged violations of the plaintiffs' due process and equal protection rights. On August 1, 2006, the plaintiffs had to evacuate their residences in an El Paso neighborhood due to severe flooding. In September 2006, the City announced plans to buyout the neighborhood, which had become uninhabitable and dangerous. As part of the buyout, the City granted relocation assistance to displaced tenants if they were able to prove a tenant/landlord relationship in the neighborhood and an increase in rent from what they had been paying. The plaintiffs had oral leases and experienced an increase in rent after leaving the neighborhood; however, they were not aware of their eligibility for relocation assistance until a former neighbor from the subdivision informed them about it in April 2007—at which time the plaintiffs made a request for tenant relocation assistance and submitted supporting documents to the City. In May 2007, plaintiffs were informed that no assistance would be granted due to inadequate proof, the owners of the rental homes had claimed the property as their homestead, and it was too late to make a claim from the flood.

Plaintiffs filed a declaratory judgment action against the City claiming, among other things, that their due process and equal protection rights were violated because of the City's failure to comply with its own policies in administering the tenant relocation assistance program and in not making the program equally accessible to all of those displaced by the City's actions. Plaintiffs also sought monetary relief from the City because of its conduct.

The City filed a plea to the jurisdiction claiming that it was immune from the plaintiffs' claims under the Texas Tort Claims Act, and that the plea for declaratory relief was an impermissible attempt to seek monetary damages. However, the court of appeals disagreed with the City's contention and held the plaintiffs may seek a declaration that their rights were violated while seeking a monetary payment of relocation assistance and not run afoul of the doctrine of sovereign immunity. In so holding, the Court stated that suits requiring compliance with statutory or constitutional provisions are not prohibited by immunity even if the compliance involves the payment

of money. The plaintiffs in this case properly pleaded a violation of their constitutional rights. As such, the suit was not barred by governmental immunity.

Derek Montgomery, KELLY HART & HALLMAN LLP, Fort Worth

COMPELLING PRODUCTION OF COMPUTER HARD DRIVES

***In re Harris*, No. 01-09-00771-CV, 2010 WL 2650638 (Tex. App.—Houston [1st Dist.] July 1, 2010, orig. proceeding) (op. on reh'g)**

The First Court of Appeals held the trial court abused its discretion by compelling a responding party to produce his hard drives where the only pending request sought emails and other electronic communications in their native format and the requesting party did not meet her burden of proof for justifying production of the hard drives.

Virgie Arthur filed suit against Howard K. Stern, Art Harris, Larry Birkhead, TMZ Productions, Inc., and others, alleging that certain syndicated television broadcasts and internet publications defamed her and harmed her efforts to seek custody and visitation of her granddaughter—the child of Vickie Lynn Marshall a.k.a. Anna Nicole Smith. Arthur served discovery requests seeking correspondence between Art Harris and thirty-eight other email addresses and people. Harris objected based on the overly broad nature of the requests and asserted the journalist privilege. Arthur then filed several motions to compel responses and production of responsive documents. One of those motions specifically sought production of computer hard drives for forensic examination. At the hearing, the trial court and all the parties agreed that Arthur had not previously requested production of Bonnie Stern's hard drives. In addition, there was no discussion regarding Harris' hard drive.

After the hearing, the parties agreed on the production of Bonnie Stern's hard drive, and agreed on the appointment of a Special Master to conduct the forensic examination. But a dispute later arose when the trial court entered an order purportedly confirming the parties' agreement by compelling production of all relevant computer hard drives, external hard drives, jump drives and other repositories of electronic communication in Harris' possession or control. Harris filed a motion to clarify and a motion to reconsider, arguing he was improperly included in the order because he had not agreed to surrender his hard drives and that no requests for production had been made for them. The trial court denied both motions and ordered that he produce his computer hard drives. Harris filed a petition for writ of mandamus in the First Court of Appeals.

On rehearing—which the court denied—the court issued this opinion.

Texas Rule of Civil Procedure 196.4 governs the production of data or information existing in electronic or magnetic form. *See* TEX. R. CIV. P. 196.4. In *Weekley Homes*, the Texas Supreme Court set out the appropriate procedure for requesting electronic information under the Texas Rules of Civil Procedure:

> When a specific request for electronic information has been lodged, Rule 196.4 requires the responding party to either produce responsive electronic information that is "reasonably available to the responding party in its ordinary course of business," or object on grounds that the information cannot through reasonable efforts be retrieved or produced in the form requested. Once the responding party raises a Rule 196.4 objection, either party may request a hearing at which the responding party must present evidence to support the objection. TEX. R. CIV. P. 193.4(a).

In re Weekley Homes, 295 S.W.3d 309, 315 (Tex. 2009) (orig. proceeding). There, the supreme court recognized that "[p]roviding access to information by ordering examination of a party's electronic storage device is particularly intrusive and should be generally discouraged, just as permitting open access to a party's file cabinets for general perusal would be." *Id.* at 317. A party requesting production of electronic storage devices has the burden of showing that:

> (1) the responding party somehow defaulted in its obligation to search its records and produce requested data;
>
> (2) the responding party's production is inadequate and that a search of its electronic storage device could recover deleted, relevant materials;
>
> (3) there is a direct relationship between the electronic storage device and the claim(s) at issue in the lawsuit; and
>
> (4) the benefits of ordering production outweigh the costs to the responding party.

Id. at 315, 317-19.

Here, Arthur's original requests sought production of emails and other electronic communications in their native format. Harris objected to the scope of the requests and claimed a journalist privilege, but nevertheless produced approximately 300 pages of emails and other documents he determined were responsive to Arthur's requests.

During the hearing on Harris' motion to clarify, the trial court did not require Arthur to make any showing that Harris defaulted in his obligation to search his records and produce requested data; that Harris's production had been inadequate; that a search of his computer hard drives could recover deleted, relevant materials; that a direct relationship existed between the computer hard drives and her claims; or that the benefits of ordering production would outweigh the costs. Because the trial court did not require Arthur to make such showings, and because Arthur did not take it upon herself to do so, the First Court of Appeals held the record lacked any evidence sufficient to satisfy the stringent standard for compelling production of Harris's computer hard drives. The First Court of Appeals, therefore, held the trial court abused its discretion by compelling production of Harris's hard drives.

CONTINUANCE OF SUMMARY JUDGMENT HEARING

***West v. SMG*, No. 01-08-00720-CV, 2010 WL 2133898 (Tex. App—Houston 1st Dist.] May 27, 2010, no pet.)**

The First Court of Appeals held denying a motion for continuance of a summary judgment hearing in order to conduct further depositions was not an abuse of discretion where the case had been on file for twenty-nine months, and the movant provided no information regarding any efforts made to secure the requested depositions in a timely manner.

In November 2003, Alicia D. West attended a concert at Reliant Arena in Houston, Texas. After being booed by the audience, the first band that performed retaliated by spitting on the audience and hurling water bottles into the crowd. One of those water bottles struck West in the side of the head, causing her to fall to the concrete floor and suffer injuries. Two years later, West filed suit against SMG—the operator of Reliant Park—and others, claiming negligence, gross negligence and negligence per se in failing to provide adequate security.

SMG filed a no-evidence motion for summary judgment in July 2006. West simultaneously filed a response and motion for continuance in January 2007, arguing the trial court should not rule on SMG's no-evidence motion for summary judgment until she could conduct another deposition. She sought to depose the employee who drafted the incident report, who had been serving with the United States military overseas at the time discovery was being conducted. The trial court heard oral argument on SMG's no-evidence motion for summary judgment in January 2007, but

did not enter judgment. More than one year later, the trial court held a status conference and set the no-evidence motion for summary judgment for final submission in April 2008. Seven days before final submission, West filed yet another motion for continuance. In this second motion for continuance, West sought to depose eight witnesses. The employee mentioned in the first motion for continuance was not among those eight witnesses. SMG objected to the request for continuance because West had already had twenty-nine months to depose those witnesses yet had not made any prior request to do so. The trial court denied the motion for continuance and granted SMG's no-evidence motion for summary judgment. West appealed the trial court's denial of her motion for continuance.

"When a party contends that it has not had an adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance." *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996); *see also* TEX. R. CIV. P. 166a(g), 251, 252. A trial court may order a continuance of a summary judgment hearing if it "appears from the affidavits of the party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition." *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004). The movant's affidavit must particularly describe the evidence sought, the diligence used to obtain the evidence, and explain why the continuance is necessary. *Rocha v. Faltys*, 69 S.W.3d 315, 319 (Tex. App.—Austin 2002, no pet.). If the movant's affidavit does so, the courts may consider the following non-exclusive factors in determining whether continuance is proper: (1) how long the case has been on file; (2) the materiality and purpose of the discovery sought; and (3) whether the movant exercised due diligence to obtain the discovery sought. *Joe*, 145 S.W.3d at 161.

Here, West sought a continuance of the summary judgment hearing in order to depose an employee who worked both before and during the concert. But the trial court did not finally submit the motion for summary judgment until 14 months after West filed her original motion for continuance, and 29 months after she had originally filed suit. There was no evidence that West made any attempt to depose the employee, either in the 15 months before or in the 14 months after filing the original motion for continuance. The same was true for the eight witnesses she sought to depose in her second motion for continuance. The record was further devoid of any reference to the materiality of the requested depositions. Accordingly, the First Court of Appeals affirmed the trial court's judgment, holding West failed to satisfy the factors that would have justified a continuance.

DISQUALIFICATION OF COUNSEL

***In re de Brittingham*, No. 04-10-00175-CV, 2010 WL 1608885 (Tex. App.—San Antonio April 21, 2010, orig. proceeding)**

In a matter of first impression, the Fourth Court of Appeals held that former Fourth Court of Appeals Justice Sarah Duncan and all members of her law firm, Locke Lord Bissell & Liddell LLP, were disqualified from representing their clients because Duncan was a participating justice in a 2006 decision arising from the same ancillary probate proceeding giving rise to the claims at issue.

The Administrator of an Estate filed a motion to disqualify former Fourth Court of Appeals Justice Sarah Duncan and all members of her law firm—Locke Lord Bissell & Liddell LLP ("Locke Lord")—from representing Maria Cristina Sada de Brittingham, Angel Eduardo Marroquin de Brittingham, Daniel Milmo de Brittingham, and Maria Cristina Lobeira de Brittingham (collectively, the "de Brittinghams") in the original proceeding because Duncan served as a participating justice on a panel affirming two trial court orders appealed from the same ancillary probate proceedings from which the underlying issues before the court arose. *See Tijerina v. Mackie*, No. 04-05-00213-CV, 2006 WL 397936 (Tex. App.—San Antonio 2006, no pet.). Duncan and Locke Lord, in response, argued they should not be disqualified because this lawsuit and *Tijerina* are not the same "matter."

Disqualification is a severe remedy because it can cause immediate harm by depriving a party of its chosen counsel and disrupting court proceedings. *See In re Sanders*, 153 S.W.3d 54, 57 (Tex. 2004) (orig. proceeding) (per curiam). Texas Disciplinary Rule of Professional Conduct 1.11 provides that

> a lawyer shall not represent anyone in connection with a matter in which the lawyer has passed upon the merits or otherwise participated personally and substantially as an adjudicatory official or law clerk to an adjudicatory official, unless all parties to the proceeding consent after disclosure.

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.11(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005) (TEX. STATE BAR R. art. X, § 9). While Rule 1.11 does not define the term "matter," the comment thereto indicates that Rule 1.11 is generally parallel to Rule 1.10, which defines the term "matter" as follows:

(1) Any adjudicatory proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge accusation, arrest or other similar, particular transaction involving a specific party or parties; and

(2) any other action or transaction covered by the conflict of interest rules of the appropriate government agency.

Id. at 1.10(f)(1)-(2).

In probate proceedings, it is critically important to review controlling, intermediate decisions because of the potential irreparable harm that might result from those decisions. But the review of each controlling, an intermediate decision is nevertheless a review from the same adjudicatory proceeding. Thus, the Fourth Court of Appeals concluded "the term 'matter' in Rule 1.11(a) in the appellate context includes a 'similar, particular transaction involving a specific party or parties,' and in this particular case the 'matter' is the ancillary probate proceeding and not each discrete appeal or original proceeding." The Fourth Court of Appeals held Duncan was prohibited from representing the de Brittinghams pursuant to Rule 1.11(a). While Rule 1.11(c) provides a mechanism by which the firm employing a person disqualified by Rule 1.11(a) can still represent the client, Locke Lord and Duncan did not comply with that mechanism. Accordingly, the Fourth Court of Appeals held that both Duncan and Locke Lord were disqualified from representing the de Brittinghams.

