The Appellate Advocate

State Bar of Texas Appellate Section Report

Vol. 23, No. 4 Summer 2011

ARTICLES

REGULAR FEATURES

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Chair's Report

David S. Coale, K&L GATES, LLP, Dallas

At our annual meeting last year, I remarked that education was the center of our Section, and that I looked forward to a year of programs, activities, and publications through which our members teach each other, other lawyers, and our clients. It has been a wonderful experience to watch that year unfold. It is hard to believe that this is now my last Chair's Report before Scott Rothenberg takes office this September.

Congratulations to Kim Phillips and Chris Kratovil on an excellent Corporate Counsel CLE Program in Dallas. The speakers included Section members and friends from places throughout the Dallas/Fort Worth area—and as far away as El Paso! This program continued the tradition of success from previous events like it, and will hopefully continue for years to come.

Our Section also had a great presence at the State Bar Annual Meeting last month. Working with the Individual Rights section, under the guidance of Chad Baruch, Section members participated in several panels about recent developments in the appellate courts. The Section also helped sponsor a presentation by Edmund Morris, a distinguished biographer of Theodore Roosevelt.

Scott Rothenberg's hard work on the "Appellate Hall of Fame" is coming to fruition this summer, as nominations are flowing in for the inaugural class. I look forward to sharing the results with you by the time of our Annual Meeting. That said, please make sure you have the Advanced Course and Annual Meeting on your calendars—the Advanced Course will be September 8-9 at the Four Seasons in Austin, and there will be a Civil Appellate 101 course on September 7. Macey Stokes has done a wonderful job leading this course. Information regarding Section scholarships can be found on the Section's website www.tex-app.org or by contacting our treasurer, Jeff Levinger.

The Annual Meeting will be on Thursday, September 8, just after the Advanced Course ends for the day. We will announce the winners of our Section's first annual Twitter Brief contest then, and after a short business session, will adjourn to a cocktail reception honoring the judiciary. I look forward to seeing you there to celebrate the continuing tradition of excellence and learning represented by that course and our Section.

Best wishes,

David Coale

Disclaimer

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

The Editorial Board of the

Appellate Advocate, as well as the officers

and council members of the

Appellate Section of the State Bar of Texas,

would like to thank LexisNexis

for its generous support of the

Appellate Advocate.

Once More Into the Typographical Breach: A "Buttericked" Appellate Brief Exemplar*

Matthew Butterick, BUTTERICK LAW CORP., Los Angeles, CA

This is the second in a three-part series Matthew Butterick—of *Typography for Lawyers* fame—has graciously agreed to write for the *Appellate Advocate.* In it, Matthew has reformatted an amicus curiae brief in the Texas Supreme Court to reflect recommended typography. All of the typographical changes comply with Texas Rule of Appellate Procedure 9.5. Specifically, below are some of the particular formatting nuances Matthew employed:

- Font: Miller
- Text size: 13 pt.
    - Footnote text size: 11 pt.
- Line spacing: Exactly 26 point in place of double spacing
- Margins: 1" top and bottom, and 1.7" left and right
- Section headings: Miller small caps, 14 pt. of space before, "keep with next" option turned on to keep headings with the text they modify
- Other headings and subheadings: Miller bold, keep with next" option turned on to keep headings with the text they modify

For ease of comparison, the Buttericked brief excerpt is presented first, with the original brief excerpt presented following.

—Brandy and Dylan

FN *: This verbification was apparently first coined by Kendall Gray at Andrews Kurth, and is used to denote the process of having one's writing conformed to proper typography. *See* @AppellateRecord (March 3, 2011), http://twitter.com/AppellateRecord/status/43349057183289344.

BUTTERICKED BRIEF

NO. 04-0432

IN THE SUPREME COURT OF TEXAS

MOKI MAC RIVER EXPEDITIONS,

Petitioner,

v.

CHARLES DRUGG and **BETSY DRUGG**, individually,
and as representatives of the estate of Andrew Patrick Drugg,

Respondents.

on appeal from the
Fifth Court of Appeals at Dallas, Texas

Brief of amici curiae
Grand Canyon River Outfitters Association
and America Outdoors
in support of Petitioner's motion for rehearing

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Grand Canyon River Outfitters
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America Outdoors

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No. 04-0432

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Respondents.

On Appeal from the
Fifth Court of Appeals at Dallas, Texas

BRIEF OF AMICI CURIAE GRAND CANYON RIVER OUTFITTERS ASSOCIATION AND AMERICA OUTDOORS IN SUPPORT OF PETITIONER'S MOTION FOR REHEARING

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TO THE HONORABLE SUPREME COURT OF TEXAS

Amici Curiae Grand Canyon River Outfitters Association and America Outdoors submit this Amici brief in support of Petitioner's Motion for Rehearing. These Amici urge this Court to grant review in this case, in order to clarify the application of the specific-jurisdiction factors discussed by the Court in *Michiana*[1] in the context of suits against outdoor recreation companies operating in foreign jurisdictions.

INTEREST OF AMICI CURIAE

Grand Canyon River Outfitters Association ("GCROA") is a non-profit trade association, incorporated in Arizona, that represents each of the sixteen licensed commercial river-running concessioners who operate in Grand Canyon National Park. Several of GCROA's member companies are owned and operated by second or third generation rafting families who pioneered river running in the Grand Canyon many years ago. GCROA's members make available to the public whitewater rafting trips down the Colorado River through Grand Canyon National Park. Each year, these member companies provide rafting trips to

1 *Michiana Easy Livin' Country, Inc. v. Holten*, No. 04-0016, 2005 WL 1252268 (Tex. 2005).

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America Outdoors is a non-profit national trade association, representing the interests of over 550 professional companies that provide a wide range of outdoor recreation services and outdoor equipment to over two million Americans each year. America Outdoors' members operate in 40 states and 50 foreign countries. Member companies offer a wide

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[1] *Michiana Easy Livin' Country, Inc. v. Holten*, No. 04-0016, 2005 WL 1252268 (Tex. 2005).

member companies will find themselves dragged into court in jurisdictions far removed from where they operate, based on contacts with the forum state that fall far short of the minimum constitutional standards required for jurisdiction to attach.

GCROA and America Outdoors file this Amici brief in support of Petitioner, and urge that this Court grant Petitioner's Motion for Rehearing. The fee for the preparation of this Amici brief is being paid by GCROA and America Outdoors.

ARGUMENT

I. This case should be reviewed by this Court because of the substantial jurisprudential impact it will have on outdoor recreation companies throughout the country, as well as on those Texans who travel to other states for recreational purposes.

The same day this Court issued its decision in the *Michiana* case, it denied the petition for review in the *Moki Mac River Expeditions* case. Perhaps the Court concluded that the *Michiana* decision—which was comprehensive and well-reasoned—would provide sufficient guidance to the bench and bar in wrestling with the thorny legal concepts associated with the area of specific jurisdiction. Unfortunately, however, by denying the petition for review in *Moki Mac*, the Court passed up the opportunity to provide much-needed guidance on the ques-

tion of specific jurisdiction with respect to an entire industry in this country—the outdoor recreation industry.

As demonstrated below, at a minimum the following types of companies would be guided by a decision by this Court in *Moki Mac*:

- Whitewater rafting outfitters
- Kayak touring companies
- Canoe touring companies
- Bicycle touring companies
- Jeep tour companies
- Hot air balloon tour companies
- Backpacking guides
- Mountain climbing guides
- Hunting guides
- Fishing guides
- Trail ride outfitters
- Dude ranches
- Rock climbing schools
- Scuba diving schools
- Hang-gliding/paragliding schools
- Parasailing operators
- Environmental education/zip-line operators

Moreover, this Court's resolution of the *Moki Mac* case would not only have practical significance for these various types of outdoor recreation companies, it would also have significance for the thousands of Texans who each year flock to companies such as these for recreational opportunities that cannot be duplicated in this state.

Although, as the above list shows, outdoor recreation companies are involved in a wide variety of activities, the individual companies themselves share certain common characteristics:

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Whitewater Rafting Outfitters

Kayak Touring Companies

Canoe Touring Companies

Bicycle Touring Companies

Jeep Tour Companies

Hot Air Balloon Tour Companies

Backpacking Guides

Mountain Climbing Guides

Hunting Guides

II. The merits of the court of appeals' decision in Moki Mac deserve this Court's review.

A. A decision by the Court in this case would clear up the continuing confusion between general-jurisdiction factors and specific-jurisdiction factors in the context of the outdoor recreation industry.

The court of appeals' decision in *Moki Mac* is disturbing to outdoor recreation companies on several different levels. First, as illustrated by the response to Moki Mac's motion for rehearing, notwithstanding this Court's decision in *Michiana*, practitioners continue to confuse *general* jurisdiction with *specific* jurisdiction.

Much of the response to Moki Mac's motion recites factors that pertain exclusively to a general-jurisdiction analysis. This is a matter of concern to outdoor recreation companies, because the vast majority of such companies do not have a sufficient presence outside of the states in which they operate to be subject to general jurisdiction elsewhere.

On the other hand, depending on the manner in which they conduct their business operations, virtually all outdoor recreation companies are concerned with potentially being subject to specific jurisdiction because many of their customers come from other states. Thus, it is worrisome when these two very distinct categories of personal jurisdiction are confused. A

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On the other hand, depending on the manner in which they conduct their business operations, virtually all outdoor recreation companies are concerned with potentially being subject to specific jurisdiction because many of their customers come from other states. Thus, it is worrisome when these two very distinct categories of personal jurisdiction are confused. A decision by this Court in *Moki Mac* would clarify the distinction between general-jurisdiction factors and specific-jurisdiction factors with respect to operations by outdoor recreation companies.

BUTTERICKED BRIEF

CONCLUSION

Because this case involves jurisdictional issues of significant interest to a substantial industry in this country—the outdoor recreation industry—and because the court of appeals' decision raises disturbing questions about what factors can subject an outdoor recreation company to specific jurisdiction, this Court should grant Petitioner's Motion for Rehearing and review the decision of the court of appeals.

Respectfully submitted,

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Amici respectfully submits that they should not. But if they can, that will be a matter of profound (and disturbing) interest to Amici's members.

CONCLUSION

Because this case involves jurisdictional issues of significant interest to a substantial industry in this country—the outdoor recreation industry—and because the court of appeals' decision raises disturbing questions about what factors can subject an outdoor recreation company to specific jurisdiction, this Court should grant Petitioner's Motion for Rehearing and review the decision of the court of appeals.

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ASSOCIATION AND AMERICA OUTDOORS

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On "Ascertainability" as a Bar to Class Certification

Jason Steed, AKIN GUMP STRAUSS HAUER & FELD LLP, Austin

WHAT IS REQUIRED FOR CLASS CERTIFICATION?

As most litigators know, a proposed class action can proceed as such only after the court has "certified" the class under Federal Rule of Civil Procedure 23. Class certification often becomes the make-or-break moment for a class action, because plaintiffs' attorneys will often abandon the action if it cannot get class status—and defendants will often settle quickly if it can.[1] Consequently, those involved in federal class actions tend to be well versed in Rule 23's requirements for a certifiable class.

> **FN 1**: Courts have recognized the "death knell" nature of the class-certification decision, for both plaintiffs and defendants. *See*, *e.g.*, *Chamberlan v. Ford Motor Co*., 402 F.3d 952, 957 (9th Cir. 2005).

To review, Rule 23(a) permits a class action only if: (1) "the class is so *numerous* that joinder of all members is impracticable; (2) "there are questions of law or fact *common* to the class"; (3) "the claims or defenses of the representative parties are *typical* of the claims or defenses of the class"; and (4) "the representative parties will fairly and *adequately* protect the interests of the class." FED. R. CIV. P. 23(a) (emphasis added). And under Rule 23(b)(3)—which governs the most common type of class action—the court must also find "that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3) (emphasis added).

This is a mouthful—which is why, in class-action parlance, these requirements have been reduced to their single-word form. That is, most litigators know that, to get certified, the proposed class must pass Rule 23's requirements of "numerosity," "commonality," "typicality," "adequacy," "predominance," and "superiority."

But what many litigators don't know is that most circuits have acknowledged—at least in passing—an additional, implicit requirement of "ascertainability."[2] This is important because another requirement means another hurdle on the way to class certification. So the question is: What is "ascertainability"? Does it really present another hurdle? And, if so, how high is the bar?

> **FN 2**: Though most circuits have acknowledged the requirement, there are very few circuit-court decisions squarely addressing "ascertainability," and none squarely relying on it to decertify a class—which suggests not

only that few litigators are raising it on appeal but also that few are making it an issue in the trial court.

WHAT IS "ASCERTAINABILITY"?

Rule 23 lists the traits that the proposed class must have—or that the proposed class representatives must have—for the proposed class to be certified. But in laying out the requirements that the proposed class must satisfy, Rule 23 presumes the existence of an identifiable "class." If there is no identifiable—or *ascertainable*—class, then there is no entity to satisfy the requirements of Rule 23. As Moore's Federal Practice puts it, "It is axiomatic that in order for a class action to be certified, a class must exist. Although the text of Rule 23(a) is silent on the matter, a class must not only exist, the class must be susceptible of precise definition. There can be no class action if the proposed class is 'amorphous' or 'imprecise.'" 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.21[1], at 23–47 (3d ed. 1997) (citations omitted). This, in essence, is the ascertainability requirement.

IS IT ANOTHER HURDLE?

Requiring a proposed class to be ascertainable, or "susceptible of precise definition," only makes sense. We need to know who is entitled to or barred from recovery. And those familiar with class actions know it is common—or at least not uncommon—for the court to require plaintiffs to refine their class definition en route to certification. But can a proposed class be denied certification altogether based on the absence of an ascertainable class?

Maybe. In *Simer v. Rios*, the Seventh Circuit declared, "It is axiomatic that for a class action to be satisfied a 'class' must exist." 661 F.2d 655, 669 (7th Cir. 1981) (citing Moore's Federal Practice). Then the court discussed at length the "serious problems . . . in defining and identifying the members of the class" at issue, before affirming the district court's denial of certification. *Id*. at 669–71. Notably, the *Simer* court also cited a 1970 opinion in which the Fifth Circuit had affirmed the dismissal of a class action based on the difficulty of identifying a class "made up of residents of this State active in the peace movement." *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970) (quotations omitted).

Later, the Seventh Circuit relied on *Simer* to again declare that a proposed class must be "indeed identifiable as a class." *Oshana v. Coca-Cola Co*., 472 F.3d 506, 513 (7th Cir. 2006). And once again, the court discussed at length the plaintiffs' ascertainability problems before affirming the district court's denial of certification. *Id*. at 513–14. Similarly, the Fifth Circuit later relied on *DeBremaecker* to again dismiss class claims due to the absence of an ascertainable class. *John v. Nat'l Sec. Fire & Cas. Co*., 501 F.3d 443,

445 (5th Cir. 2007) ("The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of Federal Rule of Appellate Procedure 23.").

These cases, at first glance, appear to support the proposition that ascertainability presents another hurdle to class certification under Rule 23. But (as always) it's not that simple. *Simer* meshed its discussion of ascertainability with its discussion of superiority and predominance. 661 F.2d at 671–75, 677–78. Similarly, *Oshana* meshed its discussion of ascertainability with its discussion of typicality. 472 F.3d at 515. Thus neither case squarely relies on lack of ascertainability as the basis for denying certification. And both of the Fifth Circuit cases affirm *dismissal* of class claims based on lack of ascertainability—meaning neither case squarely supports the proposition that lack of ascertainability is an independent basis for denying class certification.

Five other circuits have mentioned the ascertainability requirement by name—but none of them have thoroughly discussed or squarely applied it. *See*, *e.g.*, *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 589 n.8 (9th Cir. 2010) (en banc) (citing a district court's application of the ascertainability requirement); *Romberio v. Unumprovident Corp.*, 385 F.App'x. 423, 431 (6th Cir. 2009) (recognizing the ascertainability requirement but turning to typicality as the basis for reversing certification); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 30, 44–45 (2d Cir. 2006) (discussing ascertainability but meshing it with predominance); *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 19 n.22 (1st Cir. 2005) (mentioning but declining to reach the issue of ascertainability); *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 136 (3d Cir. 2000) (referring to the lower court's reliance on ascertainability as an alternative ground for denying certification). Meanwhile, two more circuits have alluded to an "identifiability" requirement—but again, without thoroughly discussing or squarely applying it. *See Shook v. El Paso Cnty.*, 386 F.3d 963, 972 (10th Cir. 2004); *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 728 (4th Cir. 1989).

In sum, a majority of the circuits—nine of them—appear to acknowledge the existence of the ascertainability requirement under Rule 23. And no circuit has denied its existence. Whether it provides an independent basis for denying class certification is unclear.

For appellate attorneys who are either assisting in the class-certification process or faced with an adverse class-certification decision, this lack of clarity matters because class-certification decisions are not readily appealable. The disappointed party must petition for permission to appeal through a process similar to petitioning for certiorari to the Supreme Court. *See* FED. R. CIV. P. 23(f), 5(a)(1); *Chamberlan v. Ford Motor Co.*,

402 F.3d 952, 957 (9th Cir. 2005). And one of the grounds for permitting interlocutory appeal is when "the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally." *Chamberlan*, 402 F.3d at 959.[3]

> **FN 3**: Notably, the Fifth Circuit has declined to provide specific standards for justifying interlocutory review under Rule 23(f). But seeking review based on the district court's legal error has been successful. *See*, *e.g.*, *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004); *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416 (5th Cir. 2004).

In other words, no matter what side of the case you're on or what circuit you're in, you should be sure to CYA ("Cover Your Ascertainability") in the trial court, because the uncertainty surrounding the ascertainability requirement makes it a potential target for appeal.

HOW HIGH IS THE BAR?

Although there is no circuit-court opinion squarely holding that lack of ascertainability provides an independent basis for denying class certification, this ought to be assumed. Yes, theoretically, plaintiffs should be able to argue, in petitioning for review of a denial of class certification that was based solely on the lack of ascertainability, that ascertainability has not been established as an independent basis for denying certification. But this is a hard sell, given the common-sense, "axiomatic" nature of the requirement—and the fact that most circuits have at least acknowledged its existence in passing.

The real question, then, is not whether the ascertainability requirement presents another hurdle to class certification, but whether that hurdle is a high bar that might actually trip a few plaintiffs, like predominance—or a low bar, easily cleared, like numerosity.[4]

> **FN 4**: If you're a plaintiff's attorney moving for class certification and you're worried about numerosity, you probably shouldn't have filed a class action to begin with; and if you're a defense attorney wasting time challenging numerosity, you're probably in trouble.

The answer is somewhere in between. In many (perhaps most) cases, plaintiffs will propose a class defined so that its members can be readily and objectively identified—usually from records produced during discovery—and this will satisfy ascertainability. *See*, *e.g.*, *MacNamara v. City of New York*, No. 04 Civ. 9216(RJS)(JCF), 2011 WL 1991144, at *25 (S.D.N.Y. May 19, 2011) (arrestees who were detained on a

particular date at Pier 57 and handcuffed with plastic flex cuffs); *In re Wachovia Corp. "Pick-A-Payment" Mortg. Mktg. and Sales Practices*, No. 5:09-md-02015-JF, 2011 WL 1877630, at *3 (N.D. Cal. May 17, 2011) (individuals who obtained a "Pick-a-Payment" mortgage from defendants between August 1, 2003 and December 31, 2008). In these cases, ascertainability will present a fairly low bar en route to certification.

But the "objectively identifiable" component of ascertainability has a flipside. Put another way: membership in the proposed class cannot be based on subjective criteria. In many cases, defendants—and subsequently courts—can use this to raise the bar on ascertainability. *See*, *e.g.*, *Pagan v. The New Wilson's Meats, Inc.*, No. 08-0751, 2011 WL 1876027, at *4 (E.D. Pa. May 17, 2011) (class defined as employees who were insufficiently compensated for all hours worked required too many subjective considerations); *Heisler v. Maxtor Corp.*, No. 5:06-cv-06634-JF (PVT), 2010 WL 4788207, at *2–*3 (N.D. Cal. Nov. 17, 2010) (class defined as purchasers of disk drive who "have experienced a failure" was too subjective); *accord Initial Pub. Offerings*, 471 F.3d at 44–45.

Moreover, some courts have balked when the proposed class was overbroad, so as to include individuals who had no standing, or who had no claim against the defendant. *See*, *e.g.*, *Tietsworth v. Sears*, 720 F. Supp. 2d 1123, 1146–47 (N.D. Cal. 2010) (class was not ascertainable because it included members who had experienced no problems and thus had no injury or standing to sue); *Hovsepian v. Apple, Inc.*, No. 08-5788 JF (PVT), 2009 WL 5069144, at *6 (N.D. Cal. Dec. 17, 2009) (same); *accord Oshana*, 472 F.3d at 513.

In other words, while plaintiffs often will be able to define their proposed class in a way that satisfies the low-bar version of ascertainability, they will need to anticipate having to clear the high bar—because smart defendants will be looking for ways to raise it. Practically speaking, this will force more and more courts to consider the high-bar version of ascertainability, which in turn should produce more and more circuit-court opinions addressing ascertainability under Rule 23.

THE BOTTOM LINE

For appellate attorneys, it's fun to speculate about the directions circuit courts might go, or that eventually the Supreme Court will have to determine the contours of the ascertainability requirement. But the real takeaway here is that, in federal class actions, the ascertainability requirement presents a potential seventh hurdle to class certification—one that smart plaintiffs' attorneys should be sure to preemptively leap in their motion for class certification, because smart defense attorneys will be sure to raise it in opposition. Then, if the class is certified—or, if certification is denied based in part

on lack of ascertainability—petitioners seeking interlocutory review under Rule 23(f) should emphasize the uncertainty surrounding ascertainability, and the need for the circuit court to settle this important class-action question.

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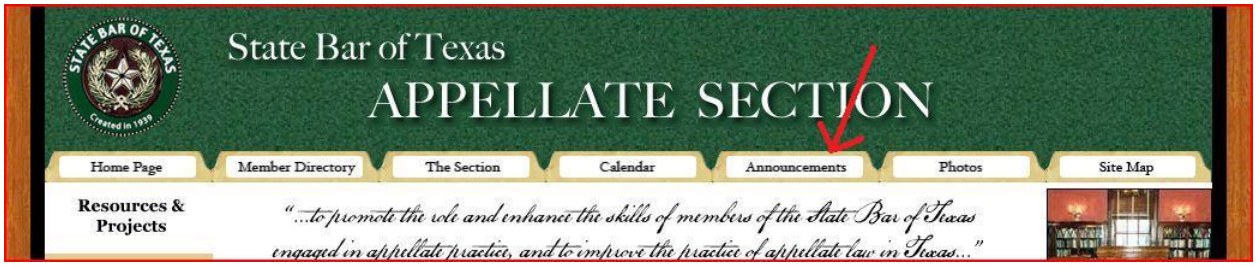

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Preparing to Cut the Umbilical Cord: Things to Think About Before Opening Your Solo Appellate Practice

Chad M. Ruback, THE RUBACK LAW FIRM, Dallas

I opened my solo appellate practice in 2005. But, before I quit my big firm job to do so, I spent a fair bit of time getting things ready. I realized that the more preparation I did before quitting my job, the less time would pass between my last paycheck from my former firm and my first paycheck from my solo practice. And I also realized that, by beginning my preparations long before resigning, I could thoroughly evaluate various decisions that need to be made by any would-be solo practitioner.

I would recommend this approach to anyone thinking of quitting a job to start a new practice. To be clear, I'm not advocating shirking one's responsibilities to a current employer. But, if a law firm associate's schedule permits him to spend Monday evening watching football (or Saturday morning watching cartoons), that time could fairly be reallocated to laying the groundwork for opening a new practice.

One might wonder what sort of things need to be done. This list is certainly not all-inclusive, but will hopefully be helpful as you create your own to-do list:

ADMINISTRATIVE

- **Computer disaster backup service**—No event could be much more traumatic for an appellate law firm than losing its electronic files. In addition to regularly backing-up to an external hard drive and to CD-ROMs, you should consider subscribing to a service that automatically backs up your critical documents to a remote server every night. Some might find this overkill, but it will give you tremendous peace of mind.

- **Fax**—All law firms need to be able to receive faxes. Although traditional fax machines work fine, you should probably consider an e-fax service. With that, you'll be able to review incoming faxes from your laptop or your cell phone, which is a huge plus for days when you are working remotely from the courthouse or a client's office.

- **Filing system**—Whether you intend your office to be entirely paperless or you prefer traditional paper files, you'll want to have your filing system in place before you open your firm. You will also probably want to have a system for storing closed case files.

- **Internet service**—Depending on whether the office you choose includes Internet service, you might need to investigate different Internet service providers. If you plan to do much work out of your office (e.g., the courthouse, clients' offices), you might investigate subscribing to a cellular Internet access plan from one of the wireless phone companies.

- **Make a list of snail-mail correspondents**—Many lawyers prefer emails to U.S. Mail, but some people who send important correspondence resist transitioning to email (kudos, by the way, to the editors of the *Appellate Advocate* for recently having begun delivery via email). A few months before resigning your current position, you should begin watching your mail closely and making a list of these people. Then, when you are ready to announce your new firm, you won't have to rack your brain to remember whom to contact with an address change request. You definitely don't want to forget to update your mailing address with the state bar, local bar associations, or courts.

- **Office supplies**—In an established law firm, appellate lawyers don't need to think about whether they have paper, pens, staples, and other basic office supplies. These things just seem to magically appear. But, when you open your own firm, you will no longer be able to rely upon "firm administration" to make sure that you have ample supplies.

- **Phone number**—Regardless of where you decide to office, be sure to secure a phone number that you can take with you when you move your office someday. If you decide to share office space (or rent an executive suite), don't make the mistake of using a number that belongs to your landlord . . . because the landlord might keep that number when you move out.

- **Technology**—Technology will probably be the largest up-front expense of your new law firm. As such, it is worth spending some time evaluating the capabilities and prices of various options. Computer servers, laptops, scanners, copy machines, cellular phones, and land-line phone systems, among other things, simply should not be purchased with wild abandon.

BRICK-AND-MORTAR

- **Furniture**—Unless your office will come furnished, you will likely need to buy some office furniture.

- **Office**—When it comes to securing office space, there are many options to explore. In addition to the traditional law firm model, you might consider renting space in an executive suite or subletting an unused room from another small firm. For the two latter options, having litigators as officemates could mean a steady stream of referrals. You might want your office near your home, near the courthouse, or near the offices of potential clients. The less time that you spend in the car, the more time you can spend building your new practice. A recognizable street address could make a newly-minted law firm seem more credible. All things being equal, a potential client might prefer to hire a lawyer who offices on "Main Street" as opposed to one who offices on "Whispering Meadow Lane." A spacious conference room is a near-must for an appellate law firm, as potential clients often like to spread out documents for an appellate lawyer's review.

HR

- **Emergency back-up lawyer**—At some point, you or a family member might have a health issue that will unexpectedly keep you away from your practice. Or an emergency might arise in one of your cases while you are on vacation. You might want to arrange in advance for another lawyer to cover for you in case such a need arises.

- **Insurance**—Health insurance, disability insurance, malpractice insurance, business property insurance, business liability insurance, business interruption insurance, life insurance, and workers' comp insurance are all products you may wish to consider.

- **Staffing**—In an informal survey I took of Texas appellate solos, easily the most-often-cited concern was staffing. As the first contact a potential client has with your firm, the person answering your phone can be a critical factor in your success. You could consider hiring a full-time secretary/paralegal, sharing a receptionist with officemates, or using an answering service. Equally important is who will be helping you meet appellate deadlines. You could consider hiring a law student, working with a contract lawyer, or referring work back-and-forth with another appellate solo. The cost of hiring one experienced paralegal would likely exceed all of your other recurring expenses combined, so this is not a decision to be made lightly. Some appellate solos attribute their rapid success to the work of a talented full-time staff member. Others attribute their success to postponing the expense of hiring a full-time staff member until absolutely necessary.

LEGAL RESEARCH

- **Online legal research**—While free legal research sites have improved dramatically over the past several years, it is doubtful that these resources would meet the demands of most appellate lawyers. So, you will likely need to buy a subscription from an online legal research company. While there are very few such companies, each company does offer myriad different subscription options. And thoroughly considering these options can ensure that you won't be paying every month for services you don't need or, possibly worse, being hit with a huge bill for research performed outside of your subscription.

- **Reference books**—In addition to online legal research, you should give thought to purchasing a few reference books (e.g., *O'Connor's Texas Civil Appeals*).

MARKETING

- **Announcements**—Consider how you'll be announcing your new firm. *Texas Lawyer*, the *Texas Bar Bulletin*, and many local bar association newsletters will run an announcement about your new law firm free-of-charge. A blast email to all of your personal and professional contacts is also cost-effective. Additionally, you should consider sharing the good news via Facebook, Twitter, and LinkedIn. Snail-mail announcements aren't as common as they once were, but can still be effective.

- **Business cards and letterhead**—Generally, you should try to keep your new law firm's overhead low. But business cards are one place you shouldn't skimp. Many more prospective clients will see your business card than will ever visit your office. And while a blue-collar worker likely wouldn't notice if your business card was printed on-the-cheap, a litigator looking to refer-out an appeal might snicker at such a card. Although seen less frequently by potential clients than business cards, the same issues apply to letterhead.

- **Domain name**—A Yahoo email address is for yahoos. Hotmail and Gmail are similarly unprofessional. To be taken seriously by prospective clients, a lawyer needs to own his own domain name. Whether that domain is derived from your name (e.g., ruback.com) or your practice area (e.g., appeal.pro) is a matter of personal preference. But using an AOL email address suggests to potential clients that you aren't technologically savvy.

- **Firm name**—Although the state bar rules limit your options in naming your firm, you do still have some options. It might seem inconsequential whether your firm name should include the word "the"; whether your firm name should include your middle initial; whether to hyphenate "attorney at law" in your firm name; or whether "office" should be singular or plural. But you nevertheless might want to give this some thought. Among many others, successful Texas solo appellate practices have used the following monikers: (1) Smith Law Group, P.C.; (2) Law Offices of Scott Rothenberg; (3) The Law Office of Don Cruse; (4) Law Offices of Martin J. Siegel; (5) The Holman Law Firm; (6) The Forbes Firm, PLLC; (7) C. Alfred Mackenzie, Attorney at Law; (8) Alan B. Daughtry, Attorney-at-Law; (9) Timothy A. Hootman, Lawyer; (10) Kurt Kuhn, PLLC; (11) Walter James Kronzer, III, P.C.; and (12) Daryl L. Moore, P.C.

- **Marketing plan**—While a written marketing plan may not be needed, at a minimum, you should give some thought to how you plan to cultivate business. It's always fun to hang out with other appellate lawyers. But you might find that marketing to trial court litigators is a much more effective use of your time and money. You might consider becoming a regular attendee at meetings of organizations composed primarily of trial court litigators (such as Inns of Court, suburban bar associations, and trial-oriented sections of the big city bar associations). And then following-up with people you meet at such meetings, making plans to meet-up for lunch or cocktails to solidify newfound relationships. Of course, you should always be on the lookout for opportunities to be the featured speaker at such meetings. You might also consider submitting articles for publication in periodicals read by trial court litigators (such as bar association newsletters, *Texas Lawyer*, and even the local business journal). You can, and probably should, begin implementing these business development strategies long before you open your own firm. It can take quite a while to develop a good network of potential referral sources. Some of the most successful appellate solos will readily admit that they spent years developing their network of potential referral sources before opening their own firms. Shortly before you do open your firm, you might want to look into getting a listing in the *Texas Legal Directory*, known as "The Blue Books," which is reasonably-priced and lends credibility with some lawyers. You might also want to check out directories published by local bar associations.

- **Website**—It takes a long time to write content for a robust website. But a law practice should, at a minimum, have a web page with the lawyer's name and contact information. If a potential client types your domain into his web browser and sees an "under construction" message, he might think that your law firm isn't yet open for business.