***In re Guaranty Ins. Servs., Inc.*, 310 S.W.3d 630 (Tex. App.—Austin 2010, orig. proceeding)**

The Third Court of Appeals denied a petition for writ of mandamus, holding the trial court did not abuse its discretion in granting a motion to disqualify Strasburger & Price because one of its paralegals was previously employed by Godwin Pappas Langley Ronquillo, LLP, and had performed work on the other side of the underlying litigation during that employment.

Godwin Pappas Langley Ronquillo, LLP ("Godwin") represented Trans-Global Solutions ("Trans-Global") in a lawsuit (the "Trans-Global Lawsuit") against Guaranty Insurance Services, Inc., which was represented by Strasburger & Price ("Strasburger"). Godwin employed a paralegal who assisted in the Trans-Global Lawsuit, but subsequently left Godwin and went to work as a paralegal for Strasburger. Trans-Global filed a motion to disqualify Strasburger on the ground the paralegal had previously

performed work for it while employed at Godwin. The trial court granted the motion to disqualify. Strasburger filed a petition for writ of mandamus seeking to vacate that order.

When a paralegal works on a case at one firm, and then moves to another firm on the opposing side of that litigation, two presumptions take effect. *See Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 834-35 (Tex. 1994). First, a conclusive presumption that the paralegal acquired confidential information during his work on the case at the first firm. *Id.* at 834. Second, a rebuttable presumption that the paralegal shared confidential information about the case with members of the new firm. *Id.* at 835. The second firm can rebut the second presumption by showing "that sufficient precautions have been taken to guard against any disclosure of confidences." *Id.* Such precautions include:

> (1) expressly cautioning the newly-hired paralegal to not disclose any information relating to the representation of a client of the former firm;
>
> (2) instructing the newly-hired paralegal not to work on any matter on which he worked while employed by the former firm; and
>
> (3) taking reasonable steps to ensure that the newly-hired paralegal does no work in connection with matters on which he worked while employed by the former firm.

Id. In connection with this third precaution, the supreme court noted that a firm's screening procedures must actually be effective in order to rebut the presumption of shared information. *Id.* at 833. That is, the extensiveness and thoroughness of a firm's screening procedures are of no import if they are ultimately ineffective. *Id.* at 833.

Strasburger employed extensive and thorough screening procedures and subsequently instructed the paralegal not to work on any matters on which he worked during prior employment. Regardless, those procedures did not reveal the potential conflict related to the paralegal's work for Trans-Global while at Godwin. While recognizing Strasburger's conflict-screening procedures as thorough, the court ultimately held that, "where a paralegal has actually been allowed to work on both sides of the same litigation, even the most exhaustive attempts at screening cannot be deemed effective." Because Strasburger's paralegal actually performed work on both sides of the same litigation, the Third Court of Appeals held the trial court did not abuse its discretion in granting the motion to disqualify Strasburger.

In his dissenting opinion, Justice Waldrop opines that the majority failed to apply the appropriate standard for granting a motion to disqualify. Specifically, Justice Waldrop contends the majority's opinion mandates disqualification, as a matter of law, without consideration of the circumstances, what the second firm did or knew, or what the paralegal did. "The simple fact that a non-lawyer 'worked' on both sides of a case or piece of litigation cannot be, by itself, the only relevant inquiry for the harsh remedy of disqualification." Justice Waldrop argues that where the second firm brings forward evidence it took measures sufficient to reduce the potential for misuse of confidences, "there must be an inquiry into whether what the non-lawyer did and what the second firm did resulted in at least potential harm to the party for whom the non-lawyer worked in the first instance."

MANAGING CONSERVATORSHIP OF CHILD

***In re Dukes*, No. 04-10-00257-CV, 2010 WL 1708251 (Tex. App.—San Antonio April 28, 2010, orig. proceeding) (mem. op.)**

The Fourth Court of Appeals held the trial court abused its discretion by appointing maternal grandparents as managing conservators of child where the maternal grandparents' live pleading did not seek such relief.

The child at issue in this proceeding, J.D., lost his mother in February 2009 (death) and father, Corey Dukes, in December 2009 (prison). After his father's imprisonment, J.D. lived with his paternal grandparents, the Dukeses. Debbie and John Orchard (J.D.'s maternal grandmother and maternal step-grandfather, respectively) originally filed a suit affecting the parent-child relationship, requesting they be appointed managing conservators of J.D. After the Dukeses filed a motion to dismiss because the Orchards allegedly lacked standing, the trial court allowed the Orchards to amend their petition to seek possession or access to J.D. The Orchards did so in their second amended petition, which only sought possession of or access to J.D. At a subsequent hearing, however, the trial court entered a temporary order giving the Orchards temporary managing conservatorship of J.D. the Dukeses filed a petition for writ of mandamus.

Mandamus is the proper avenue of relief when complaining of a trial court's temporary orders. *See In re Derzapf*, 219 S.W.3d 327, 334-35 (Tex. 2007) (orig. proceeding). The Dukeses argued the trial court abused its discretion by giving the Orchards temporary managing conservatorship when there was no live pleading

requesting managing conservatorship. The Fourth Court of Appeals agreed. At the time the trial court gave the Orchards temporary managing conservatorship, their live pleading merely requested access to or possession of J.D. Thus, the trial court abused its discretion, and the Fourth Court of Appeals conditionally granted the Dukeses' petition for writ of mandamus.

PLENARY POWER TO RULE ON SANCTIONS MOTION AFTER NONSUIT

***In re Anderson*, No. 01-10-00182-CV, 2010 WL 1612309 (Tex. App.—Houston [1st Dist.] April 19, 2010, orig. proceeding) (mem. op.)**

The First Court of Appeals granted mandamus relief, holding a trial court has plenary power to rule on motion for sanctions after signing an order nonsuiting plaintiff's claims where the motion for sanctions was pending at the time plaintiff filed its motion for nonsuit.

Violet Adovnik sued her three adult children for theft. Adovnik later appeared on a local television news interview with her attorney, Esther Anderson, where they described her allegations and made general statements regarding the necessity for parents to implement "checks and balances" when a child assumes control of a parent's finances. After hearing the interview, the adult children sued Adovnik and Anderson for defamation. Adovnik and Anderson filed an answer, including a motion for sanctions. The adult children subsequently filed a motion to nonsuit their claims. The trial court signed an order of nonsuit, stating "the court grants Plaintiffs' Nonsuit and hereby orders that Cause No. 2009-14652 be Non-Suited." More than two months after signing the order of nonsuit, the trial court held a hearing on Adovnik and Anderson's motion for sanctions. The trial court held it was without power to rule on the motion for sanctions because it lacked plenary power. Anderson filed a petition for writ of mandamus.

When a trial court refuses to hear and rule on motions due to lack of plenary power, mandamus is the proper avenue for relief. *See In re Granite Shop*, No. 002-08-00410-CV, 2009 WL 485696, at *1 (Tex. App.—Fort Worth Feb. 24, 2009, orig. proceeding). It is true that a court cannot issue an order of sanctions after its plenary power has expired. *See Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996). With respect to nonsuits, Rule of Civil Procedure 162 provides that a dismissal "shall have no effect on any motion for sanctions." Tex. R. Civ. P. 162. Logically then, an order of nonsuit "does not necessarily dispose of any cross-actions, such as a motion for sanctions, unless specifically stated within the order." *Crites v.*

Collins, 284 S.W.3d 839, 840 (Tex. 2009); *see also Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 96 (Tex. 2009). An order of nonsuit that does not contain specific language addressing a pending motion for sanctions is not a final judgment. Here, the trial court's order granting the nonsuit did not contain specific language addressing Anderson's motion for sanctions. Thus, it was an interlocutory order and did not trigger the clock on the trial court's plenary power. The Fourth Court of Appeals, therefore, held the trial court abused its discretion in refusing to rule on the motion for sanctions.

REVERSING DEFAULT JUDGMENTS FOR LACK OF NOTICE

***Rivas v. Rivas*, No. 08-08-00352-CV, 2010 WL 1347726 (Tex. App.—El Paso April 7, 2010, no pet.)**

The Eighth Court of Appeals reversed a default judgment entered after a party failed to appear at a hearing because the trial court had previously reset the hearing for a later date and gave no subsequent orders, indications, or notice to the party that such resetting was made in error, set aside, vacated, or in any way revoked.

Sylvia Rivas petitioned for divorce from her husband, Juan Rivas, in 2002. After pending for six years, the divorce was set for "pretrial conference" on June 11, 2008. Sylvia filed a *pro se* motion for continuance, and the trial court entered an "Order Resetting Final Hearing and Pretrial Conference." That order was dated May 19, 2008 and reset the pretrial hearing for January 30, 2009. Juan's attorney received the reset order the same day it was dated. Nevertheless, Juan's attorney appeared in court on the date of the originally set pretrial conference, June 11, 2008. Relying on the court's order resetting the pretrial conference for January 30, 2009, Sylvia did not appear on June 11, 2008. Without acknowledging or considering its order resetting the pretrial conference, the trial court allowed Juan to put on his case, and the trial court granted a default judgment for divorce on June 11, 2008. The trial court subsequently denied Sylvia's motion for new trial. Sylvia appealed, complaining that the default judgment hearing denied her due process of law.

A trial court must set aside a default judgment when the movant has satisfied the requirements set forth in *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124 (1939). In the post-answer default judgment context, a movant must demonstrate that: (1) her failure to appear was not intentional or the result of conscious indifference; (2) she has a meritorious defense; and (3) the granting of a new trial will not operate to cause delay or injury. *See Director, State Employees Workers'*

Compensation Division v. Evans, 889 S.W.2d 266, 268 (Tex. 1994). The first element requires that the movant prove that taking action would not have been obvious to a person of reasonable sensibilities under the same circumstances. *See Strackbein v. Prewitt*, 671 S.W.2d 37, 39 (Tex. 1984); *Johnson v. Edmonds*, 712 S.W.2d 651, 652 (Tex. App.—Fort Worth 1986, no writ). When the movant establishes that she received no notice of a trial setting, she satisfies the first element and need not meet the remaining two. *See Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988).

Sylvia submitted an affidavit, averring she was not notified of the June 11 hearing and was given an order resetting the hearing. There was no evidence the resetting order Sylvia received was sent in error, set aside, vacated, or in any other manner revoked. The Eighth Court of Appeals, therefore, held she had no notice of the June 11 hearing, reversed the default judgment, and remanded for trial on the merits.

WRIT *OF SCIRE FACIAS*

***Cadles of Grassy Meadow, II, LLC v. Herbert*, No. 07-09-00190-CV, 2010 WL 1705307 (Tex. App.—Amarillo April 27, 2010, no pet.) (mem. op.)**

The Seventh Court of Appeals reversed the trial court's judgment, holding a petition for writ of *scire facias* was not barred by limitations because the May 1, 1996 written order in the original proceeding constituted the final judgment, not the April 23, 1996 docket entry.

People's Bank and Trust sued John Herbert in 1990, but later agreed to settle the suit for $8,000 plus interest. The trial court made a docket entry on April 23, 1996 with the following notations:

> 4-23-96 Judgment-Agreement presented. Judgment awarded to Plaintiff in the sum of $8,000.00. Interest 18% from this date. Judgment to be prepared by Mr. Jarvis. Counsel for plaintiff will prepare and submit appropriate judgment for entry.

The trial court signed a written judgment on May 1, 1996. That judgment was ultimately transferred to Cadles of Grassy Meadow, II, L.L.C. ("Cadles"). On April 28, 2008, Cadles filed its petition for *scire facias* to revive the 1996 judgment. Herbert responded to the writ by arguing the petition was untimely and barred by limitations. The trial court agreed, finding Cadles's petition was untimely by five days. Cadles appealed, arguing the trial court rendered judgment when it signed its written order on May 1, 1996—not when it made its April 23, 1996 docket entry.

If a writ of execution is not issued within ten years after the rendition of a judgment, the judgment becomes dormant and cannot be executed upon unless revived. TEX. CIV. PRAC. & REM. CODE ANN. § 34.001(a). A judgment can be revived by a petition for writ of *scire facias* if brought no later than two years after the judgment becomes dormant. *Id.* § 31.006.