MONEY

- **Accounting and billing**—If you do not timely send out bills, you increase your odds of not getting paid. More importantly, if you do not file an accurate tax return, you increase your odds of being incarcerated. As boring as accounting/billing software might be, it deserves your full attention. You might investigate software designed specifically for lawyers (whose trust account requirements can make general-purpose accounting software less than ideal). You should also consider developing a good working relationship with an accountant.

- **Bank accounts**—It takes a little while to research what bank might be the best for your operating account and your IOLTA account. While convenience of bank branch location is certainly a consideration, it should not be the only consideration. Banks vary in regard to hours of operation, minimum balances, monthly fees, and services offered.

- **Business entity**—Many appellate lawyers probably haven't studied business entities since law school. Before opening the doors to your new firm, you should evaluate the pros and cons of operating as a sole proprietorship, a professional corporation, and a professional limited liability company, among others. If you choose an option other than sole proprietorship, you will likely need to register your entity with the Texas Secretary of State and get a tax identification number from the Internal Revenue Service.

- **Fee structure**—Regardless of whether you intend to bill by the hour, be paid a contingency fee, or charge a flat fee, you will probably want to survey other appellate lawyers to get an idea of what would constitute fair payment for your services.

- **Savings**—It will likely take at least a few months before your new law firm brings in enough revenue to cover expenses and have a surplus large enough for you to take home money to rival your salary at an established firm. So, be sure that you have savings sufficient to cover your living expenses during this time period.

* * *

STAYING OUT OF TROUBLE

- **Conflicts check**—There are software programs designed to perform conflicts checks, but you may find that a spreadsheet is equally effective. Work which you performed at your prior firm could also pose a conflict, and consequently, should be incorporated into whatever conflicts check system you use at your new firm.

- **Ethical considerations**—You should study the ethical considerations regarding soliciting work from clients of your current firm.

- **Mentorship**—You should consider developing a network of mentors. It is unlikely that you will find one person who would be a good mentor for every aspect of your practice. A partner in the appellate section of a large firm might be a good mentor for appellate advocacy, a business litigator at a medium-sized firm might be a good mentor for business development, and a general practice sole practitioner might be a good mentor for law office management.

In preparing this article, I reached out to all of the solo appellate lawyers I could locate in Texas. Over eighty percent of them responded with helpful suggestions. And this confirms my longstanding belief that appellate lawyers are eager to help one another. If you ever decide to join the ranks of us solos, please let us know how we can help you.

Planning on attending the Advanced Course this September but wondering how to pay for it?

Did you know the Appellate Section offers a limited number of need-based scholarships each year to attend either or both the Advanced Course and 101 Course? The available scholarships include partial awards whereby the discounted cost to attend the 101 Course is $75.00 and the discounted cost to attend the full Advanced Course is $150.00. A limited number of full scholarships are also available.

Please contact Jeff Levinger at 214-754-9199 or jlevinger@hanklev.com for more information.

Appellate-Related Excerpts from the Texas Judicial Report: Legislative Edition—82nd Legislature

TEXAS JUDICIAL COUNCIL, Austin

The following are appellate-related excerpts taken from the excellent report prepared by the Texas Judicial Council, which summarizes new legislation coming out of both the Regular and Special Sessions of the 82nd Legislature that impact upon the Texas judicial system.

The Texas Judicial Council has generously granted the *Appellate Advocate* permission to reprint the following excerpts, but those wishing to read the full report may do so at: http://www.courts.state.tx.us/tjc/pdf/82nd_leg_update.pdf.

—Brandy and Dylan

TEXAS JUDICIAL REPORT

OFFICE OF COURT ADMINISTRATION
TEXAS JUDICIAL COUNCIL

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Legislative Edition – 82nd Legislature **August 2011**

The 82nd regular and special legislative sessions resulted in a number of new laws of interest to the judiciary. Perhaps the most significant legislation was the court reorganization bill passed during the special session as HB 79. Highlights of HB 79 include:

- Setting the minimum jurisdictional amount of district courts at $500 and raising the upper jurisdictional limit of all statutory county courts to at least $200,000;
- Generating uniform provisions relating to all statutory county courts and repealing many provisions specific to statutory county courts in particular counties;
- Discontinuing small claims courts, but bringing the small-claims-court model of handling cases into the justice court provisions of Chapter 27, Government Code;
- Directing the Supreme Court to promulgate rules of civil procedure to ensure the fair, expeditious, and inexpensive resolution of small claims cases;
- Creating general provisions for the appointment, qualification, compensation, termination and powers of "associate judges" while repealing many individual statutes creating masters, referees and magistrates;
- Providing a structure for the receipt of gifts, grants, and donations for court system enhancements and child protection courts;
- Clarifying procedures regarding vexatious litigants; and
- Ordering a study of the feasibility, efficiency, and cost of converting statutory county courts with civil jurisdiction in excess of $200,000 into district courts;

This report briefly summarizes new legislation directly impacting the Texas court system, judges, clerks, and other judicial actors. No attempt is made to cover substantive areas of the law in detail; other entities are expected to provide legislative updates on substantive legal topics. We hope the report will be a useful resource for the judicial and legal community and all those interested in the administration of justice.

Carl Reynolds
Administrative Director, Office of Court Administration
Executive Director, Texas Judicial Council

Appellate Courts

HB 79, Article 2 (First Called Session) – Effective 1/1/12.
Permits appeals from judgments of county-level courts in commercial eviction suits. *See* § 24.007, Property Code.

HB 79, Article 9 (First Called Session) – Effective 1/1/12.
Permits a person found to be a vexatious litigant to appeal the order of a court prohibiting the person from filing new litigation in propria persona in the courts of Texas. Additionally, authorizes a litigant to challenge by means of an application for a writ of mandamus with the court of appeals, the decision of a local administrative judge denying the litigant special permission to file a litigation. Prohibits the clerk of a court from filing any original proceeding, appeal or other claim presented by a vexatious litigant except for the appeal and application for writ of mandamus mentioned above. Requires the clerk of a court to provide the Office of Court Administration with a copy of any prefiling order issued under Section 11.101 of the Civil Practice and Remedies Code not later than the 30th day after the date the prefiling order is signed. Clerks are currently required to make such a report, but the 30-day directive is new. Requires the Office of Court Administration to post a list of vexatious litigants subject to prefiling orders on the Office's Internet website. Further directs that, upon the request of a person on the list, the list indicate whether the person has filed an appeal of the prefiling order. *See* §§ 11.101 - 11.104, Civ. Prac. & Rem. Code. ***See also* County Clerks; District Clerks; Office of Court Administration; Supreme Court.**

HB 79, Article 14 (First Called Session) – Effective 1/1/12.
Updates terminology used in statute on filing fees in the Supreme Court and the courts of appeals. *See* §§ 51.005, 51.207, Gov't Code. ***See also* Costs, Fees, Fines and Collections; Supreme Court.**

HB 1781 – Effective 6/17/11.
Requires the Supreme Court, the Court of Criminal Appeals, the intermediate courts of appeals, and OCA to identify obsolete reporting requirements. A report concerning such requirements is to be submitted to the governor and others by August 1, 2012. *See* §§ 2052.401, 2052.402, Gov't Code. ***See also* Court of Criminal Appeals; Office of Court Administration; Supreme Court.**

Court Jurisdiction

HB 79, Article 3 (First Called Session) – Effective 1/1/12.
Sets the minimum jurisdictional amount of a district court in civil cases at $500. Currently, the minimum jurisdiction is uncertain – the amount is either $200 or $500. *See* § 24.007, Gov't Code.

HB 79, Article 4 (First Called Session) – Effective 1/1/12.
Creates standard definitions of "criminal law cases and proceedings," "family law cases and proceedings," juvenile law cases and proceedings," and "mental health cases and proceedings" in statutory county courts. Under current law, definitions of these terms can vary from county to county. *See* § 25.002, Gov't Code.

HB 79, Article 4 (First Called Session) – Effective 1/1/12.
Raises the maximum jurisdictional amount in civil cases in statutory county courts with a current maximum jurisdictional limit of less than $200,000 to $200,000. Does not change the maximum jurisdictional amount of those statutory county courts that currently have a maximum jurisdictional amount of more than $200,000. *See* § 25.003, Gov't Code.

HB 79, Article 4 (First Called Session) – Effective 1/1/12.
Eliminates current jurisdictional provisions in individual statutes creating statutory county courts in favor of general provisions applying to all statutory county courts. *See* §§ 25.0102, 25.0132, 25.0202, 25.0212, 25.0222, 25.0302, 25.0312, 25.0362, 25.0482, 25.0632, 25.0732, 25.0733, 25.0862, 25.0962, 25.1033, 25.1042, 25.1072, 25.1142, 25.1182, 25.1312, 25.1542, 25.1652, 25.1762, 25.1772, 25.1892, 25.1932, 25.2012, 25.2142, 25.2222, 25.2232, 25.2352, 25.2382, 25.2421, 25.2422, 25.2452, 25.2462, 25.2482, 25.2512, Gov't Code.

HB 79, Article 4 (First Called Session) – Effective 1/1/12.
Repeals individual statutory provisions regarding particular statutory county courts in favor of new general provisions applicable to all statutory county courts. *See* SECTION 4.50 of HB 79 for a listing of the repealed statutes.

HB 79, Article 5 (First Called Session) – Effective 5/1/13.
Discontinues small claims courts on May 1, 2013. Directs justices of the peace to transfer all cases pending in the small claims court to the justice court immediately before May 1, 2013. Calls for justice courts, beginning May 1, 2013, to conduct justice court proceedings in small claims cases in accordance with new rules of civil procedure promulgated by the Supreme Court. Directs the Supreme Court to promulgate the new rules not later than May 1, 2013. The new rules must define the term "small claims cases." The new rules must ensure the fair, expeditious, and inexpensive resolution of small claims cases. Other guidelines for the new rules are delineated. Also requires the Supreme Court to promulgate rules providing specific procedures for actions by: (1) an assignee of a claims or other person seeking to bring an action on an assigned claim; (2) a person primarily engaged in the business of lending money at interest; and (3) a collection agency or collection agent. None of the foregoing rules promulgated by the Supreme Court are require that a party in a case be represented by an attorney. Another requirement is that the rules may not be so complex that a reasonable person without legal training would have difficulty understanding or applying the rules. Any committee established by the Supreme Court to recommend the rules to be adopted is required to include justices of the peace. Separate and apart from the foregoing rules, requires the Supreme Court to promulgate rules for eviction proceedings by May 1, 2013. *See* §§ 27.060, Chapter 28 Gov't Code. ***See also* Justices of the Peace and Municipal Judges; Supreme Court.**

HB 734 – Effective 9/1/11.
Gives jurisdiction of truancy cases to constitutional county courts in counties with a population of 1.75 million or more. Currently, a constitutional county court in a county with a population of 2 million or more may exercise such jurisdiction. *See* §§ 25.093, 25.094, Educ. Code; § 54.021, Fam. Code; § 26.045(d), Gov't Code.

HB 984 – Effective 5/19/11.
Authorizes neighboring municipalities to enter agreement establishing concurrent jurisdiction of the municipal courts in those municipalities. *See* Art. 4.14, Code of Crim. Proc., § 29.003, Gov't Code. ***See also* Justices of the Peace and Municipal Judges.**

Supreme Court

HB 79, Article 2 (First Called Session) – Effective 1/1/12.
Redacts surplus language regarding the issuance of writs of mandamus by the Supreme Court. *See* § 22.002, Gov't Code.

HB 79, Article 5 (First Called Session) – Effective 5/1/13.
Discontinues small claims courts on May 1, 2013. Directs justices of the peace to transfer all cases pending in the small claims court to the justice court immediately before May 1, 2013. Calls for justice courts, beginning May 1, 2013, to conduct justice court proceedings in small claims cases in accordance with new rules of civil procedure promulgated by the Supreme Court. Directs the Supreme Court to promulgate the new rules not later than May 1, 2013. The new rules must define the term "small claims cases." The new rules must ensure the fair, expeditious, and inexpensive resolution of small claims cases. Other guidelines for the new rules are delineated. Also requires the Supreme Court to promulgate rules providing specific procedures for actions by: (1) an assignee of a claims or other person seeking to bring an action on an assigned claim; (2) a person primarily engaged in the business of lending money at interest; and (3) a collection agency or collection agent. None of the foregoing rules promulgated by the Supreme Court are require that a party in a case be represented by an attorney. Another requirement is that the rules may not be so complex that a reasonable person without legal training would have difficulty understanding or applying the rules. Any committee established by the Supreme Court to recommend the rules to be adopted is required to include justices of the peace. Separate and apart from the foregoing rules, requires the

Supreme Court to promulgate rules for eviction proceedings by May 1, 2013. *See* §§ 27.060, Chapter 28, Gov't Code. ***See also* Court Jurisdiction; Justices of the Peace and Municipal Judges.**

HB 79, Article 7 (First Called Session) – Effective 1/1/12.
Provides guidelines for the determination of cases requiring additional resources. Creates the Judicial Committee for Additional Resources. The Committee's primary function is to evaluate special needs cases or extraordinary events impacting the courts and to direct additional resources to those cases. Such additional resources can include the assignment of visiting judges, additional legal and administrative personnel, information and communication technology, specialized continuing education, and special accommodations or furnishings. No funding is appropriated for additional resources but creation of the Committee provides a legal structure for the assignment of judicial resources. The Committee is composed of the Chief Justice of the Supreme Court and the nine presiding judges of the administrative judicial regions. The Chief Justice serves as the Committee's presiding officer. The Office of Court Administration provides staff support to the Committee. Requires the Supreme Court to adopt rules under which the courts, the presiding judges of the administrative judicial regions, and the Committee may determine whether a civil case requires additional resources to ensure efficient judicial management of the case. *See* §§ 74.251-74.257, Gov't Code. ***See also* Judicial Administration; Office of Court Administration.**

HB 79, Article 7 (First Called Session) – Effective 1/1/12.
Requires the Supreme Court to request the president of the State Bar of Texas to appoint a task force to consider and make recommendations regarding rules for determining whether civil cases pending in a trial court require additional resources for efficient judicial management. The task force is include judges and attorneys. The task force is to provide recommendations on the rules to the Supreme Court by March 1, 2012. Then the Supreme Court is to consider the recommendations of the task force and adopt rules by May 1, 2012. *See* SECTION 7.05 of HB 79.

HB 79, Article 8 (First Called Session) – Effective 1/1/12.
Directs the Permanent Judicial Commission for Children, Youth and Families, which is established by the Supreme Court, to develop and administer a program to provide grants from available funds for initiatives that will improve safety and permanency outcomes, enhance due process, or increase the timeliness of resolution in child protection cases. However, no state funds may be used to provide a grant. Gifts, grants and donations may be accepted. Additionally, no state funds may be used to administer the grant program. *See* § 22.017, Gov't Code.

HB 79, Article 9 (First Called Session) – Effective 1/1/12.
Permits a person found to be a vexatious litigant to appeal the order of a court prohibiting the person from filing new litigation in propria persona in the courts of Texas. Additionally, authorizes a litigant to challenge by means of an application for a writ of mandamus with the court of appeals, the decision of a local administrative judge denying the litigant special permission to file a litigation. Prohibits the clerk of a court from filing any original proceeding, appeal or other claim presented by a vexatious litigant except for the appeal and application for writ of mandamus mentioned above. Requires the clerk of a court to provide the Office of Court Administration with a copy of any prefiling order issued under Section 11.101 of the Civil Practice and Remedies Code not later than the 30th day after the date the prefiling order is signed. Clerks are currently required to make such a report, but the 30-day directive is new. Requires the Office of Court Administration to post a list of vexatious litigants subject to prefiling orders on the Office's Internet website. Further directs that, upon the request of a person on the list, the list indicate whether the person has filed an appeal of the prefiling order. *See* §§ 11.101 - 11.104, Civ. Prac. & Rem. Code. ***See also* Appellate Courts; County Clerks; District Clerks; Office of Court Administration.**

HB 79, Article 14 (First Called Session) – Effective 1/1/12.
Updates terminology used in statute on filing fees in the Supreme Court and the courts of appeals. *See* §§ 51.005, 51.207, Gov't Code. ***See also* Appellate Courts; Costs, Fees, Fines and Collections.**

HB 274 – Effective 9/1/11.
Requires Supreme Court to adopt rules providing for the dismissal of causes of action having no basis in law or fact. Also requires Supreme Court to adopt rules promoting the prompt, efficient, and cost-effective resolution of civil actions. Addresses calculation of "litigation costs." *See* § 42.004(d), Civ. Prac. & Rem. Code; § 22.004, Gov't Code.

HB 906 – Effective 9/1/11.
Amends appellate procedures for child protection cases, including making final orders subject to procedures for accelerated appeals and requiring that information regarding the appeals process be included in the final order. Also requires Supreme Court to adopt rules related to accelerated disposition of these cases by the appellate courts and requires that an attorney appointed for an indigent parent continue to represent the parent until all appeals are exhausted or the attorney is relieved or replaced by the court. *See* §§ 107.013, 107.016, 109.002(a), 263.405(a.), (b) and (c), Fam. Code. ***See also*** **Associate Judges; Family Law.**

HB 962 – Effective 1/1/12.
Requires Supreme Court to adopt rules of civil procedure requiring a person who serves process to complete a return of service. *See* §§ 17.030, 17.065(b), Civ. Prac. & Rem. Code.

HB 1228 Effective 9/1/11.
Requires the Supreme Court to adopt rules establishing expedited foreclosure proceedings for use by a property owner's association in foreclosing an assessment lien. The rules must be adopted by January 1, 2012. *See* § 209.0092, Property Code.

HB 1614 – Effective 9/1/11.
Allows the Process Server Review Board to recommend fees to the Texas Supreme Court that would be charged for process server certification and certification renewal. The fees would have to be approved by the Texas Supreme Court before they could be collected. Fees would be prorated to cover periods less than a full term. The Office of Court Administration would collect the fees, which would be sent to the comptroller for deposit into the General Revenue Fund. *See* § 51.008, Government Code. ***See also*** **Office of Court Administration; Other Court Actors.**

HB 1781 – Effective 6/17/11.
Requires the Supreme Court, the Court of Criminal Appeals, the intermediate courts of appeals, and OCA to identify obsolete reporting requirements. A report concerning such requirements is to be submitted to the governor and others by August 1, 2012. *See* §§ 2052.401, 2052.402, Gov't Code. ***See also*** **Appellate Courts; Court of Criminal Appeals; Office of Court Administration.**

SB 1, Article 79A (First Called Session) – Effective 9/28/11.
Makes certain peace officer vouchers confidential for a period of 18 months. Specifically, the vouchers are those submitted for payment or reimbursement of a travel expense incurred while assigned to provide protection for a state elected official or a member of the elected official's family. The Supreme Court is given original and exclusive mandamus jurisdiction ove r any dispute pertaining to the construction, applicability or constitutionality of the confidentiality provision. The Supreme Court may appoint a master to assist in the resolution of any dispute. Also, the Supreme Court may adopt rules as necessary to govern the procedures for the resolution of any such dispute. *See* § 660.2035, Gov't Code.

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CIVIL PROCEDURE

Henderson v. Shinseki, 131 S. Ct. 1197 (2011)

The Supreme Court held a veteran's failure to file a notice of appeal within the limitations period provided for in 38 U.S.C. section 7266(a) does not deprive the reviewing court of jurisdiction over the appeal.

Petitioner, a veteran of the Korean War, was diagnosed with paranoid schizophrenia and received a 100-percent disability rating from the Department of Veterans Affairs (VA). In 2001, he filed a claim for supplemental benefits with the VA, and the claim was denied. He filed a notice of appeal with the Veterans Court, but the filing was 15 days after the 120-day statutory deadline. During the pendency of Henderson's appeal, the Supreme Court held in *Bowles v. Russell*, 551 U.S. 205 (2007), that a statutory limitation on the time in which to file an appeal in a civil case is jurisdictional and that a failure to meet the deadline cannot be waived. Applying *Bowles* to the instant case, the Veterans Court found Henderson's appeal untimely and therefore dismissed the case for lack of jurisdiction. Henderson appealed to the Federal Circuit, which affirmed the decision of the Veterans Court.

The Supreme Court, in a unanimous decision by Justice Alito, reversed. The Court stated the deadline at issue in this case relates to a "claim-processing rule," which allows for efficient and orderly process in litigation. The Court then noted that Congress was free to make claims-processing rules jurisdictional in nature. However, the Court found that neither the language of section 7266 nor the statute as a whole demonstrated congressional intent to assign jurisdictional attributes to the time limits on appeal. Thus, because the time limit exceeded was not jurisdictional in nature, the Veterans Court was free to determine whether exceptions applied allowing for an extension of the time period in which to file an appeal.

Justice Kagan took no part in the decision.

***Arizona Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011)**

The Supreme Court held taxpayers challenging a tax credit under the Establishment Clause lack Article III standing.

Respondents, Arizona taxpayers, challenged a state statute that provides tax credits for contributions to school tuition organizations that then use the funds to provide scholarships to students who attend private schools, including religious schools. Arguing that this practice violates the Establishment Clause, the Respondents sued the director of the state Department of Revenue. Various state tuition organizations then intervened, including Petitioner Arizona Christian School Tuition Organization. The district court dismissed the complaint for failure to state a claim. The Ninth Circuit reversed, holding that the taxpayers had standing to challenge the suit and had adequately pleaded an Establishment Clause claim.

The Supreme Court, in an opinion by Justice Kennedy, reversed. The Court first noted a litigant generally does not have standing based solely upon his status as a taxpayer. A narrow exception to this rule was established in *Flast v. Cohen*, 392 U.S. 83 (1968), in which the Court held a taxpayer may have standing if he can show a logical link between his status as a taxpayer and the statute being attacked and a nexus between the status and the "precise nature of the constitutional infringement alleged." The Court noted the *Flast* exception applies in Establishment Clause cases when a taxpayer's money is alleged to have been transferred to a religious entity. The Court went on to state that this case did not invoke the *Flast* exception because the case at hand involved a tax credit, thus taxpayers were not forced to pay taxes that ultimately benefitted a sectarian institution. Rather, the tax credit allowed Arizona taxpayers to pay their taxes without contributing to religious entities. Finally, the Court held that the Respondents failed to satisfy the elements of causation and redressibility.

Justice Scalia, joined by Justice Thomas, concurred. Justice Scalia argued the *Flast* exception should be abandoned as inconsistent with Article III.

Justice Kagan, joined by Justices Ginsburg, Breyer and Sotomayor, dissented, arguing the *Flast* exception applies to suits where taxpayers have alleged that a statute violates the Establishment Clause and that statute was enacted pursuant to a state's taxing and spending power.

***Va. Off. for Prot. & Advoc. v. Stewart*, 131 S. Ct. 1632 (2011)**

The Supreme Court held the exception to state sovereign immunity created by Ex Parte Young, 209 U.S. 123 (1908), applied to permit a state agency to sue officials of the same state in federal court.

Two federal statutes provide funding to improve services for those with developmental disabilities and mental illness. The states that accept funding under the statutes are required to set up a "protection and advocacy system" for these individuals. The system may be run by a state agency or a private nonprofit but, in either case, the entity selected must be insulated from state control and given authority to investigate abuse and to pursue appropriate remedies.

As a program participant, Virginia set up a protection system overseen by an independent state agency—the Virginia Office for Protection and Advocacy (VOPA). VOPA operates independent of the state attorney general and may initiate any proceedings necessary to secure the rights of disabled individuals. In furtherance of its mission, VOPA requested documents from officials in charge of state-run mental hospitals as part of an investigation into the deaths of two patients at those hospitals. The officials refused, asserting a state-law privilege that protects medical peer-review materials. VOPA then sued in federal district court, claiming that the federal statutes governing VOPA supersede any state law privilege. The officials responded by moving to dismiss based on Eleventh Amendment immunity. The district court denied the motion, but the Eleventh Circuit reversed, holding that VOPA's lawsuit failed to trigger the Ex Parte Young exception to sovereign immunity.

The Supreme Court, in an opinion by Justice Scalia, reversed. As the Court recognized, the *Ex parte Young* doctrine limits the states' sovereign immunity under the Eleventh Amendment, allowing injunctions against state officials who fail to comply with federal law. The doctrine applies when a complaint alleges ongoing violations of federal law and seeks prospective relief, both of which were conceded in this case. The Court rejected the argument that VOPA's status as a state agency changes the analysis. In the Court's view, allowing a state agency to sue a state official is no more offensive to state dignity than allowing a private party to do the same. Moreover, any offense to the dignity of the state is unconnected to sovereign immunity analysis. Dividing the state against itself was not a result of the federal nature of forum; the same would occur in state court or if the state chose to waive immunity. And ultimately, this is a novel situation unlikely to recur often.

Justice Kennedy, joined by Justice Thomas, concurred in the judgment. The concurring justices wrote separately to state their view of the *Ex Parte Young* doctrine as a balancing test between the protection of federal supremacy and a proper regard for state sovereignty. Applying the standard of review, the concurring justices assumed VOPA has a federal right to obtain the documents, which implicates federal supremacy. VOPA's choice of a federal forum implicates the state's interest in officiating "intramural" disputes in its own courts. But the effect on state sovereignty is mitigated by state's choice to use an independent agency, rather than a private entity, to head its protection and advocacy system. The effect is further mitigated by structural protections, such as the state's control over whether one agency has power to sue another and the ability to obtain abstention in federal court when there are doubts over a state agency's power to sue. The concurring justices also noted federal law rarely vests federal rights in state agencies; thus, the laws at issue in this case may present constitutional issues, but that question was not raised in this case.

Justice Roberts authored a dissent, joined by Justice Alito. The dissent emphasized *Ex Parte Young* is a narrow exception to the Eleventh Amendment. Thus, a claim under *Ex Parte Young* must avoid implicating the special sovereignty interests protected by the Amendment. VOPA's claims, which force Virginia to defend itself against its own agency before a federal judge without its consent, fail that test. According to the dissent, there is a real difference between a suit filed by a private party and one filed by a state agency—and the indignity to a state of defending the latter is greater than defending the former. The dissent also warned the Court's holding opens the doors of federal court to any state agency or official with sufficiently independent litigating authority.

Justice Kagan took no part in the proceedings.

***United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011)**

The Supreme Court held a plaintiff is jurisdictionally barred from pursuing a claim in the Court of Federal Claims (CFC) when a claim pending in another court is based upon the same set of operative facts and that an overlap in the relief sought is not additionally necessary to bar the claim.

The Respondent, Tohono O'Odham Nation (the "Nation"), is a Native American Tribe recognized by the federal government. The Nation filed suit in a federal district court against federal officials for a breach of fiduciary duty in their management of the Nation's assets. The day after filing suit in federal district court, the Nation filed suit in the Court of Federal Claims for a breach of fiduciary duty based upon the same

management of trust assets that formed the basis of the federal district court suit. The CFC dismissed the suit for want of jurisdiction under 28 U.S.C. section 1500, which prevents CFC jurisdiction over "a claim that is also the subject of an action pending in another court." The Court of Appeals for the Federal Circuit reversed.

The Supreme Court, in an opinion by Justice Kennedy, reversed. The Court noted previous decisions held that the CFC does not have jurisdiction over a claim that is pending in another court if those two claims are "based on substantially the same operative facts" and if "there is some overlap in the relief" sought. The Court explained the broad nature of the prohibition and then held factual overlap alone is enough to bar jurisdiction in the CFC. Thus, the Court found remedial overlap is not a necessary component of the prohibition. The Court finally noted there existed a sufficient factual overlap in the case to bar suit in the CFC based upon the pending claim in the district court.

Justice Sotomayor, joined by Justice Breyer, concurred in the judgment. Justice Sotomayor asserted the Nation's two actions sought overlapping relief, and therefore the Court's determination that overlapping relief was unnecessary to bar CFC jurisdiction was not necessary to decide the case. She went on to state Congress intended to preclude suits in the CFC for claims that sought overlapping relief, and not merely overlapping factual bases.

Justice Ginsburg dissented, arguing an overlap in relief sought is necessary for a jurisdictional bar and asserting that no such overlap existed in this case.

Justice Kagan took no part in the decision.

CRIMINAL LAW

Pepper v. United States, 131 S. Ct. 1229 (2011)

In this case regarding criminal sentencing, the Supreme Court held evidence of postsentencing behavior may be considered by a district court when an appellate court remands for resentencing.

Jason Pepper was convicted on drug charges and given a reduced sentence under the Sentencing Guidelines (the "Guidelines") based on "substantial assistance" he rendered to the Government after his arrest. The appeals from this initial sentence and subsequent resentencing decisions have been considered three times by the Eighth Circuit and once before by the Supreme Court. In the latest round of appeals, the

district court on remand refused to reduce the sentence for good behavior after sentencing and applied a smaller reduction for Pepper's substantial assistance. The Eighth Circuit affirmed, holding that consideration of postsentencing behavior was improper and that the district court was not bound by the initial sentence reduction for Pepper's substantial assistance.

The Supreme Court reversed in an opinion authored by Justice Sotomayor. The Court began by recognizing that, although the Sentencing Reform Act (the "Act") and accompanying Guidelines limit a trial court's traditional discretion in making sentencing determinations, they still leave room for courts to consider "without limitation" information regarding a defendant's "background, character, and conduct" in determining a sentence. The Court further concluded consideration of postsentencing behavior is relevant to several statutorily significant factors, including the history and characteristics of the defendant, the responsibility to serve the purposes of sentencing, and the need to impose a sufficient sentence.

The Court rejected provisions in the Act and underlying policy statements that arguably supported a contrary position. First, the Court invalidated section 3742(g)(2), which bars courts from resentencing outside the Guidelines based on previously unaddressed grounds, as inconsistent with *United States v. Booker*, 543 U.S. 220 (2005). It also rejected the contention that section 3742(g)(2), even if invalid, embodied a general policy disfavoring consideration of postsentencing evidence. Second, the Court concluded that policy statements from the Sentencing Commission that postsentencing evidence is an inappropriate basis for diminished sentences rested on faulty grounds. Finally, although the Court acknowledged the need to avoid disparity in sentencing, it concluded that any disparity that results from consideration of postsentencing evidence is an acceptable outcome of the normal process of trial and appeal.

Having decided that postsentencing evidence is admissible, the Court held the initial downward adjustment for substantial assistance was not binding on subsequent sentencing decisions in light of the Eighth Circuit's remand for de novo sentencing.

Justice Breyer filed a separate opinion concurring in part and concurring with the judgment. Although Justice Breyer agreed generally with the postsentencing evidence result, he disagreed with the rationale employed by the Court. For Justice Breyer, reliance on the statutory provision allowing consideration of a defendant's background "without limitation" begs the question given that the provision only applies to "relevant" information. Similarly, the Court's analysis largely ignores the longstanding tradition of avoiding disparate sentencing. According to Justice Breyer, the Guidelines, while not mandatory, must still be consulted and should only be departed from when reasonable. Both as a general proposition, and specifically here in this case, it would be

reasonable to consider postsentencing behavior which, under the facts of the case, warrants a downward departure from the Guidelines.

Justice Alito filed an opinion concurring in part and dissenting in part. He largely agreed with Justice Breyer's analysis. He also expressed concern that the Court's language embracing district court discretion, and its reliance on pre-Sentence Reform Act opinions, could lead to a return to the problematic sentencing system the Act was designed to correct.

Consistent with his previous opinions in the *Booker* line of cases, Justice Thomas dissented. In Justice Thomas's view, the Guidelines should be followed unless their application actually violates the Sixth Amendment. Justice Thomas asserted that there was no risk of a constitutional violation here, where sentencing within the Guidelines was based on Pepper's own admission.

Justice Kagan took no part in these proceedings.

***Wall v. Kholi*, 131 S. Ct. 1278 (2011)**

The Supreme Court held a motion to reduce sentence under Rhode Island law constituted a collateral review that tolled the one-year statute of limitation period for filing a habeas petition under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

In 1993, Respondent Kholi was convicted on ten counts of sexual assault in a Rhode Island court and sentenced to consecutive life terms. Kholi directly appealed his conviction, which was ultimately affirmed by the Supreme Court of Rhode Island. Kholi also filed two motions outside of the direct appeal process: the first was a motion to reduce his sentence under Rule 35 of the Rhode Island Superior Court Rules of Criminal Procedure; the second was an application for state post-conviction relief. The trial court denied both motions. The parties agreed that the conviction became final on May 29, 1996, when the time period expired for filing a petition for certiorari with the United States Supreme Court. On September 5, 2007, Kholi filed a federal habeas petition, challenging his conviction. While the application for post-conviction relief tolled the limitation period for nine years, the federal habeas petition was still untimely unless the Rule 35 motion for a reduction of sentence was also considered a collateral review that tolled the limitations period. The district court dismissed the federal habeas petition, finding that the Rule 35 motion was a plea for leniency rather than a motion for collateral review. The First Circuit reversed.

The Supreme Court, in an opinion by Justice Alito, affirmed the appellate court decision. The Court noted the AEDPA has a one-year limitation period in which a state prisoner can file his motion for federal habeas relief. The Court further explained the time period is tolled while a motion for collateral review is pending. The Court then examined the meaning of collateral review, noting that it is a "form of review that is not part of the direct appeal process." Looking specifically to the Rule 35 motion for reduction of sentence, the Court found it was not a part of the direct appeal process and that it constituted a collateral review, thereby tolling the limitation period for the filing of federal writ of habeas corpus.

Justice Scalia concurred in part, agreeing with the Court that Rule 35 is not a direct review and therefore is collateral, and refusing to join the Court in footnote 3 of its opinion, which expressly refused to determine whether a Rule 35 motion actually seeks direct review.

***Felkner v. Jackson*, 131 S. Ct. 1305 (2011) (per curiam)**

In a case challenging the appropriateness of certain peremptory jury strikes, the Supreme Court reaffirmed the highly deferential review for Batson challenges and habeas corpus proceedings.

After Steven Jackson was convicted of sexual offenses relating to an assault on a 72-year-old woman, he filed a *Batson* motion to challenge the peremptory strikes of two of the three African-Americans in the jury pool. Juror S was stricken after stating that he was stopped frequently by California police during a 14-year period because of his race and age. The prosecutor defended the strike based on concern over the juror's continuing animosity toward police. Juror J was stricken after discussing her master's degree in social work and an internship in the county jail; the prosecutor supported the dismissal because he "does not like to keep social workers." Finding the prosecutor's explanations credible, the trial court denied Jackson's motion.

On direct appeal to the intermediate appellate court, Jackson argued that the prosecutor's explanations were pretextual. Jackson claimed a non-black juror similarly situated to Juror S was not stricken even though he expressed an opinion that he was stopped in Illinois as part of a police "scam." Jackson likewise pointed to several white jurors who were asked multiple follow-up questions about their education; whereas Juror J was stricken without any follow-up. Applying the equivalent of clear error review, the intermediate court rejected Jackson's arguments, concluding a one-time, out-of-state experience was not equal to a 14-year history of in-state police difficulties and that that dismissal based on educational background was a proper race-neutral

reason. Review of the decision was subsequently denied by the California Supreme Court. Jackson then sought habeas relief sought in federal court, but the district court denied his petition, concluding the findings of the California Court of Appeals were not unreasonable. The Ninth Circuit reversed, however, holding there was evidence of "purposeful discrimination" and "different treatment of comparably situated jurors."

In a per curiam opinion, the Supreme Court reversed. The Court emphasized review of both *Batson* challenges and habeas petitions requires great deference to lower courts. The Court concluded the California court "carefully reviewed the record" to reach a ruling that was "plainly not unreasonable." In contrast, the Court denounced the Ninth Circuit's three-paragraph decision as both "inexplicable" and "unexplained."

***Kentucky v. King*, 131 S.Ct. 1849 (2011)**

The Supreme Court held police officers are entitled to enter a home without a warrant where necessary to prevent the imminent destruction of evidence so long as their conduct leading to the entry does not threaten or actually violate the Fourth Amendment.

In the course of a controlled purchase of crack cocaine set up by undercover police officers, the drug buyer was able to reach his apartment before uniform officers could apprehend him. Although the officers did not see which apartment the suspect entered, the officers did detect a smell of burning marijuana outside a nearby apartment. They knocked on the door and announced their presence. The inhabitants did not answer, but the officers heard sounds of people and things moving inside. Fearing that evidence was being destroyed, the officers announced their intent to enter and then kicked down the door. The officers' initial protective sweep uncovered marijuana and cocaine; a later search further revealed crack, drug paraphernalia, and cash. The inhabitants were charged with drug trafficking but moved to suppress the evidence based on the officers' warrantless entry.

The trial court denied the motion, ruling that the officers had probable cause based on the smell of marijuana and that they acted under exigent circumstances given the reasonable conclusion that defendants were destroying evidence. The ruling was upheld on appeal by the intermediate court but overturned by the Kentucky Supreme Court, which held that the officers, while not acting in bad faith, reasonably should have foreseen that defendants would destroy evidence when they announced their presence.

The Supreme Court reversed in an opinion authored by Justice Alito. Although a warrantless search of a home is presumptively unreasonable, a longstanding exception

exists under exigent circumstances where a need of law enforcement renders the warrantless search objectively reasonable. One recognized instance of such exigent circumstances is the prevention of "imminent" destruction of evidence, so long as law enforcement officials did not create the exigency. The Court rejected several approaches adopted by lower courts attempting to identify when police create an exigency, including tests based on bad faith, reasonable foreseeability, the earliest point of probable cause, and the use of standard investigative tactics. The Court also rejected the respondents' proposed test, which relied on hard-to-measure factors such as the tone of voice or loudness of knock to identify when inhabitants could reasonably believe entry was imminent.

Instead, the Court concluded the touchstone of the exigency analysis is reasonableness and held that the exigency rule applies where police conduct leading up to the exigency is reasonable, in other words, where the conduct does not threaten or actually violate the Fourth Amendment. This approach is similar to analysis applied in other Fourth Amendment cases and still allows occupants to refuse to open the door or to open the door but refuse access to the home. Applying this test to the facts of the case, the Court, like the lower courts, assumed that exigent circumstances in fact existed. From there, the Court concluded there was no evidence of an actual or threatened violation of Fourth Amendment: the police knocked as loud as they could and announced their presence but did not make any demands or threats. Furthermore, their announcement of entry occurred only after the exigency arose.

Writing in dissent, Justice Ginsburg reasoned two principles should have governed this case: first, police should obtain warrants wherever possible, and second, warrantless searches and seizures in a home are reviewed under heightened scrutiny. According to Justice Ginsburg, this burden was not met here, where there was little risk that evidence would have been destroyed prior to warrant, given that the occupants had no reason to suspect police proximity. Instead, the police could have obtained a warrant before announcing their presence, and their failure to do so should bar reliance on the exigent circumstances doctrine.

***United States v. Tinklenberg*, 131 S. Ct. 2007 (2011)**

Interpreting the Speedy Trial Act (the "Act"), the Supreme Court determined the exceptions provided for by the Act do not require a showing that trial was actually delayed and that the measure of delay in the exceptions includes weekends and holidays.

Jason Tinklenberg was convicted on drug and gun charges and made his initial appearance before a judicial officer; 287 days later, his criminal trial began. Tinklenberg moved for dismissal under the Act, which requires that trial begin within seventy days of the initial appearance. The district court denied the motion, finding that 218 days were excluded by the Act, leaving 69 days of delay. The Sixth Circuit disagreed with respect to three pretrial motions accounting for nine excluded days, holding that the motions did not actually cause a delay or expectation of a delay and thus could not be excluded. The court then dismissed the indictment with prejudice in light of prison time served.

The Supreme Court, in an opinion authored by Justice Breyer, affirmed on different grounds. The Act's seventy-day requirement is triggered by the filing an indictment or the first appearance before a judicial officer. The Act excludes from the seventy-day calculation "delay resulting from any pretrial motion." The Sixth Circuit interpreted "delay" to require that a pretrial motion actually result in delay in holding trial. The Court disagreed, recognizing that "delay" can also refer to an interval of time. The Court turned to the context of the statute, which signals automatic application of the exceptions rather than requiring a court determination of whether delay actually resulted. The Court found further support for its view in the interpretation of lower courts, the difficulty engendered by the Sixth Circuit's holding, previous cases from the Court interpreting other sections of the Act, and the legislative history behind the Act.

Having rejected the Sixth Court's primary holding, the Court turned to Tinklenberg's alternative ground for affirmance. Another statutory exclusion applied to this case allows for ten days between a court order regarding competency examination and transportation to and from the place of examination; a longer delay is presumed unreasonable. In this case, the lower courts agreed that the exclusion did not apply to all twenty days between the court order and Tinklenberg's examination; however, they counted only two of the extra ten days towards the total—the other eight were excluded as weekends and holidays under Federal Rule of Criminal Procedure 45.

The Court concluded this was error. Although Rule 45 excludes weekends and holidays, it applies only to rules and orders; there is no mention of statutes and nothing in the Act incorporates Rule 45. Common law and Congressional practice instead

indicate that weekends and holidays do count unless specifically excluded. Adding an additional eight days to the total resulted in a delay exceeding the seventy-day limit. Thus, although the Court disagreed with both of the Sixth Circuit's holdings, it nonetheless affirmed the judgment as ultimately correct.

In a concurring opinion joined by Chief Justice Roberts and Justice Thomas, Justice Scalia agreed with the Court that the text, context, and structure of the Act all point to automatic application of the Act's exception. Thus, according to the concurring Justices, there is no need to look to extra-textual sources for confirmation of the holding. Rather, the sources relied upon by the Court are relevant only as they reflect the meaning of statutory text.

Justice Kagan took no part in the proceedings.

***Fowler v. United States*, 131 S. Ct. 2045 (2011)**

The Supreme Court held a person that kills a local police officer to avoid detection of a crime may only be convicted under the federal witness tampering statute if there was a reasonable likelihood that, but for the killing, a relevant communication would have been made to a federal officer.

Charles Fowler and multiple co-conspirators were preparing for a bank robbery in a cemetery when a local police officer approached them and drew his weapon. Fowler and others managed to overcome the officer and take his gun. After the officer identified one of the men by name, Fowler stated that they could not "walk away from this" and executed the officer. Fowler was convicted of federal witness tampering under 18 U.S.C. section 1512(a)(1)(C). Fowler appealed, asserting the Government did not prove his specific intent to prevent communication with federal authorities. The Eleventh Circuit affirmed, holding that the statute's requirement of intent was met when the Government demonstrated "possible or potential communication to federal authorities[.]"

The Supreme Court reversed and remanded. Justice Breyer, writing for the majority, began by noting the statute expressly stated that there was no requisite state of mind for the element requiring communication with federal authorities. Therefore, the Court could not "insist that the defendant have had some general thought about federal officers in mind." The majority then considered whether some factual likelihood of communication needed to be shown. Arguing that a person can intend to prevent a result that is factually unlikely, the majority held that, if likelihood needed to be proved,

the standard did not require proof that, but for the killing, communication to federal authorities was more likely than not. The majority also held some level of probability must be required, because interpreting the statue to require no proof regarding the probability that information would be communicated to federal authorities would expand the statute beyond the intention of Congress to cover purely state investigations. Looking to the particular level of likelihood, Justice Breyer rejected the Eleventh Circuit's standard of "possible" as essentially requiring no proof because "where a federal crime is at issue, communication with federal law enforcement is almost always a possibility." Setting the standard slightly higher, the majority held the Government needed to show there was a reasonable likelihood that that information would be communicated to federal authorities. Because the courts below had not previously considered how this standard applied to the facts of Fowler's case, the Court remanded.

Justice Scalia concurred in the judgment, but argued the proper standard requires the Government to prove beyond a reasonable doubt, but for the killing, a relevant communication would have been made to a federal officer. Justice Scalia argued that the majority's standard was "hopelessly indeterminate" with no real distinction between "reasonably likely" and "reasonably possible."

Justice Alito dissented, joined by Justice Ginsburg. The dissent rejected the requirement that the Government provide separate proof regarding the probability of communication to federal authorities. Rather, intent to prevent communication to federal authorities needed to be shown, but could be inferred from "the federal character of an offense."

EMPLOYMENT LAW

Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011)

The Supreme Court held both written and oral complaints suffice under the Fair Labor Standards Act (FLSA) provision preventing retaliatory firing after an employee filed a complaint.

The FLSA forbids employers from retaliating against employees who "filed any complaint or instituted or caused to be instituted any proceeding under or related to [the FLSA.]" Kevin Kasten, a Saint-Gobain Performance Plastics Corp. ("Saint-Gobain") employee, orally complained to his supervisors about the placement of a time clock that violated the FLSA. Kasten was subsequently discharged. When Kasten brought an

antiretaliation suit, the district court entered summary judgment for Saint-Gobain because it held that the FLSA did not protect oral complaints. The Seventh Circuit agreed and affirmed.

Justice Breyer, writing for the majority, began by analyzing the word "file." Justice Breyer found that some dictionaries, other statutes, and governmental regulations used the word in conjunction with oral statements. Though filing is more often done by writing, the majority noted the FLSA dealt with the filing of any complaint, suggesting a broad interpretation. Finding the text alone was not conclusive, the majority reviewed the history and purpose of the statute, which supported a broad interpretation including oral complaints. The act relies on information and complaints received from employees for enforcement. Limiting the provision's scope to written complaints would inhibit enforcement by employees. In support of this, the majority noted that, at the time the FLSA was passed, illiteracy rates were high among poor workers the FLSA was intended to protect. But, the majority noted, an oral complaint only triggers the FLSA antiretaliation provision if it is "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection[.]"

The majority also considered administrative interpretations regarding the FLSA complaints. Both the EEOC and the Secretary of Labor interpreted the FLSA's requirement to include oral complaints. Finding these were long held interpretations and were reasonable and consistent with the Act, the majority held they "add[ed] force to our conclusion" that an oral complaint is sufficient to trigger the FLSA antiretaliation provision. Finally, the majority rejected Saint-Gobain's assertion that, because the antiretaliation provision provides for a criminal sanction, the rule of lenity necessitated a narrow interpretation that excluded oral complaints. The majority held that, "after engaging in traditional methods of statutory interpretation, we cannot find that the statute remains sufficiently ambiguous to warrant application of the rule[.]"

Justices Scalia dissented, joined in part by Justice Thomas. The dissent noted "filing a complaint" in the context of language addressing instituting FLSA proceedings envisions a formal process, not an oral intracompany complaint.

Justice Kagan took no part in the decision.

***Staub v. Proctor Hosp.*, 131 S.Ct. 1186 (2011)**

The Supreme Court held employers are liable to employees under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) for the acts of supervisors motivated by antimilitary animus if those acts are intended to cause and do proximately cause an adverse employment action.

Vincent Staub worked as a technician for Proctor Hospital and was a member of the United States Army Reserve. His supervisor, Mulally, and her supervisor, Korenchuk, were hostile to Staub's military obligations. Mulally issued Staub a disciplinary warning. Subsequently, Korenchuk reported that Staub had violated the terms of the warning to Buck, a human resources officer. Buck fired Staub based on Korenchuk's report and a review of his employment file.

Staub sued the Hospital under the USERRA claiming that his termination was motivated by hostility to his military obligations. Staub alleged that Mulally and Korenchuk fabricated the warning and the violation due to their animus and that those actions caused his termination. A jury found that Staub's military status was, as required by the USERRA, a "motivating factor" in the Hospital's decision to terminate him and awarded damages. The Seventh Circuit reversed, holding that where liability stems from the animus of supervisors who do not make the ultimate employment decision, a suit could only succeed where the supervisor had "singular influence" over the decisionmaker. Because Buck was not wholly dependent on Korenchuk, the Circuit held the Hospital was not liable as a matter of law.

Justice Scalia, writing for the majority, noted Congress adopts the background of general tort law when it creates a federal tort. Under general tort law, the majority noted that responsibility for a tort can be attributed to an earlier agent if the adverse action is the intended consequence of that agent's conduct. Thus, "so long as the agent intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable under USERRA." Therefore, an employer is at fault if one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision.

The majority also rejected the Hospital's argument that Buck's exercise of judgment and independent investigation isolated the animus and precluded liability. First, the court noted that a decisionmaker's termination of an employee is not an independent and unforeseeable superseding cause when the result is the intended consequence of a supervisor's actions. Second, the majority found no support under

tort law or in the statute for a principle that an independent investigation can eliminate an employer's liability for its agent's actions. Finding that the jury instruction here varied with the rule the majority reached, the majority reversed and remanded for consideration as to whether the variance was harmless error.

Justice Alito, joined by justice Thomas, concurred. The concurrence argued the language of the statute requires that the animus directly motivate the action. But the concurrence stated that, as was the case here, where the employer effectively delegated the decision to a supervisor, without a reasonable investigation, the employer could be held liable.

Justice Kagan took no part in the decision.

ERISA

CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011)

The Supreme Court held a district court may reform a pension plan when the plan did not provide adequate disclosures required by the Employee Retirement Income Security Act of 1974 (ERISA), even if the beneficiary does not show detrimental reliance on the defective disclosures.

CIGNA Corp. changed its pension plan. Amara, acting on behalf of 25,000 beneficiaries of CIGNA's plan, challenged CIGNA's adoption of the new plan. The beneficiaries claimed that CIGNA failed to give them proper notice of changes to their benefits as required by ERISA. The district court agreed that CIGNA had failed to give the beneficiaries proper notice and reformed the plan, finding that the notice defects had caused the beneficiaries "likely harm" under ERISA section 502(a)(1)(B). The Second Circuit affirmed.

The Court granted certiorari, vacated, and remanded in an opinion by Justice Breyer. The Court found the district court lacked authority to reform the plan under ERISA section 502(a)(1)(B), because that section only speaks of enforcing the plan's terms—not changing them. But the district court had the authority to reform the plan under ERISA section 502(a)(3), which allows a beneficiary "to obtain other appropriate equitable relief" to redress ERISA violations. The Court remanded to let the district court determine whether it would have imposed the same remedy under this different provision. Justice Scalia, joined by Justice Thomas, concurred in the judgment to argue that the Court should not have reached the question whether the district court had authority to reform the plan under section 502(a)(3). Justice Sotomayor was recused.

FALSE CLAIMS ACT

***Schindler Elevator Corp. v. United States* ex rel *Kirk*, 131 S.Ct. 1885 (2011)**

The Supreme Court held a governmental agency's response to a Freedom of Information Act (FOIA) request constitutes a "report" which can satisfy the public disclosure bar on qui tam actions under the federal False Claims Act (FCA).

Respondent Kirk, a former employee of the petitioner, brought a qui tam action under the FCA against Schindler Elevator Corp. for filing false claims with the government under the Vietnam Era Veterans' Readjustment Assistance Act of 1972. In support of his allegations, Kirk relied upon responses to FOIA requests that his wife obtained from the Department of Labor. Schindler argued that the FOIA responses constituted publicly disclosed governmental reports that barred the respondent's suit under the Act. The district court dismissed the complaint, agreeing with Schindler that the allegations were based upon public disclosures contained in an administrative report, and therefore the suit was barred by the FCA. The Second Circuit vacated and remanded, holding that a response to a FOIA request does not constitute a "report" as defined by the public disclosure exception of the FCA.

In an opinion by Justice Thomas, the Court reversed the Second Circuit's decision. After first noting that the FCA does not explicitly define the term "report," the Court then looked to the ordinary meaning of the word. The Court found the ordinary meaning to be broad, and noted that this broad interpretation was consistent with the expansive scope of the public disclosure exception under the FCA. The Court rejected the Second Circuit's reliance on the doctrine of noscitur a sociis, finding that the circuit court erred in only applying the canon of construction to words immediately surrounding the term "report" rather than examining the statutory language as a whole. The Court further found the legislative history behind the public disclosure exception was not contradicted by a holding that FOIA responses satisfied the exception. Finally, the Court found its holding would not necessarily lead to the negative consequences suggested by the respondent, explaining that under the original source exception, defendants may not be able to insulate themselves from qui tam suits by simply filing their own FOIA requests.

Justice Ginsburg, joined by Justices Breyer and Sotomayor, dissented. Justice Ginsburg agreed with the Second Circuit's interpretation of the statutory language, asserting that the term "report" in the context of the statute connotes an investigation or synthesis of information, rather than the mere production of documents resulting

from a FOIA request. She further expressed her concern that the Court's holding would weaken the effectiveness of the FCA as a tool to fight fraud.

FOURTH AMENDMENT

Tolentino v. New York, 131 S. Ct. 1387 (2011)

In this exclusionary rule case, the Supreme Court dismissed the writ of certiorari as improvidently granted.

Police pulled over Jose Tolentino. After running a check of his Department of Motor Vehicles (DMV) record, the police learned that his license was suspended due to at least ten different failures to answer a summons or pay a fine. The police arrested Tolentino for aggravated unlicensed operation of a motor vehicle.

After arraignment, Tolentino moved to suppress the records and a confession as fruits of an unlawful stop. He alleged he had not committed any traffic infraction that would have given police probable cause to stop his vehicle. The trial court denied the request because it held the defendant did not possess a legitimate expectation of privacy in DMV files and therefore the records were not subject to the exclusionary rule.

Tolentino appealed. The Appellate Division affirmed on a different basis. It held a defendant need not establish a privacy interest in order to seek exclusion. But DMV records, like the identity of the defendant, are never suppressible as fruit of an unlawful arrest. In a split decision, the Court of Appeals affirmed the Appellate Division.

The Supreme Court granted certiorari. At oral argument, multiple Justices questioned why Tolentino had sought to suppress the DMV record evidence rather than the officer's testimony identifying the driver. Subsequently the Supreme Court issued a per curiam opinion dismissing the writ of certiorari as improvidently granted.

FREE SPEECH

***Snyder v. Phelps*, 131 S. Ct. 1207 (2011)**

The Supreme Court held the First Amendment shielded the Westboro Baptist Church from tort liability for picketing military funerals to communicate its belief that God hates the United States for its tolerance of homosexuality.

Seven members of the Westboro Baptist Church traveled to Maryland to picket the funeral of Marine Lance Corporal Matthew Snyder, who was killed in Iraq in the line of duty. The picketing took place on public land one thousand feet from the church where the funeral was held, in accordance with guidance from local law enforcement officers. The picketers peacefully displayed their signs—which stated, for example, "Thank God for Dead Soldiers" and "You're Going to Hell"—for thirty minutes before the funeral began. Matthew Snyder's father saw the tops of the picketers' signs when driving to the funeral, but did not learn what was written on the signs until watching a news broadcast later that night.

Snyder's father brought a diversity suit against the Westboro Baptist Church and the members who picketed his son's funeral, alleging state tort claims including intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. At trial, Snyder testified that he was unable to separate the thought of his dead son from his thoughts about the picketing, and this led to severe depression and exacerbated existing health conditions. A jury ruled for Snyder's father and awarded him $2.9 million in compensatory damages and $8 million in punitive damages. The district court remitted the punitive damages award to $2.1 million, but left the verdict otherwise intact. The Fourth Circuit reversed, ruling that Westboro's statements were protected by the First Amendment because the statements were on matters of public concern, were not provably false, and were expressed solely through hyperbolic rhetoric.

By a vote of 8-1, the Court affirmed in an opinion by Chief Justice Roberts. It noted that whether the First Amendment prohibits holding Westboro liable for its speech largely turns on whether that speech is a matter of public concern. The Court concluded it was a matter of public concern. It stated Westboro's statements discussed the political and moral conduct of the United States and its citizens, and those statements were made publicly while designed to reach a broad public audience. The context of the speech (the fact that the speech was made in connection with Matthew

Snyder's funeral), the Court said, cannot transform the nature of Westboro's speech—which was not a personal attack on Snyder and did not interfere with the funeral itself. The Court expressed no view on whether state laws prohibiting funeral picketing were permissible time, place, or manner regulations of speech (Maryland passed such a law after the facts in this case occurred).

Justice Breyer concurred, noting the majority opinion was based on the specific facts of this case: the picketing was done in a lawful place, in compliance with police direction, and could not be seen or heard from the funeral; and Matthew Snyder's father testified that he saw no more than the tops of the picketers' signs as he drove to the funeral. Justice Alito dissented, arguing Matthew Snyder was not a public figure and Westboro launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. Justice Alito stated Westboro's otherwise actionable speech should not be protected by the First Amendment just because: (1) its personal attack on Snyder was mixed with other speech of public concern; (2) Westboro did not hold a personal grudge against Snyder; and (3) the speech was on a public street. Justice Alito also recognized that funerals are unique events, and allowing family members to have a few hours of peace without harassment would not undermine public debate.

FREEDOM OF INFORMATION ACT

Fed. Comm'cns Comm'n v. AT&T Inc., 131 S. Ct. 1177 (2011)

The Supreme Court held corporations do not possess personal privacy interests for purposes of the Freedom of Information Act (FOIA).

The Enforcement Bureau of the Federal Communications Commission (FCC) investigated AT&T Inc.'s ("AT&T")billing practices after AT&T voluntarily reported that it may have overcharged the FCC for services rendered in an FCC-administered program. After the investigation was resolved, CompTel, a trade association composed in part by AT&T's competitors, filed a Freedom of Information Act (FOIA) request for the entire file from the AT&T investigation. The Enforcement Bureau withheld certain corporate and personal information under relevant FOIA exemptions, but refused to apply the personal privacy exemption to AT&T itself. The FCC affirmed this result, but the Third Circuit reversed, holding that because corporations were included in the definition of "person," they also fell within the reach of the personal privacy exemption.

The Supreme Court, in an opinion authored by Chief Justice Roberts, reversed. Looking to the relevant statute, the Court stated that, while "person" was defined to include corporations, "personal" was not defined at all; thus, the term should be given its ordinary meaning. The Court recognized the term "personal" is ordinarily defined and used to refer to human beings. This is consistent with the general rule that the adjective form of a word ("personal") does not always incorporate the meaning of the underlying noun ("person").

Turning to the context of the statute, the Court noted "personal"—as used in the statute—described the kind of privacy information exempted by FOIA. Considered together rather than in isolation, the words "personal privacy" suggest privacy relating to human concerns. This understanding is bolstered by a review of other exemptions in FOIA. The first exemption to use the term "personal privacy" deals with medical records, which can only be claimed by individuals. In contrast, the exemption relating to trade secrets, which can be claimed by corporate entities, uses the term "person" instead. This distinct use of "personal" and "person" was consistent with the accepted understanding of legal authorities at the time that corporate entities did not possess privacy rights. Similarly, a memorandum from the Attorney General issued at the time the personal privacy exemption passed interpreted the exemption as covering individual, not corporate, rights.

In contrast, the Court noted AT&T produced no examples where personal privacy had been applied to a corporate entity. The Court also rejected AT&T's reference to examples in constitutional and common law precedent, stating that these examples were irrelevant to interpreting the statutory exemption at issue in the case. The Court therefore concluded the information at issue fell outside the scope of the FOIA personal privacy exemption.

Justice Kagan took no part in the consideration of the case.

***Milner v. Dep't of Navy*, 131 S. Ct. 1259 (2011)**

The Supreme Court held Exemption 2 to the Freedom of Information Act (FOIA), which protects from public disclosure material "related solely to the internal personnel rules and practices of an agency," encompasses only records relating to employee relations and human resource issues.

Glen Milner, a resident of Puget Sound, Washington, submitted a FOIA request for data and maps about explosives stored in a Naval base in Puget Sound. FOIA requires federal agencies to make government records available to the public

subject to nine exemptions. The Navy denied the request, invoking FOIA Exemption 2 and stating that disclosure of the explosives data and maps would threaten the security of the base and the community. The district court granted summary judgment for the Navy, and the Ninth Circuit affirmed.

Because of a circuit split, the Court granted certiorari, and reversed the decisions below in an opinion by Justice Kagan. The Court began by examining the text of Exemption 2 and other FOIA exemptions, which led it to interpret "personnel rules and practices" as limited to human resource matters. This interpretation was also reinforced by FOIA's purpose, which favored broad disclosure. Applying this definition of Exemption 2, the Court found explosives data is no way related to human resource issues such that Exemption 2 did not prevent disclosure of the data. The Court also noted, though, that other FOIA exemptions may cover the explosives data requested by Milner, so it remanded to let the Ninth Circuit address other FOIA exemptions.

Justice Alito concurred, explaining the explosives data was probably covered by FOIA Exemption 7(F), which permits withholding of "records or information compiled for law enforcement purposes" that, if disclosed, "could reasonably be expected to endanger the life or physical safety of any individual." Justice Breyer dissented, arguing the Court should have followed the consistent course of decision by other federal judges and agencies that applied Exemption 2 broadly to cover disclosure of any material that would risk circumvention of the law.

GOVERNMENT CONTRACTING

Gen. Dynamics Corp. v. United States, 131 S. Ct. 1900 (2011)

The Supreme Court held where the state-secrets privilege prevented trial of a defense to breach of contract, the proper remedy was to leave the parties where they were on the day they filed suit.

The Navy awarded General Dynamics Corp. ("General Dynamics") a multibillion-dollar stealth aircraft contract. When development of the aircraft fell behind and ran significantly over-budget, the Navy terminated the contract. General Dynamics filed suit in the Court of Federal Claims (CFC) challenging the termination. General Dynamics established a prima facie case that the Government's failure to share its "superior knowledge" about how to design and manufacture stealth aircraft excused General Dynamics' default. The Navy asserted the state-secrets privilege regarding to the superior knowledge defense and the CFC terminated further discovery on the issue.

After trial, the CFC ruled in the Navy's favor. The Federal Circuit reversed on an issue unrelated to the state-secrets privilege, but agreed that the state-secrets privilege made General Dynamics' superior-knowledge defense nonjusticiable. When the CFC again ruled for the Navy, the Federal Circuit affirmed.

The Supreme Court, in an opinion written by Justice Scalia, vacated the Federal Circuit's decision and remanded. The Court began by addressing its precedent regarding the state-secrets privilege. In *United States v. Reynolds*, 345 U. S. 1 (1953), the Court held plaintiffs who sued over the death of civilian contractors associated with a secret B-29 development project could not introduce evidence based on state secrets in their case. Justice Scalia distinguished language in *Reynolds* by noting *Reynolds* addressed admission of evidence. This case, Justice Scalia argued, did not involve evidentiary rules, but rather involved substantive law regarding the Court's common-law authority to fashion contractual remedies in Government-contracting disputes.

The majority then analogized to caselaw addressing contracts to spy, where the Court twice held that, because litigation of contracts to spy threatens to undermine national security, "[w]e leave the parties to an espionage agreement where we found them the day they filed suit." Similarly, full litigation of General Dynamics' defense would lead to the disclosure of state secrets. Additionally, the Supreme Court found the CFC's trial of the contract claim when the superior knowledge defense was nonjusticiable was unrealistic because it is "claims and defenses together that establish the justification, or lack of justification, for judicial relief." Therefore the Court held the contract was rendered unenforceable because the defense was nonjusticiable and the "parties will be left where they are."

Finally, the Court noted its holding was limited. First, the rule applies only when the party asserting the superior-knowledge defense supports the claim by enough evidence to make a prima facie case. Second, as a common-law opinion, the holding "is subject to further refinement where relevant factors significantly different from those before us here counsel a different outcome."

HABEAS CORPUS

***Cullen v. Pinholster*, 131 S. Ct. 1388 (2011)**

The Supreme Court held federal habeas corpus review under 28 U.S.C. section 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Thus, respondent was not entitled to federal habeas relief.