A judgment is rendered when the decision is officially announced orally in open court, by memorandum filed with the clerk, or otherwise announced publicly. *Garza v. Tex. Alcoholic Bev. Comm'n*, 89 S.W.3d 1, 6 (Tex. 2002). But an oral announcement is not an official judgment unless it indicates an intent to render a full, final, and complete judgment at that point in time. *S&A Rest. Corp. v. Leal*, 892 S.W.2d 855, 858 (Tex. 1995). While there is little doubt that a docket entry may supply facts, a party cannot rely on it to contradict or prevail over a final judicial order. *N-S-W Corp. v. Snell*, 561 S.W.2d 798, 799 (Tex. 1977) (orig. proceeding). That is, the date the judgment was signed prevails over a conflicting docket sheet entry. *Garza*, 89 S.W.3d at 6-7.

The Seventh Court of Appeals held May 1, 1996 was the date on which the trial court rendered a final judgment. While the April 23, 1996 docket entry was ordinarily sufficient to constitute the rendition of a final judgment, it could not establish the date of final judgment here because doing so would cause it to prevail over a final judicial order. The Seventh Court of Appeals reversed the trial court's judgment and rendered judgment reviving the May 1, 1996 judgment.

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AMERICANS WITH DISABILITIES ACT—RETROACTIVITY OF 2008 AMENDMENTS

***Carmona v. Sw. Airlines Co.*, 604 F.3d 848 (5th Cir. 2010)**

The Fifth Circuit held that the definition of "disability" in the ADA Amendments Act of 2008 (ADAAA) does not apply retroactively.

Carmona worked as a flight attendant for Southwest Airlines in 2005. Following ongoing absences as a result of a variety of issues including psoriatic arthritis, Southwest terminated Carmona. Carmona appealed via his union's grievance process, but the union denied his claim. In 2006, he filed suit against Southwest under the ADA and Title VII. The jury found for Carmona on his ADA claim. The district court vacated the verdict, holding that Carmona presented insufficient evidence to prove that he was an "individual with disability" or had been discriminated against "because of" his disability under the ADA.

The Fifth Circuit noted that the Supreme Court had narrowly construed the key ADA phrase "individual with disability" in *Sutton v. United Airlines, Inc.,* 527 U.S. 471 (1999), and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,* 534 U.S. 184 (2002). In these two decisions, the Supreme Court held that the mitigating effects of medications must be taken into account in determining whether or not a person is disabled under the ADA. The Supreme Court also held that impairments that interfered with major life activities in only minor ways are not disabilities under the ADA. Congress adopted the ADAAA to supersede these two Supreme Court decisions. In particular, the ADAAA was potentially beneficial to plaintiffs with episodic conditions claims, such as Carmona.

The Fifth Circuit rejected Carmona's argument that the ADAAA should apply retroactively. The court reasoned that the Supreme Court had established the definitive and governing interpretation of "disability" in effect at the time of Carmona's trial. Until the ADAAA actually went into effect, no court had power to consider Congress's subsequent decision to amend the ADA.

ARBITRATION

***Todd v. Steamship Mut. Underwriting Assoc. (Bermuda), Ltd*., 601 F.3d 329 (5th Cir. 2010)**

The Fifth Circuit recognized that non-signatory "direct action" plaintiffs could be compelled to arbitrate. In doing so, the court acknowledged that its previous decision in *Zimmerman v. Int'l Cos. & Consulting, Inc*., 107 F.3d 344 (5th Cir. 1997), had been effectively overruled by *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009).

Todd was injured while working as a cook on a Louisiana riverboat. He sought compensation from Steamboat, the insurer of the riverboat, under a Louisiana "direct action" statute permitting plaintiffs to proceed directly against their employer's insurers. Steamboat removed and moved to stay the proceedings and compel arbitration under the New York Convention. Steamboat argued that Todd's claims against Steamship were all derivative of his claims against the riverboat and, thus, subject to arbitration under the riverboat's insurance policy. The district court summarily refused to compel arbitration because it found that *Zimmerman* precluded arbitration of a direct action plaintiff's claims.

The Fifth Circuit reconsidered *Zimmerman* in light of the Supreme Court's subsequent decision in *Carlisle.* In *Carlisle*, the Supreme Court held that non-signatories to arbitration agreements could sometimes be compelled to arbitrate. The Supreme Court also held that state law principles regarding enforcement of contracts against non-parties could be applied to arbitration agreements. Accordingly, the Fifth Circuit concluded that *Zimmerman*'s categorical prohibition on compelling non-party direct action plaintiffs to arbitrate claims is no longer valid. Therefore, the court remanded the case to the district court for consideration of the arbitration issue in light of *Carlisle* rather than *Zimmerman*, leaving open the possibility that a direct action plaintiff such as Todd could be compelled to arbitrate.

DORMANT COMMERCE CLAUSE—STATE HEALTH INSURANCE CONTRACTS

***U. Healthcare Ins. Co. v. Davis*, 602 F.3d 618 (5th Cir. 2010)**

The Fifth Circuit held that the dormant Commerce Clause does not bar a Louisiana law that requires the state's Office of Governmental Benefits ("OGB") to solicit proposals in each region of the state from "Louisiana HMOs" and contract with any Louisiana HMO that submits a "competitive" bid for a fully funded HMO plan.

The statute defines "Louisiana HMOs" as plans that: (1) offer fully insured commercial or Medicare advantage products; (2) are domiciled, licensed, and operating within the state; (3) maintain their primary corporate offices in the state and seventy percent of its employees in the state; and (4) maintain their core business functions within the state

The statute became effective in the fiscal year of 2007-2008. On August 1, 2007 the OGB issued a Notice of Intent to Contract limited to Louisiana HMOs. In response, two previous providers sought declaratory and injunctive relief from the implementation of the statute. The district court held that the statute probably did violate the dormant Commerce Clause, but not the Contract or Due Process Clauses and granted plaintiffs' motion for a permanent injunction.

The Fifth Circuit reversed the district court's holding. The court applied a two-pronged test to determine whether the State constituted a "Market Participant" under the act and therefore did not run afoul of the dormant Commerce Clause. First, the court analyzed whether the activities provided for in the act constituted "regulation." The court concluded that they did not, holding that the list of qualifications for a "Louisiana HMO" merely constituted a definition of the State's "preferred contracting Partners." Second, the court analyzed whether that the statute "h[as] a regulatory effect on a market downstream from the market in which the State participates." The court held that Louisiana did not participate directly in the administrative services markets that would be affected by the act's preference for providers that maintained their "core business functions" within the state. Therefore, the court concluded that Louisiana was a market participant and reversed the district court.

ENFORCEMENT OF JUDGMENTS—SUCCESSIVE REGISTRATION

***Del Prado v. B. N. Dev. Co*., 602 F.3d 660 (5th Cir. 2010)**

The Fifth Circuit approved the process of "successive registration," holding that when a federal court judgment has been registered in a second federal court under 28 U.S.C. section 1963, the resulting judgment of the second court may be subsequently "re-registered" and enforced in a third federal court.

After several cases against former Filipino President Ferdinand Marcos were consolidated and certified as a class action, the United States District Court for the District of Hawaii entered judgment against Marcos in 1995 for nearly $2 billion. The Ninth Circuit affirmed this judgment. In 1997, the plaintiff registered this judgment in the Northern District of Illinois pursuant to section 1963

In 2005, the plaintiff again registered the 1995 Hawaiian judgment—this time in the Northern District of Texas—and filed a complaint to foreclose on certain property of Marcos's estate. The defendants argued that the Hawaiian judgment had expired before it was registered in the Northern District of Texas. In response, the plaintiffs first unsuccessfully tried to revive the Hawaiian judgment. The plaintiffs then timely revived the Illinois registered judgment and registered this revived judgment in the Northern District of Texas.

The defendants argued this "successive registration" was not allowed, because a judgment registered under section 1963 is not an independent judgment but is merely derivative of the judgment of the court that initially rendered it. In other words, the defendants contended that, because the underlying Hawaiian judgment had already expired, the derivative Illinois judgment could not be re-registered in a Texas federal court. The district court agreed and dismissed the case.

The Fifth Circuit reversed, noting that a judgment registered under section 1963 has "the same effect as a judgment of the district court of the district where registered and may be enforced in like manner." Based on the plain language of section 1963, the Fifth Circuit reasoned that once the Hawaiian judgment was registered in Illinois, the Illinois registered judgment had the same effect as any other Illinois federal court judgment. The Illinois registered judgment could therefore be "re-registered" in the Northern District of Texas and enforced in Texas. The Fifth Circuit also reasoned that

the Full Faith and Credit Clause and Full Faith and Credit Act allow a plaintiff to successively register judgments between state courts, and between state and federal courts, and that it would be unorthodox and unusual if Congress intended for section 1963 to compel a different result for federal court judgments.

ENVIRONMENTAL LAW—"INTERRELATED ACTION"

***Medina Cnty. Envtl. Action Assoc. v. Surface Transp. Bd.*, 602 F.3d 687 (5th Cir. 2010)**

The Fifth Circuit held that the Surface Transport Board's (STB) decision to grant a railroad an exemption from 49 U.S.C. section 10901 to construct a railroad around a limestone quarry was not arbitrary and capricious. In doing so, the court defined the term "interrelated action" under section 7 of the Endangered Species Act's (ESA) regulations.

Vulcan, a mining company, entered into a lease to develop a quarry on a large tract of land in Quihi, Texas. The Medina County Environmental Action Association (the "Association") was formed to oppose the construction of the quarry. As part of that development, a railroad sought to build a seven mile rail spur to connect the quarry to the main rail line. The STB granted the railroad an exemption from 49 U.S.C. section 10901 to construct the seven mile spur. Section 10901 requires a party to obtain the STB's certification that the project is not "inconsistent with the public convenience and necessity." Before the STB granted the exemption, the railroad conducted a biological assessment study as part of an environmental impact study. The Association questioned the rigor of both. Specifically, the Association argued that the railroad's studies did not sufficiently consider the impact of the entire project on the golden-cheeked warbler and certain karst invertebrates, which are endangered. In doing so, the Association argued the STB abused its discretion under the ESA.

The Fifth Circuit examined whether the STB abused its discretion in mandating the scope of the biological assessment under the ESA. The Association contended that the STB should have considered the "interrelated action" of the entire development in mandating the guidelines for the biological assessment. The Fifth Circuit, noting that it had not yet defined "interrelated action," adopted the Ninth Circuit's approach to hold that action is "interrelated" only if other activities would not have occurred but for the proposed action. Applying this definition, the court concluded that the development of the tract did not depend upon the rail line because alternative transport means existed. Therefore, the STB had no obligation to mandate an assessment considering the "interrelated effects" of the development in its entirety.

EXPERT WITNESSES

***Wells v. SmithKline Beecham Corp.*, 601 F.3d 375 (5th Cir. 2010)**

The Fifth Circuit determined that key expert witness testimony relied on by the plaintiff was not scientifically reliable. With this expert testimony excluded, the defendant drug manufacturer could not be held liable for failing to warn that a prescription drug could potentially trigger pathological gambling.

The plaintiff was diagnosed with Parkinson's disease and was given a prescription for "dopamine agonist" drugs, including Requip, which was manufactured by the defendant. Although the plaintiff had regularly traveled to Las Vegas since the 1970s, the plaintiff began losing staggering sums of money shortly after his diagnosis, ultimately losing approximately $10 million in just five months.

The plaintiff filed suit and alleged that the defendant failed to warn that its Requip drug could cause pathological gambling. To satisfy his burden on proximate cause, the plaintiff submitted expert testimony from three witnesses. Each of these witnesses testified that Requip could cause pathological gambling. But each witness conceded that there was no scientifically reliable evidence to support this conclusion. The district court held that the plaintiff's experts did not provide reliable evidence of causation and entered summary judgment for the defendant.

The Fifth Circuit affirmed. First, the court noted that the experts' concessions that there was no scientifically reliable evidence to support their conclusions "drain[ed] the expert opinions of probative force."

But because of the "case-specific nature of the *Daubert* inquiry," the court also examined whether the experts' methodology was reliable. The court concluded that the experts' testimony did not provide the necessary "scientific knowledge" that *Daubert* demands because the experts relied on case studies, rather than statistically significant epidemiological studies. Because the plaintiff could not establish proximate cause, the court affirmed the summary judgment.

JOINDER

***Acevedo v. Allsup's Convenience Stores, Inc*., 600 F.3d 516 (5th Cir. 2010)**

The Fifth Circuit affirmed the dismissal of approximately 800 joined plaintiffs' claims. The court held that the "same transaction" test of Federal Rule of Civil Procedure 20 did not permit the joinder of several hundred plaintiffs to proceed against a convenience store company under the Fair Labor Standards Act (FLSA).