Scott Pinholster was convicted of first-degree murder in California. At the penalty phase, Pinholster's counsel did not call a psychiatrist. Pinholster was sentenced to death. Pinholster filed for state habeas relief, arguing that his trial counsel had failed to adequately investigate and present mitigating evidence during the penalty phase. The California Supreme Court denied relief. Pinholster then filed a federal habeas petition. The federal district court held an evidentiary hearing, considered new evidence that was adduced in that hearing, and granted Pinholster federal habeas relief. The en banc Ninth Circuit affirmed.

The Court reversed in an opinion by Justice Thomas. By a vote of 7-2 (with Justices Alito and Sotomayor dissenting), the Court first held the Ninth Circuit and district court erred in examining evidence that was outside the state court record. The Court noted the Antiterrorism and Effective Death Penalty Act (AEDPA) limited federal habeas review by using backward-looking language in 28 U.S.C. section 2254(d)(1): federal courts must ask whether the state court decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law." Therefore, the Court reasoned federal courts must examine the state-court decision at the time it was made under section 2254(d)(1), and this only allows review of the state-court record.

The Court then examined the state-court record and held, 5-4 (with Justices Ginsburg, Breyer, Kagan, and Sotomayor dissenting), that Pinholster was not entitled to federal habeas relief under AEDPA. It first ruled that the state court's decision—that Pinholster's trial counsel's performance was not deficient—was not an unreasonable application of clearly established federal law. The state-court record showed counsel made a reasonable strategic decision to evoke sympathy for Pinholster's mother, as Pinholster boasted about his criminal history during the guilt phase and counsel's investigation into mitigating evidence did not show that Pinholster had a significant mental disorder or defect. The Court alternatively determined that, even if counsel had been deficient, the state court was not unreasonable to conclude that Pinholster

suffered no prejudice, because the new evidence presented in state court was of questionable mitigating value.

Justice Alito concurred in part and concurred in the judgment. He argued federal habeas review under section 2254(d)(1) must account for new evidence admitted in federal court, but Pinholster was not entitled to relief even if that additional evidence were considered. Justice Breyer concurred in part and dissented in part. He agreed with the majority that federal habeas review under section 2254(d)(1) could only examine the state-court record, but he would have remanded to let the Ninth Circuit apply this legal principle to these facts. Justice Sotomayor dissented, first arguing review under section 2254(d)(1) could account for new evidence admitted in federal court. Justices Ginsburg and Kagan then joined Justice Sotomayor in arguing the state court was unreasonable to conclude that Pinholster received effective assistance of counsel.

***Bobby v. Mitts*, 131 S. Ct. 1762 (2011)**

The Supreme Court held a prisoner sentenced in state court under instructions requiring the jury to reject the death penalty prior to considering alternate sentences was not entitled to habeas relief because the instructions were not contrary to clearly established Federal law.

Harry Mitts approached and shot a man at his apartment complex. When the police arrived, he fired on them and retreated to his apartment, beginning a standoff. After police made entry and ended the standoff, the neighbor and one police officer were dead and two police officers were injured. An Ohio state court jury convicted Mitts of two counts of aggravated murder and two counts of attempted murder and sentenced Mitts to death for the aggravated murders.

After exhausting state review, Mitts sought habeas relief in federal court. He argued that the sentencing instructions presented to the jury were invalid. The Sixth Circuit agreed. It held that, because the sentencing instructions required the jury to reject the death penalty prior to considering alternate sentences, the instructions were contrary to *Beck v. Alabama*, 447 U.S. 625 (1980). In *Beck*, the Supreme Court found a failure to submit lesser-included offenses precluded application of the death penalty because it enhanced the "risk of an unwarranted conviction."

In a per curiam opinion, the Court reversed the Sixth Circuit. The Court noted its holding in *Beck* addressed the guilt/innocence phase of the trial, rather than the sentencing phase, and was concerned with the risk of an unwarranted conviction.

In this case, the jurors were instructed that if they did not find that the aggravating factors outweighed the mitigating factors they could not recommend the death penalty and would choose from two life sentence options. Therefore, the Court held the jurors could not have been improperly influenced by a "fear that a decision short of death would [result]" in Mitts freedom. The sentencing instructions were not contrary to Beck and habeas relief was not available because the state court decision was not contrary to "clearly established Federal law" as required by AEDPA.

HEALTH LAW

Astra USA, Inc. v. Santa Clara Cnty., 131 S. Ct. 1342 (2011)

In this case, the Supreme Court held private parties are not entitled to enforce the provisions of a statutorily-created form agreement between pharmaceutical companies and government entities.

The Medicaid Drug Rebate Program, created in 1990, governs drug manufacturers who participate in Medicaid and requires participating manufacturers to provide purchase rebates to the States based on "average" and "best" prices, which are calculated according to regulatory formulas. In 1992, Congress added the 340B Program, which requires manufacturers participating in Medicaid to offer drugs to covered entities—facilities caring for the poor—at discounted rates. These rates are determined based on the same average- and best-price calculations used in the Medicaid Drug Rebate Program. Participation in the 340B Program is governed by a form agreement (the "Agreement"), which lays out the statutory requirements of the program.

Santa Clara County (the "County"), which operates several entities covered by the 340B Program, sued nine pharmaceutical companies alleging they overcharged for drugs the County purchased under the 340B Program. The County claimed damages as a third party beneficiary to the Agreement. The district court dismissed the suit, finding the Agreement bestowed no enforceable rights on covered entities. The Ninth Circuit reversed, holding third-party-beneficiary suits are compatible with statutory objectives such as ensuring the drug companies' compliance and spreading the enforcement burden beyond government.

In an opinion by Justice Ginsburg, the Supreme Court reversed. The Court began by recognizing the statute itself does not allow for a private cause of action; instead, the Health Resources and Services Administration has been granted oversight authority with

power to order reimbursement or terminate manufacturer's participation in the program. The County conceded this point but argued its suit should nonetheless go forward because it was based on the Agreement rather than the statute. The Court disagreed. The Court determined the Agreement was a form contract that served primarily to enroll drug manufacturers into the 340B Program and spell out the terms of the statute and underlying regulations. The Court reasoned that, because the obligations under the Agreement and under the statute are identical, a suit to enforce the Agreement would be the same as a suit to enforce the statute. This conclusion was supported by the facts of the case, where the County's claims were based entirely on statutory obligations embodied in the Agreement, rather than any independent substantive obligation unique to the contract. The Court also rejected the Ninth Circuit's conclusion that third party beneficiary suits were an acceptable method of spreading the enforcement burden. The Court held this approach is inconsistent with the statutory framework, which centralizes enforcement power to avoid disjointed application of the closely related Medicaid Drug Rebate Program and 340B Program.

Justice Kagan did not participate in the resolution of this case.

PREEMPTION, ARBITRATION, AND CLASS ACTIONS

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1207 (2011)

The Supreme Court held the Federal Arbitration Act (FAA) preempts state law that renders arbitration agreements unconscionable if those agreements prohibit classwide arbitration.

AT&T Mobility LLC (AT&T) had a cellular telephone contract with the Concepcions, and the Concepcions sued AT&T over a fee dispute. Their suit was consolidated with a class action against AT&T. The Concepcion's contract with AT&T required arbitration but did not allow classwide arbitration. The district court denied AT&T's motion to compel arbitration finding that, under California law, the arbitration provision was unconscionable because it disallowed classwide arbitration. The Ninth Circuit affirmed, ruling that the FAA did not preempt California law.

By a vote of 5-4, the Court reversed and remanded in an opinion by Justice Scalia. The majority ruled state law that renders arbitration agreements unconscionable when those agreements prohibit classwide arbitration is preempted by the FAA, because these state laws stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The Court noted the FAA reflects a liberal federal

policy favoring arbitration, and that the FAA displaces state law that prohibits outright arbitration of a particular claim. The majority also noted forcing parties into classwide arbitration interferes with the fundamental attributes of arbitration.

Justice Thomas concurred, explaining he would have preferred to have decided the case based solely on the FAA's text instead of implied obstacle preemption. But he concurred in full to prevent a fractured opinion that would not have given lower courts guidance. Justice Breyer dissented and was joined by Justice Ginsburg, Sotomayor, and Kagan. Justice Breyer posited California's law fell squarely within the FAA's provision that allows courts to refuse to enforce arbitration agreements on grounds that exist "for the revocation of any contract," because California found all class action litigation waivers unconscionable—not just class action waivers in arbitration agreements.

PREEMPTION AND IMMIGRATION

Chamber of Com. of the U.S. v. Whiting, 131 S. Ct. 1968 (2011)

The Supreme Court held federal law did not preempt Arizona's law revoking an employer's license for employing unauthorized aliens and Arizona's requirement that employers use E-Verify, an internet-based system created by Congress that allows employers to check the work authorization status of employees.

The Chamber of Commerce and various businesses and civil rights organizations filed a preenforcement suit, arguing Arizona's licensing and E-Verify laws were preempted by federal law. The district court held Arizona's laws were not preempted. The Ninth Circuit affirmed.

The Court affirmed by a vote of 5-3. Chief Justice Roberts's majority opinion first found Arizona's licensing law was not expressly preempted by the Immigration Reform and Control Act (IRCA). While IRCA prohibits states from imposing civil or criminal sanctions on those who employ unauthorized aliens, IRCA's savings clause preserves state authority to impose sanctions through licensing and similar laws. The majority found that Arizona enacted a licensing law, and there was no indication in the savings clause's text that it should only apply to certain types of licensing laws. Nor was Arizona's licensing law impliedly preempted, according to the majority, because Arizona's procedures simply implement the sanctions that Congress expressly allowed the State to pursue through licensing laws. The Court also found Arizona's E-Verify law requirement was not preempted by the Illegal Immigration Reform and Immigration

Responsibility Act (IIRIRA). It reasoned there was no express preemption because the IIRIRA provision setting up E-Verify contained no language circumscribing state action. And the fact that IIRIRA limits when the federal government may require the use of E-Verify says nothing about what the States may do. Finally, Arizona's E-Verify requirement was not impliedly preempted by IIRIRA because the requirement does not obstruct any of the aims of the federal program.

Without filing an opinion, Justice Thomas concurred in part and concurred in the judgment. Justice Thomas did not join the parts of the majority opinion discussing implied preemption (in previous opinions, Justice Thomas has expressed the view that implied preemption should not exist). Justice Breyer, joined by Justice Ginsburg, dissented. Justice Breyer argued Arizona's law penalizing employers that employ unauthorized aliens did not fall within IRCA's savings clause. He reasoned the law was not actually a licensing law because it defined "license" very broadly. Justice Breyer also would have found the E-Verify requirement impliedly preempted, because he found a congressional purpose to make the E-Verify program voluntary. Justice Sotomayor dissented separately, reading IRCA's savings clause as only allowing state licensing laws to apply after a final federal determination that a person has violated IRCA. And she would have found the E-Verify requirement impliedly preempted because Arizona made a decision for Congress regarding use of a federal resource. Justice Kagan was recused.

PRISON LITIGATION

***Brown v. Plata*, 131 S. Ct. 1910 (2011)**

The Supreme Court held a three-judge court decision ordering the reduction of California's prison population was proper under the Prison Litigation Reform Act of 1995 (PLRA) and necessary under the Eighth Amendment.

The two lawsuits forming the basis of the appeal resulted from class action litigation on behalf of prisoners in California's prison system. In the suits, the prisoners asserted their constitutional rights were violated because prison overcrowding had led to unconstitutional inhumane treatment. Specifically, in *Coleman v. Brown*, a suit filed in 1990, the prisoners alleged that they were denied minimal mental health services and in *Plata v. Brown*, a suit filed in 2001, the prisoners alleged that they were denied adequate medical care. The prisoners in both suits alleged the deficiencies in the California prison system were due to an incarcerated population that was almost double the capacity of the prison facilities. Once the prisoners in each suit established that their Eighth Amendment rights were violated, the district court in Coleman appointed a Special Master and the district court in Plata appointed a Receiver to oversee remedial efforts. After overseeing the State's efforts to alleviate the problem, the Special Master and Receiver each reported back to the district court that the situation was deteriorating. The plaintiffs in both cases then moved, as authorized under PLRA, for a three-judge panel to be convened to order a reduction in the size of the prison population. The cases were consolidated and a single three-judge panel found the constitutional violations could not be remedied without a reduction in the prison population. The panel then ordered the State to reduce the population of its prisons by 137.5% within two years. The State appealed from the panel decision.

Justice Kennedy, writing for the Court, affirmed the lower courts' decisions. The Court found the panel was properly constituted under PLRA, noting that the State did not contest the appropriateness of the consolidation of the cases. The Court held: (1) the factual findings of the panel were reviewed under a clear error standard and the panel did not err in finding, by clear and convincing evidence, the constitutional violations were caused by overcrowding; (2) those violations could only be remedied by a reduction in the size of the prison population; and (3) such an order was the least intrusive means by which to correct the violation. The Court further held the State was given a reasonable time in which to correct the constitutional violations and that "reasonableness must be assessed in light of the entire history of the court's remedial efforts." Thus, the Court held recent plans adopted by the State to fix the violations did

not require the Court to impose a moratorium on new remedial orders before ordering a limitation of the prison population.

Utilizing a deferential standard of review, the Court found the trial court did not err in determining prison overcrowding was the primary cause of the constitutional violations. In so finding, the Court reviewed the record of the lower court and described the significant crowding problems in California prisons and the lack of prisoner access to adequate health care and mental health care. The Court rejected the State's argument that it was prohibited from introducing evidence of current conditions in the California prison system, finding that it was not factually-based. The Court then found the panel did not err in determining that no other remedy would fix the constitutional violations, agreeing with the lower court that the state's plan for out-of-state transfers of prisoners would not adequately relieve prison overcrowding and that construction of new facilities or hiring of additional employees to solve the problem were unrealistic possibilities. Further, the Court held the lower court did not err in finding a reduction in prison population the least intrusive means to resolve the constitutional violations because it was not overbroad and it provided the State flexibility in implementation. Finally, the Court held the population limit and time constraints imposed by the three-judge panel were reasonable und consistent with public safety and that the panel could later modify its order to allow the State more time to comply.

Justice Scalia, joined by Justice Thomas, dissented, arguing the Court's decision misinterpreted the PLRA and exceeded the constitutional powers allotted to the federal courts. Justice Scalia first asserted he plaintiffs did not allege system-wide Eighth Amendment violations. He then argued the panel's order was a structural injunction that improperly expanded upon the role of the federal courts.

Justice Alito, joined by the Chief Justice, dissented, arguing the panel exceeded its constitutional authority and its authority under the PLRA. Alito asserted the panel failed to consider current conditions in the prison system, the release of prisoners ordered by the panel was not the only remedy available to address the constitutional violation, and the panel failed to give adequate consideration to public safety concerns in its decision

QUALIFIED IMMUNITY

***Camreta v. Green*, 131 S. Ct. 2020 (2011)**

The Supreme Court held the Court may review a lower court's ruling on a constitutional issue at the request of a government official who has been granted immunity at the appellate level, but it may not do so in a case where the controversy is moot.

The Petitioners, a child welfare worker and deputy sheriff, were sued for damages under 42 U.S.C. section 1983 by the parent of a child who had been interviewed at her school by petitioners about allegations that her father had sexually abused her. Respondent alleged the interview was an unreasonable seizure under the Fourth Amendment. The district court granted the officials' motion for summary judgment. The Ninth Circuit affirmed, holding the officials violated the Fourth Amendment but were entitled to qualified immunity. The officials petitioned for review from the Supreme Court on the determination that their actions had violated the Fourth Amendment.

The Supreme Court, in an opinion by Justice Kagan, affirmed the determination of immunity and vacated the portion of the Ninth Circuit opinion relating to the Fourth Amendment, finding that the issue was moot. The Court first noted that, under Article III of the Constitution, it has the power to review a petition brought by officials who have won at the appellate level on the grounds of qualified immunity, but object to a lower court's determination that they violated the constitution. The Court further explained that, as a matter of judicial policy, such review is important because the lower court's ruling on constitutional issues can have a significant impact on the conduct of government officials and policies adopted. The Court noted the limited nature of its holding, explaining that it did not decide whether an appellate court could hear an appeal from a party who had won in the trial court on immunity grounds. The Court further explained the holding was not mandatory in nature, but merely explained what may be reviewed by the Supreme Court, not what must be reviewed. Having found that it could review the constitutional issues decided by the appellate court despite the grant of immunity, the Court determined it would not address those issues because the case was moot. Because the child had moved to another state and was only a few months away from being eighteen years old, the Court found it no longer had power to consider the constitutional issues in the case.

Justice Scalia concurred in the judgment, asserting the Court followed precedents, but explaining that in an appropriate case he would be willing to end the practice of hearing cases upon constitutional issues when the defendant has been granted qualified immunity.

Justice Sotomayor, joined by Justice Breyer, concurred in the judgment, agreeing with the majority that the case was moot, but asserting the Court need not have addressed the issue of whether an official can seek review after having been granted qualified immunity.

Justice Kennedy, joined by Justice Thomas, dissented. Justice Kennedy argued the Court should not examine the constitutional issues in a case in which the defendants won on grounds of qualified immunity because that the lower court's ruling is merely dicta, and should not provide a basis for Supreme Court review.

SECTION 1983

Skinner v. Switzer, 131 S. Ct. 1289(2011)

The Supreme Court held a convict's claim seeking DNA testing of crime-scene evidence was cognizable under 42 U. S. C. section 1983.

Henry Skinner was found by police at the murder scene of his girlfriend and her two sons. The police collected significant physical evidence from the crime scene but only tested a limited amount of the evidence, some of which implicated Skinner. Skinner's attorney did not seek further testing because he was afraid the DNA would implicate Skinner. Skinner was convicted by a Texas state court jury and sentenced to death for the murders.

After Texas passed a postconviction DNA testing statute, Skinner sought relief under the statue. The statute has two alternative threshold criteria. Testing is only available if either: (1) testing was not available at the time of the conviction or was not technologically capable of providing probative results; or (2) the evidence was not previously tested through no fault of the convict. The Texas Court of Criminal Appeals rejected Skinner's final motion under the statute because he had failed to meet the no-fault requirement. Skinner then brought a due process claim under section 1983 in federal court. The trial court dismissed Skinner's suit because, under Fifth Circuit precedent, postconviction requests for DNA evidence were cognizable only in habeas corpus, not under section 1983. The Fifth Circuit affirmed.

The Court considered two questions: (1) whether the federal court had subject-matter jurisdiction over Skinner's claim; and (2) whether Skinner's claim is cognizable under section 1983. Writing for the Court, Justice Ginsburg rejected Switzer's argument that Skinner's suit was jurisdictionally barred by the *Rooker-Feldman* doctrine because Skinner challenged the constitutionality of the Texas statute, not the Texas Court decisions construing the statute. *See*, *e.g.*, *Dist. of Colum. Ct. of App. v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fid. Trust Co*., 263 U.S. 413 (1923).

Addressing the second question, the court noted its previous precedent established that habeas was the exclusive route for a prisoner challenge only when the relief sought would necessarily imply the invalidity of the prisoner's conviction or sentence. The relief Skinner sought would only grant access to DNA testing. The testing could exculpate Skinner, but it also could be inconclusive or could further incriminate him. Therefore, the relief would not "necessarily" imply invalidity of Skinner's conviction and his claim is cognizable under section 1983.

The Court also distinguished Skinner's claim from a claim under *Brady v. Maryland*, 373 U.S. 83 (1963). Because a *Brady* claim necessarily yields evidence undermining a conviction, it, unlike Skinner's claim, is only cognizable in habeas.

Justice Thomas dissented, joined by Justices Kennedy and Alito. The dissent argued Section-1983 review would undermine restrictions imposed on federal habeas review because collateral review procedures, like the Texas Statute, concern the validity of the conviction. Justice Thomas warned the majority had "provide[d] a roadmap for any unsuccessful state habeas petitioner to relitigate his claim under [section] 1983: After state habeas is denied, file a [Section-]1983 suit challenging the state habeas process rather than the result."

***Connick v. Thompson*, 131 S. Ct. 1350 (2011)**

The Supreme Court held a district attorney's office may not be held liable under 42 U.S.C. section 1983 for failure to train its prosecutors based on a single violation of *Brady v. Maryland*, 373 U.S. 83 (1963), which requires prosecutors to disclose exculpatory evidence.

The Orleans Parish District Attorney's Office conceded that, in prosecuting John Thompson for attempted armed robbery, prosecutors violated *Brady* by failing to disclose a crime lab report. Because of his robbery conviction, Thompson elected not to testify at his later murder trial and was convicted. Thompson spent eighteen years in prison and fourteen years on death row. One month before his scheduled execution,

the lab report was discovered. Both of Thompson's convictions were vacated, and he was found not guilty in a retrial on the murder charge. Thompson then sued the district attorney's office under section 1983, alleging that the *Brady* violation was caused by the office's deliberate indifference to an obvious need to train prosecutors to avoid these constitutional violations. The district court held that Thompson did not have to show a pattern of similar *Brady* violations, and the jury found for Thompson and awarded him damages. The Fifth Circuit affirmed by an equally divided court.

The Court reversed, 5-4, in an opinion by Justice Thomas. The majority noted plaintiffs seeking to impose Section-1983 liability on local governments must prove that their injury was caused by action pursuant to official municipal policy, and acknowledged that a local government's decision not to train certain employees about their legal duties could count as such a policy. However, the failure to train must amount to deliberate indifference to the rights of persons with whom the untrained employees come into contact. And to establish deliberate indifference, one must ordinarily show a pattern of similar constitutional violations by untrained employees. Thompson did not contend that he proved such a pattern. Instead, he argued the *Brady* violation was an obvious consequence of failing to provide specific *Brady* training, and that such an obviousness showing could substitute for the requisite pattern of similar constitutional violations. The Court rejected this claim, reasoning *Brady* violations were not the obvious consequence of failing to provide *Brady* training because prosecutors receive training before entering the legal profession, often train on the job with more experienced attorneys, and must satisfy ongoing licensing standards and ongoing ethical obligations.

Justice Scalia, joined by Justice Alito, concurred to address five points raised by the dissent. Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented. The dissent argued the long-concealed prosecutorial transgressions were neither isolated nor atypical and therefore qualified as persistent and deliberately indifferent, such that the district attorney's office should bear responsibility under section 1983.

SECURITIES LAW

***Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011)**

The Supreme Court held a pharmaceutical company can make a material misrepresentation under section 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission Rules when it fails to disclose reports of adverse events related to one of its products, even if there are not a statistically significant number of those adverse events

Petitioner Matrixx Initiatives, Inc. ("Matrixx") is a pharmaceutical company that develops and distributes a brand of products under the name, "Zicam," which are comprised of drugs used to treat common cold symptoms. "Zicam Cold Remedy" was the Zicam product made the subject of this suit, and was alleged by Respondents to comprise approximately 70% of the Petitioner's sales. Respondents filed a securities fraud class action suit against Matrixx alleging that the company had made untrue statements about the risks associated with its products and had failed to disclose reports that consumers had lost their sense of smell after having used Zicam Cold Remedy. Matrixx moved to dismiss the complaint, arguing the plaintiffs had failed to plead that the misstatements or omissions were material. The District Court dismissed the complaint, holding the plaintiffs had not plead materiality because they had failed to show a "statistically significant correlation" between the use of the drug and the loss of smell. The Ninth Circuit reversed, holding materiality should be determined from the standpoint of a reasonable shareholder and therefore that an allegation of statistical significance was not necessary to establish materiality.

In a unanimous opinion by Justice Sotomayor, the Court affirmed. The Court noted the materiality requirement of section 10(b) is satisfied when there is a substantial likelihood that a reasonable investor would have viewed the omitted fact as significantly altering "the 'total mix' of information available." The Court noted such a determination is fact-specific and not subject to a bright-line rule. Thus, the Court rejected Matrixx's argument that a bright-line rule for materiality should be adopted in pharmaceutical cases, requiring a statistically-significant number of reports that a product is causing an adverse event. The Court explained the adoption of such a rule would necessarily be either over-inclusive or under-inclusive. The Court further pointed out that a lack of statistically significant data does not necessarily mean there is no reliable basis for experts to connect the product with an adverse event. The Court noted that, as a fact-specific inquiry into what a reasonable investor would find material, pharmaceutical manufacturers need not disclose all reports of adverse events

involving their products, however in applying the "total mix" standard to this case, the Court found that the materiality element had been adequately pleaded.

SOVEREIGN IMMUNITY

Sossamon v. Texas, 131 S. Ct. 1651 (2011)

The Supreme Court held states do not consent to waive sovereign immunity to suits for money damages under the Religious Land Use and Institutionalized Persons Act (RLUIPA) by accepting federal funding.

In *City of Boerne v. Flores*, 521 U.S. 507, the Court held that Congress's passage of the Religious Freedom Restoration Act (RFRA) exceeded Congress's authority under the Fourteenth Amendment. RFRA accorded religious exercise heightened protection from state and local interference by applying the compelling interest test to state and local actions that substantially burdened religious exercise. Subsequently, Congress passed a less expansive act—RLUIPA. RLUIPA applied the compelling interest test to two areas—land-use regulation and the treatment of institutionalized persons. RLUIPA's effect was conditioned on the acceptance of federal funding. Included in RLUIPA is an express private cause of action allowing a person to obtain "appropriate relief against a government" for violations of the act.

Harvey Leroy Sossamon III is imprisoned in Texas. He sued the State of Texas and prison officials under RLUIPA alleging that certain prison policies restricted inmates' attendance of religious services. Sossamon sought both injunctive and monetary relief. The District Court held that sovereign immunity barred the claims for monetary relief and the Fifth Circuit affirmed.

Writing for the majority, Justice Thomas began by noting a waiver of sovereign immunity must be unequivocally expressed in a statute in order to bind a state. Though RLUIPA waives immunity from suit for some relief, Justice Thomas held "appropriate relief" is ambiguous about the type of relief available. "Strictly construing" appropriate relief "in favor of the sovereign," the majority held it does not include suits for money damages against a state.

The majority also rejected Sossamon's argument that 42 U.S.C. section 2000d-7 waived immunity for suits under RLUIPA for money damages. The court noted section 2000d-7 only applied to statutes prohibiting discrimination. Because RLUIPA did not prohibit discrimination, but only prohibited substantial burdens on religious

exercise, it was not unequivocally an antidiscrimination statute and section 2000d-7 did not put states on notice of a waiver of immunity.

Justice Sotamayor, joined by Justice Breyer, dissented. The dissent asserted that it was not clear why "appropriate relief" was too ambiguous to waive sovereign immunity with respect to damages but clear as to injunctive and other forms of equitable relief. Justice Sotamayor argued this was contrary to the background legal principle that equitable relief is only available after a remedy at law has been determined inadequate. Justice Sotamayor also argued the majority's holding undermined the purpose of RLUIPA. Under the majority rule, a state could "shield unlawful policies and practices from judicial review in many cases" by, for example, "transferring prisoners from the institution where the alleged violation took place prior to adjudication on the merits."

Justice Kagan took no part in the decision.

WATER LAW

Montana v. Wyoming, 131 S. Ct. 1765 (2011)

In this interstate dispute, the Supreme Court held Montana's complaint—that efficiency improvements by Wyoming water users improperly reduced the water available to Montana water users—failed to state a claim for breach of a water rights compact.

In 1951, Wyoming, Montana, and North Dakota entered the Yellowstone River Compact (the "Compact") to allocate water rights in the Yellowstone River system. Among other things, the Compact: (1) protects the rights of water users existing as of Jan 1, 1950; (2) allows for supplemental water supplies to serve those users; and (3) divides any remaining water in fixed percentages between Wyoming and Montana.

In 2008, Montana filed a complaint against Wyoming for exceeding its allocation of certain tributary rivers covered by the Compact. Wyoming moved to dismiss the complaint, but the special master appointed by the Supreme Court largely disagreed with Wyoming, although he did conclude that Montana failed to state a claim for water lost to the river system due to efficiency improvements by Wyoming water users. Montana filed exceptions to this ruling; the others were unchallenged.

The Supreme Court, in an opinion by Justice Thomas, affirmed the special master's ruling. Reviewing the terms of the Compact, the Court determined it

incorporated the doctrine of appropriation, a common law doctrine governing water rights. Thus, the Court agreed with the special master that Wyoming's users did not improperly expand their rights at Montana's expense so long as they withdrew the same amount of water for the same acreage. Allowing a change in irrigation method is consistent with other types of changes allowed under the law of appropriation, which focuses instead on changes to the point at which water is diverted and the purpose or place water is used. It is also consistent with the rule of recapture, which under both Wyoming and Montana law allows the user to capture and reuse properly diverted water.

The Court likewise rejected Montana's alternative argument that the Compact altered the applicable law by defining "beneficial use" in terms of the amount of water depleted, such that increased water depletion violates the Compact. According to the Court, the definition refers to the type rather than the amount of use, which is consistent with the context of the Compact and the general understanding of the term "use" in water law. Had the Compact been intended to focus on the amount of depletion, it could have said as much, like other Compacts from the same time period.

In dissent, Justice Scalia contended the sole question at issue is whether "beneficial use" covers the amount of water diverted or the amount of water depleted. Article II(H) of the Compact defines "beneficial use" in terms of water "depleted when usefully employed by the activities of man." The Compact's focus on depletion rather than diversion gives users right to a fixed amount of net consumption. Thus, a reduction in water available due to efficiency increases would fall afoul of the Compact. This interpretation is bolstered by the way the Compact's authors distinguished between depletion and diversion throughout the document. The Court's interpretation, by contrast, gives no meaning to the use of the term "depleted."

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

APPELLATE PROCEDURE

CMH Homes v. Perez, 340 S.W.3d 444 (Tex. 2011) (per curiam)

Texas Civil Practice and Remedies Code section 51.016 does not permit interlocutory appeal from an order appointing an arbitrator.

In 2002, Adam Perez bought a manufactured home from CMH Homes ("CMH"). Perez financed the home through CMH under an installment contract that contained an arbitration clause. In 2009, Perez sued CMH and others for fraud and violations of the Texas Debt Collection Act. While both sides agreed that the case needed to be arbitrated, they could not agree on an arbitrator. Perez filed a motion to compel arbitration. After a hearing, the trial court issued an order appointing Gilberto Hinojosa as arbitrator. Although the order was titled "Order on Plaintiff's Motion to Compel Arbitration," the only directive in the order was to name an arbitrator to preside over the dispute.

CMH filed an interlocutory appeal under Texas Civil Practice and Remedies Code section 51.016 challenging the court's appointment. Although it did not file a separate mandamus petition, CMH also asked the appellate court to consider its appeal as a mandamus proceeding. The San Antonio Court of Appeals held an interlocutory appeal was unavailable under section 51.016 and dismissed the case for want of jurisdiction.

In this case of first impression addressing the scope of section 51.016, the Texas Supreme Court held the statute does not allow an interlocutory appeal of an order appointing an arbitrator. Section 51.016 provides that a party may appeal a judgment or interlocutory order "under the same circumstances that an appeal from a federal district court's order or decision would be permitted by 9 U.S.C. Section 16." This federal statute, in turn, permits the appeal of certain types of orders and expressly denies the appeal of other specified types of orders; the statute is silent as to orders appointing an arbitrator. Consequently, section 51.016 does not provide appellate jurisdiction in this case.

The Court also rejected CMH's argument that the order compelled arbitration, which is a type of order listed in section 16: "While it may be argued that by appointing

an arbitrator the order implicitly compels the parties to arbitration, the order does not explicitly grant Perez's motion to compel and does not explicitly compel the parties to arbitrate their dispute. There is no question that both parties agreed to arbitrate their dispute; the open question remaining was who would serve as the arbitrator. The purpose of the order was to answer that question."