Several hundred employees of Allsup's, a regional convenience store chain, alleged that they had been underpaid under the FLSA. Some of the plaintiffs initially attempted to bring a class action under the FLSA. Although the district court initially certified a class, it ultimately decertified the class. Then Acevedo filed suit against Allsup's and attempted to join approximately 800 other employee plaintiffs rather than proceeding as a class action. Allsup's moved to dismiss all of the claims but Acevedo's under Federal Rule of Civil Procedure 21. The district court granted the motion and dismissed all claims including Acevedo's, and the plaintiffs appealed to the Fifth Circuit.

The plaintiffs argued that joinder of all 800 plaintiffs in a single case was proper because the employment policies in question satisfied the "transactional test" for joinder. The Fifth Circuit disagreed, noting that even if the claims satisfied the "same transaction" test, the trial court had considerable discretion under rule 21 to deny joinder if it determined joinder would not facilitate judicial economy and if proof in the cases could be different. The court acknowledged that it previously allowed joinder of twenty-two plaintiffs in an employment case, but it emphasized that the joinder of 800 plaintiffs was of a different order of magnitude and presented substantial logistical obstacles. In addition, the court held that working conditions were not uniform at Allsup's various stores, and therefore different proof and defenses would be involved for each store. Accordingly, the Fifth Circuit concluded that the district court's logistical and practical concerns were well-founded and affirmed. But the court noted that Rule 21 provides that the district court may only dismiss misjoined claims, and therefore the dismissal of Acevedo's claim was unwarranted. Accordingly, the court affirmed in part and reversed in part.

PRETRIAL ORDERS—AMENDMENT

***Meaux Surface Protection, Inc. v. Fogelman*, 607 F.3d 161 (5th Cir. May 17, 2010)**

The Fifth Circuit determined that although the plaintiff failed to include a claim for lost profits in either its complaint or its pretrial order, it could pursue the claim at trial because it did submit proposed jury instructions on lost profits prior to trial.

Meaux, a company specializing in maritime sandblasting and painting, had a falling out with two of its executives. Fogelman, the former president of Meaux resigned along with the former operations manager. After their resignations, they formed a new company. Subsequently many of the work crews and clients of Meaux left for the new company. Meaux filed suit in state court alleging that Fogelman stole both its employees and its clients. Meaux's state court petition alleged that Meaux suffered "loss of business" but did not expressly assert a claim for lost profits. The defendants removed the case to federal court.

Meaux did not amend its pleadings before the pleading deadline established by the federal district court. The parties' joint pre-trial order did not include a claim for lost profits either. But along with the joint pre-trial order, the parties also filed proposed jury instructions. Meaux's proposed jury charge included an instruction on lost profits. Three months later, two days before trial, the defendants challenged these jury instructions. The defendants argued that Meaux's failure to include lost profits in either the complaint or the body of the joint pre-trial order meant that Meaux waived that claim. The district court disagreed, and allowed Meaux to amend the pre-trial order to include a lost profit claim. At trial, the jury found for Meaux on the lost profits claim.

The Fifth Circuit affirmed the district court's decision to allow Meaux to amend the pre-trial order and to try its claim for lost profits. First, the court emphasized that without the amendment Meaux possessed no real remedy. Second, the court noted that the parties engaged in extensive discovery and pre-trial motion practice on the issue of lost profits. Finally, the court chastised the defendants for delaying their objection to the addition of the lost profits claim until two days before trial, which left little time for a continuance. Under these facts, the Fifth Circuit that the district court properly permitted amendment despite the state of the pleadings and the initial pre-trial order.

REMOVAL—REVIEW OF REMAND ORDERS

***Price v. Johnson*, 600 F.3d 460 (5th Cir. 2010)**

The Fifth Circuit concluded that the defendant's failure to satisfy the removal statute meant that the court lacked subject-matter jurisdiction to review a remand order. The court declined to recognize a distinction between a failure to satisfy the removal statute and a lack of subject-matter jurisdiction for the purposes of review.

John Wiley Price, a Dallas County Commissioner, sought to take an investigatory (pre-suit) deposition of Congresswoman Eddie Bernice Johnson under Texas law. Commissioner Price's desire to take an investigatory deposition arose from certain statements that Rep. Johnson made regarding Commissioner Price's ethics. In response, Rep. Johnson removed the case to federal court under 28 U.S.C. section 1442(a)(1) because she is a federal officer. The district court remanded the case to state court because it found that the matter was not a "civil action" within the meaning of 28 U.S.C. section 1442(a)(1). Rep. Johnson attempted to appeal the remand order to the Fifth Circuit.

The Fifth Circuit considered whether this situation presented an exception to the general rule that remand orders are not subject to appellate review. Specifically, the court acknowledged that defects in the removal procedure or lack of subject-matter jurisdiction render remand orders not subject to review. To review a remand order, the court found that that order needed to be based on a ground other than those in 28 U.S.C. section 1447(c).

The court held that the district court's findings that Rep. Johnson failed to satisfy the jurisdictional requirement of a "civil action" under the statute constituted a finding that no subject-matter jurisdiction existed, and therefore that the remand order was not subject to review. Consequently, the court dismissed the appeal.

REMOVAL—SUPPLEMENTAL JURISDICTION

***Halmekangas v. State Farm Fire & Cas. Co*., 603 F.3d 290 (5th Cir. 2010)**

The Fifth Circuit, aligning itself with the Sixth and Eighth Circuits, found that supplemental jurisdiction does not provide a basis for removal because the supplemental jurisdiction statute, 28 U.S.C. section 1367, does not supply original jurisdiction.

Halmekangas owned a home in New Orleans that was flooded, and subsequently burned down, during Hurricane Katrina. Halmekangas had flood insurance through State Farm and a homeowner's policy with ANPAC Louisiana Insurance Company ("ANPAC"). His homeowner's policy incorrectly described his house, a three-story, 5,400 square foot home, as a 3,400 square foot two-story home. Halmekangas filed a state court claim against ANPAC alleging negligence and misrepresentation in the issuance of the policy. Neither federal question nor diversity jurisdiction was present in Halmekangas's state court suit against ANPAC. A month later, Halmekangas filed a separate suit in federal court against State Farm claiming that he was underpaid for his flood insurance claim.

Upon learning of the federal court suit, ANPAC removed based on supplemental jurisdiction under 28 U.S.C. section 1367. The district court denied the motion to remand, holding that supplemental jurisdiction existed because the object of the two suits—Halmekangas's home—was the same. After the district court rendered summary judgment in favor of ANPAC and Halmekangas settled with State Farm, Halmekangas appealed the denial of the motion to remand the claims against ANPAC.

The Fifth Circuit found that 28 U.S.C. section 1441 and 28 U.S.C. section 1367 could not support for removal in this case. The court noted that the language of section 1441 provides for removal jurisdiction only where a district court otherwise has "original" jurisdiction. The court held that the supplemental jurisdiction statute does not create "original jurisdiction." Therefore, no jurisdictional basis existed for ANPAC's removal of the state court action. This was true even through it was possible that had Halmekangas filed the actions together in federal court, supplemental jurisdiction might have provided a jurisdictional basis for the claims against ANPAC. Because the court held that the district court never had proper subject-matter jurisdiction over the ANPAC action, it vacated the summary judgment for ANPAC and remanded.

STANDING—HOMEOWNERS ASSOCIATION MEMBERS

***Joffroin v. Tufaro*, 606 F.3d 235 (5th Cir. 2010)**

The Fifth Circuit held that a group of disgruntled homeowners association members lacked standing to sue their Homeowners Association (HOA) under RICO. The court reasoned that the homeowners' proper remedy was to pursue a derivative claim on behalf of their HOA.

A coalition of homeowners filed suit against the builder of their subdivision and the directors of the HOA alleging that the HOA and the directors diverted their assessments to pay for a variety of personal projects instead of maintaining the subdivision's common areas. The district court dismissed the claim, holding that the injuries complained of belonged to the HOA rather than the individual homeowners.

The Fifth Circuit analyzed the claim under a three factor test it derived from *Whalen v. Carter,* 954 F.2d 1087, 1093 (5th Cir. 1992). The *Whalen* test has been used by the Fifth Circuit to determine whether or not civil RICO plaintiffs have standing to bring claims analogous to shareholder claims, and the court found this test appropriate in the HOA context as well. The three factors of the *Whalen* test are: (1) whether the racketeering activity was directed against the corporation; (2) whether the alleged injury to the shareholders merely derived from, and thus was not distinct from, the injury to the corporation; and (3) whether state law provides that the sole cause of action accrues in the corporation. Applying these factors to gauge the disgruntled homeowners' standing, the Fifth Circuit answered all three questions in the affirmative, noting that for practical purposes the plaintiff homeowners' injury was not distinct from that of the HOA itself.

The Fifth Circuit rejected the argument that the *Whalen* test should not apply because the HOA was a non-profit entity, noting that such a ruling would exempt all non-profit organizations. Because all of the injuries accrued to the HOA, the plaintiff homeowners lacked standing to pursue a claim against the defendants who controlled the HOA. Holding that the disgruntled homeowners' proper remedy would be to pursue a derivative claim on behalf of their HOA, the Fifth Circuit affirmed the district court's dismissal for lack of standing.

SUBJECT-MATTER JURISDICTION—DIVERSITY

***Berik Stiftung v. Plains Mktg., L.P.*, 603 F.3d 295 (5th Cir. 2010)**

In an issue of first impression, the Fifth Circuit held that a "stiftung"—a legal entity created under the laws of Liechtenstein—was a foreign citizen for purposes of diversity jurisdiction, and affirmed the trial court's dismissal for lack of subject-matter jurisdiction.

Berik Stiftung, an entity organized under Liechtenstein law, filed a declaratory judgment action against a Texas corporation and a Canadian corporation, asserting diversity jurisdiction. Because diversity jurisdiction is destroyed where a foreign citizen is on both sides of the dispute, Berik argued that it was not a foreign citizen for diversity purposes. Berik argued that its entity form, called a "stiftung," was similar to an American trust, and therefore the court should determine its citizenship as it would for a trust—by looking to the citizenship of its beneficiaries. Because its beneficiaries were Florida citizens, Berik argued that it was not a foreign citizen. The district court rejected that argument and held that Berik was a "foreign citizen" for purposes of diversity jurisdiction.

The Fifth Circuit affirmed, reasoning that a foreign entity is a "foreign citizen" for diversity purposes if it is considered a distinct juridical entity under the laws of the nation that created it. Here, Liechtenstein law mandates that a "stiftung" is a juridical person and a legally and economically independent entity. As such, a "stiftung" is considered a foreign citizen for diversity purposes regardless of the citizenship of its beneficiaries. "

SUBJECT-MATTER JURISDICTION—FEDERAL QUESTION

***Budget Prepay, Inc. v. AT&T Corp*., 605 F.3d 273 (5th Cir. 2010)**

The Fifth Circuit concluded that federal question jurisdiction did not exist when a company sought judicial interpretation of an agreement that incorporates federal law. The court found that because the heart of the dispute involved construing contract provisions, the dispute did not raise a federal question.

Budget, a phone service provider, purchased certain services from AT&T. Among these services were some provided under the auspices of the Telecommunications Act of 1996 (the "Act"). The Act provides for deregulation through the use of interconnection agreements (ICAs). These ICAs are contracts between providers such as AT&T and Budget to provide services. The ICAs are subject to the approval and review of state commissions. Parties can contract around provisions of the Act. Budget sued AT&T for a variety of claims, including declaratory relief, to determine the correct application of certain terms in the ICA it had with AT&T.

AT&T moved to dismiss for lack of subject-matter jurisdiction, and the district court denied the motion. AT&T appealed to the Fifth Circuit. Budget argued that the basis for subject-matter jurisdiction was the federal question arising from the necessary interpretation of terms contained in the ICA that are also found in federal regulations. AT&T contended the issue was merely one of contract interpretation of the ICA's terms.

The court first addressed whether Budget's claim was a state or federal claim. The court determined that an agreement that merely invoked and incorporated federal law did not create a federal question. Rather, the court found that because these provisions could be contracted around, a suit for the enforcement of the ICA arose in contract. The interpretation of the terms became an issue of contract law rather than federal regulatory law, and a matter for state courts. Therefore, the claim was not a federal claim which gave rise to subject-matter jurisdiction.

The court then analyzed whether in the alternative a "substantial issue" of federal law existed. The court concluded that the claim did not address substantial issues of federal law. The court found that Congress's decision to invest the power to interpret and approve ICAs in state commissions presented an explicit rejection of a federal forum for these issues. Therefore, no substantial issues of federal law were raised merely by

the interpretation of these regulatory terms. Finding that no subject-matter jurisdiction existed, the court reversed and vacated the district court's decision.

TITLE VII—AVAILABILITY OF MIXED MOTIVE JURY INSTRUCTIONS

Smith v. Xerox Corp., 602 F.3d 320 (5th Cir. 2010)

Distinguishing the Supreme Court's recent decision in *Gross v. FBL Financial Services*, 129 S. Ct. 2343 (2009), the Fifth Circuit affirmed the availability of mixed-motive jury instructions in Title VII cases. The court concluded that Gross is limited to ADEA cases.

Smith served as an "Office Solutions Specialist" for Xerox. This job largely involved sales and sales support. In January 2005, a new manager took over for Smith's sales region. This precipitated a realignment in Smith's territory, resulting in the allocation of fewer personnel and resources to her area. Smith and the new manager frequently sparred over the size of her territory and other issues. Smith complained that her new manager discriminated against her based on her gender and her age by reducing both the size of her territory and the resources available to her. Smith also contended that the sales goals she was expected to meet were disproportionately challenging relative to her colleagues, several of whom were younger males. Smith filed a EEOC discrimination charge against her manager in September 2005.

After Xerox terminated Smith in January 2006, she sued, alleging that Xerox violated Title VII by discriminating against her based on her gender and age and subsequently retaliated against her for filing EEOC charges. The case was tried to a jury, and the district court instructed the jury using a mixed-motive theory of causation. The jury returned a verdict in Smith's favor, which Xerox appealed.

The Fifth Circuit affirmed. One of Xerox's principle arguments on appeal was that the mixed-motive instruction was improper because the Supreme Court held in *Gross* that a mixed-motive instruction could never be proper in an ADEA case. The court analyzed *Gross* and agreed that "the *Gross* reasoning could be applied in a similar manner to the instant case." The court also considered the viability of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), an earlier Supreme Court case authorizing similar instructions. The court concluded that because *Gross* arose in an ADEA statutory construction context, and not under Title VII, "[i]t is not our place, as an inferior court, to renounce *Price Waterhouse* as no longer relevant to mixed-motive retaliation cases,

as that prerogative remains always with the Supreme Court." Therefore the court concluded that in this case it could not follow *Gross* and must affirm the district court.

Alan Curry, HARRIS COUNTY DISTRICT ATTORNEY'S OFFICE, Houston

ABILITY TO APPEAL—APPOINTMENT OF COUNSEL FOR MOTION FOR POST—CONVICTION DNA TESTING

***Gutierrez v. State*, 307 S.W.3d 318 (Tex. Crim. App. 2010)**

The decision to deny appointed counsel for post-conviction DNA testing is not an appealable order.

The defendant was convicted of capital murder and sentenced to death for his participation in the robbery and murder of an eighty-five year-old woman. His conviction and sentence were affirmed, and relief was denied on an application for a post-conviction writ of habeas corpus. The defendant later filed a motion for the appointment of counsel under chapter 64 of the Code of Criminal Procedure, which governs motions for post-conviction DNA testing. The defendant claimed he was indigent and could not prepare an adequate motion without the assistance of experienced counsel. The defendant also maintained reasonable grounds for post-conviction DNA testing existed, noting several items containing biological material were in the State's possession and were not tested at trial including:

- A blood sample taken from the victim;
- A shirt belonging to the victim's nephew and housemate containing apparent blood stains;
- Nail scrapings taken from victim;
- Blood samples collected from: (1) the victim's nephew's bathroom, (2) a raincoat located outside the victim's nephew's bedroom; and (3) the sofa in the front of the victim's house; and
- A hair discovered around the third finger on the victim's left hand.

The defendant claimed DNA testing excluding the defendant as a donor of the biological material on these items would "tend to support" the defendant's assertion he was not guilty of capital murder.

The State filed a response to the defendant's request for counsel, asserting the defendant failed to present reasonable grounds for a motion for testing to be filed. Citing article 64.01(a), which states a motion for DNA testing must be accompanied by an affidavit containing statements of facts supporting the motion, the State asserted the

defendant's request for counsel failed to state any facts to support his contention he was entitled to DNA testing. The State also maintained the defendant could have been found guilty as a principal or party and identity was not in issue. The trial judge denied the defendant's request for the appointment of counsel, and the judge determined no reasonable grounds for a motion for DNA testing existed. The defendant filed a notice of appeal from the trial court's order, claiming the trial judge erred in concluding that his request for counsel failed to establish reasonable grounds for the filing of a motion for DNA testing.

The Court of Criminal Appeals noted the entitlement to appointed counsel for post-conviction DNA testing is not absolute; it is conditioned on three criteria:

- The convicted person must inform the trial judge that he or she wants to submit a motion;
- The trial judge must find that "reasonable grounds" exist for the filing of a motion; and
- The trial judge must find that the convicted person is indigent.

The majority of courts of appeals that have addressed the issue have held a convicted person may immediately appeal a trial judge's decision to deny appointed counsel under article 64.01(c). These courts have relied on the Legislature's expansive amendment to the text in article 64.05. Before September 1, 2003, appeals were limited to determinations made under articles 64.03 and 64.04. In 2003, the Legislature amended article 64.05 to broaden the right to appeal under chapter 64. The Court of Criminal Appeals held that, because of the Legislature's expansive text revision to article 64.05, a convicted person may indeed challenge a trial judge's refusal to appoint counsel. The 2003 revision makes sense in light of the Legislature's amendment to article 64.01(c), which made the appointment of counsel dependent, in part, on the trial judge's discretion. Before 2003, appointed counsel was mandatory. A trial judge's refusal to appoint counsel was not appealable; rather, the inability of a trial judge to appoint counsel would entitle the defendant to mandamus relief.

Nevertheless, there is a difference between issues that may be litigated on appeal and issues that are immediately appealable. The courts of appeals which have concluded that a trial judge's decision to deny appointed counsel is an appealable order have seemed to confuse the difference between an issue that may be litigated on appeal and an issue that forms the basis of an immediately appealable order. An appealable issue is not always immediately appealable under Rule of Appellate Procedure (the "Rule") 25.2(a)(2). In fact, as a general rule, interlocutory appeals are viewed as an extraordinary measure and are rarely permitted. The decision to deny appointed counsel is not an "appealable order" under Rule 25.2(a)(2). Such an appeal is

premature; a motion for appointed counsel is a preliminary matter that precedes the initiation of chapter 64 proceedings. At this stage, a convicted person has only contemplated the filing of a motion for DNA testing. A request for appointed counsel in no way legally binds the convicted person to file a motion for DNA testing. A convicted person may always opt to decline to pursue DNA testing, even after consulting with counsel. A convicted person may also attempt to cure any deficiencies in an initial request for appointed counsel by filing another request. Indeed, there is no limit to the number of requests for appointed counsel that a convicted person may make. Thus, it would be a waste of judicial resources to entertain a challenge to a trial judge's refusal to appoint counsel when the convicted person has not yet initiated chapter 64 proceedings. The better course is for a convicted person to file a motion for DNA testing and, if and when the motion is denied, appeal any alleged error made by the trial judge in refusing to appoint counsel. If a reviewing court determines the trial judge erred in failing to appoint counsel, then the case will be remanded to the trial court, so the convicted person can file a subsequent motion for DNA testing with the assistance of counsel. Because an order denying appointed counsel under Article 64.01(c) is not an immediately appealable order under Rule 25.2(a)(2), the court dismissed the appeal because it did not have jurisdiction to consider the defendant's claim that the trial judge had erred in denying his request for appointed counsel.

ABILITY TO APPEAL—REINSTATEMENT OF COUNSEL IN A BAIL PROCEEDING

***Montalvo v. State*, No. 01-09-01134-CR, 2010 WL 1729414 (Tex. App.—Houston [14th Dist.] Apr. 29, 2010, no pet.)**

In an appeal from a trial court's setting of a defendant's bail, a court of appeals does not have jurisdiction over the defendant's claim that his original attorney should be reinstated on the case.

The defendant was charged with murder, and his pretrial bail was originally set at $50,000. The defendant filed an application for a pre-trial writ of habeas corpus, complaining the bail was excessive and seeking a reduction of the bail to $5,000. After a hearing, the trial court increased the defendant's bail to $100,000. A notice of appeal was filed, and Tony Aninao was appointed as the defendant's counsel on appeal. Aninao also filed a motion to withdraw as attorney of record. The motion stated the reason for the request was that the trial court "informed undersigned appointed counsel to withdraw since court [sic] wanted to appoint another lawyer." On the same day, the trial court granted the motion. In the appeal of the trial court's denial of relief

on the application for a writ of habeas corpus, the defendant asked the court of appeals order the trial court to reinstate Aninao as his appointed trial counsel.

The defendant's right to appeal was limited to the matters properly raised in his habeas corpus petition. Article 11.24 of the Code of Criminal Procedure, which provides the statutory authority for the type of petition filed by the defendant, provides no authority for the defendant to raise any issue in his habeas corpus petition other than the cause for or excessiveness of his bail. Furthermore, no issue relating to the appointment of trial counsel was raised in the habeas corpus petition or hearing. Mr. Aninao filed his motion to withdraw in the murder case, and not the habeas corpus proceeding, after the trial court had already denied the habeas corpus petition and after the defendant filed his notice of appeal.

Even if the issue of appointed counsel had been raised in the course of the habeas corpus proceeding, the court of appeals held that it still could not consider it. Texas Rule of Appellate Procedure 31.2 expressly provides "[t]he appellate court will not review any incidental question that might have arisen on the hearing of the application before the trial court." Therefore, the court of appeals concluded it lacked jurisdiction to consider the defendant's request that Aninao be reinstated as his appointed trial counsel.

ABILITY TO APPEAL—SETTING OF A NEW EXECUTION DATE

***Skinner v. State*, 305 S.W.3d 593 (Tex. Crim. App. 2010)**

A capital murder defendant may not bring a direct appeal from a trial court's order setting a new execution date.

The defendant filed a motion both in the Court of Criminal Appeals and the trial court in which he asked each court to: (1) vacate the trial court's October 20, 2009, order setting his execution date for February 24, 2010, and recall the void death warrant issued by the clerk of the court on November 13, 2009; and (2) prohibit the trial court from setting a new execution date until the Court of Criminal Appeals had denied post-conviction habeas corpus relief in his case (or issued mandate on a filed and set writ).

In response to the motion filed in the trial court, the trial judge issued an order in which he: (1) vacated his October 2009 order setting the defendant's execution date; (2) withdrew the November 13, 2009, death warrant; and (3) set a new execution date of March 24, 2010.

The defendant then attempted to appeal from that part of the trial court's order setting a new execution date. Specifically, the defendant claimed that, because the Court of Criminal Appeals had not reviewed the merits of the claims that he raised in his application for a writ of habeas corpus, the trial court did not have the authority to set his execution date.

The Court of Criminal Appeals held it did not have appellate jurisdiction over the defendant's claim. The defendant had been convicted, and the direct appeal process from that conviction was exhausted. No statute specifically authorizes an appeal from a trial court's order setting an execution date or from an order that denies a defendant's motion with respect to the setting of an execution date.

APPELLATE FILING FEES—BOND FORFEITURE CASES

***Safety Nat'l Cas. Corp. v. State*, 305 S.W.3d 586 (Tex. Crim. App. 2010)**

Even though civil court costs may be assessed at the trial court level in bond forfeiture proceedings, civil appellate filing fees do not apply to appeals in bond forfeiture proceedings.

In this bond forfeiture appeal, the bail bond surety claimed civil appellate filing fees should not have been assessed against it. Specifically, the surety challenged the assessment of civil filing fees mandated by sections 51.207, 51.208, and 51.941 of the Government Code.

The Court of Criminal Appeals reaffirmed an appeal from a bond-forfeiture proceeding originating in a criminal case is a criminal matter, not a civil matter, with final state-court jurisdiction vested in the Court of Criminal Appeals. Article 44.42 of the Code of Criminal Procedure permits a defendant or the State to appeal from every final bond forfeiture judgment, where such a judgment is for twenty dollars or more. Article 44.44 provides a bond forfeiture appeal is to be regulated by the same rules that govern civil actions. The Court of Criminal Appeals then undertook a historical review of the predecessors to article 44.44 to determine whether the "rules that govern civil actions" included civil appellate fees. Article 2380 of the Revised Civil Statutes was the Texas Supreme Court's fee statute in effect in 1876 when the predecessor to the Court of Criminal Appeals was created. Article 2380 was analogous to sections 51.207, 51.208, and 51.941 of the Government Code. But article 2381 pertained to the predecessor to the Court of Criminal Appeals, and that statute stated "clerks of the court of appeals shall, in civil cases, receive the same fees allowed to clerks of the supreme court for like

services." Article 2381 clearly excluded the application of civil-case fees in criminal cases heard by the predecessor to the Court of Criminal Appeals. Thus, the criminal appellate court would have been precluded from assessing civil appellate fees in bond-forfeiture cases, which were held to be criminal cases even prior to the creation of the predecessor to the Court of Criminal Appeals in 1876. Reviewing this history makes clear the Legislature did not intend "rules that govern the other civil actions" in the predecessor to article 44.44 to be construed to permit the application of the civil fee schedule in criminal bond-forfeiture cases. Consequently, article 44.44 also excludes the application of civil-case fees by the courts of appeals in appeals from criminal bond-forfeiture proceedings.