Finally, the Court also held the court of appeals erred in failing to consider the appeal as a request for mandamus relief. Noting that it had previously treated a petition for review as a petition for writ of mandamus where the appellant specifically sought mandamus relief, the Court held CMH need not have filed a separate mandamus petition; rather, CMH's request for mandamus relief was sufficient to preserve the issue for appeal. Thus, the Court remanded the case to the court of appeals to consider the appeal as a petition for writ of mandamus.

ARBITRATION

In re Rubiola, 334 S.W.3d 220 (Tex. 2011)

Nonsignatories can compel an arbitration agreement that makes them parties to that agreement and which involve a dispute that falls within the scope of the arbitration provision.

Brian and Christina Salmon purchased a home from Greg and Catherine Rubiola using a standard Texas real estate sales contract. That form did not contain an arbitration provision. J.C. Rubiola served as the property broker. The Salmons then financed their home through Rubiola Mortgage Company, a company owned by Greg and J.C. Rubiola. The agreement between the Salmons and Rubiola Mortgage included an arbitration provision that expressly applied to the Salmons, Rubiola Mortgage, and "any of the parties as part of this transaction." Later, the Salmons sued the Rubiolas for fraud and DTPA violations in regard to the sale of the house. The Rubiolas filed a motion to compel arbitration, which the trial court denied. The Rubiolas filed a petition for writ of mandamus, which the San Antonio Court of Appeals denied.

The Supreme Court considered whether nonsignatories to an arbitration provision could compel arbitration of a dispute that is related to the agreement that contained the arbitration agreement. Justice Medina authored the Supreme Court's opinion, analyzing the parties to and scope of the arbitration agreement. He initially noted nonsignatories to an arbitration agreement generally cannot compel arbitration. However, in this case, the financing agreement expressly provided that both J.C. Rubiola

(a signatory) and Greg Rubiola (a nonsignatory) are parties to the arbitration provision. So Greg Rubiola had the right to request arbitration.

Justice Medina next considered whether the dispute fell within the scope of the arbitration provision. In the financing agreement, the Salmons promised to arbitration disputes arising from the financing agreement and "any other agreements between or among any of the parties as part of this transaction." Moreover, the arbitration provision states arbitrable disputes include "any and all controversies between the parties of whatever type or manner, including without limitation, all past, present and/or future credit facilities and/or agreements involving the parties." This broad language casts a wide net, capturing the Salmons' dispute with the Rubiolas regarding the condition of the house, which is the subject of the Salmons' suit. Therefore, Justice Medina held the Rubiolas could compel arbitration of the Salmons' claims. The Supreme Court conditionally granted the Rubiolas' petition for writ of mandamus.

***Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011)**

The Texas General Arbitration Act (TAA) does not prohibit parties from agreeing to judicial review of arbitration awards and the Federal Arbitration Act (FAA) does not preempt the TAA in regard to such agreements.

Margaret Quinn entered into an employment contract with Nafta Traders, Inc. ("Nafta Traders"). That contract provided that if a dispute arose between the parties, they would submit the dispute to binding arbitration. The parties further agreed that an arbitrator is prohibited from issuing an award based upon reversible error or for a cause of action that has not been recognized under state or federal law. When Nafta Traders terminated Quinn's employment, citing economic conditions, Quinn claimed sex discrimination. The dispute was arbitrated and the arbitrator awarded Quinn approximately $200,000 in damages. Quinn filed a motion for the trial court to confirm the award under the TAA. Nafta Traders asked the trial court to set aside the award, arguing the award was legally incorrect and was the result of reversible error. The trial court simply confirmed the award without expressly addressing Nafta Traders' arguments. The Dallas Court of Appeals affirmed, holding that, like the FAA, the TAA precludes parties from agreeing to expand the scope of judicial review of arbitration awards.

The Supreme Court analyzed two issues: (1) whether the TAA prohibit parties from agreeing to judicial review of an arbitration award; and (2) whether the FAA, which prohibits such agreements, preempts the agreement. Justice Hecht authored the majority opinion, disagreeing with the United States Supreme Court's interpretation in

Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 578 (2008) of provisions of the FAA also found in the TAA. In *Hall Street*, the United States Supreme Court held sections 9, 10, and 11 of the FAA preclude parties from agreeing to submit an arbitration award for judicial review. Justice Hecht disagreed with the reasoning of the United States Supreme Court. Justice Hecht explained these terms, as included in the TAA, reflect the strong public policy to permit parties to contract to arbitrate their disputes and to prevent state impediments to that agreement. As such, the terms of the parties' arbitration agreement should be controlling and the TAA is not construed to limit that parties' right to contract as they see fit. So if parties agree to broaden the scope of judicial review of an arbitration award to prevent awards based upon reversible error, the TAA does not preclude such an agreement.

Justice Hecht also held the FAA does not preempt the TAA in regard to permitting agreed judicial review of arbitration awards. The FAA preempts only state-law action that impedes an arbitration agreement. As the majority construes the TAA, the state procedure permitting agreed judicial review fosters—rather than impedes—the enforcement of the terms of the parties' arbitration agreement. The majority, therefore, reversed the judgment of the Dallas Court of Appeals and remanded the case to the trial court for consideration of Nafta Traders' complaints with the arbitration award.

Chief Justice Jefferson authored a concurring opinion, to which Justices Wainwright and Lehrmann joined. Chief Justice Jefferson joined the majority holding that the agreement for judicial review is enforceable under the TAA. But the Chief Justice noted such an agreement reflects a potential deficiency in the judicial system that may be leading litigants to opt for arbitration. Chief Justice Jefferson urged adoption of more efficient procedures to improve the litigation process.

***Ellis v. Schlimmer,* 337 S.W.3d 860 (Tex. 2011) (per curiam)**

> Once the party seeking arbitration establishes the existence of a valid arbitration agreement, a strong presumption favoring arbitration arises and the burden shifts to the party opposing arbitration to raise an affirmative defense to the agreement's enforcement.

In their lawsuit involving a real-estate transaction gone wrong, Veronica Ellis and others sought to enforce the arbitration clause contained in the Schlimmers' real-estate contract with Ellis. In response, the Schlimmers claimed waiver and estoppel and argued the language of the agreement did not cover the dispute between the parties. After the trial court denied Ellis's motion, she filed an interlocutory appeal under section

171.098(a)(1) of the Civil Practice and Remedies Code, a provision of the Texas Arbitration Act (TAA). Although the Schlimmers did not contest its jurisdiction, the Corpus Christi Court of Appeals sua sponte dismissed the appeal, holding it had no jurisdiction because Ellis's motion to compel failed to invoke either the TAA or the Federal Arbitration Act (FAA).

The Texas Supreme Court reversed, holding the Schlimmers had the burden to show that Texas state law or other statutory requirement would prevent enforcement of the arbitration agreement under the TAA so that the FAA would preempt the Texas act. The court of appeals erroneously placed the burden to establish the absence of any defenses to arbitration on Ellis. Under these circumstances, its decision contravened the strong policy favoring arbitration

COMPENSATION FOR WRONGFUL IMPRISONMENT

In re Smith, 333 S.W.3d 582 (Tex. 2011) (orig. proceeding)

Texas law permits the compensation of a probationer for the time period that he serves after his parole is revoked based on a wrongful conviction.

In 1970, Billy Smith was convicted of robbery and sentenced to twenty-five years. In 1983, he was released on parole. In 1986, Smith was wrongfully-convicted of aggravated sexual assault and sentenced to life imprisonment; in addition, his parole on the robbery conviction was revoked. He began serving this sentence on August 8, 1986. On June 11, 1987, his sentence on the robbery conviction was discharged, but he remained in prison under the life sentence for sexual assault. Years later, a trial court determined that Smith was wrongfully-convicted of the sexual assault. He was released from custody on July 7, 2006.

The issue before the Court was whether the Texas Wrongful Imprisonment Act (now known as the "Tim Cole Act") permitted compensation for the time Smith served from August 8, 1986 (the date he began serving his wrongful conviction) to June 11, 1987 (the date his robbery conviction was discharged). When the Texas Comptroller of Public Accounts denied Smith's request to be compensated for this period, he filed a writ of mandamus to the Texas Supreme Court, which held that the compensation was warranted.

The Texas Comptroller argued the concurrent-sentence restriction found in section 103.001(b) of the Tim Cole Act voided Smith's compensation for this ten-month period. This restriction states that a person "is not entitled to compensation . . . for any

part of a sentence in prison during which the person was also serving a concurrent sentence" for a valid conviction. Smith argued that "in prison" modified "sentence" and thus did not include parole. In other words, that Smith would have been on parole for the robbery during this ten-month period did not constitute a concurrent sentence. The Texas Supreme Court agreed, citing an attorney-general (AG) opinion involving compensation for a drug conviction of a probationer in the notorious Tulia case (see Op. Tex. Att'y Gen. No. GA-0531 (2007)). In citing this AG opinion, the Court found no substantive differences existed between probationers and parolees. Moreover, the concurrent-sentence restriction does not apply when the wrongful conviction is the cause of the person serving a concurrent sentence in prison. Therefore, the Supreme Court remanded the case to the Comptroller to adjust Smith's compensation in accordance with this opinion.

CONTEMPT

In re Reece, No. 09-0520, 2011 WL 2112786 (Tex. May 27, 2011) (orig. proceeding)

> Lying in a deposition is not constructive contempt unless that conduct obstructs the court's performance of its duties.

Coy Reese lied while testifying by deposition. One of the parties filed a motion for sanctions against Reese, seeking attorney fees and costs. But sua sponte, the trial court found Reece committed criminal contempt. The trial court sentenced him to sixty days of confinement. Reece challenged his confinement by seeking a writ of habeas corpus in the Dallas Court of Appeals. That court ruled it lacked jurisdiction. Reece then sought habeas relief from the Court of Criminal Appeals. That court also declined jurisdiction and referred Reece to seek relief before the Texas Supreme Court.

While Reece had initially sought habeas relief, the Supreme Court considered whether it should order Reece's release by a mandamus proceeding. Justice Guzman authored the Court's opinion and held that an act must impede, embarrass, or obstruct the court in the discharge of its duties in order to constitute constructive contempt—contempt that occurs outside the presence of the court. Justice Guzman reasoned that, while Reese's conduct was reprehensible, there was nothing in the record indicating it obstructed the court in the performance of its duties. As such, Reece did not commit criminal contempt. Justice Guzman conditionally granted the writ of mandamus.

Justice Johnson dissented, explaining Reece's petition sought the form of relief that reflects a habeas proceeding, not a petition for writ of mandamus. Therefore, Reece is not entitled to the relief ordered by the majority.

Lamenting the convoluted structure of Texas court jurisdiction, Justice Willett also dissented, joined by Justice Johnson in part. Justice Willett concluded that, because the Supreme Court does not have habeas jurisdiction, and mandamus is not the proper remedy, the case should be returned to the Court of Criminal Appeals.

CONTRACT LAW

Allen Keller Co. v. Foreman, No. 09-0955, 2011 WL 1456702 (Tex. April 15, 2011)

> Because a general contractor was working under a contract that required strict compliance and had no discretion to vary from its terms, the contractor had no duty to rectify a dangerous condition. In addition, because the contractor did not control the premises and the property owner knew about the condition, the contractor owed no duty to warn about it.

Courtney Foreman drowned when the vehicle in which she was riding rolled down an embankment and into the Pedernales River. The driver had momentarily lost control of the car, which drove through a fifteen-foot gap between the road's guardrail and the embankment. This gap was the product of a construction contract between the Allen Keller Company ("Keller") and Gillespie County (the "County"). The County hired Keller to work on several road construction projects intended to allay flooding in the area. The project at issue in this case required Keller to excavate an embankment and to erect a concrete pilot channel next to a one-lane bridge spanning the Pedernales River. This was the same embankment involved in the Foreman drowning.

The contract between Keller and the County had several provisions whose meaning was hotly contested after Foreman's surviving family sued Keller and others for wrongful death. First, the contract required Keller to adhere to the engineering specifications produced by the County's chosen engineering firm, O'Malley Engineers ("O'Malley"). It also expressly required Keller to do its work in absolute accordance with the contract documents. Finally, it provided that, when Keller finished its work, a representative of O'Malley would inspect the site and certify that Keller had completed the work according to specifications. There was undisputed evidence showing that O'Malley's representatives were at the work site every day assessing Keller's work and progress.

As to Foreman's only claim of premises defect against it, Keller moved for summary judgment, arguing that it that it owed no duty to Foreman and that its actions were not the proximate cause of her death. The trial court granted summary judgment. The San Antonio Court of Appeals reversed, holding that: (1) Keller failed to address whether it created a dangerous condition; (2) it was foreseeable that a motorist might deviate from the road even when driving with reasonable care; (3) the Foremans presented sufficient evidence to raise a question of fact to support their claim that Keller created a dangerous condition at the job site; and (4) Keller had not established as a matter of law that it did not proximately cause the accident that led to Courtney's death.

The Texas Supreme Court reversed, holding the contract between Keller and the County exonerated Keller from a duty to rectify the site conditions or to warn of them. The contract required absolute compliance with the contract specifications and summary judgment evidence showed that any deviation from the specifications could have jeopardized the project's federal financing. In addition, O'Malley certified Keller's compliance with contract specifications and the County accepted and paid Keller for the work. Because Keller had no discretion in the duties and specifications required under the contract, it had no duty to rectify the fifteen-foot gap. Finally, Keller had no duty to warn of the gap because it did not own the property, and the actual owner (the County) was aware of conditions at the site. For these reasons, the Supreme Court reversed the judgment of the court of appeals and rendered judgment in favor of Keller.

***Basic Cap. Mgmt. Inc. v. Dynex Commercial Inc*, No. 08-0244, 2011 WL 1206376 (Tex. Apr. 1, 2011)**

A parent company can be a third-party beneficiary of a loan commitment involving its subsidiaries when the evidence shows the parent was using the subsidiaries as a conduit for its own business ventures. To be entitled to seek lost profits for breach of a loan commitment, a borrower need only prove the lender knew the nature—rather than the specifics—of the borrower's intended use of the funds.

A parent company, Basic Capital Management, Inc. ("Basic") managed two real estate investment trusts, American Realty Trust, Inc. (ART) and Transcontinental Realty Investors, Inc. (TCI), in which Basic owned stock. On behalf of ART and TCI, Basic negotiated with Dynex Commercial, Inc. ("Dynex") to obtain funding for several commercial real estate investments. In the loan commitment between Dynex and Basic, Dynex required that the financing transaction fund single-asset, bankruptcy-remote

entities (SABREs) ART and TCI would own, enabling Dynex to recover its collateral more easily in the event of a default.

Dynex at first funded the SABREs, but stopped funding when market conditions changed. Basic, ART and TCI then sued Dynex for breach of contract, seeking lost profits. A jury found for the plaintiffs and awarded lost profits to both Basic and the trusts. The trial court granted Dynex's motion for judgment notwithstanding the verdict. The Dallas Court of Appeals affirmed.

The Supreme Court granted the petition to consider whether ART and TCI were third-party beneficiaries of the financing agreements under the terms of the loan commitment. The Court also considered whether lost profits is a type of consequential damages Basic can recover for breach of contract.

Justice Hecht authored the opinion. He held ART and TCI were third-party beneficiaries as a matter of law. Based upon the uncontroverted evidence and the language of the loan commitment, the parties agreed to fund financing for ART's and TCI's projects through the SABREs. This was a term of the loan commitment Dynex required and which benefited Dynex. As such, Dynex was well aware the SABREs were being used a conduit for ART's and TCI's commercial real estate investments. Justice Hecht also held that Basic may recover lost profits if, on remand, Basic proves an amount of lost profits. Justice Hecht explained that, to seek recovery of lost profits for breach of a loan commitment, a borrower must first prove only that the lender knew the nature—rather than the specifics—of the borrower's intended use of the funds. In the present case, Dynex knew Basic was borrowing money to finance ATC's and TCI's commercial and multi-family real estate projects. That is sufficient to permit Basic to seek recovery of lost profits as consequential damages. The Supreme Court, therefore, reversed the Dallas Court of Appeals and remanded the case to that Court for consideration of the evidence regarding the amount of lost profits.

***Italian Cowboy Partners Ltd. v. Prudential Ins. Co. of Am.*, No. 08-0989, 2011 WL 1496799 (Tex. Apr. 15, 2011)**

To preclude a claim for fraudulent inducement, the disclaimer-of-reliance clause must be clear and unequivocal

James and Francesco Secchi negotiated a lease with Prudential Insurance Company of America ("Prudential") through its property manager Prizm Partners ("Prizm") for the Secchis' newest location of its restaurant, "Italian Cowboy." During negotiations, Fran Powell of Prizm told the Secchis that the property had "no problem"

and that "there had been nothing wrong with the place at all." After seven rewrites, the Secchis signed the lease, which included a merger clause and a disclaimer-of-representations clause, which stated that Prudential and Prizm had not made any representations or promises about the property other than those contained within the lease. Shortly after beginning the remodel of the leased space, the Secchis learned that a foul odor often permeated the area. While Prudential, Prizm, and the Secchis all tried to fix the problem, the odor persisted and doomed the restaurant. When the Secchis learned that Powell had been aware of the issue all along, they closed the Italian Cowboy and filed suit, seeking actual damages and rescission of the lease and alleging fraud, breach of implied warranty, and constructive eviction. Prudential countered by claiming breach of contract. The case was tried to the bench and the trial court entered judgment for the Secchis, awarding over $600,000 in damages. The trial court also rescinded the lease. The Eastland Court of Appeals reversed.

The Supreme Court reviewed several issues, including whether a disclaimer-of-representations clause conclusively negates the reliance element of a fraud claim. The Supreme Court also considered whether the lessor's representations constituted material factual representations to implicate fraud. Finally, the Court evaluated whether Italian Cowboy properly recovered for breach of an implied warranty of suitability and

Justice Green authored the majority opinion. After considering the contract as a whole, and focusing upon the disclaimer-of-representation and merger clauses, Justice Green concluded the parties intended only to agree to a merger clause and did not intend to disclaim reliance on any representation. Justice Green noted Texas law permits parties to disclaim reliance, but that disclaimer must be clear and unequivocal. Simply disclaiming the existence of representations is not precise enough to constitute a clear and unequivocal disclaimer of reliance, especially in light of the uncontroverted testimony that Powell had told the Secchis that there were no problems with the property. Justice Green next considered whether Powell's statements were factual and material. Because these statements addressed an objective factor and Powell had one-sided knowledge about the premises, Justice Green concluded her statements were material and factual. Justice Green evaluated whether the lease obligated the Secchis to repair the defect, absolving Prudential of its obligation to warrant the suitability of the premises. The Court concluded that, because the defect was latent, and remedying the defect required alternations to the premises the Secchis were not permitted to make, Prudential maintained the duty to provide restaurant space that did not suffer from foul odors.

Finally, Justice Green affirmed the trial court's damages awards, including rescission of the lease, the capital invested, the Secchis' $81,000 worth of time and

effort, the debt Italian Cowboy incurred (offset by the value of Italian Cowboy's existing assets), and over $27,000 in interest the Secchis would have earned if they had invested their resources in a different venture. Based upon these holdings, the Supreme Court reversed the judgment of the Eleventh Court of Appeals, entered judgment for Italian Cowboy and the Secchis and against Prudential, and remanded the case to the court of appeals for consideration of additional issues.

Justice Hecht dissented, joined by Justice Guzman. Justice Hecht would hold that Italian Cowboy was a sophisticated business and represented by counsel. So its contractual representation as a matter of law foreclosed the fraud claim. Justice Hecht reasoned that if the parties had agreed there were no representations, there could be no reliance.

DISCOVERY

In re Does, 337 S.W.3d 862 (Tex. 2011) (orig. proceeding) (per curiam)

A court may not order pre-suit discovery by agreement of the witness over the objections of other interested parties without first making the findings required by Texas Rule of Civil Procedure 202.4

Two corporations owned by Phillip Klein sought the identities of two bloggers who he claimed had violated copyright laws, invaded his privacy, and defamed him on the internet. To this end, Klein filed a Rule 202 petition for pre-suit discovery, requesting the identities of the bloggers from their blog host, Google. The petition also named the two bloggers (the "Relators"). After being served and without a hearing, Google agreed to respond to a subpoena duces tecum and gave relators notice of its receipt of the subpoena. Relators filed a motion to quash, which the trial court denied. The Beaumont Court of Appeals denied mandamus relief.

The Texas Supreme Court granted the mandamus petition. Among several arguments, relators argued the trial court abused its discretion by failing to comply with Rule 202.4(a), which requires a trial court to make one of two findings for a deposition to be taken: (1) that allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or (2) that the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure. The trial court made neither finding and did not conduct a hearing. Moreover, these findings cannot be implied to support

the order compelling discovery. Accordingly, the Supreme Court ordered the trial court to grant relators' motion to quash and to vacate the discovery order.

EMPLOYMENT

Travis Cent. Appraisal Dist. v. Norman, No. 09-0100, 2011 WL 1652133 (Tex. Apr. 29, 2011)

Based upon the Legislature's amendment of Texas Labor Code section 504 , political subdivisions are immune from retaliatory discharge claims brought under Texas Labor Code section 451 (the "Anti-Retaliation Law")

The Travis Central Appraisal District (Appraisal District) hired Diane Lee Norman as a probationary employee, but discharged her six months later after she was injured on the job. Norman sued the Appraisal District under the Anti-Retaliation Law, claiming she was fired in retaliation for making a workers' compensation claim. The Appraisal District filed a plea to the jurisdiction, which the trial court denied. On interlocutory appeal, the Austin Court of Appeals affirmed.

The Supreme Court considered whether its prior holding in *City of LaPorte v. Barfield*, 898 S.W.2d 288, 298–99 (Tex. 1995) is controlling in light of the Legislature's amendment of section 504. Justice Medina, who authored the opinion, explained that, in *Barfield*, the Supreme Court had held that a political subdivision of the state is a "person" under the Anti-Retaliation Law, thereby waiving sovereign immunity for claims brought under it. But in 2005, the Legislature amended section 504, including a provision that nothing in section 504 waives sovereign immunity. Justice Medina concluded that this broadly-worded provision clouded the clear waiver of sovereign immunity that the Supreme Court had found in *Barfield*. Without a clear waiver of immunity, Justice Medina concluded that no such waiver exists. The Supreme Court therefore reversed the Austin Court of Appeals' judgment and dismissed Norman's lawsuit.

***Roccaforte v. Jefferson Cnty.*, No. 09-0326, 2011 WL 1661445 (Tex. April 29, 2011)**

Texas Local Government Code section 89.0041's notice-of-suit provision is not jurisdictional; therefore, dismissal depends on whether the governmental entity actually received a timely and proper notice of suit. In addition, a trial court's failure to stay the proceedings during the pendency of the interlocutory appeal makes the final judgment merely voidable, not void.

Former Chief Deputy Constable Larry Roccaforte sued Jefferson County (the "County") and Constable Jeff Greenway, alleging that his wrongful termination deprived him of rights guaranteed by the Texas Constitution. Roccaforte provided the presuit notice under Local Government Code section 89.0041, but did so by personal service of process, rather than registered or certified mail as the statute contemplates. The County and Constable Greenway filed their answers and conducted substantial discovery. The County also filed a plea to the jurisdiction, asserting that Roccaforte did not give proper notice of the suit. After hearing the County's plea to the jurisdiction, the trial court indicated it would sustain it, but did not immediately sign an order. The case then proceeded to trial against Greenway alone, and the jury awarded damages to Roccaforte. Afterwards, the court signed the order granting the County's plea to the jurisdiction, and Roccaforte filed his notice of interlocutory appeal of the order, even though the proceedings below were not stayed. Greenway then moved for judgment notwithstanding the verdict (JNOV), which the trial court granted as to Roccaforte's property interest and First Amendment retaliation claims but denied as to his claimed liberty interest violation.

The trial court then rendered a purported final judgment for Roccaforte and awarded damages, attorney fees, and costs. Greenway appealed, and Roccaforte cross-appealed, raising as his only issues complaints regarding the trial court's JNOV on his claims against Greenway. The Beaumont Court of Appeals affirmed in part and reversed in part, rendering judgment that Roccaforte take nothing. As for Roccaforte's interlocutory appeal, the Beaumont appellate court concluded that Roccaforte's failure to notify the County of the suit by registered or certified mail mandated dismissal of his suit against the County, but not because the trial court lacked jurisdiction. Accordingly, the court modified the dismissal order to reflect that dismissal was without prejudice and affirmed the order as modified.

The Texas Supreme Court addressed two issues regarding the interlocutory appeal: (1) whether Local Government Code section 89.0041's notice-of-suit provision is jurisdictional by virtue of Texas Government Code section 311.034, and (2) whether the trial court's failure to stay the proceedings during the pendency of the interlocutory

appeal made the final judgment void or merely voidable. The Court held county officials who receive notice in time to answer and defend against a claim are not prejudiced, therefore the case should not be dismissed for failure to provide notice by registered or certified mail. In so holding, the Court rejected the County's argument that Government Code section 311.034 made Roccaforte's failure to comply with Local Government Code section 89.0041's notice requirements jurisdictional. The Court noted the language of Local Government Code section 89.0041 reflects no legislative intent to make the notice provision jurisdictional. Moreover, Government Code section 311.034 addresses the prerequisites to filing suit, not the post-filing notice requirements. Accordingly, the Supreme Court reversed the court of appeals' judgment as to Roccaforte's claims against the County and remanded the case to the trial court for further proceedings.

As a fundamental matter, the Supreme Court also held the trial court's rendition of final judgment while the interlocutory stay was in effect was voidable, not void. Essentially, the trial court signed a final judgment disposing of all parties and all claims, and a final judgment frequently moots an interlocutory appeal. Moreover, Roccaforte did not present in his appeal from the final judgment the arguments he advanced in his interlocutory appeal. Ultimately, the Supreme Court held that the final judgment implicitly modified the interlocutory order. Therefore, the Court could address the arguments advanced by Roccaforte in his interlocutory appeal, rather than dismissing the appeal as moot.

In his concurring opinion, Justice Willett asserted that the core issue was not one of Legislative intent in assessing the meaning of Local Government Code section 89.0041 and Government Code section 311.034. Rather, the issue should have been whether the County waived Roccaforte's noncompliance with Local Government Code section 89.0041 by failing to timely assert it: "Roccaforte's claim should proceed, but the reason is rooted not in his substantial compliance but rather the County's substantial dalliance."

***Nueces County v. Ballesteros*, No. 09-0561, 2011 WL 1662878 (Tex. April 29, 2011) (Willett, J., dissenting from denial of review)**

For reasons explained in his concurrence in *Roccaforte v. Jefferson County*, Justice Willett dissented from the Court's denial of Nueces County's petition for review. In *Roccaforte*, Jefferson County effectively waived the plaintiff's noncompliance with the notice requirements by failing to raise it "as soon as possible." As the Court stated in *University of Texas Southwest Medical Center v. Loutzenhiser*, 140 S.W.3d 351, 359 (Tex. 2003), "[t]he failure of a nonjurisdictional requirement mandated by statute may result in the loss of a claim, but that failure must be timely asserted and compliance can be waived." In *Roccaforte*, Jefferson County litigated for over two years before

asserting defective notice, raising it only after limitations had expired. But In *Ballesteros*, Nueces County immediately objected to the plaintiff's noncompliance in both its plea to the jurisdiction and its motion to dismiss. Therefore, Nueces County was entitled to mandatory dismissal under Local Government Code section 89.0041(c).

EVIDENCE

Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores Inc., 337 S.W.3d 846 (Tex. 2011)

The "Property Owner Rule" applies to entities—not just individuals—that own property. As to entities, the rule is limited to those witnesses who are officers of the entity in managerial positions with duties related to the property, or employees of the entity with substantially equivalent positions and duties. In addition, Texas Rule of Evidence 801(e)—providing that admissions by a party opponent are not hearsay—allows the use of testimony and evidence adopted by the party opponent in a previous proceeding.

Reid Road Municipal Utility District (the "District") sought to acquire an easement on property owned by Speedy Stop Food Stores Inc. ("Speedy"). However, the parties could not agree on the value of the easement. Based on the calculations of an outside appraiser, the District valued the easement at $9,342. In contrast, Speedy's employee in charge of property issues valued the easement at $62,000. At the special commissioners' hearing that was part of the District's condemnation proceedings, the District introduced the testimony and written appraisal of its outside appraiser. Because Speedy Stop did not appear at the hearing or otherwise offer contrary evidence, the commissioners awarded $9,342 to Speedy, which then sought judicial review in district court. After the deadline to designate experts passed, the District filed a no-evidence motion for summary judgment. In response, Speedy attached the affidavit of its employee that valued the easement at $62,000 and alternatively argued that the District's hired appraiser valued the easement at $9,342. The District successfully argued this evidence should be struck, in part because Speedy's employee was not a broker or licensed appraiser and because the Property Owner Rule did not apply to a corporate entity. The trial court granted summary judgment and awarded $1 to Speedy. The Fourteenth Court of Appeals in Houston reversed, holding the rule applied to entities. Notably, the appellate court did not reach Speedy's other point of error, that the testimony and appraisal of the District's hired appraiser constituted an admission on damages.

The Texas Supreme Court affirmed and addressed both issues on appeal. First, the Court agreed the Property Owner Rule can apply to a corporate entity. However, Speedy's corporate agent—in this case, an employee of the general partner in a limited partnership—did not fall under the rule because he was not a management officer with duties that related at least in part to the property in dispute. Moreover, his affidavit did not set out facts showing he was personally familiar with the property and its value, thus his opinions were inadmissible under the rule as well as Texas Rule of Evidence 701. Accordingly, the trial court did not abuse its discretion by excluding his opinion as to the easement's value.

Second, the Court held the District's hired appraiser's testimony before the special commissioners was admissible under evidentiary rule 803(e)(2). The District argued the appraiser's testimony in the special commissioners' hearing was inadmissible in a de novo appeal to the trial court, and that his testimony was not an admission by the district because he was not an agent of the district. But the Court held that, even if there was no evidence of an agency relationship, Rule of Evidence 801(e)(2)(B) allows for admissions by a party-opponent when the party-opponent has manifested an adoption or belief in the statement's truth.

Justices Willett and Lehrmann issued a concurring opinion that sought to clarify the scope of the Property Owner Rule. They opined that, in the case of a limited partnership, the Court should hold that a managing officer of the corporate general partner with duties relating to the property may testify as to the value of partnership property without being qualified as an expert witness, provided the officer is familiar with the specific property in issue and its value. Such a rule would provide some parity of treatment of limited partnerships and corporations in condemnation proceedings.

FAMILY LAW

Iliff v. Iliff, 339 S.W.3d 74 (Tex. 2011)

For a trial court to order child support based upon potential rather than actual earnings, an obligee is not required to prove the obligor intends to avoid a child support obligation by being unemployed or underemployed.

James and Jerilyn Iliff married and had three children. James was the primary breadwinner, earning approximately $100,000 a year. But when the marriage broke down, James voluntarily quit his position with a chemical company and chose to work odd jobs, earning less than $5,000 a year. When the Iliffs divorced, the trial court found

that James could gross $5,000 a month and based James's child support obligation on that sum. The Austin Court of Appeals affirmed.

The Supreme Court analyzed whether a court must find that a parent is intentionally unemployed or underemployed for the purpose of avoiding child support in order for the court to consider setting child support based upon potential rather than actual earnings. Justice Wainwright wrote the opinion. Focusing upon the plain language of Texas Family Code section 154.066, Justice Wainwright held a trial court is not required to consider a parent's motive for being unemployed or underemployed. Section 154.066 only requires an obligee to prove that the obligor has consciously chosen to be unemployed or underemployed. When the obligee has met this burden, the trial court may set child support based upon earning potential rather than actual resources. Justice Wainwright pointed out that a trial court can properly consider motive. He also noted that an obligor earning a higher income is not always in a child's best interest. However, the trial court did not abuse its discretion by ordering child support based upon James's earning potential. James held a B.S., an M.B.A., and twenty years of work experience. He voluntarily left his job and spent most of his time reading and watching television. While there was some evidence James was abusing alcohol and experiencing psychological issues, he declined to seek treatment. In light of this evidence, the Supreme Court affirmed the judgment of the trial court and the Austin Court of Appeals.

GOVERNMENTAL IMMUNITY

City of Houston v. Williams, No. 09-0770, 2011 WL 923980 (Tex. Mar. 18, 2011)

Certain City of Houston ordinances and two different agreements between the City and its firefighter's union waived the City's immunity under section 271.152 of the Texas Local Government Code, which waives governmental immunity for suits alleging breach of a written contract.

A large group of former Houston firefighters sued the City of Houston, alleging the City underpaid them on lump sums due upon the termination of their employment. The case had been previously appealed to the Texas Supreme Court, which remanded the case to the trial court for further consideration. After the remand, the Texas Legislature retroactively waived governmental immunity for certain contract claims by enacting section 271.152 of the Local Government Code. At issue in this appeal is whether the City's immunity from suit is waived by section 271.152, which provides that:

> A local governmental entity that is authorized by statute or the constitution to enter into a contract and that enters into a contract subject to this subchapter waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of the contract, subject to the terms and conditions of this subchapter.

The firefighters argued that three distinct writings qualified as written contracts under that section: (1) certain City Ordinances; (2) Chapter 143 of the Local Government Code; and (3) two Meet and Confer Agreements (MCAs) and a Collective Bargaining Agreement (CBA). The trial court held the City waived its immunity and denied its plea to the jurisdiction. The Fourteenth Court of Appeals affirmed, but disagreed with the firefighters' argument that Chapter 143, two MCAs from 1995 and 1997, and a 2005 CBA constituted written contracts within the scope of section 271.152's waiver of immunity. The court of appeals held that Chapter 143 was not an executed contract between the City and the firefighters, and that the firefighters lacked standing.

The Texas Supreme Court affirmed in part and reversed in part, ultimately holding the City waived its immunity. More specifically, the Court held the City entered into a unilateral contract with the firefighters through certain ordinances that promised the firefighters specific compensation in the form of overtime pay and termination pay, set forth the essential terms of a contract, and satisfied the elements of section 271.152.

As for the firefighters' arguments that the two MCAs and the CBA agreements also waived the City's immunity, the Supreme Court agreed, holding that the agreements met the five definitional elements in section 271.151(2). The Court also held that the firefighters had standing to sue under those agreements because they were clearly third-party beneficiaries of the agreements.

Finally, the Supreme Court held Chapter 143 of the Local Government Code, as adopted by the City, did not, standing alone, constitute a contract between the City and the firefighters. Chapter 143 creates a civil service classification system for emergency service personnel in those qualifying municipalities that vote to adopt it. It is also addressed to City policy makers and the City's civil service commission, and does not make an offer or promise to the firefighters. As such, it is not a contract within the scope of section 271.152's waiver of immunity. Accordingly, the Supreme Court affirmed the judgment of the court of appeals in part, reversed in part, and remanded the case to the trial court for further proceedings

HEALTH-CARE LIABILITY

***Mitchell v. Methodist Hosp.*, 335 S.W.3d 610 (Tex. 2011) (per curiam)**

In light of the Texas Supreme Court's opinion in *Samlowski v. Wooten*, the court of appeals should revisit the issue of whether the trial court abused its discretion in dismissing a medical malpractice claim because the expert report was deemed insufficient.

Frank Mitchell received a catheter in his left arm while a patient at Methodist Hospital ("Methodist"). Shortly after being discharged from the hospital, he returned after developing septic thrombophlebitis. While still in the hospital, Mitchell developed multisystemic organ failure and died. Mitchell's family sued the hospital for medical malpractice and timely served an expert report. Methodist moved the trial court to dismiss the case, asserting that the expert report was "wholly conclusory and based on mere conjecture and assumptions that are contrary to the medical record and fact." The Mitchells responded that their expert report was sufficient and alternatively requested time to cure any deficiency. The trial court granted Methodist's motion. The First Court of Appeals affirmed, noting he trial court did not abuse its discretion in refusing to grant an extension "given the extreme deficiencies" in the expert report.

The Texas Supreme Court reversed and remanded the case in light of its opinion in *Samlowski v. Wooten*, 332 S.W.3d 404 (Tex. 2011), which held to show an abuse of discretion, a claimant whose expert report has been deemed deficient and whose request for a thirty-day extension of time has been denied should move the court to reconsider and promptly fix any problems with the report within the statutory thirty-day period.

***Harris Methodist Fort Worth v. Ollie*, No. 09-0025, 2011 WL 1820880 (Tex. May 13, 2011) (per curiam)**

Following *Yamada v. Friend*, a hospital patient's claim based on injuries suffered when she fell on a wet bathroom floor constitutes a health care liability claim.

Jo Fawn Ollie had knee replacement surgery at Harris Methodist Hospital ("Harris"). During her post-surgery hospitalization, she slipped on a wet floor in her

bathroom and injured her right shoulder. She sued the hospital for general negligence, asserting the hospital owed her a duty to provide a safe environment; in the same pleading, she also asserted a "medical malpractice" cause of action based on the same facts. Later, Ollie amended her petition, omitting the malpractice claim. Because she did not serve an expert report, Harris filed a motion to dismiss, which the trial court denied. A divided Fort Worth Court of Appeals affirmed, concluding Ollie's claim was for a breach of ordinary care, not a malpractice claim. The dissenting justice opined that the negligence claim fell under the Health Care Liability Act (the "Act") because it alleged that Harris's actions departed from accepted standards of safety and were directly related to actions it took or failed to take during her hospitalization.

The Texas Supreme Court agreed with the dissenting judge, holding the claim was directly related to health care and therefore fell under the Act. A claim's underlying nature determines whether it is a health care liability action. Under the Court's holding in *Yamada v. Friend*, 335 S.W.3d 192 (Tex. 2010), the statutory requirements cannot be circumvented by artful pleading that splits a cause of action into both a health-care liability claim and an ordinary negligence claim when both claims are based on the same facts.

***Carreras v. Marroquin*, 339 S.W.3d 68 (Tex. 2011)**

To toll the running of limitations under Chapter 74 of the Texas Civil Practice and Remedies Code, a claimant must send both a notice of the claim and an authorization form for release of protected health information.

Priscilla Marroquin died after being treated for a broken leg. Two days prior to the end of the limitations period, Marroquin's parents sent a written notice of claim to the treating physician, attempting to toll limitations under Texas Civil Practice & Remedies Code section 74.051(c). The Marroquins then filed suit. The doctor subsequently filed a motion for summary judgment, arguing the Marroquins' claims were time barred because they had failed to comply with all the requirements of section 74.051(c) to trigger tolling of limitations. The trial court denied the motion but ordered an interlocutory appeal. The Corpus Christi Court of Appeals affirmed the trial court's order.

The Supreme Court analyzed whether a claimant must strictly comply with the requirements of section 74.051(c) to toll limitations of a health care liability claim. Justice Wainwright authored the Court's opinion and held that the health care liability limitations period is not tolled unless a claimant provides both the pre-suit notice and the medical-authorization form. Litigants must strictly comply with these requirements

to ensure the integrity of the Legislature's intent to encourage negotiation and settlement of claims prior to suit.

***Turtle Healthcare Group, L.L.C. v. Linan*, 337 S.W.3d 865 (Tex. 2011) (per curiam)**

Following *Yamada v. Friend*, the Texas Medical Liability Act does not permit "splitting" a cause of action into a health care liability claim and an ordinary negligence claim when both claims are based on the same facts.

Turtle Healthcare Group, L.L.C. ("Turtle") supplied a ventilator to Maria Linan. A respiratory therapist from Turtle made regular visits to ensure the ventilator was operating properly. On news of an impending hurricane, Maria's mother and caretaker, Yolanda Linan, contacted Turtle and requested an oxygen tank and two additional batteries; Turtle delivered the oxygen tank and one battery. When the hurricane arrived, the Linans' power went out around 7:00 a.m. and the ventilator continued to function. But 2½ hours later, Maria's family found that the ventilator was not operating and Maria was dead.

Yolanda and Maria's brother, Gerardo filed suit against Turtle, alleging that Maria died as a result of the equipment failure. They asserted that Turtle was negligent "in the operation and/or maintenance of the . . . ventilator and/or its components and accessories" and that Turtle was negligent in delivering a defective ventilator, battery, and battery boxes. Turtle filed a motion to dismiss on the grounds that the Linans' claims were healthcare liability claims and they had not filed an expert report. The Linans responded that their claims were for ordinary negligence. The trial court determined that the claims were not health care liability claims and denied Turtle's motion to dismiss. The Corpus Christi Court of Appeals—like the Fort Worth Court of Appeals did in *Yamada v. Friend*, 335 S.W.3d 192 (Tex. 2010)—split the claims, dismissing all claims based the rendition of medical services, but holding that the Linans' claims based on the failure to provide functioning, charged batteries were not health care liability claims.

The Texas Supreme Court reversed in part and affirmed in part. Following its decision in *Yamada*, the Court determined that all of the Linans' claims were based on the same underlying facts and, therefore, were not amenable being split into medical and non-medical claims. Essentially, the Linans alleged that Maria's death was caused by Turtle's negligence in the "operation and/or maintenance of the . . . ventilator and/or its components and accessories"—that Turtle failed to provide Maria with a properly functioning ventilator. Because these claims address the negligent rendition of medical services, the Linans were required to file an expert report, which they failed to do.

Accordingly, the Court reversed the court of appeals' judgment to the extent it affirmed the trial court's order denying Turtle's motion to dismiss and affirmed that part of the judgment reversing the trial court's order. Moreover, Turtle waived its request for attorney's fees and costs, thus its request for attorney's fees and costs was correctly rejected.

INSURANCE

***In re Universal Underwriters of Tex. Ins. Co.*, No. 10-0238, 2011 WL 1713278 (Tex. May 6, 2011)**

> Parties to an insurance contract do not foreclose their right to invoke an appraisal clause by waiting to request the appraisal until after suit is filed. Rather, a party must show waiver and prejudice to foreclose the other party from invoking an appraisal clause.

Grubbs Infiniti ("Grubbs") suffered hail damage to its property. Grubbs and its insurer, Universal Underwriters of Texas Insurance Company ("Universal"), did not agree on the value of the damage. Grubbs then sued Universal, asserting claims for breach of contract and breach of a duty of good faith and fair dealing, among others. Universal then moved to compel an appraisal and to abate the lawsuit under the insurance contract's appraisal provision. Grubbs countered that Universal waived that provision by waiting to seek an appraisal until after eighty days had passed and Grubbs had been forced to file suit. The trial court denied Universal's motion. The Fort Worth Court of Appeals denied Universal's petition for writ of mandamus.

The Supreme Court considered whether a party to an insurance contract, who waits to demand an appraisal until after suit is filed, necessarily waives its contractual right to the appraisal. Chief Justice Jefferson authored the opinion, holding Grubbs had not waived its right to demand an appraisal. Chief Justice Jefferson reasoned a party waives an appraisal provision in an insurance contract upon a showing of two elements: (1) the party seeking the appraisal delayed after reaching an impasse—good faith negotiations broke down; and (2) the party opposing the appraisal will be prejudiced because of the delay. In the present case, the impasse crystallized when Grubbs filed suit. Universal demanded an appraisal a month later. And Grubbs offered no evidence of prejudice. As such, Universal was entitled to demand an appraisal and an abatement while the appraisal was performed. The Supreme Court, therefore, conditionally granted the writ of mandamus and directed the trial court to order an appraisal.

***Ojo v. Farmers Group Inc.*, No. 10-0245, 2011 WL 2112778 (Tex. May 27, 2011)**

Texas law prohibits the use of race-based credit scoring in the pricing of insurance premiums, but permits race-neutral credit scoring even if it has a racially disparate impact.

Patrick Ojo is an African-American resident of Texas who filed a putative class action against Farmers Insurance. He has a homeowner's property-and-casualty insurance policy issued by Farmers and saw a nine percent increase in his premium despite having never made a claim on the policy. In his suit, Ojo alleged that Farmers Group Inc. ("Farmers") increased the premium as a result of unfavorable credit information acquired though its automated credit-scoring system. Because the system uses several "undisclosed factors" that result in charging minorities higher premiums for homeowners' insurance than the premiums charged to similarly-situated Caucasian policyholders, it violates the federal Fair Housing Act (FHA).

Ojo's suit reached the federal Ninth Circuit Court of Appeals, which certified the following question to the Texas Supreme Court:

> Does Texas law permit an insurance company to price insurance by using a credit-score factor that has a racially disparate impact that, were it not for the [McCarran-Ferguson Act], would violate the federal Fair Housing Act, 42 U.S.C. §§ 3601-19, absent a legally sufficient nondiscriminatory reason, or would using such a credit-score factor violate Texas Insurance Code sections 544.002(a), 559.051, 559.052, or some other provision of Texas law?

The Texas Supreme Court held that Texas law prohibits the use of race-based credit scoring in the pricing of insurance premiums, but permits race-neutral credit scoring even if it has a racially disparate impact.

Under the McCarran-Ferguson Act, state law preempts a federal statute if the application of federal law to the case might invalidate, impair, or supersede the state law. Thus, the Ninth Circuit's question asks whether allowing Ojo's claim under the federal Fair Housing Act might invalidate, impair or supersede Texas law. Under the Insurance Code, rates may not be based wholly or partly on race, and an individual may not be charged a rate that is different from the rate charged to other individuals for the same coverage because of the individual's race. Moreover, a credit score factor constitutes unfair discrimination if it is "based wholly or partly on" race, or if it is used to arrive at an insurance rate that is different from the rate charged to other individuals for

the same coverage because of the individual's race. Indeed, the Insurance Code requires that the factors used in credit scoring to price insurance be race-neutral, or not based on race.

Ojo argued federal case law interpreting the FHA provides for disparate impact protection, and asserted that the Texas Insurance Code should also be interpreted to provide for disparate impact protection because it uses the same "because of race" language in the FHA. But the Supreme Court disagreed. In determining whether discriminatory impact liability exists within the FHA, courts have focused on the breadth and reach of prohibitory language, and have refused to find disparate impact liability when a statute focuses only on the nature of an action, and not on its effects. Sections 544.002(a) and 560.002(c)(3) of the Texas Insurance Code do not include the type of broad prohibitory language that gives rise to disparate impact claims. Rather, both sections focus exclusively on the manner in which insureds are classified and specifically prohibit classifications because of or based on race. Neither statute broadens its application so as to prohibit practices that may "otherwise adversely affect" or "tend to deprive" an insured of an opportunity.

Justice Willett's concurring opinion argued the Court should follow its credo that "Where text is clear, text is determinative." Thus, the majority's "foray into extratextual aids" was not only inadvisable but also inappropriate. Although Justice Willett joins the Court's textual analysis unreservedly, he nevertheless chided the Court's failure to follow "longstanding interpretive precedent."

In his concurring opinion, Chief Justice Jefferson asserted the relevant Insurance Code provisions were unambiguous. Thus, the Court could have simplified its holding to, "The Texas Insurance Code is void of any language creating a cause of action for a racially disparate impact." Regardless, the Court's opinion "gives us information that, while not essential to our interpretation of the Insurance Code, is far from irrelevant."

NEGLIGENCE

Loftin v. Lee, No. 09-0313, 2011 WL 1651223 (Tex. Apr. 29, 2011)

The Texas Equine Activity Limitation of Liability Act (the "Act") reflects an expansive interpretation of "inherent risk" to include both equine behavior and risks associated with activities involving equine animals.

Terri Loftin invited her friend, Janice Lee, to go horseback riding on Loftin's property. Loftin selected the horse for Lee, which Loftin thought was calm and gentle.

During the ride, Lee's horse bolted, spooked by muddy ground and vines that touched the horse's flank. Lee was injured, and sued Loftin to recover for her damages. Loftin filed a motion for summary judgment, arguing the Act limited liability. The trial court granted the summary judgment. The Tyler Court of Appeals reversed and remanded.

The Supreme Court granted Loftin's petition to consider the scope of the term "inherent risk" under the Act. Justice Hecht wrote the opinion. He concluded the language of the Act, including the nonexclusive list of inherent risks and the list of exceptions, connote a broad interpretation to the term, "inherent risk." As such, that term applies to more than equine behavior, but also the risks associated with activities involving equine animals. In this case, Lee was injured because her horse was spooked by trail conditions. This risk is inherent in riding a horse. As such, the Act affords Loftin immunity for Lee's damages resulting from the trail conditions. Justice Hecht also considered Lee's claim that Loftin is responsible for Lee's damages under the Act because Loftin did not adequately determine Lee's riding abilities. However, while the Act lists such misconduct as falling outside of immunity, the record contains no evidence that Loftin's failure to properly determine Lee's abilities caused the accident. The Supreme Court, therefore, reversed the Tyler Court of Appeals' judgment and rendered judgment for Loftin.

OIL & GAS

***R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619 (Tex. 2011)**

The construction the Texas Railroad Commission (the "Railroad Commission") gave to the "public interest" requirement of Texas Water Code section 27.031 that this term refers solely to oil and gas production and not traffic safety is reasonable and comports with the statutory meaning.

Pioneer Exploration, Ltd. ("Pioneer") sought a permit from the Railroad Commission to create an injection well for waste from oil and gas wells. Texas Citizens for a Safe Future and Clean Water ("Texas Citizens") opposed granting the permit, presenting unrebutted evidence that traffic created by operations at the injection well would adversely impact the safety of area residents. The Railroad Commission granted the permit, finding that the injection well would serve the public interest because it enabled further gas production. Texas Citizens appealed to the trial court, but the trial court affirmed the Railroad Commission's order.

The Supreme Court analyzed the statutory construction of the term, "public interest," in Water Code section 27.031. Justice Guzman authored the majority opinion. Justice Guzman explained that, among other requirements, to obtain an injection well permit for the disposal of oil and gas production waste, the Railroad Commission must find that creation of the well is in the "public interest." The majority construed the meaning of that phrase in light of the entirety of the Water Code, concluding the Railroad Commission's construction of "public interest"—that the phrase refers to the production of oil and gas—is both reasonable and corresponds with the statute. As such, the majority upheld the Railroad Commission's—along with the trial court's—decision not to consider traffic safety when evaluating the public interest of Pioneer's injection well permit. The majority, therefore, reversed the Austin Court of Appeals and rendered judgment for Pioneer.

Joined by Justices Willett and Lehrmann, Chief Justice Jefferson concurred with the majority opinion. Chief Justice Jefferson would have held that section 27 unambiguously precludes the Railroad Commission from evaluating traffic safety when weighing public interest. As such, the Court need not defer to the Railroad Commission's construction of that term.

***Tawes v. Barnes*, 340 S.W.3d 419 (Tex. 2011)**

Under the two agreements governing an oil and gas lease, the lessor—as a third-party beneficiary or through privity of estate—cannot enforce the agreements to recover unpaid royalties from an investor who consented to the drilling of two wells on a pooled gas unit, but who did not operate the wells.

Doris Barnes sought to enforce a Working Interest Unit Agreement (WIUA) and Joint Operating Agreement (JOA) for unpaid royalties. Because she was not a party to the agreements, she sought recovery as a third-party beneficiary or through privity of estate. Barnes was the executrix of the estate of her husband, who was an original signatory to a lease (the "Barnes lease") that was later assigned to Dominion Oklahoma Texas Exploration & Production ("Dominion"). Dominion and others including Lee Tawes, created a joint venture to begin drilling on lands covered by the Barnes lease. Four years into the project, Barnes sued Dominion, Tawes, and others, for unpaid royalties. When one of the defendants went bankrupt, the suit was removed to federal bankruptcy court, which granted Barnes's partial summary judgment and ordered Dominion to pay her nearly $300,000 in unpaid royalties. Eventually, all defendants but Tawes settled with Barnes. After considering the merits of Barnes's claims against

Tawes, the federal bankruptcy court determined that as a JOA signatory, Tawes became obligated under the terms of the JOA Royalty Provision to perform Dominion's duty of paying Barnes the lessor's royalty owed to her pursuant to the Barnes Lease. Based on this conclusion, the bankruptcy court found Tawes liable to Barnes, who was deemed a third-party beneficiary of the agreements. Tawes then appealed to the federal district court, which made the same determination. On appeal to the federal Fifth Circuit, the Court of Appeals certified three questions, the first of which was:

> Does Barnes have any right [to] enforce the … WIUA and JOA [agreements . . . to recover unpaid royalties, between the date of first production and February 2002, of Baker-Barnes Nos. 1 & 2 wells under what we have called the "Royalty Provision" of the JOA, either as a third-party beneficiary of the WIUA and JOA or by virtue of having privity of estate with Tawes?

The Texas Supreme Court said no, concluding that Barnes had no right to enforce agreements that gave rise to this suit as a third-party beneficiary. Under Texas law, a third party can enforce a contract it did not sign only when the parties to the contract entered into it with the clear and express intention of benefiting the third party. When the contract confers only an indirect, incidental benefit on the third party, the third party cannot enforce the contract. Here, the Supreme Court concluded that the purpose of the royalty provisions was to allocate responsibility for payment of operating expenses to maintain each of the leases contributed to the unit, not to directly benefit Barnes. Any benefit that Barnes derived was merely incidental and not enough to entitle her to sue to enforce the Agreements. In addition, the Court held privity of estate did not exist between Barnes and Tawes because the terms of the agreements never gave Tawes a permanent interest in the Barnes Lease. Rather, Tawes only had a temporary ownership interest that would automatically revert back to Dominion after the interest expired. Finding no theory of recovery, the Supreme Court did not address the two remaining certified questions.

***BP Am. Prod. Co. v. Marshall*, No. 09-0399, 2011 WL 1820876 (Tex. May 13, 2011)**

Under the facts of this case, the fraudulent claims of oil and gas mineral lessors were time-barred because their injury was not inherently undiscoverable, and the lessee's fraudulent representations about its good faith efforts could have been discovered with reasonable diligence before limitations expired. Additionally, a mineral lease cotenant's pattern of significantly underpaying another cotenant's royalties constituted an unmistakable and hostile assertion of exclusive ownership of the leasehold, thus achieving adverse possession of the leases.

This case involves two related oil and gas mineral lease disputes that were tried jointly. The first dispute is between BP America Production Company and others (collectively, "BP") as the lessees and operators, and the Marshall family, the lessors. The second dispute involves BP's successors-in-interest, Wagner Oil and others (collectively, "Wagner") and lessors Vaquillas Ranch Co., Ltd., Vaquillas Unproven Minerals, Ltd., and Vaquillas Proven Minerals, Ltd. (collectively, "Vaquillas").

Both disputes involve leases in the mineral development known as the Slator Ranch. In the 1970s, BP obtained oil and gas leases on the Ranch from Tenneco, Vaquillas, the Marshalls, and others. The leases had a standard sixty-day savings clause providing that the lease would continue past the expiration date so long as BP was engaged in good-faith drilling or reworking operations designed to produce paying quantities of oil or gas with no cessation of operations for more than sixty days. The leases were set to expire on July 11, 1980. Two weeks before the expiration date, BP drilled a new well, the J.O. Walker No. 1, and continued this work for the rest of 1980. Seeing no production from this well, Stanley Marshall contacted BP and was told the lease was kept alive by continuing operations. He also received a letter purporting to document BP's continuing operations. During the same period, Vaquillas representatives also inquired into the lease status and were given the same information and letter. On March 25, 1981, BP contracted with a new operator, Sanchez-O'Brien, to operate some of its wells on the Ranch. On the same day, BP decided to permanently plug and abandon J.O. Walker No. 1 as unproductive. Sanchez-O'Brien then drilled its first, undisputedly productive, well in April 1981. Ultimately, Wagner acquired Sanchez-O'Brien's portion of the lease. At the time, Wagner was already operating in other portions of the Ranch and regularly paying royalties.

In 1997, Vaquillas sued Wagner, BP, and others alleging breach of implied covenants to reasonably develop and market hydrocarbons under the lease. During the course of discovery, Vaquillas came to believe that its original lease with BP terminated in early January 1981 because BP had abandoned any real efforts to rework the J.O. Walker No. 1 well and would not have expected it to produce in paying quantities when it continued operations in February and March. Because drilling by Sanchez-O'Brien did not start until April 1981, more than sixty days later, Vaquillas claimed that title to the leasehold reverted back to Vaquillas and sought a declaration of title to the mineral interest. In 2001, the Marshalls intervened in the suit against BP and Wagner, similarly alleging that their lease had terminated in 1981 and adding that BP had defrauded them by concealing facts and evidence showing that the lease was terminated. Vaquillas settled with BP and proceeded to trial against Wagner only. The Marshalls conceded that Wagner's possession of the Marshall leaseholds during the ten years following the alleged lapse in operations constituted adverse possession and proceeded to trial only on their fraud claims against BP. At trial, the jury found in favor of the Marshalls and against BP, and the court rendered judgment on the verdict. As to the other case, the jury found that Wagner had adversely possessed Vaquillas's leasehold. The trial court also granted a directed verdict for Wagner against the Marshalls, ruling that Wagner had adversely possessed the mineral interest covered by its lease as to them. The San Antonio Court of Appeals affirmed the judgment on the Marshalls' fraud claim, but reversed the judgment awarding title to the leases to Wagner by adverse possession.

The Texas Supreme Court reversed the court of appeals' judgment and rendered judgment for Wagner and BP. First, the Supreme Court held the Marshalls' fraud claims were time-barred because their injury was not inherently undiscoverable. Indeed, BP's fraudulent representations about its good faith efforts to develop the well could have been discovered with reasonable diligence before limitations expired. For example, the well log and plugging report to the Texas Railroad Commission were sufficient by themselves to discover the work being done, and were available in October 1982, well within the limitations period. Consequently, neither the discovery rule nor fraudulent concealment extended the limitations period on the Marshalls' fraud claims. The Supreme Court reversed and rendered judgment that the Marshalls take nothing.

The Supreme Court further held that, by paying a clearly labeled royalty to Vaquillas, Wagner sufficiently asserted its intent to oust Vaquillas to acquire the lease by adverse possession. In an adverse possession claim between cotenants, the proponent must prove ouster—unequivocal, unmistakable, and hostile acts the possessor took to dispossess other cotenants. The test for establishing adverse possession is whether the acts unmistakably assert a claim of "exclusive ownership" by the occupant. The undisputed evidence showed that Wagner consistently paid Vaquillas a royalty interest

of 4.23%, not the cotenant's share of roughly 25% to which it was entitled. This was an unmistakable and hostile assertion by Wagner of exclusive ownership of the leasehold. Accordingly, the Supreme Court reversed the judgment of the court of appeals and rendered judgment for Wagner.

PROPERTY LAW

***Genesis Tax Loan Servs., Inc. v. Kothmann*, 339 S.W.3d 104 (Tex. 2011)**

Section 32.06 of the Texas Tax Code permits a verified copy of a tax lien to be enforceable, so long as the copy complies with all the requirements of the statute.

Kody and Janet Kothmann sold four tracts of land. They had a vendors' lien on each of the tracts that was secured by a duly-recorded deed of trust. Two years after the sale, the purchaser of the tracts asked Genesis Tax Loan Services to pay one year's ad valorem taxes on the tracts. After paying the taxes, Genesis claimed a tax lien on each tract by transfer from the county tax collector. None of the original tax lien transfers were recorded. Instead, Genesis recorded a photocopy of each, which was verified by a proper affidavit stating in part that the original had been mailed to the county clerk but had been lost either in the mail or at the courthouse.

Eventually, the purchaser defaulted and both the Kothmanns and Genesis sought to enforce their respective liens. The Kothmanns filed a declaratory judgment action seeking to have their lien declared superior. Genesis responded with a general denial. At trial, the Kothmanns established the validity of their liens and objected to Genesis's offer of evidence of the superiority of its liens on the ground that it had not plead an affirmative defense. After hearing Genesis's evidence, the court overruled the Kothmanns' objection and rendered judgment for Genesis. The Amarillo Court of Appeals reversed, holding the Kothmanns' objection should have been sustained, and alternatively, that Genesis's liens were not enforceable under section 32.06(d) of the Tax Code because the statute does not permit a verified photocopy of the lien transfer to be recorded when the original has been lost.

The Texas Supreme Court reversed, holding that Genesis's tax liens were enforceable because the verified copies that were recorded with the county met the statutory requirements. First, the Court held Genesis's general denial placed the burden of proof on the Kothmanns to not only prove that their liens were valid, but that they were also superior. As such, Genesis was not required to plead a specific affirmative

defense that its liens were superior. Second, the Court held section 32.06 does not expressly require that only original documents be recorded, and that the Kothmanns could have challenged the authenticity of verified photocopies under Texas Rule of Evidence 1003. Third, the Court rejected the Kothmanns' argument that Genesis's liens were unenforceable because they lacked the tax collector's seal. At the time that the liens were created, the tax collector did not have a seal, but nevertheless made the required certification before a notary, stamped with a notary seal, in lieu of a seal of his own. This is sufficient. Fourth, the Court held Genesis's liens were valid because the tax collector did not keep a record of the liens in compliance with section 32.06(b): "The tax collector's record-keeping is irrelevant to the enforceability of Genesis's liens." Finally, the Court held that, whether the tax collector issued receipts was similarly irrelevant to the enforceability of Genesis's liens. Accordingly, the Supreme Court reversed the court of appeals' judgment and remanded the case to the trial court.

PUBLIC UTILITY

***St. of Tex. v. Pub. Util. Comm'n of Tex*, No. 08-0421, 2011 WL 923949 (Tex. March 18, 2011)**

The Public Utility Commission (PUC) is required to use one of the four statutorily-mandated valuation methods to determine the market value component of the stranded cost true-up and apply valuation criteria in a manner that conforms to the statute.

CenterPoint Energy Houston Electric LLC ("CenterPoint"), Reliant Energy Retail Services, LLC (RERS), and Texas Genco, LP (TGN) sought to have the PUC determine its stranded costs and other true-up adjustments under Texas Utility Code section 39.262. The State of Texas, among others, intervened. After making factual findings, the PUC ordered CenterPoint could recover $2.3 billion. CenterPoint appealed to the district court, which affirmed all but two aspects of the PUC's order. The Austin Court of Appeals affirmed in part and reversed in part.

The Supreme Court considered: (1) whether the PUC erred by using an extra-statutory method for determining the market value of CenterPoint's generation assets when calculating the stranded cost true-up; (2) whether the parties considered the correct criteria when determining the net book value of CenterPoint's generation assets; and (3) whether the parties properly performed the capacity auction true-up.

Justice Willett wrote the opinion. He held the PUC was required to use one of the four valuation methodologies mandated by Utility Code section 39.262(h). Considering that CenterPoint ultimately sold the generation asset through a bona fide third-party transaction, Justice Willett concluded the PUC should have used the sale-of-assets valuation method.

Justice Willett also held the court of appeals erred by holding CenterPoint could not include in its stranded costs the excess mitigation credits (EMCs) CenterPoint had issued to its affiliate, RERS. CenterPoint granted the EMCs because the PUC had estimated CenterPoint would not have any stranded costs. In fact, CenterPoint did have stranded costs and, therefore, is entitled to recoup the EMCs. Justice Willett reasoned nothing in the Utility Code prohibits CenterPoint from recovering the EMCs paid to CenterPoint's affiliate. Justice Willett addressed several additional valuation issues. He held that RRI's option to purchase CenterPoint's Genco share does not affect the net book value of CenterPoint's generation assets. He held that the PUC should not have reduced the stranded costs attributable to CenterPoint's depreciation of its generation assets. And CenterPoint must satisfy ratemaking requirements to include construction work in progress in the net book value.

Finally, Justice Willett analyzed the capacity-auction true-up. He held the PUC should not have reduced the true-up amount because Genco failed to meet a goal set by statute when the evidence shows Genco made a good faith effort to comply. Justice Willett also held CenterPoint is permitted to recover interest on the capacity true-up award.