The Court of Criminal Appeals held this determination did not conflict with its prior decision in *Dees v. State*, 865 S.W.2d 461 (Tex. Crim. App. 1993), in which the court construed article 22.10 of the Code of Criminal Procedure to allow for the assessment of civil court costs at the trial court level in bond forfeiture proceedings after entry of a judgment nisi. The Court of Criminal Appeals noted an examination of trial-court fee-schedule statutes in effect in 1879, when Article 22.10 was enacted, shows Dees was correctly decided. Unlike the 1876 Supreme Court fee-schedule statute, the trial-court civil fee statutes in effect after 1879 did not contain any provision restricting their application to civil cases.

INVITED ERROR—DEFENDANT'S ABSENCE DURING JURY SELECTION

***Jett v. State*, No. 04-08-00754-CR, 2010 WL 1904042 (Tex. App.—San Antonio May 12, 2010, no pet.)**

A defendant's behavior prior to and during jury selection can constitute invited error, and the trial court's resulting exclusion of the defendant from jury selection will not constitute a violation of article 33.03 of the Code of Criminal Procedure.

In the defendant's murder trial on the day that voir dire was scheduled to begin, the defendant was brought from jail and was placed in a holding cell in the court's building. While waiting to appear in court, he took off the civilian clothing he had been provided for trial and put them in the toilet. When the bailiffs attempted to enter the cell, the defendant swung the wet clothes at them. The defendant told the bailiffs that he would assault his attorneys if taken to court. The bailiffs used a taser to obtain compliance with their orders and eventually produced the defendant in the courtroom.

The defendant appeared before the court wearing only his underwear and was restrained in leg irons and handcuffs. The judge admonished the defendant that he would be removed from the courtroom and trial would proceed without him if he was unable to "behave properly" in front of the jury. The defendant refused to answer any of the judge's questions. The court announced it would conduct a pretrial hearing later in the week and postponed voir dire until the following Monday.

The defendant appeared in the trial court twice more that week. Initially, the defendant apologized to the court for his earlier behavior. After the court ruled on some pretrial motions, the defendant requested to represent himself at trial. The court extensively admonished the defendant about the dangers of self-representation and ordered an evaluation of whether the defendant's mental health issues would impair his ability to adequately represent himself. The court stated it would decide the issue on the following Monday, before voir dire. The judge asked the defendant whether he could "come to court on Monday and act appropriately." The defendant responded that he could not answer the question. Because the defendant had previously told the court he had hepatitis C and was HIV positive, and bailiffs advised the court the defendant had a history of spitting, the judge stated the defendant should wear a mask when he came to court.

On the following Monday, the defendant was brought into the courtroom confined to a wheelchair because he refused to get dressed. The defendant was handcuffed, shackled, and wore a mask. He had writing on his arms. One of the bailiffs told the judge that he had to "forcibly dress" the defendant and then the defendant urinated in his clothes. The trial court noted that, during the approximately forty-five minutes the defendant was before him, the defendant kept his head hanging down, made no eye contact with anyone, and was nonresponsive to questions. After a recess, one of the bailiffs testified that, once the defendant had been taken back to the holding cell, away from the judge and his lawyers, he lifted his head, opened his eyes, and interacted with the bailiffs. The trial court denied the defendant's request to represent himself, and announced that jury selection would begin the next day.

The following morning, the bailiff reported to the trial court that, while in the holding cell, the defendant had removed his clothes, put the clothes in the toilet, and covered himself with a white powder. When the defendant was brought into the court, he told the court that he did not want to be present for jury selection. He then announced there was a "contract" on the lives of his two lawyers, and they would be executed immediately unless they withdrew or were removed from the case. The court asked the defendant if he would act in an orderly manner and behave during the proceedings. The defendant responded that he would not. The court warned the

defendant he could be forced to appear at trial in jail clothes if he continued to soil his civilian clothes. The defendant responded, "You got to do what you got to do, and I'm going to do what I got to do." The defendant told the judge he did not intend to sit in the courtroom during jury selection and assist his lawyers in picking a jury, and said he could not "stand these bitch lawyers." Then one of the defendant's lawyers attempted to place a plea offer on the record, and asked the defendant if he understood the offer. The defendant responded "f*ck you, man" and "F*ck both of you bitches, man." The defendant was removed from the courtroom, and jury selection began.

During the initial stages of voir dire, the judge instructed the panel about the defendant's absence and told them the defendant voluntarily absented himself from the proceedings. He informed the jurors the defendant did not want to be in the courtroom while the jury was being picked, and that it was possible the jurors might never see the defendant in the courtroom. After the State had conducted its general voir dire, the court had the defendant brought back into the courtroom. The judge asked the defendant if it was still his desire not to be involved in voir dire. The defendant responded affirmatively and told the judge that he would not behave appropriately if he were forced to remain in the courtroom. The defendant again left the courtroom. The defense attorneys asked the panel what they thought about the defendant's absence. Several panel members suggested his absence was due to his guilt and the defendant did not want to "face the music." Eleven panel members indicated they agreed with this sentiment. However, when questioned individually, four of them stated they could set aside any concern about the defendant's absence or would not hold it against the defendant. These four eventually served on the jury. After voir dire was completed, but before any challenges for cause were made to the court, the trial judge once again had the defendant brought into court. The judge asked the defendant if he wanted to participate in selecting the jury. The defendant kept his head hung down and did not respond to the judge's question. The defendant was removed from the courtroom, and the parties completed jury selection.

The court of appeals held the invited error doctrine properly applied in this case. The doctrine of invited error is properly thought of, not as a species of waiver, but as estoppel. The law of invited error estops a party from complaining of an appellate error arising from an action it induced. Because the defendant indicated he would disrupt the proceedings in a manner similar to his past conduct, the court reasonably concluded the only way voir dire could proceed without significant disruption was to remove him. Under the particular facts of this case, the defendant invited any error and he was estopped to claim his absence from the courtroom during voir dire violated article 33.03 of the Code of Criminal Procedure.

POST-CONVICTION WRIT OF HABEAS CORPUS—AVAILABILITY OF RELIEF

***Ex parte Harrington*, 310 S.W.3d 452 (Tex. Crim. App. 2010)**

Relief on an application for a post-conviction writ of habeas corpus is available under article 11.07, even if the defendant has discharged his sentence, if he continues to suffer collateral consequences arising from the conviction.

The defendant was arrested for committing the offense of driving while intoxicated (DWI), and he was indicted for felony DWI, based upon two prior DWI convictions. The defendant told his appointed attorney that one of the two prior convictions did not belong to him and was mistakenly listed on his criminal-history report. The defendant claimed the conviction actually belonged to a man who had dated the defendant's sister and had stolen the defendant's driver's license. He claimed the other man was arrested for DWI, presented the defendant's driver's license, and identified himself as the defendant to police. The defendant claimed the other man was convicted of DWI under the defendant's name. Although the defendant had given his attorney this information, the attorney failed to investigate the prior conviction and advised the defendant to plead guilty to the felony DWI. The defendant claimed that his attorney told him the District Attorney would just refile the case and he would be found guilty anyway. Therefore, upon the advice of his attorney, the defendant pleaded guilty to the felony DWI and was placed on probation. Seven days later, the District Attorney sent the defendant a letter confirming the defendant's version of the prior DWI. The Austin Police Department also conducted a fingerprint analysis, which confirmed the defendant was not the person attached to the prior conviction. The defendant's probation was later revoked, and he was sentenced to two years in prison and a $2,500 fine.

The defendant later filed an application for a writ of habeas corpus, seeking relief from his conviction for felony DWI, based upon the prior misdemeanor conviction that did not belong on his record. The defendant claimed his plea of guilty was involuntary because his trial attorney had rendered ineffective assistance of counsel by failing to investigate the prior DWI conviction used to enhance the defendant's misdemeanor DWI charge to a felony. The defendant was not in custody at the time he filed his application for a writ of habeas corpus because the sentence for the felony DWI conviction had been discharged. But, as a result of the defendant's wrongful conviction for a felony DWI, he had suffered the following collateral consequences:

- Loss of his job with the Texas Workforce Commission;
- Loss of job opportunities;
- Loss of his right to vote;
- Loss of his right to run for an elected public office;
- Loss of his right to possess firearms.

The Court of Criminal Appeals noted that, under article 11.07 of the Code of Criminal Procedure, a person who files an application for a post-conviction writ of habeas corpus must challenge either the fact or length of confinement. In this case, the court held a showing of a collateral consequence, without more, is now sufficient to establish "confinement," so as to trigger application of article 11.07. Even if a defendant is not in the actual physical custody of the government at the time of the filing of his petition, that fact does not necessarily preclude his application nor deprive the trial court of jurisdiction to consider it. Relief on an application for a post-conviction writ of habeas corpus is available under article 11.07, even if the defendant has discharged his sentence, if he continues to suffer collateral consequences arising from the conviction. The court held that, because the defendant in this case currently suffers collateral consequences arising from his conviction, he was "confined" for the purpose of seeking habeas corpus relief under article 11.07.

POST-CONVICTION WRIT OF HABEAS CORPUS—CREDIT FOR TIME SERVED

***Florence v. State*, No AP-76,228, 2010 WL 1979432 (Tex. Crim. App., May 19, 2010)**

In a case in which a convicted person is seeking credit for pre-sentence confinement, an application for a post-conviction writ habeas corpus is typically not the correct procedure.

The defendant was convicted of aggravated sexual assault of a child, and while serving a sentence for that conviction, he committed the offense of possession of a deadly weapon in a penal institution. He was indicted for the subsequent offense, and he was convicted and sentenced. Pursuant to article 42.03, section 2(a)(1) of the Code of Criminal Procedure, the trial court gave the defendant credit on his subsequent sentence for the time he previously served. The defendant later filed a motion for

judgment *nunc pro tunc* in the trial court seeking credit on his sentence for the subsequent offense for some additional time he served. The trial court denied the motion, and the defendant filed an application for writ of mandamus in the court of appeals. The court of appeals denied the application, finding the defendant was not entitled to credit for such time because no detainer had been lodged against him prior to his indictment. The defendant then filed an application for a post-conviction writ of habeas corpus in which he claimed he was entitled to pre-sentence time credit, and that such time credit would advance his mandatory supervision discharge date. He also claimed the court of appeals exhibited unethical conduct and violated due process in denying his application for a writ of mandamus that would have ordered the trial court to give him the time credits.

The Court of Criminal Appeals held in a case in which a convicted person is seeking credit for pre-sentence confinement, an application for a post-conviction writ habeas corpus is not the correct procedure. Pre-sentence time credit claims typically must be raised by a motion for judgment *nunc pro tunc*, and must be filed with the clerk of the convicting trial court. That occurred in this case. If the trial court denies the motion for judgment *nunc pro tunc* or fails to respond, relief may be sought by filing an application for writ of mandamus in a court of appeals. That also occurred in this case. But if the court of appeals denies the application, relief may be sought by filing an application for writ of mandamus in the Court of Criminal Appeals. An application for writ of habeas corpus under article 11.07 of the Code of Criminal Procedure may be used to raise a claim for pre-sentence time credit only if a defendant alleges that he is presently being illegally confined because he would have discharged his sentence if given the proper time credit.

POST-CONVICTION WRIT OF HABEAS CORPUS—PROBATION

***Ex parte Hiracheta*, 307 S.W.3d 323 (Tex. Crim. App. 2010)**

If a defendant was placed on probation, he must file an application for writ of habeas corpus under article 11.072 of the Code of Criminal Procedure in order to attack the judgment of conviction.

After entering pleas of guilty to the offenses of intoxication manslaughter and aggravated assault, the defendant was sentenced to confinement for fifteen years and ten years respectively. The latter sentence was suspended, and the defendant was placed on ten years probation for the aggravated assault offense. The defendant later filed an application for a writ of habeas corpus in which he claimed, among other things:

(1) that the trial court should have sua sponte withdrawn the defendant's plea of guilty regarding one of the offenses, where both offenses were based on the same conduct; and (2) that he was denied a fair and impartial jury determination of punishment due to the trial court's instruction to the jury that it should assess punishment on both counts. The trial court found there had been a double-jeopardy violation and the appropriate remedy for such violation was to vacate one of the convictions. The trial court recommended that, because the first intoxication manslaughter charge resulted in the more serious punishment, it should be affirmed.

The Court of Criminal Appeals noted an application for a post-conviction writ of habeas corpus under article 11.07 of the Code of Criminal Procedure may only be used to challenge a final conviction. However, a defendant must file an application for writ of habeas corpus under article 11.072 in order to attack a judgment of conviction, in which the defendant was placed on probation.

PRESERVATION OF ERROR—TRIAL COURT'S ORDER REQUIRING REIMBURSEMENT FOR COURT—APPOINTED ATTORNEY'S FEES

***Mayer v. State*, 309 S.W.3d 552 (Tex. Crim. App. 2010)**

A defendant need not object at trial to a trial court's order that he reimburse the county for his court-appointed attorney fees.

Prior to his trial for aggravated kidnapping, the defendant filed a pre-indictment "Affidavit of Financial Status," which included a request for the court to appoint an attorney to represent him in the case because he did not have the financial ability to hire his own attorney. The trial court found the defendant was indigent and appointed an attorney to represent him at trial. The jury found the defendant guilty of aggravated kidnapping and assessed his punishment at thirty years in prison. After discharging the jury, the trial court announced the jury's verdict of guilt and assessment of punishment, and ordered the defendant to pay court costs and the court-appointed attorney fees that were incurred by the county in his defense. In the written judgment, the trial court ordered the defendant to reimburse the county for court-appointed-attorney fees in the amount of $2,850. The defendant filed a pro se notice of appeal and an affidavit of financial status in support of a request for appellate counsel, and he was granted the assistance of appellate counsel. On appeal, the State claimed the defendant had procedurally defaulted the issue of attorney-fee reimbursement because he did not object in the trial court. The defendant had made no objection to either the fact or the

amount of restitution for attorney fees, and he made no such objection in a motion for new trial.

The Court of Criminal Appeals noted it has previously held "an appellate court must always address challenges to the legal sufficiency of the evidence. A claim regarding sufficiency of the evidence need not be preserved for review at the trial level and is not waived by the failure to do so." In *Idowu v. State*, the Court of Criminal Appeals had held that, if a defendant wishes to complain about the propriety of—as opposed to the factual basis for—a trial court's restitution order, he must explicitly do so in the trial court. 73 S.W.3d 918, 921 (Tex. Crim. App. 2002). However, in *Idowu*, the court also stated defendants are ordinarily allowed to raise sufficiency of the evidence questions for the first time on appeal, and whether the record provides a sufficient factual basis for a particular restitution order could be considered an evidentiary sufficiency question that need not be preserved by objection at the trial level. The court held whether a party must object to preserve an evidentiary-sufficiency claim concerning a restitution order, or the amount of restitution, was not to be resolved at that time. *Id*. at 922. *See also Moff v. State*, 131 S.W.3d 465, 489 (Tex. Crim. App. 2004) (claim regarding sufficiency of evidence need not be preserved for appellate review at trial level, and it is not forfeited by failure to do so).

The Court of Criminal Appeals noted article 26.05(g) of the Code of Criminal Procedure provides that, if the trial court determines a defendant has the financial resources to enable him to offset in whole or in part the costs of the legal services provided, the court shall order him to pay—as court costs—the amount it finds the defendant is able to pay. Thus, the defendant's financial resources and ability to pay are explicit elements in the trial court's determination of the propriety of ordering reimbursement of costs and fees. The defendant's claims on appeal included assertions of insufficient evidence of his financial resources and ability to pay. The defendant's complaint about the sufficiency of evidence regarding his financial resources and ability to pay were not waived by his failure to raise such a complaint at trial. No trial objection is required to preserve an appellate claim of insufficient evidence, thus the defendant's complaint about the order to reimburse court-appointed attorney fees would be addressed.

The State also claimed the case should have been remanded to the trial court to give the State an opportunity to be heard on the issue in the trial court, as well as to give the trial court an opportunity to decide the issue. The State contended a remand order to the trial court would be appropriate, so that the trial court could hear evidence and make the decision whether and what amount of money the defendant should reimburse the county for attorney fees. Thus, the State had an opportunity, if it so desired, to contest whatever evidence or arguments the defendant employed against

the trial court's order, and to present evidence and arguments in support of its own position. However, when claims of insufficient evidence are made, the cases are not usually remanded to permit supplementation of the record to make up for alleged deficiencies in the record evidence. Sufficiency of the evidence is measured by viewing all of the record evidence in the light most favorable to the verdict. In this case, there is no indication the State was precluded from presenting evidence and being heard on the issue of the defendant's financial resources and ability to pay for reimbursement of the court-appointed attorney fees.

SUPPLEMENTING THE RECORD—AFTER AN OPINION HAS ISSUED

***Lopez v. State*, No. 10-08-00400-CR, 2010 WL 965956 (Tex. App.—Waco Mar. 10, 2010, no pet.)**

Under unusual circumstances, a court of appeals may permit supplementation of the appellate record, even after an opinion has been issued.

A jury convicted the defendant of aggravated assault by using a deadly weapon and causing serious bodily injury to a member of his family. The defendant pleaded "true" to an enhancement allegation, and the jury assessed his punishment at thirty-five years in prison. The court of appeals initially reversed the judgment because the record did not reflect the indictment had been properly amended and, therefore, the guilt-innocence charge submitted a different offense than that alleged in the indictment. Two days later, the court of appeals received supplemental records from the district clerk and the court reporter that reflected the indictment was, in fact, properly amended. The State filed a motion for rehearing several days later urging the court of appeals to reconsider the issues presented in light of these supplemental records. The defendant claimed there was no valid basis to permit supplementation of the record at that late date. The defendant specifically requested records relating to the amendment of the indictment be included in the appellate record, but was informed there were no such records aside from the motion to amend. The parties briefed the case as if the indictment had not been properly amended, and the court's original opinion was based on this understanding, which was later proved to be incorrect.

The court of appeals noted that, in *In re Cervantes*, the court held that Texas Rules of Appellate Procedure 34.5(c) and 34.6(d) grant a court of appeals wide discretion to supplement the appellate record so as to include an omitted matter. However, such discretion should not be exercised in the absence of some unusual

circumstance so as to permit new material to be filed after the appellate court has written its opinion and rendered its judgment. *In re Cervantes*, 300 S.W.3d 865, 870-72 (Tex. App.—Waco 2009, orig. proceeding) (quoting *K & S Interests, Inc. v. Texas Am. Bank/Dallas*, 749 S.W.2d 887, 891 (Tex. App.—Dallas 1988, writ denied)). The court of appeals also noted the Court of Criminal Appeals required supplementation under similar circumstances where both parties mistakenly believed that a videotape, which was the subject of two of the defendant's points of error, was on file with the court of appeals, but the parties did not learn until after the court of appeals issued its opinion that the videotape was never been filed. The court of appeals held that the facts of this case presented the requisite "unusual circumstances." Therefore, the supplemental records were properly before the court of appeals, and the court reconsidered the merits of the three issues presented in the defendant's brief.

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CRIMINAL LIABILITY

***United States v. Schiff*, 602 F.3d 152 (3d Cir. 2010)**

In *Schiff*, the Third Circuit Court of Appeals held the government could not establish a Rule 10b-5 claim arising from communications with investors under the omission liability theory because the government failed to allege

Frederick Schiff was the acting CEO for pharmaceutical manufacturer Bristol-Myers Squibb (Bristol). It was a common business practice in the industry for wholesalers to stock just enough product to meet the immediate general demand. The government alleged that Schiff provided incentives to wholesalers to purchase and store more of Bristol's product than necessary to give the appearance of higher sales and to boost the stock price. During this time, Schiff assured investors through press releases, investor meetings, and related communications that Bristol's wholesaler inventory strategy was not unusual.

The government indicted Schiff and others on charges of securities fraud. While the government acknowledged there were no irregularities in the SEC filings, it asserted that Schiff had a fiduciary duty to Bristol's shareholders, and that Schiff's communications were a violation of Rule 10b–5, which prohibits the omission of material statements about a company's securities. 17 C.F.R. § 240.10b–5. The district court disagreed and the government filed an interlocutory appeal.

In examining whether Schiff owed a duty to disclose, the Third Circuit Court of Appeals noted that silence was not misleading or fraudulent under Rule 10b–5 unless there was a duty to disclose. Citing its prior holding in Oran v. Stafford, the court said that a duty to disclose arises in only three situations: (1) in cases involving insider trading; (2) when a duty arises by statute; or (3) when a prior statement contains misleading, inaccurate, or incomplete information. *Oran v. Stafford*, 226 F.3d 275, 285-86 (3d Cir. 2000). The court reasoned that prongs one and two did not apply and that the government failed to meet the requirements of the third prong as it did not allege that Schiff had made any prior misleading statements in Bristol's SEC filings that would

create a duty. The court therefore held that Schiff's silence did not create a violation under the omission liability theory of Rule 10b–5.

EXCLUSIONARY RULE

***United States v. Davis*, 598 F.3d 1259 (11th Cir. 2010)**

In *Davis*, the Eleventh Circuit Court of Appeals held that, while the defendant's Fourth Amendment rights were violated under the Supreme Court's *Gant v. Arizona* decision, the evidence discovered should not be excluded because the officer acted in good faith reliance on the prior judicial precedent.

Willie Gene Davis was initially arrested following a routine traffic stop during which he identified himself with a false name to the officer. After Davis and the car's driver were handcuffed and placed in police cars, the officer searched the car and found a handgun in Davis's jacket.

Davis was charged with illegal possession of a handgun. Davis sought to have the evidence of the gun excluded, arguing the search was a violation of his Fourth Amendment rights. At the time of the district court trial, the gun evidence was admissible under the Eleventh Circuit's established precedent. However, the Supreme Court was scheduled to hear *Arizona v. Gant*, a case dealing with Fourth Amendment rights regarding vehicle searches, and Davis moved to preserve the issue for appeal. *See Arizona v. Gant*, 552 U.S. 1230 (2008).

The Eleventh Court of Appeals heard the appeal following the Supreme Court's decision in Gant, which held that a search of a suspect's vehicle after he was detained was unconstitutional unless the officer had a reasonable suspicion the suspect had access to weapons or evidence relating to the suspected crime. Applying the Gant holding, the Eleventh Court of Appeals said the search of Davis's belongings was clearly a violation of his constitutional rights.

The court commented that whether a party's Fourth Amendment rights were violated was a separate issue from whether the evidence procured should be excluded. The determination of whether to exclude evidence gathered during an unreasonable search is based on the blameworthiness of the officers and the degree to which the exclusion will deter illegal searches. Circuit courts have split on the issue, the court noted, with the Ninth Circuit applying the exclusionary rule regardless of officers' reliance on then-accepted law in a jurisdiction, and the Tenth Circuit rejecting the

application of the exclusionary rule where an officer has relied in good faith on precedent that has been overturned. *Compare United States v. Gonzalez*, 578 F.3d 1130 (9th Cir. 2009), *with United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009).

In deciding that the good faith exception applied, the Eleventh Court of Appeals relied heavily on the impact of the Belton rule, which was overturned by Gant. *See United States v. Belton*, 453 U.S. 454 (1981). The court reasoned that in the decades since the Belton decision, the courts developed well-established, bright-line rules regarding the constitutionality of vehicle searches. Applying the exclusionary rule to police searches due to judicial error would not deter officers from acting in reliance on well-established, but ultimately incorrect, court precedents. Therefore, the court held that while Davis's Fourth Amendment rights were violated by the unreasonable search of the vehicle, the exclusionary rule did not apply because the evidence's exclusion did not serve the dual purposes of the rule. The exclusionary rule might apply, however, to circumstances in which the precedent was ambiguous or when officers rely on their own misinterpretations of the law.

FORFEITURE

***United States v. Jalaram, Inc*., 599 F.3d 347 (4th Cir. 2010)**

In *Jalaram*, the Fourth Circuit Court of Appeals read recent Supreme Court rulings to mean that in determining if a forfeiture is punitive and therefore subject to the Eighth Amendment's Excessive Fines Clause, the court should look at whether the forfeiture arose from the defendant's criminal culpability, and not the nature of the property itself.