In light of these rulings, the Supreme Court affirmed in part and reversed in part the judgment of the Austin Court of Appeals. The Supreme Court remanded the case to the PUC.

STATUTE OF LIMITATIONS

***Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, No. 05-1076, 2011 WL 1226100 (Tex. Apr. 1, 2011) (op. on reh'g)**

Knowledge of some harm—not the full extent of the harm—is sufficient to trigger the running of limitations. A contractual term to develop wells only requires drilling wells and preparing them to produce oil and gas. There is some evidence of the intention element of fraud when a defendant misrepresented information in a public filing knowing "there is an especial likelihood" the information would reach the claimant and that the claimant would rely on the information.

In the 1950s, three families (collectively, the "Miesches") executed mineral leases with a predecessor of Exxon Corporation and Exxon Texas, Inc. (collectively, "Exxon") giving them a fifty percent royalty and establishing strict disclosure requirements. Exxon then produced on the property for over thirty years, until it began plugging wells. Exxon claimed the operations were not profitable and sought to renegotiate the longstanding leases. The Miesches demanded Exxon provide drilling, production, and other information regarding the leases, but Exxon failed to provide all the requested information. And when renegotiations regarding the lease terms failed, Exxon plugged and abandoned the rest of the producing wells. The Miesches then leased a third of their property to Emerald Oil & Gas Company, L.C. ("Emerald"). In attempting to re-enter the wells, Emerald discovered that Exxon had plugged the wells improperly, damaging the mineral interests. Emerald sued Exxon and the Miesches intervened, alleging waste, breach of contract, tortious interference, fraud, and environmental claims. The trial court dismissed Emerald's claims for fraud, negligent misrepresentation and tortious interference, and submitted to the jury only the Miesches' claims for waste and breach of contract. The jury found for the Miesches and awarded $5 million for waste, $10 million in punitive damages, and $3.6 million for breach of contract. The trial court entered judgment on the verdict. The Corpus Christi Court of Appeals affirmed the judgment for the Miesches and reversed the dismissal of Emerald's claims.

The Supreme Court reviewed the evidence to determine if the Miesches had actual knowledge of their waste, negligence, and tortious interference claims based upon improperly plugged wells, such that these claims are barred by limitations. The Supreme Court also construed the lease to determine if Exxon was required to develop the full value of the Miesches' mineral interests. Finally, the Supreme Court determined whether there was some evidence to support Emerald's fraud claim.

Justice Wainwright authored the Supreme Court's opinion, holding conclusive evidence established the Miesches had actual knowledge of the alleged misconduct by September 1990 when they sent a letter to Exxon warning of suit if Exxon continued to plug wells. Moreover, Exxon sent the Miesches a letter in August 1991 that Exxon had completed plugging and abandoning certain wells. This letter imbued the Miesches with actual knowledge of their claim. Justice Wainwright also held there was conclusive evidence that by June 1994 the Miesches were actually aware that Exxon was improperly plugging wells based upon a report Emerald sent to the Miesches informing them that Emerald had found cut casings and junk in a well Exxon plugged. Emerald filed suit and the Miesches intervened more than two years after they were both aware of the damaged wells. Because Emerald and the Miesches had learned of their wrongful injury, they were on notice to investigate the cause and extent of the damages. As such, the limitations period was not tolled until Emerald and the Miesches understood their damages were not isolated. Their tortious interference, negligent misrepresentation, and waste claims were therefore barred by the two-year statute of limitations.

Justice Wainwright next analyzed the lease between the Miesches and Exxon. Justice Wainwright construed the requirement in Article 3 of the lease, which mandates that Exxon develop the field for oil and gas. Using the standard meaning in the oil and gas industry for technical terms, Justice Wainwright concluded "develop" means to complete a well and to "complete" a well means to make capable of producing oil and gas. As such, Article 3 does not create a duty for Exxon to actually produce oil and gas, but simply to prepare a well to be capable of production. Justice Wainwright discounted the Miesches' argument that Article 4 creates a duty to realize full value from a well. Construing all the lease provisions in harmony, Justice Wainwright found the language of Article 4 to be only aspirational. In light of this construction of the lease, Justice Wainwright found no evidence to support the jury's finding that Exxon failed to comply with its obligation to fully develop wells. While the Miesches offered expert testimony that Exxon breached its obligation, that expert assumed the lease required Exxon to exhaust production from the wells.

Finally, Justice Wainwright reviewed the Corpus Christi Court of Appeals' ruling that set aside the trial court's directed verdict of Emerald's fraud claim. The Supreme Court applied the "reason-to-expect" standard of section 531 of the Restatement (Second) of Torts, explaining the intention element of fraud is satisfied by some evidence a defendant misrepresented information in a public filing knowing "there is an especial likelihood" the information would reach the claimant and that the claimant would rely on the information. Justice Wainwright outlined the evidence that Exxon knew of "an especial likelihood" that Emerald would review Exxon's plugging reports and rely on the information in those reports. The Supreme Court further held there is legally sufficient evidence to require a jury to consider Emerald's fraud claim.

Applying these holdings, the Supreme Court rendered judgment that the claimants take nothing by their claims for waste, negligent misrepresentation, and tortious interference. The Supreme Court rendered judgment against the Miesches on their contract claim. The court also affirmed the Corpus Christi Court of Appeals' reversal of Emerald's fraud claim and the remand of that claim to the trial court. Finally, the Supreme Court remanded several of the Miesches' other affirmative claims to the court of appeals for consideration of the Miesches' conditional issues presented.

TAX

***TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432 (Tex. 2011)**

The receipts of a non-Texas entity generated from a license to use seismic and geophysical data is not taxable.

TGS-NOPEC Geophysical Company ("TGS") is a Delaware Corporation operating its principal place of business in Texas. It sells access to its proprietary seismic and geophysical data through its master library. Customers purchase access to TGS's master library through a license agreement. TGS characterized these revenues as receipts from the sale of intangible assets. Because TGS is a non-Texas payor, the receipts were not subject to Texas Franchise tax. The Texas Comptroller ultimately concluded TGS's characterization was incorrect, the receipts were the product of the use of a license, and the receipts were subject to tax. TGS sued the Comptroller, contesting the tax determination. The trial court agreed with the Comptroller's characterization of the receipts. The Austin Court of Appeals affirmed.

The Supreme Court analyzed whether the sale of geophysical and seismic data through a use-license is the sale of an intangible asset for the purpose of determining franchise tax liability. Justice Medina authored the Court's opinion. Justice Medina analyzed the Comptroller's historical tax treatment of receipts from the use of seismic and geophysical data and the plain language of Texas Tax Code section 171.003. Until recently, the Comptroller had characterized the receipts from the use of seismic and geophysical data as intangible assets, making them subject to taxation only if the payor is from Texas. In this case, however, TGS sold use of the assets through a licensing agreement. Section 171.003 lists receipts from the use of a license as taxable to any payor. Justice Medina concluded the reference to license in section 171.003 is in connection with the use of patents, copyrights, trademarks, and franchises. The license is simply a means by which the use of this intellectual property is sold. So it is not the license that is the subject of the tax but the underlying property. In the present case,

the underlying property is seismic and geophysical data. As such, the receipts generated from licensing these assets are not taxable to TGS, as a non-Texas payor. The Supreme Court reversed and remanded the judgment of the Austin Court of Appeals.

TRIAL PROCEDURE

***In re Commitment of Hill*, 334 S.W.3d 226 (Tex. 2011) (per curiam)**

> Parties are entitled to ask potential jurors questions about whether hearing certain evidence will cause them to be biased or to ignore the other party's legal burden to prove each element of its claim or defense.

The State sought to commit Seth Hill as a sexually-violent predator. During voir dire, the trial court prohibited Hill's attorney from asking questions of the panel regarding their ability to: (1) fairly consider all the evidence when the defendant is homosexual; and (2) require the State to prove the second required element of its case after proving the first requirement—that Hill has committed several violent sexual offenses. The selected jury found against Hill and the trial court entered judgment on that verdict. The Beaumont Court of Appeals affirmed.

The Supreme Court analyzed whether the trial court's prohibitions foreclosed Hill from determining whether the potential jurors could fairly consider all the evidence presented at trial after hearing of Hill's homosexual conduct and violent sexual misconduct. In a per curiam opinion, the Supreme Court held the trial court was too restrictive. The areas of inquiry properly sought to determine whether the potential jurors would be biased after hearing of Hill's sexual history. Also, asking a jury whether they would follow the law and require a party to prove all elements of its case is not a commitment question. Because the trial court foreclosed two lines of proper inquiry, the Supreme Court reversed the judgment of the Beaumont Court of Appeals and remanded the case for a new trial.

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FINANCIAL INSTITUTIONS

***Invesco Inv. Servs., Inc. v. Fidelity Deposit & Discount Bank*, No. 01-10-01126-CV, 2011 Tex. App. LEXIS 4554 (Tex. App.—Houston [1st Dist.] June 16, 2011, no pet. h.)**

The First Court of Appeals reversed a default judgment entered against a financial institution in a writ of garnishment suit because, as a financial institution, it was protected from default judgment and a garnishment proceeding "as to the amount of damages."

In this case, Invesco Investment Services, Inc. ("Invesco") challenged the trial court's default judgment based on a writ of garnishment suit. Invesco contended the evidence was not legally sufficient to support the trial court's default judgment and the judgment should be set aside on the grounds that, as a financial institution, Invesco was protected from default judgment and a garnishment proceeding "as to the amount of damages." Texas Finance Code section 276.002 precludes the entry of a default judgment "as to the amount of damages" against a "financial institution" that fails to timely file an answer to an application for a writ of garnishment. Invesco argued error appeared on the face of the record because Fidelity Deposit and Discount Bank ("Fidelity") presented no evidence regarding the value of the underlying debtors alleged accounts in Invesco, and that section 276.002 precluded the entry of a default judgment against a financial institution like itself for a specific amount of damages in a garnishment proceeding. Fidelity asserted that Invesco's status as a legitimate financial institution was not apparent on the face of the record and that Fidelity had no duty to prove up the monetary value of whatever investment products Invesco held for the underlying debtor.

The court of appeals agreed with Invesco and reversed the default judgment. The court cited to multiple sections of the Finance Code that defined the term "financial institution." However, the court found all of those definitions did not apply to the particular statue in question. Thus, the court simply applied the ordinary meaning of the term to determine if Invesco fell within the statute's scope. "Financial institution" is defined to include "a business, organization, or other entity that manages money, credit, or capital, such as a bank, credit union, savings-and-loan association, securities broker or dealer, pawnbroker, or investment company." The court found this definition

was consistent with section 276.002's broad reference to a financial institution as an entity that maintains debts, assets, or personal effects of the debtor. The court noted Fidelity sought and obtained a writ of garnishment against Invesco on the basis that it held investment accounts for the underlying debtor. Applying the general definition of the term "financial institution," the court concluded that the face of the record demonstrated that Invesco, as a holder of underlying debtor's investment accounts, qualified as a financial institution under section 276.002. The court then found the trial court erred in entering a default judgment against Invesco for the full amount of Fidelity's judgment against the underlying debtor without any evidence as to the amount of damages actually caused by Invesco's default. Therefore, the court reversed the default judgment and remanded the proceedings to the trial court.

***Wells Fargo Bank, N.A. v. Ballestas*, No. 01-10-00020-CV, 2011 Tex. App. LEXIS 3597 (Tex. App.—Houston [1st Dist.], May 12, 2011, no pet.)**

The First Court of Appeals held that a bank could not file a second lawsuit to foreclose on a note and deed of trust where it previously lost on the issue of whether it owned a note and deed of trust in a previous litigation.

In this case, a bank lost a trial against the owners of a home because it failed to prove that it owned the note by which it sought to foreclose. It did not appeal or otherwise challenge that judgment. The bank then sued the owners again, contending once more that it owned the disputed note. The owners responded in a second suit that the bank's claims were barred by res judicata and collateral estoppel. The trial court granted summary judgment for the homeowner based on those defenses. The bank then appealed, arguing that, by granting the summary judgment, the trial court erred because the first suit's final judgment was void for lack of subject matter jurisdiction and because res judicata and collateral estoppel are inapplicable.

The court of appeals noted a trial court's judgment is void if the court lacked jurisdiction over the subject matter of the claim. A trial court has jurisdiction over the subject matter of a claim only if the claimant has standing to assert the claim. To collect from a promissory note, a plaintiff must establish: (1) the existence of the note in question; (2) the defendant signed the note; (3) the plaintiff is the owner and holder of the note; and (4) a certain balance is due and owing on the note. The court of appeals held the homeowner had standing in the first suit to seek a declaratory judgment that the bank did not own the promissory note and did not have the right to foreclose in the first lawsuit. Because the homeowner had standing, the court had subject-matter jurisdiction to determine those issues. The court also noted the question of whether a

party is entitled to sue on a contract is sometimes informally referred to as an issue of standing. Nevertheless, the issue does not affect the court's jurisdiction, and it is not truly one of standing, but one on the merits of the contract claim itself. Because ownership of the promissory note was an essential element of the bank's right to collect on it, the first court's determination the bank did not own the promissory note is a determination on the merits, not one of jurisdiction. Thus, the court found that the first judgment was not void. Being a determination on the merits, the court found the prior final judgment barred the same claims in the second suit under the doctrine of res judicata, and/or collateral estoppel because there were no changed circumstances plead. The court held the trial court properly granted summary judgment for the homeowner.

MEDICAL MALPRACTICE—EXPERT REPORTS

***Baylor All Saints Med. Ctr. v. Pamela Martin and John Martin*, 340 S.W.3d 529 (Tex. App.—Fort Worth 2011, no pet.)**

The Fort Worth Court of Appeals held an expert report for a patient and her husband who sued a hospital for the sexual assault of the patient did not comply with section 74.351 of the Texas Civil Practice and Remedies Code because it failed to establish what specific policies should have been in place to safeguard patients.

Pamela and John Martin sued Baylor All Saints Medical Center ("Baylor") for negligence, alleging Pamela was sexually assaulted in her hospital room as she recovered from surgery. In support of their claim, the Martins served Baylor with Dr. John C. Shershow's expert report. Baylor objected to the sufficiency of the report and moved to dismiss the Martins' claim. The trial court denied Baylor's motion to dismiss.

On appeal, the court noted hospitals are expected to adhere to specific standards of care with respect to its patients. A fundamental principle in providing patient care is the understanding that all patients are potentially vulnerable and necessarily need to receive treatment in a safe and secure environment. The Joint Commission on Accreditation of Health Care Organizations (JCAHO) has established standards requiring hospitals to adopt policies that safeguard patients from assault by hospital staff and by strangers that enter the hospital. JCAHO requires hospitals to adequately implement these standards and monitor this implementation. JCAHO patient security and safety expectations require, at a minimum, that hospitals should employ a sufficient number of security personnel to insure that no unauthorized persons enter patient rooms and

physically assault the patients. Additionally, JCAHO standards expect that all hospital staff will be trained to identify persons that are not authorized to enter patient rooms and will monitor and prevent unauthorized persons from having access to patients receiving treatment at the hospital.

The Martins claimed the trial court did not abuse its discretion by denying Baylor's motion to dismiss because Dr. Shershow's report was adequate. In the alternative, the Martins argued the medical records that section 74.351 allows them to discover do not contain adequate information to establish the appropriate standard of care and breach thereof and, therefore, further discovery should be allowed.

However, the court rejected the Martins' argument and held the Martins were "well aware, as set out in their petition, of the alleged facts of the assault. Therefore, it was incumbent upon their expert to articulate the standard of care applicable to the hospital to prevent such an assault, which does not require a factual inquiry into the measures taken by the hospital to meet this standard of care."

Dr. Shershow's report stated that: (1) Baylor is expected to adhere to "specific standards of care" for its patients; (2) there must be policies in place to safeguard patients from assault, including employing "a sufficient number of security personal [sic] to insure that no unauthorized persons assault patients and training staff to identify persons not authorized to enter patient rooms and prevent them from doing so"; and (3) these standards must be adequately implemented. However, Dr. Shershow's opinion did not establish what specific policies and safeguards should have been in place. For example, the "policies in place to safeguard patients" were not identified and Dr. Shershow did not opine as to the number of security personnel required or the training the staff should have received regarding identifying unauthorized persons.

The court held that "mere conclusions" about the standard of care are insufficient. An expert report must establish what the applicable standard is and set out what care was expected. Because Dr. Shershow's report failed to fulfill the required specificity, the trial court should have sustained the objection to the expert's report.

Further, although the Martins complained section 74.351(s) only allows discovery of medical records and billing records, which do not contain the circumstances surrounding the assault and, therefore, provided no discovery as to whether security standards were met, the court held the Martins complaint is a misreading of the discovery allowed under section 74.351(s). Section 74.351(s) allows discovery "of information, including medical or hospital records or other documents or tangible things, related to the patient's health care." Furthermore, as assaults of patients are covered by section 74.351, the court reasoned discovery of the hospital's policies and

procedures regarding the protection of patients from assault must be covered by section 74.351(s).

The court held the Martins' expert report was deficient with respect to the establishment of the appropriate standard of care for Baylor and the breach of that standard and, therefore, the trial court abused its discretion by not granting Baylor's motion to dismiss.

OIL AND GAS

***Faith Oil & Gas v. King*, No. 11-10-00234-CV, 2011 Tex. App. LEXIS 4215 (Tex. App.—Eastland June 2, 2011, no pet.)**

The Eastland Court of Appeals held an oil and gas lease had expired due to the nonproduction of minerals even though the oil and gas company was still using the well as a salt-water injection well.

In this case, the oil and gas company appealed a summary judgment on behalf of the landowner regarding whether the lease was null and void of no force and effect. The oil and gas company entered into a lease that was dated February 19, 2007. The lease provided for primary one-year term and as long thereafter "as oil, gas or other mineral are produced from said land thereunder." Although a well was drilled on the property, it was undisputed that no oil, gas, or other minerals were ever produced under the lease. Instead, the oil and gas company began to use the well as a saltwater injection well. The oil and gas company believed that they had the right to continue doing so after the one-year term because Exhibit B to the lease provided that, if a well was drilled on the land and did not prove to be a producing well, then, and only then, could the oil and gas company use the well as a salt water injection well.

The court of appeals noted that, in Texas, the usual oil and gas lease contains a habendum clause. The habendum clause defines the duration of the lease, and it usually provides for a relatively-short fixed term of years followed by a secondary term for "as long thereafter as oil, gas or other mineral is produced." Leases create a determinable fee that terminates when events upon which the term is limited occur. The court held that, if there was no production before the end the primary term, the lease terminated.

The court of appeals noted Exhibit B to the lease contained no terminology that spoke to an extension of the primary term. In the exhibit, the parties merely addressed the use of the well for injection purposes during the term of the lease, not the extension

of the term of the lease. Therefore, the court held that, under the plain terms of the lease, it expired at the end of one year as a matter of law and affirmed the trial court's summary judgment.

PROBATE—ESTATE

***In re Est. of Wilbur Waldo Lynch*, No. 04-09-00777-CV, 2011 Tex. App. LEXIS 2942 (Tex. App.—San Antonio April 20, 2011, no pet. h.)**

The San Antonio Court of Appeals affirmed a judgment finding a testator did not have mental capacity to execute a will and in denying attorney' fees to the proponent of the will.

This case involves a dispute over the 2003 will of Wilbur Waldo Lynch. Wilbur had three daughters: Peggy, Patricia, and Tracy. Wilbur died in July 2005, and Tracy filed an application to probate his 2003 will. After it was admitted to probate, Peggy and Patricia contested the will on the grounds that their father lacked testamentary capacity to execute the 2003 will, and allegedly executed it as a result of undue influence by Tracy. A jury returned a verdict in favor of Peggy and Patricia and the trial court invalidated the 2003 will. Although the jury had found Tracy incurred over $600,000 in reasonable and necessary attorney fees, the jury found she did not act in good faith and with just cause in defending the 2003 will. The trial court did not allow Tracy her attorney fees. Tracy appealed the trial court's judgment.

In answer to question number one, the jury found Wilbur did not have testamentary capacity when he executed the 2003 will. In the answer to question number two, the jury found that, at the time Wilbur executed the 2003 will, he was acting under the undue influence of Tracy. Tracy asserted these two findings created an irreconcilable conflict because a person cannot both lack testamentary capacity and be duly influenced. She also argued the trial court erred in admitting the evidence of Peggy's and Patricia's expert because that expert failed to recognize that a lack of testamentary capacity and undue influence are mutually exclusive.

The court of appeals noted the lack of testamentary capacity and undue influence are two distinct grounds for avoiding a will. It also acknowledged many courts have found that a finding of no testamentary capacity and a finding of undue influence are in conflict. Quoting a former Texas Supreme Court case, the court stated: "While testamentary incapacity implies the want of intelligent mental power, undue influence implies the existence of testamentary capacity subjected to and controlled by a

dominant influence or power." The court of appeals acknowledged the Supreme Court had recognized a finding of undue influence implies the existence of a sound mind. However, it found that neither the Supreme Court nor it had held a finding of undue influence requires the existence of sound mind. In fact, the court noted a previous Supreme Court case had recognized "weakness of mind and body, whether produced by infirmities of age or by disease or otherwise, maybe considered as a material circumstance in determining whether or not a person was in a condition to be susceptible to undue influence."

The court of appeals concluded testamentary incapacity and undue influence are not necessarily mutually exclusive because "(incapacity) may be a factor in the existence of the other (undue influence)." Accordingly, the court was unwilling to hold that, in all cases a person cannot both lack testamentary capacity and be unduly influenced. Thus, the court held the expert was not precluded from opining on both questions, and also found =the jury's affirmative findings on both questions were not an irreconcilable conflict.

The court next viewed the sufficiency of evidence to support the findings of lack of mental capacity. The court concluded there was legally and factually sufficient evidence to support the jury's finding that Wilbur lacked testamentary capacity to execute the 2003 will. The court found an expert testified after reviewing his medical records and multiple depositions that Wilbur had dementia before and after the execution of the will, and therefore had dementia when he executed the will. Furthermore, Wilbur's answers to questions by another physician days before the will was executed supported an opinion that he lacked the ability to understand the complicated will that he executed. Finally, the court of appeals affirmed the jury's finding that Tracy had not acted in good faith and the trial court's denial of her attorney fees.

PROFESSIONAL LIABILITY—CLAIMS AGAINST ENGINEERS

***TDIndustries, Inc., v. Citicorp North America, Inc.,* No. 02-10-00030-CV, 2011 Tex. App. LEXIS 2643 (Tex. App. - Fort Worth April 7, 2011, no pet.)**

The Fort Worth Court of Appeals held that, because the Plaintiff's negligence claims against TDIndustries (TDI) involved both claims for damages arising out of the provision of professional services by a licensed or registered professional and claims for negligent acts, errors, or omissions arising out of the provision of those services, Citicorp North America, Inc. ("Citicorp") was required to file a certificate of merit with its claims against TDI. Having failed to do so, the trial court abused its discretion by denying TDI's motion to dismiss Citicorp's claims against TDI.

Citicorp filed suit against numerous parties, including TDI, on February 26, 2009. Citicorp's suit sought damages against TDI and others related to the installation and retrofit of complex machinery and equipment. Specifically, recovery was sought for damages caused by a fire involving a generator retrofitted with a selective catalytic reduction (SCR) exhaust scrubber for emissions reduction purposes, which TDI allegedly installed. Citicorp claimed the SCR produced more "backpressure" than anticipated, thereby causing the fire. Citicorp's petition alleged TDI "owed a duty to [Citicorp] to exercise reasonably prudent and ordinary care in the installation [of the SCR]." Citicorp also plead that TDI committed various negligent acts.

Citicorp subsequently amended its petition and included a certificate of merit concerning the alleged professional engineering negligence of another defendant regarding the installation and retrofit of the SCR, but Citicorp did not file a certificate of merit regarding its claims against TDI. Believing that Citicorp was required to file a certificate of merit pertaining to Citicorp's claims against it, TDI filed a motion to dismiss. In its motion, TDI alleged that Citicorp was in fact complaining of acts or omissions by TDI that implicated engineering services and the applicable standard of care for rendering engineering services; thus, a certificate of merit was required.

Citicorp did not dispute that TDI is a "licensed or registered professional," that it did not file a certificate of merit regarding its claims against TDI with its original or live petition, or that it failed to file a certificate of merit setting forth specifically a negligent act, error, or omission of TDI. Instead, Citicorp responded that "the testing and verification of backpressure conditions does not necessarily involve the provision of professional services by a licensed professional engineer." Citicorp also noted that, in

TDI's initial responses to disclosure, TDI denied having engineering or design obligations or backpressure testing responsibilities. Both parties filed affidavits in support of their positions. The affidavits were filed by Citicorp's expert, Timothy B. Hatch, and TDI's senior vice president responsible for engineering, Larry Stephen Canter. Canter averred that, in his professional opinion, the allegations against TDI would necessarily involve the use of engineering skill and duties. Hatch averred the allegations against TDI do "not necessarily involve the provision of professional services by a licensed professional engineer." On January 29, 2010, the trial court denied TDI's motion to dismiss.

On appeal, TDI complained that the trial court abused its discretion by denying its motion to dismiss because Citicorp sought damages against TDI, other than for the payment of fees, for alleged errors or omissions arising out of the provision of professional services by TDI and that the trial court misconstrued or misapplied section 150.002 of the Texas Civil and Practices Remedies Code (CPRC) and section 1001.003 of the Texas Occupations Code when it determined that Citicorp's claims against TDI did not require a certificate of merit. In response, Citicorp claimed that TDI did not provide any professional engineering services related to the retrofit and that TDI admitted in its responses to request for disclosure that it did not have any engineering or design obligations related to the retrofit.

On appeal, the court concluded Citicorp's negligence claim implicated TDI's engineering education, training, and experience because it was premised on TDI's knowledge of the installation and testing of complex machinery and equipment. In other words, it was TDI's engineering expertise upon which Citicorp based TDI's alleged liability for having failed to exercise ordinary care in the installation of the SCR and for failing to exercise ordinary care to adequately inspect, verify, or otherwise take reasonable and necessary precautions so as to prevent harm to and perform backpressure testing of the SCR. Additionally, the court noted the Texas Occupations Code defines the practice of engineering services to include "engineering for preparation of an operating or maintenance manual"; "a service, . . . analysis, or other work performed . . . in connection with a utility, structure, building, machine, equipment, process, system, work, project, or industrial . . . product or equipment of a mechanical . . . [or] hydraulic . . . nature"; and "any other professional service necessary for the . . . progress, or completion of an engineering service"—all of which describe many of Citicorp's negligence allegations against TDI. Therefore, the court concluded Citicorp's negligence claims, as plead, were claims for damages arising out of the provision of professional services by a licensed or registered professional engineer within the meaning of former CPRC section 150.002(a).

Because the court concluded that the negligence claims alleged against TDI were both claims for damages arising out of the provision of professional services by a

licensed or registered professional and claims for negligent acts, errors, or omissions arising out of the provision of those services, Citicorp was required to file a certificate of merit with its claims against TDI. Having failed to do so, the trial court should have dismissed Citigroup's claims against TDI. Therefore, the court reversed the trial court's order and remanded the case with instructions for the trial court to dismiss Citicorp's claims against TDI.

In a dissenting opinion, Justice Lee Ann Dauphinot stated an engineer was not the only person who could adequately perform the acts alleged not to have been performed and, therefore, the trial court's decision was not erroneous. Specifically, Justice Dauphinot reasoned:

> [N]ot all work on all mechanical equipment can be engineering; if it were, even a mechanic changing the oil in a customer's car would be practicing engineering, and a suit over a negligent oil change would require the expert report of an engineer. Such work is not engineering if it does not require "engineering education, training, and experience" to be adequately performed.

REAL ESTATE—CLAIM TO BROKER FEES UNDER THE REAL ESTATE LICENSING ACT

***Neary v. Mikob Props., Inc.*, 340 S.W.3d 578 (Tex. App.—Texarkana 2011, no pet.)**

The Dallas Court of Appeals held that, because a "Term Sheet" and other documents did not constitute a signed, written memorandum setting forth the essential terms regarding a broker's fee, there was no contract between the real estate broker and the sellers that satisfied the requirements of the Real Estate Licensing Act (RELA) and, therefore, summary judgment for the sellers was appropriate.

Michael Neary and St. John's Holdings, Inc. (SJH) brought suit to recover a brokerage fee in connection with the sale of eight apartment complexes to Comunidad Corporation ("Comunidad"). The final purchase agreement did not include a provision awarding a real estate broker's fee. Neary is a licensed real-estate broker, and held a valid license. SJH is a Texas corporation wholly owned by Neary, to which Neary had assigned his commissions. SJH did not hold a real estate broker's license at the time of the Comunidad transaction. Comunidad was a section 501(c)(3) non-profit tax-exempt entity. In the summary judgment evidence, Comunidad described its related entities (collectively, the "Comunidad entities") as "Texas limited liability companies that were

created to take ownership and title to the subject apartments as part of the sale to Comunidad that closed on December 29, 2003." The Comunidad entities were "wholly owned by Comunidad Corp., in that Comunidad Corp. was and continues to be the sole member of these LLC's," according to the affidavit testimony of Mitchell Kobernick, who was the President of Mikob Properties, Inc. ("Mikob"). Certain limited partnerships owned by Kobernick and one of the appellees, Allan Klein, were the sellers in the transaction (collectively the "Seller entities").

Neary and SJH claimed that a document dated November 17, 2003, entitled "Term Sheet," combined with several email messages exchanged before and after the date of the Term Sheet, constituted a contract for a brokerage fee of one percent of the purchase price, and alleged the Comunidad and Seller entities breached the contract by failing to pay the fee. The Comunidad and Seller entities asserted that the Term Sheet and other documents did not satisfy the requirements of section 1101.806(c) of RELA. They also asserted SJH was not licensed as a broker until November 1, 2007, and therefore could not file suit to recover a commission from the Comunidad transaction. In addition to the Term Sheet, Neary and SJH relied on various e-mail messages to satisfy the requirements of RELA. The e-mails were exchanged both prior to and after the date of the Term Sheet.

The underlying lawsuit was filed after the parties failed to agree on the terms for payment of a commission to Neary or SJH. The trial court granted the motion for summary judgment filed on behalf of the Comunidad and Seller entities and severed the summary judgment order from the original action.

On appeal, the appellate court noted that, according to section 1101.806(c) of the Texas Occupations Code, a person cannot maintain an action to recover a commission for the sale or purchase of real estate unless "the promise or agreement on which the action is based, or a memorandum, is in writing and signed by the party against whom the action is brought or by a person authorized by that party to sign the document." Neary and SJH conceded that this provision of the Occupations Code applied to their claim for a commission, but claimed the statutory requirements were met by reading together the Term Sheet and the e-mail messages. However, in rendering its decision, the court noted that "strict compliance with RELA is required; the agreement to pay a real estate commission must be in writing or it is not enforceable." Specifically, in order to comply with RELA, an agreement or memorandum must:

> (1) be in writing and must be signed by the person to be charged with the commission; (2) promise that a definite commission will be paid, or must refer to a written commission schedule; (3) state the name of the broker to whom the commission is to be paid; and (4) either itself or by reference

> to some other existing writing, identify with reasonable certainty the land to be conveyed.