For several years, a prostitution ring called the Gold Club operated out of two hotels, the Economy Inn and the Scottish Inn. The Scottish Inn was owned by Jalaram, Incorporated ("Jalaram") and operated by Dilipkumar "Dan" Patel. During this time, the Gold Club received approximately $385,000 in gross revenue from its illegal activities at the Scottish Inn.

Following the arrest of the Gold Club manager, Jalaram and other co-defendants were convicted of violating the anti-prostitution provisions of the Mann Act. Under the Mann act, a violator must forfeit any proceeds obtained from the criminal act and must forfeit the properties used in committing the violations. *See* 18 U.S.C. § 2253(a). Because the conspirators of a violation are viewed as jointly and severally liable for the

illegal proceeds, the government sought to recover approximately $350,000 from Jalaram. The district court denied the recovery, holding that this was a violation of the Eighth Amendment's prohibitions under the Excessive Fines Clause against punitive fines that are disproportional to the nature of the offense. *See* U.S. CONST. amend. XIII.

In its appeal to the Fourth Circuit, the government argued that the Eighth Amendment did not apply as the in personam forfeiture of proceeds was, by definition, not punitive in nature. In rejecting this argument, the court noted several Supreme Court cases holding that the Eighth Amendment still applied to forfeitures. *See Austin v. United States*, 509 U.S. 602 (1993) (applies to civil forfeitures of property); *Alexander v. United States*, 509 U.S. 544 (1993) (applies to criminal forfeiture of racketeering proceeds); *United States v. Bajakajian*, 524 U.S. 321 (1998) (applies to criminal forfeiture of instrumentalities). The Fourth Circuit read these cases to mean that the type of property involved in forfeiture cases was irrelevant. The focus should be on whether the forfeiture arose from the defendant's criminal culpability. If yes, then the forfeiture does constitute a punitive act, and the Eighth Amendment and the Excessive Fines Clause do apply. The court noted this analysis was necessary to prevent potential "grave injustice" in cases involving joint and several liability against multiple conspirators. *Jalaram*, 597 F.3d at 355.

In determining whether the forfeiture arose from the defendant's criminal culpability, the court looked to whether the forfeiture was "imposed at the culmination of a criminal proceeding, requires conviction of an underlying felony, and cannot be imposed upon an innocent [person] . . . but only upon a person who has himself been convicted of a crime." *Jalaram*, 597 F.3d at 354 (citation omitted). The court held that Jaloram met each of these prongs and that the Eighth Amendment did apply, but was not violated as the forfeiture was not grossly disproportional to the defendant's offenses.

PRIVILEGES

***Sandra T.E. v. South Berwyn Sch. Dist. 100*, 600 F.3d 612 (7th Cir. 2009)**

The Seventh Circuit held the product of a law firm engaged only to conduct an internal investigation is protected by the attorney-client privilege and the work-product doctrine, even though the firm is not involved in the eventual litigation.

A music teacher employed by the South Berwyn School District was convicted of molesting students over a period of seven years. Several victims and their families filed suit alleging that the school's principal had been informed of the abuse but had not taken sufficient remedial measures. In response to the lawsuit and growing controversy, the school district hired the Sidley Austin law firm to review the district's response to the initial allegations and to provide legal advice on regulatory compliance matters. The Sidley Austin team, led by attorney Scott Lassar, conducted interviews with school district employees, making handwritten notes to draft materials for the school district and its board. Sidley Austin did not represent the school district in any related court proceedings.

The plaintiffs in the civil lawsuit against the school district sought to discover information related to Sidley Austin's investigation, including the production of the handwritten notes and memoranda, and an opportunity to depose Lassar about his involvement. Sidley Austin asserted these were protected under the attorney-client privilege and work-product doctrine.

Sidley Austin filed an interlocutory appeal after the lower court held that the privileges did not apply because Sidley Austin had provided only non-legal services. The Seventh Court of Appeals reversed the lower court's decision that the privileges did not apply. The court relied on Upjohn Co. v. United States, and looked at whether the school district was seeking legal advice from Sidley Austin and, if so, whether the memoranda and notes sought by the plaintiffs were related to the legal advice. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981). Both the engagement letter and conduct of the Sidley Austin attorneys demonstrated that the investigation was conducted in order to provide services within their capacity as attorneys. As such, the court concluded, the notes and documents created by Sidley Austin were protected. The court also noted that no exception to the attorney-client privilege and work product doctrine exists based on public policy for suits involving public entities such as school districts or government bodies.

SEARCH & SEIZURE

***United States v. Cha*, 597 F.3d 995 (9th Cir. 2010)**

Police officers' seizure of a residence for over twenty-four hours was unconstitutional because the officers did not sufficiently accommodate the owner's privacy rights.

Song Ja Cha owned the Blue House Lounge, which consisted of a karaoke bar and an attached living space for Song Ja and her husband, In Ha Cha. During an investigation of the club, police officers developed probable cause to believe Mrs. Cha was forcing women to engage in prostitution. The officers closed the lounge on Friday night and interviewed the Chas, the lounge's customers, and its employees. The Chas were then taken to the police station, where Mrs. Cha was arrested on Saturday morning. Following Mrs. Cha's arrest, Mr. Cha returned home Sunday morning to find police guarding the property. The police told him that the residence was being detained. Mr. Cha was not permitted to enter the house, except once to get medication, until police obtained and executed a search warrant around one o'clock Tuesday morning, forty hours later.

At trial, the Chas moved to suppress all evidence under the exclusionary rule, which allows courts in limited circumstances to exclude evidence gathered as a result of an unconstitutional search. The Chas argued that the warrantless seizure of their home was unconstitutionally long because it violated their constitutional protections against unreasonable searches and seizures. See U.S. CONST. amend. IV.

In analyzing whether the seizure of a residence was unconstitutional, the court applied the factors specified in *Illinois v. McArthur*: (1) whether the police had probable cause to expect evidence on the property; (2) whether there was a reasonable fear that the evidence would be destroyed without the seizure; (3) whether the police made a reasonable effort to balance their needs with the individual's personal privacy interests; and (4) whether the seizure no longer than reasonably necessary. *See Illinois v. McArthur*, 531 U.S. 326 (2001).

The Ninth Circuit held that although the police did have probable cause to suspect that evidence was present on the property, the other factors weighed in the Chas' favor. The district court had determined there was no reasonable fear the evidence would be destroyed by Mr. Cha. Both the district court and the Ninth Circuit found that the police had not taken adequate steps to accommodate Mr. Cha's privacy rights, noting, for example, that the police had initially refused to permit Mr. Cha access

to his medication. In determining whether the seizure was no longer than necessary, the Ninth Circuit noted the police had numerous opportunities to get a warrant, but failed to do so. The Ninth Circuit also distinguished this case from others in which residences were held for similar periods. In those cases, the defendants were under arrest and did not require access to their property, while in this case, Mr. Cha was free but was restricted access to his property.

The government argued the exclusionary rule did not apply in this case because the prolonged seizure was not the result of intentional misconduct, citing *Herring v. United States*, 129 S. Ct. 695 (2009) (holding that the exclusionary rule did not apply for recordkeeping mistakes because they were due to unintentional, isolated acts). The Ninth Circuit rejected this argument, distinguishing between police misconduct due to mistakes of fact, as in *Herring*, and mistakes of law, such as here where the police officers' misconduct was due to their failure to recognize an unconstitutional seizure. Noting that the purpose of the exclusionary rule is, in part, to deter police misconduct, the Ninth Circuit added that excluding evidence will be a greater deterrent to police mistakes of law rather than mistakes of fact and where the misconduct involves multiple police officers, rather than isolated misconduct.

***Armijo ex rel. Sanchez v. Peterson*, 601 F.3d 1065 (10th Cir. 2010)**

> The exigent circumstances exception to warrantless entry into a residence applies when a reasonable belief that a threat of serious bodily harm or injury exists, whether to the occupants of the residence or outside parties.

Sanchez was suspected of making bomb threats to Oñate High School in furtherance of gang activity. Officers went to his mother's address and knocked loudly and announced themselves. After no response, the officers received approval from their sergeant to enter the unlocked home. They found Sanchez asleep in his room. The officers left after questioning him, searching the home, and inspecting his phone; they found no evidence he made the bomb threats. During this time, the school was in lock-down mode because the school administration believed that releasing the students would result in gang violence.

Sanchez's mother filed suit under the Civil Rights Act, alleging the officers' actions violated her son's rights. *See* 42 U.S.C. § 1983. The officers moved for summary judgment, arguing their actions were permitted under the exigent circumstances exception. Prior Supreme Court cases had noted that warrantless entry into a residence was justified when the officers had a reasonable belief an occupant was threatened with

serious harm or injury. Pursuant to this precedent, the court noted that a motion for summary judgment should be denied only if no reasonable officer would believe the actions were justified under the circumstances.

The Tenth Circuit granted the officers' summary judgment, holding that the exigent circumstances could apply in situations where the party at risk was not an occupant of the residence, reasoning the court noted that the victim and the attacker are not always in the same place. The court believed that applying the exception only when the victim and the attacker were in the same place would hurt law enforcement's ability to prevent attacks and risk public safety. Examining the facts of the case, the court felt a reasonable officer could believe the entry and subsequent acts were justified to prevent a school bombing. The same reasonable belief also justified the search of the home and Sanchez's detainment. The determination that there were no bombs and the fact that other evidence existed to disprove this belief was irrelevant, because the test is whether the officer's belief at the time of the event was reasonable.

SENTENCING

United States v. Williams, 602 F.3d 313 (5th Cir. 2010)

As a matter of first impression, the Fifth Circuit Court of Appeals held a conviction for the forcible assault of a federal officer under 18 U.S.C. section 111 does not require an underlying act of assault.

Federal officers questioned Maria Williams after a neighbor reported her for indecent exposure. The officers detained her after she became uncooperative and began yelling that she would not be arrested. While resisting attempts to handcuff her, she struck two officers on the face. The officers stated that Williams's blows did not seem intentional, and Williams claimed that she was only moving her arms to prevent being handcuffed. Williams was convicted of misdemeanor forcible assault under 18 U.S.C. section 111(a) and sentenced to two years in prison. 18 U.S.C. section 111(a) provides, in relevant part that whoever:

> (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any [federal officer]
>
> . . .

> Shall, where the acts in violation of this section constitute only simple assault, be fined . . . or imprisoned not more than one year . . . and where such acts involve physical contact with the victim of that assault of the intent to commit another felony, be fined . . . or imprisoned not more than 8 years or both.

Williams appealed, arguing that section 111 requires a showing of assault and that the evidence was insufficient to support such a claim. In other words, the issue before the court was whether assault was a required component of a section 111 conviction, or could Williams be convicted under section 111 when one "resists, opposes, impedes, intimidates, or interferes" without any underlying assault.

The Fifth Circuit determined that as a matter of first impression, Williams's argument required the court to construe the boundaries of the statute. The court noted the statute had two key ambiguities. First, the statute's language prohibited several forms of conduct in relation to federal officers; it referred to anyone who "assaults, resists, opposes, impedes, intimidates, or interferes" with a federal officer. Second, the statute distinguished between misdemeanor and felony conduct only through the undefined term, "simple assault." Simple assault constitutes a misdemeanor, but assault with physical contact or intent to commit another crime is a felony. The difficulty facing courts is whether a misdemeanor conviction based on non-assaultive conduct requires that the conduct amount to "simple assault."

The Fifth Circuit upheld Williams's conviction, finding that a misdemeanor conviction under section 111 does not require underlying assaultive conduct. The court discussed several reasons for its holding that a section 111 misdemeanor conviction does not require any underlying assault. First, the court noted that requiring assault to be a necessary component of a section 111 conviction would render the statute's language referencing the other wrongful acts superfluous. Second, the court examined Congress's intent, finding that Congress changed section 111 in 2008 to resolve prior ambiguities and to clarify that the distinction between section 111 misdemeanor and felony conduct is whether there is physical contact or an intent to commit another crime. The court noted that if Congress intended a misdemeanor conviction to be based on assaultive conduct, it could have deleted the other wrongful acts from the statute, but Congress chose not to do so. Lastly, the court discussed the law's purpose, noting that the Supreme Court had previously held that the purpose of section 111 is to enable officers to better perform their duties by punishing certain obstructive acts of resistance. *See United States v. Feola*, 420 U.S. 671 (1975). The Fifth Circuit found that applying section 111 to all the wrongful conduct listed in section 111(a)(1) would be more consistent with this purpose. The Fifth Circuit held that because section 111 does not require assault for a misdemeanor conviction and ample evidence existed that

Williams "forcibly . . . resist[ed]" federal officers, Williams was criminally liable for resisting the officers while in performance of their duties.