The court agreed with the Comunidad and Seller entities' claims that the Term Sheet and the other communications relied upon by Neary and SJH did not constitute a written promise, agreement, or memorandum to pay a commission. Further, even when the Term Sheet and e-mail messages were read together, the court stated the documents indicated at most an effort by Kobernick and Neary to negotiate an agreement on the terms upon which a commission would be paid. While there was testimony that Kobernick had authority to sign the Term Sheet on behalf of the Seller entities, none of the writings relied on by Neary to comprise the memorandum satisfied the statute of frauds contained this information. Finally, the Term Sheet provided that SJH and two others would receive a commission "equal to a total of 2.0% of the Purchase Price," and included terms for payment. Neary, however, was not identified as a "broker to whom the commission is to be paid." Moreover, SJH's name appeared in the paragraph entitled "Brokerage Fee," rather than Neary's name. It was undisputed that SJH did not hold a license at the time of the Comunidad transaction, and could not plead and prove it was a duly-licensed real-estate broker in its suit to recover a commission. Without the name of a licensed broker, the Term Sheet could not be in strict compliance with RELA. Therefore, because there was no broker fee contract meeting the requirements of RELA, the court of appeals held that summary judgment for the Comunidad and Seller entities was proper.

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CLASS ACTION CERTIFICATION

***Jimmy Glen Riemer v. State*, No. 07-10-00037-CV, 2011 WL 2119197 (Tex. App.—Amarillo May 27, 2011, no pet. h.)**

The Amarillo Court of Appeals held Plaintiffs had standing to pursue their class claims, but nevertheless affirmed the trial court's denial of class certification because the proposed class representatives could not fairly and adequately protect the interests of the proposed class on the basis of a conflict of interest, created by defendants after plaintiffs filed their application for class certification, in the absence of a finding of "wrongdoing" on the part of defendants.

Plaintiffs Jimmy Glen Riemer, Richard Coon, Jr., the June Coon Trust, the Johnson Borger Ranch Partnership, and Montford Johnson III (collectively, "Plaintiffs") are landowners who own property situated on the boundary of the Canadian River east of the Sanford Dam. Plaintiffs brought suit against the State of Texas and Jerry Patterson in his capacity as Commissioner of the General Land Office (collectively, the "State") alleging an unconstitutional taking of their property. Specifically, Plaintiffs alleged the State had for years taken minerals, oil, and gas from Plaintiffs' property without just compensation, basing such taking on a Canadian River boundary survey that was previously declared incorrect and invalid. In connection therewith, Plaintiffs sought certification of a class generally described as "All owners, from 1981 to present, of any real property interest adjacent to the Canadian Riverbed . . . ." In denying class certification, the trial court found the Plaintiffs lacked standing to bring the claims alleged and the proposed class representatives were not typical of the class claims, would not adequately represent the class, and none of the alternate grounds of Texas Rule of Civil Procedure 42(b) were met. Plaintiffs appealed.

With respect to standing, the court of appeals noted that, generally, owning an interest in property at the time of its alleged taking would confer standing to sue for the taking. In their live pleading, Plaintiffs alleged they have been owners in fee simple of the properties at issue and have been and were at all material times entitled to possession of all such property. Additionally, Plaintiffs asserted in a later pleading that

they owned interests in the properties at issue through devise, descent, or assignment. Although the court of appeals found deposition testimony of certain Plaintiffs cited by the State "clouds the pleading picture and might give rise to an inference supporting the court's ruling," the court of appeals held the record did not conclusively demonstrate that Plaintiffs lacked standing. Therefore, the court of appeals held the trial court abused its discretion in finding the Plaintiffs lacked standing.

With respect to the requirements of Rule 42, the court of appeals found the trial court did not abuse its discretion in finding the proposed class representatives could not fairly and adequately protect the interest of the class, as required by Rule 42(a). The trial court based its decision regarding adequacy, in part, on the finding that a 2002 agreement between the State and some of the proposed class members (the "Boundary Agreement"), which purported to settle the boundary dispute claim at the heart of the underlying suit between the State and certain landowners created a conflict between certain members and the potential representatives. The Boundary Agreement was signed by some members of the potential class, but not the potential representatives. In the trial court and on appeal, Plaintiffs argued the State manufactured such conflict by circulating the Boundary Agreement amongst landowners some six months after Plaintiffs applied for class certification. The court of appeals, however, found the timing of the State's settlement had not been determined to be "wrongdoing" and, therefore, was of no consequence. Notwithstanding the timing of the signing of the Boundary Agreement, however, the court of appeals found the fact that the proposed class representatives sought to address the validity of the Boundary Agreement in the underlying suit, where some evidence showed that certain proposed class members did not want the Boundary Agreement to be determined void, was dispositive on the existence of a potential conflict between members of the proposed class and proposed class representatives. Therefore, the court of appeals found the trial court did not abuse its discretion in denying class certification.

SCOPE OF INTERLOCUTORY APPEALS

***Gulley v. State Farm Lloyds*, No. 04-11-00076-CV, 2011 WL 1796295 (Tex. App.—San Antonio May 11, 2011, no pet.)**

The San Antonio Court of Appeals reversed the trial court's denial of competing motions for summary judgment because, although there were no disputed issues of material fact precluding summary judgment, the trial court failed to decide the substantive legal issue presented in the competing motions and instead elected to "improperly certify" a "controlling question of law" in an interlocutory appeal.

Dora Gulley owned a home damaged by foundation movement resulting from a below-slab plumbing leak. She made a claim under her homeowners insurance policy for that damage. State Farm concluded the damage was covered under the "Dwelling Foundation Endorsement" to the policy, and therefore subject to a 15% coverage limitation. Gulley accepted the payment but later sued State Farm for breach of contract, arguing she was entitled to additional benefits under a "Water Damage Endorsement" in the same policy. Both parties filed competing summary judgment motions and argued their interpretations of the endorsements at issue were conclusively established as a matter of law.

The trial court entered an order denying both parties' motions and authorizing an immediate interlocutory appeal pursuant to section 51.014(d) of the Texas Civil Practice and Remedies Code. That section confers a trial court with authority to issue an order for a permissive interlocutory appeal in a civil case if: (1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion; (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and (3) the parties agree to the order. The trial court found all three criteria were met. The parties and the trial court agreed that the following was the "controlling question of law":

> Whether damage to walls, floors, roofs or ceilings caused solely by foundation movement resulting from a below-slab plumbing leak is covered under either the Dwelling Foundation Endorsement (to Plaintiff's Homeowners Policy) or the Policy's Water Damage Endorsement.

Thus, the trial court presented a legal question for the San Antonio Court of Appeals to decide.

The San Antonio Court of Appeals noted that, if as represented by the parties and the court, there are no disputed fact issues, then one or the other of the competing interpretations of the policy endorsements had to be correct "as a matter of law." The court then held that, "[b]y failing to decide which endorsement applied, the trial court failed to comply with its duty to rule on the substantive legal issue, instead opting to ask this Court to make the initial 'matter of law' decision through an agreed interlocutory appeal." While federal appellate courts enjoy the authority to certify a determinative question of state law to the Texas Supreme Court, nothing in section 51.014(d) of the Texas Civil Practice and Remedies Code authorizes a trial court to present a "certified question" to an intermediate court of appeals. In reversing the trial court's denial of the competing motions for summary judgment, the San Antonio Court of Appeals held section 51.014(d) is not intended to relieve the trial court of its role in deciding substantive issues of law properly presented to it.

PLEAS TO THE JURISDICTION—PROCEDURE FOR CHALLENGING LACK OF STANDING

***Unifund CCR Partners v. Watson,* 337 S.W.3d 922 (Tex. App.—Dallas 2011, no pet.)**

The Amarillo Court of Appeals reversed the trial court's sustaining of a plea to the jurisdiction challenging a credit card company assignee's standing to sue on credit card debt where the defendant filed a plea to the jurisdiction alleging the assignee had no evidence of an assignment, but did not himself present any proof that the trial court lacked subject-matter jurisdiction.

Unifund CCR Partners ("Unifund") filed suit against Eddie Watson, arguing Watson breached a contract regarding funds advanced to him via credit card. Unifund's petition alleged that, "[i]n the usual course of business, First USA Bank NA advanced funds to" Watson by and through a credit card agreement, and that Unifund was "the assignee of this credit card agreement." Watson filed a plea to the jurisdiction, alleging that, "[w]ithout some admissible evidence of the assignment, [Unifund] lacks standing to bring its claims." Watson did not file any evidence in support of his plea to the jurisdiction. Nevertheless, the trial court signed an order dismissing the case for want of jurisdiction. Unifund appealed, arguing the trial court erred in not handling the plea to the jurisdiction like a motion for summary judgment.

A plea to the jurisdiction seeks dismissal of a case for lack of subject-matter jurisdiction. To demonstrate subject-matter jurisdiction, a plaintiff is only obligated to plead facts affirmatively demonstrating the trial court has subject-matter jurisdiction. A

plea to the jurisdiction that challenges the existence of facts alleged by the pleader to establish the trial court's subject-matter jurisdiction is governed by a standard that generally mirrors that of a traditional summary judgment. The moving defendant bears the burden of presenting conclusive proof that the trial court lacks subject-matter jurisdiction. Only when the moving defendant satisfies that burden does the burden shift to the plaintiff to present evidence raising a material issue of fact.

Here, Watson attempted to alter that standard. Specifically, Watson argued Unifund lacked evidence of an assignment and that Unifund was obligated to present evidence sufficient to demonstrate an issue of fact. He did so without presenting any evidence supporting his own plea to the jurisdiction challenging the facts alleged in Unifund's petition. The Amarillo Court of Appeals held a defendant may not merely offer a pleading denying the existence of jurisdictional facts and, by doing so, force the plaintiff to present evidence sufficient to raise an issue of fact. Because Watson did not present conclusive proof that Unifund was not an assignee of his account, the court of appeals held he did not satisfy his burden of proof and, therefore, reversed the trial court.

RES JUDICATA

***Gamma Group, Inc. v. Home St. Cnty. Mut. Ins. Co.*, No. 05-10-00070-CV, 2011 WL 1810495 (Tex. App.—Dallas May 12, 2011, pet. filed).**

The Dallas Court of Appeals, affirming the trial court, held the plaintiff's permissive indemnity claim was barred by res judicata where similar claim arising out of the same subject matter had been adjudicated, and indemnity claim could have been brought, in previous suit.

Defendant Home State County Mutual Insurance Company ("Home State") is an insurance company that issues nonstandard auto-insurance policies. Plaintiff Gamma Group, Inc. ("Gamma Group") is Home State's agent for binding and adjusting insurance policies. Specifically, pursuant to an agency agreement, Gamma Group was to produce insurance policies, collect premiums, and adjust any liability claims of Home State's insureds. Gamma Group would use the collected premiums to pay its commission and to pay Home State and its reinsurer, Transatlantic Reinsurance Co. ("Transatlantic"). Home State terminated the agency agreement with Gamma Group on January 1, 1999. Following termination, Gamma Group could no longer write new business on Home State policies; however, Gamma Group remained responsible for adjusting claims and policies issued during the term of the agency agreement (the "run-off claims").

In 2002, Home State terminated Gamma Group's servicing of run-off claims and hired Marshall Contract Adjustors ("Marshall") to service those claims. Home State and Transatlantic ultimately paid over $4 million on the run-off claims. As a result, Home State and Transatlantic sued Gamma Group, alleging Gamma Group breached the agency agreement by not only failing to pay the claims adjusted by Marshall out of the premiums Gamma Group had collected, but also retaining such premiums. Gamma Group counterclaimed, alleging that, pursuant to the agency agreement, Home State was liable to Gamma Group for any amount Gamma Group owed to Transatlantic as such was a "loss adjustment expense[] incurred at the direction of [Home State]." The trial court disagreed, holding "settlements paid for ordinary claims are not expenses that can be attributed to Home State's actions; they are losses caused by insured under the policies."

The Dallas Court of Appeals affirmed in part and remanded in part to the trial court for recalculation of the amount of damages.

Thereafter, Gamma Group filed a second suit against Home State seeking indemnity under the agency agreement for the unreasonable amount of any settlements of the run-off claims adjusted by Marshall that Gamma Group was required to pay out of the premiums it had collected. Specifically, Gamma Group alleged Home State intentionally and negligently caused Marshall to adjust and settle claims for unreasonable amounts and, therefore, pursuant to the agency agreement, Home State was obligated to indemnify Gamma Group. Home State moved for summary judgment, and the trial court ultimately granted summary judgment on the ground that Gamma Group's suit was barred by res judicata.

Res judicata precludes relitigation of claims that have been finally adjudicated, or that arise out of the same subject matter and that could have been litigated in the prior action. Texas follows the transactional approach, which provides that a final judgment on an action extinguishes the right to bring suit on the transaction, or series of connected transactions, out of which the action arose. The court of appeals noted the second suit arose out of the same subject matter as Gamma Group's counterclaim asserted against Home State and Transatlantic in the prior suit. The court of appeals found Gamma Group's counterclaim in the first suit was essentially a contractual indemnity claim, much like the indemnity claim asserted by Gamma Group in the second suit. Although Gamma Group's indemnity claims were permissive, rather than compulsory, once Gamma Group chose to assert one indemnity claim in the first suit, it was required to bring all other claims arising out of the same subject matter that could be litigated in the same action. Thus, by not bringing the second indemnity claim in the first suit, notwithstanding the fact that such claim was permissive, it was barred by res judicata.

STATUTE OF LIMITATIONS

***Russo v. Goodness,* No. 02-10-00330-CV, 2011 WL 2119627 (Tex. App.—Fort Worth May 26, 2011, no pet.) (mem. op.)**

The Fort Worth Court of Appeals reversed a trial court's order granting summary judgment on limitations grounds because the discovery rule deferred the accrual of an inmate's libel cause of action until he received the libelous statement in prison, and because the date on which the inmate filed his petition without filing fee became the official filing date when he subsequently filed his affidavit of indigency in lieu of a filing fee.

Steven Charles Russo, a defendant in a criminal proceeding, was ultimately convicted and incarcerated. He subsequently filed a writ of habeas corpus, arguing ineffective assistance of counsel because his trial counsel had refused to argue an insanity defense relating to Russo's insanity and/or intoxication at the time of the crime because of Russo's high blood pressure and the medicine he took for the same. Russo's trial counsel had a physician, Kelly Goodness, M.D., appointed to evaluate Russo. In the habeas proceeding, Russo's trial counsel filed an affidavit to explain the reasons for not asserting the insanity defense, pointing to Goodness's characterization of Russo as "a malingerer or a person who fakes medical symptoms in order to evade criminal prosecution." While the affidavit was filed on February 19, 2009, the district attorney's office did not forward a copy to Russo until March 11, 2009. Russo received a copy of the affidavit on March 13, 2009. Based on the statements in the affidavit, Russo filed his lawsuit against Goodness on March 15, 2010. The trial court granted summary judgment in favor of Goodness, finding that Russo's claims were barred by the one-year statute of limitations for libel claims.

Although the statute of limitations for libel claims is one year, the Fort Worth Court of Appeals held the discovery rule may apply to libel claims when the libelous statements are not public knowledge. Because Russo was incarcerated at the time the affidavit was filed, he did not receive a copy of it until almost one month later. The Fort Worth Court of Appeals held his incarceration precluded him from discovering the injurious statements by independent means. Thus, the Fort Worth Court of Appeals held the discovery rule deferred the accrual of Russo's cause of action until March 13, 2009—the date he was first able to discover the injury. Because the one-year period following that date fell on a Saturday, the court further held that Russo was required to file his petition by March 15, 2010.

Russo's case, however, was not created until June 14, 2010. The clerk's office received Russo's petition on March 15, 2010. The petition was not originally accompanied by a filing fee or affidavit of indigency. Not realizing the petition was for a new civil cause of action, the clerk's office filed it as part of his criminal case. It subsequently sent Russo a letter on May 26, 2010 notifying Russo that it had misfiled the petition and that it would file the petition as a civil case as soon as he paid a filing fee or filed an affidavit of indigency. Russo did so soon thereafter, and the clerk instituted a new civil action on June 14, 2010.

Goodness argued that, because the new matter was not created until June 14, 2010, Russo's petition was barred by the one-year statute of limitations. Russo, on the other hand, argued he timely filed his petition and that any error made by the clerk's office should not be attributed to him. Texas law makes clear that a petition filed without an accompanying filing fee is considered "conditionally filed" on the date it was tendered to the clerk. As soon as the fee is paid, the petition is deemed filed on the date it was originally tendered. Here, the Fort Worth Court of Appeals concluded the same rationale should control circumstances involving affidavits of indigency, as opposed to filing fees. Accordingly, the court held Russo's petition was conditionally filed on March 15, 2010 when he tendered the petition to the clerk's office, and that the filing of his affidavit of indigency deemed the filing date March 15, 2010. The court, therefore, reversed the trial court's summary judgment.

TURNOVER ORDERS

***Premier Trailer Leasing, Inc. v. GTR Rental L.L.C.*, No. 02-09-00449-CV, 2011 WL 1901980 (Tex. App.—Fort Worth May 19, 2011, no pet.) (mem. op.)**

The Fort Worth Court of Appeals modified the trial court's turnover order because its language was not definite, clear, and concise, and it left the judgment debtor with doubt about its duties and prompted it to make inferences or conclusions about which persons might differ.

A South Carolina federal court granted judgment in favor of GTR Rental L.L.C. (GTR) against John Dal Canton. Dal Canton owned stock in Premier Trailer Leasing, Inc. ("Premier"), a company based in Denton County, Texas. That stock entitled Dal Canton to distributions. Because Dal Canton's ownership of Premier stock entitled him to future distributions, GTR domesticated the South Carolina judgment in Denton County,

Texas. The Denton County trial court issued a turnover order requiring Premier to pay or distribute to GTR all company distributions to which Dal Canton may be entitled.

To allow GTR to determine whether it was receiving all distributions it was entitled to under the turnover order, the trial court further ordered that:

> In order that GTR may ascertain whether DalCanton and, by virtue of this Order, GTR may be entitled to a distribution from Premier, Premier shall provide to GTR all notices related to Premier distributions and any financial information, to which DalCanton is entitled as a stockholder of Premier in the same fashion as DalCanton is entitled (except that GTR is not entitled to marketing materials, price lists, customer lists, customer identities, and product identities and availabilities); provided, further, that all such information and notices shall remain subject to the Confidentiality Order.

Premier appealed, arguing in part that the above-quoted paragraph lacks the requisite clarity and definiteness of a turnover order. Specifically, Premier argued it was unsure whether the "any financial information" reference required disclosure of confidential information.

A turnover order acts as a mandatory injunction. Pursuant to Texas Rule of Civil Procedure 683, such an order must therefore be specific and describe in reasonable detail the act contemplated by the order. The Fort Worth Court of Appeals held the above-quoted paragraph exemplified "the exact lack of clarity that a turnover order cannot contain." The court, therefore, modified the paragraph, deleting the unclear portion:

> In order that GTR may ascertain whether DalCanton and, by virtue of this Order, GTR may be entitled to a distribution from Premier, Premier shall provide to GTR all notices related to Premier distributions.~~ and any financial information, to which DalCanton is entitled as a stockholder of Premier in the same fashion as DalCanton is entitled (except that GTR is not entitled to marketing materials, price lists, customer lists, customer identities, and product identities and availabilities); provided, further, that all such information and notices shall remain subject to the Confidentiality Order~~.

The modified paragraph made the order definite, clear and concise, and removed the concerning "doubt about the conduct required by Premier to comply with the order" and "doubt about the conduct that would be a failure by Premier to comply with the order."

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BANKRUPTCY PROCEDURE

In re Davis Offshore, L.P., No. 09-41294, 2011 WL 2410498 (5th Cir. June 16, 2011)

The Fifth Circuit held exculpatory language in a Chapter-11 reorganization plan barred a party from seeking damages for the fraudulent creation and passage of the plan, reasoning that the party was represented by sophisticated counsel and the exculpatory language was consistent with the plan's goal to end both litigation and continued hemorrhaging of the debtor's cash.

Whether a prepackaged Chapter-11 reorganization plan and confirmation order bar the assertion of fraud claims against the creators of the plan is an issue of perennial importance in bankruptcy procedure. On one hand, fraud should be prevented whenever possible. On the other, quick implementation of prepackaged plans can avoid unnecessary depletion of the estate.

In this case, a prepackaged plan to sell the debtor entities' assets was filed and resolved by a confirmation order in less than a week. One party (the Nancy Sue Davis Trust (the "Trust")) declined to vote on the plan but did not register opposition to the plan. Six months later, and after a district court rejected its motion to revoke the allegedly fraudulent confirmation order, the Trust filed a direct appeal to the Fifth Circuit, seeking not revocation of the confirmation but damages against the asset buyers—a claim the bankruptcy court had dismissed as an impermissible collateral attack on the plan and confirmation order.

The Fifth Circuit affirmed the judgment of the bankruptcy court and held the fraud claims had to be dismissed because: (1) the reorganization plan was crafted under emergency pressures required by intra-family conflict and a suffering business; (2) all relevant parties, including the Trust, were continuously represented by sophisticated counsel; and (3) the Trust had not timely pursued the remedies offered under Chapter 11. The court also relied on exculpatory language in the Chapter-11 plan, reasoning that exculpation was consistent with the prepackaged plan's purposes of quickly reorganizing, preventing further loss of assets, and halting litigation. Therefore,

the exculpatory language of the plan and the confirmation order protected the defendants from fraud claims.

DUE PROCESS—RIPENESS AND WAIVER OF CLAIMS

***Rosedale Missionary Baptist Church v. City of New Orleans*, 641 F.3d 86 (5th Cir. 2011)**

Interpreting the Fourteenth Amendment, the Fifth Circuit held a substantive due-process claim is waived if not pressed at trial. Additionally, the court held a procedural due-process claim is not ripe until the petitioner has first proven an injury by exhausting state takings procedures.

The Rosedale Missionary Baptist Church (the "Church") was damaged by Hurricane Katrina and, after Hurricane Gustav in 2008, the City of New Orleans (the "City") demolished the Church without notice. At the time, a consent decree required the City to provide notice before demolition. The Church sought damages against the City for violations of its procedural and substantive due process rights and for just compensation under the Takings Clause. The district court dismissed the Takings Clause claim as unripe but did not address ripeness of the other claims. At trial, the Church—and the Court—addressed only the procedural due process claim, never referencing or articulating an independent substantive due process claim. On the procedural due process claim, the jury awarded the Church $300,000 for violation of the Church's "Fifth or Fourteenth Amendment constitutional rights."

The City appealed, arguing the procedural and substantive due process claims were unripe. The Church responded, arguing the City waived any ripeness argument by not raising it before appeal.

The Fifth Circuit held the Church waived its substantive due process argument by not pressing it at trial because the Church had failed to: (1) adequately explain that claim; (2) distinguish it from its procedural due process claim; (3) argue it before the district court, and (4) correct the court when it instructed the jury on the procedural claim alone. The Fifth Circuit then decided the Church's procedural due process claim was not ripe because the Church had failed to allow the state takings procedures to run their course before filing its takings and due process claims in federal court. The Fifth Circuit reversed the district court's judgment and dismissed the Church's claim without prejudice to allow for completion of the state takings procedures.

EMPLOYMENT LAW—UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

***Carder v. Cont'l Airlines, Inc,* 636 F.3d 172 (5th Cir. 2011)**

The Fifth Circuit—the first circuit to address this question—decided the Uniformed Services Employment and Reemployment Rights Act (USERRA), a statute adopted to prohibit civilian employers from discriminating against their employees because of their military service, does not create a free-standing cause of action for a hostile work environment

Several Continental Airlines, Inc. ("Continental") pilots filed a USERRA class action against their employer for, among other things, a hostile work environment created by an alleged "continued pattern of harassment" regarding the pilots' military leave. Continental moved to dismiss the complaint under Rule 12(b)(6). The district court agreed that, as to the hostile-work-environment count, the pilots did not state a claim under the USERRA, which creates a cause of action for the denial of any "benefit of employment." Applying the plain language of the USERRA, the district court reasoned the prohibition against denial of a "benefit of employment" on the basis of military service did not include a prohibition against hostile work environments. The Fifth Circuit was the first circuit court to address this question, and the district courts were split.

The court first looked at the language of the USERRA, which defines "benefit" as including any "advantage, profit, privilege, gain, status, account, or interest," but makes no mention of work environment. Although the court found the express language of the statute does not provide for a hostile-work-environment claim, it went on to consider the legislative history of the USERRA and to compare that statute with analogous anti-discrimination legislation. Neither the legislative history of the USERRA nor congressional intent gleaned from other anti-discrimination statutes supported the pilots' contention that "benefit" was meant to include "a non-hostile work environment." Thus, the court concluded the USERRA does not provide a free-standing cause-of-action against an employer for a hostile work environment.

The Fifth Circuit agreed and vacated the district court's decision. Because the FDA did not raise the inspection issue in its first appeal, the issue was forfeited and the district court could not reconsider the issue on remand.

EQUAL ACCESS TO JUSTICE ACT—ATTORNEY FEE

***Murkeldove v. Astrue*, 635 F.3d 784 (5th Cir. 2011)**

The Fifth Circuit held that, for purposes of the Equal Access to Justice Act (EAJA), attorneys "incur" fees while asserting and appealing a client's right to past-due Social Security payments on a contingency basis.

Murkeldove sought past-due benefits from the Social Security Commissioner (the "Commissioner"), but his claim was denied. He appealed to the district court, which reversed the Commissioner's decision and remanded for further proceedings. Murkeldove applied for attorney fees under the EAJA. The district court denied his request, reasoning Murkeldove's contingency-fee arrangement with his attorney was based on an eventuality (payment of the benefits), which had yet to occur, and that Murkeldove had consequently not "incurred" any obligation that could be paid under the EAJA. Murkeldove appealed, and his appeal was later consolidated with appeals filed by four other similarly-situated claimants.

The Fifth Circuit stated four requirements that must be met for a party to receive an award of attorney fees under the EAJA: (1) the claimant must be a "prevailing party"; (2) the claimant must "incur" attorney fees; (3) the government's position must not have been "substantially justified"; and (4) "special circumstances" cannot render an award of fees unjust. Only the second factor—whether the Claimants incurred attorney fees—was at issue here.

The Fifth Circuit held the claimants incurred attorney fees by virtue of their contingency fee arrangements. Although the term "incur" is not defined in the EAJA, each of the claimants' contingency-fee agreements stated that any fees granted by a federal court belonged to the claimants' attorneys. Even if those clauses did not exist, however, statutory construction would have demanded the same result. The court also rejected the district court's finding that the relevant clauses violated the Assignment of Claims Act, 31 U.S.C. § 3727.

FEDERAL AGENCIES—FEDERAL ENERGY REGULATORY COMMISSION CLAIMS

***W. Ref. Southwest, Inc., v. FERC,* 636 F.3d 719 (5th Cir. 2011)**

The Fifth Circuit held the Federal Energy Regulatory Commission (FERC) has jurisdiction over common carriers engaged in the transportation of oil. Applying that holding to the facts of the case, the court held that: (1) the defendant pipeline owner was not a common carrier; and (2) FERC had acted appropriately in finding that it lacked jurisdiction and in refusing to hear complainant's claims against the defendant pipeline owner.

Enterprise Crude Pipeline ("Enterprise") agreed to provide specific daily pipeline capacity so that Western Refining Southwest ("Western") could transport oil from Midland, Texas to Hobbs, New Mexico. When it appeared to Enterprise that Western was not going to use its capacity for a time, Enterprise unilaterally decided to reverse flow and transport oil from New Mexico to Texas, placing Western's products in an Enterprise holding tank. Western filed a complaint against Enterprise with FERC, the agency that has jurisdiction over common carriers engaged in "the transportation of oil . . . by pipe line." FERC decided it had no jurisdiction over the dispute because the matter was one of property rights to the pipeline capacity rather than the transportation of oil. Western appealed, arguing FERC had jurisdiction.

The Fifth Circuit determined whether FERC had jurisdiction here by looking to whether Congress unambiguously expressed its intent on the issue or, if Congress didn't express its intent, following the agency's reasonable interpretation of its actions or authority. Looking first to the text of the Act, the court decided that Congress's intent was unambiguous: FERC has jurisdiction over common carriers engaged in the transportation of oil. The remaining question was whether Enterprise was acting as a "common carrier" when it leased pipeline capacity to Western. The court held that, as defined by the agreement between the parties, Enterprise was a lessor (not a common carrier) and Western was a lessee. Thus, the dispute was over property rights, and FERC was correct in holding that it had no jurisdiction.

FULL-FAITH-AND-CREDIT CLAUSE—EQUAL PROTECTION

***Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011) (en banc)**

The Fifth Circuit held an unmarried New York couple could not force Louisiana to place both of their names on their adopted child's birth certificate under either the Full-Faith-and-Credit or Equal-Protection Clauses.

Plaintiffs, an unmarried couple from New York, adopted a Louisiana-born child in New York. They asked the Louisiana Registrar of Vital Records and Statistics to reissue the child's birth certificate and replace the names of the biological parents with their own. Although the state is allowed to reissue birth certificates to adoptive parents, it permits only married couples to adopt children. Interpreting the relevant statutes, the Registrar refused to place both of the Plaintiffs' names on the reissued certificate, offering instead to insert the name of one or the other. The Plaintiffs sued the Registrar for declaratory and injunctive relief under 42 U.S.C. section 1983, arguing the Full-Faith-and-Credit Clause (the "Clause") required Louisiana to recognize their New York adoption decree and that, under the Equal-Protection Clause, their child was part of a discriminated subclass of adoptive children with unmarried parents.

The district court found for Plaintiffs, concluding the Clause required Louisiana to recognize the joint adoption decree issued in New York. The Fifth Circuit initially upheld the district court's ruling, but then ordered a rehearing en banc.

Chief Judge Jones, writing for the en-banc majority, first addressed the full-faith-and-credit claim, noting 28 U.S.C. section 1738 (which effectuates the Clause) states full faith and credit and recognition must be given to "such Acts, records and judicial proceedings or copies thereof" of any U.S. state, territory, or possession. But section 1983 "has no place in the Clause's orchestration of inter-court comity—state courts may err, but their rulings are not subject to declaratory or injunctive relief in federal courts." Thus, the court restricted the reading of the Clause to the application of interstate res judicata and held that: (1) the Clause cannot be the vehicle for a Section-1983 suit against a non-judicial state actor such as the Registrar; (2) the Clause cannot be an independent basis for federal jurisdiction; (3) the full-faith-and-credit issue was improperly before the federal courts; and (4) even if the Clause was a vehicle for Section-1983 suits, the Registrar had not violated the Clause by interpreting and applying her own state's law. Interstate res judicata was therefore not in play, and Plaintiffs failed to state a Section-1983 claim under the Clause.

Regarding equal protection, the court held that Louisiana had a legitimate interest in encouraging a stable and nurturing environment for educating and socializing adopted children. The means of reaching this end—allowing only married couples to adopt—is reasonably related to the goal because marriage, as opposed to cohabitation, is at least arguably more likely to provide the stability needed for healthy childhood development.

MANDAMUS JURISDICTION—MEDICARE REIMBURSEMENT CLAIMS

Wolcott v. Sebelius, 635 F.3d 757 (5th Cir. 2011)

The Fifth Circuit held 42 U.S.C. section 405(h) does not preclude a Medicare reimbursement claimant from invoking a federal court's mandamus jurisdiction to review otherwise unreviewable procedural issues—even where the claimant has not satisfied the requirements of section 405(g) by seeking review by the Secretary of Health and Human Services.

Wolcott filed Medicare reimbursement claims that were denied, then reversed by an administrative law judge, and then denied again. Before appealing to the Secretary of Health and Human Services (the "Secretary"), as required in some circumstances by 42 U.S.C. section 405(h), Wolcott brought five claims in the district court for mandamus relief seeking enforcement of the administrative law judge's ruling and other procedural matters.

The district court held it lacked subject-matter jurisdiction and that Wolcott failed to state a claim. On appeal, the Fifth Circuit considered whether Wolcott had complied with 42 U.S.C. section 405(g), which requires that judicial review not be sought until after the Secretary has issued a final decision.

The court, however, focused on the third sentence of 42 U.S.C. section 405(h), which provides that "[n]o action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter." This sentence does not deprive the courts of jurisdiction under 28 U.S.C. section 1361, which provides jurisdiction in cases challenging the procedures used in administering benefits but unrelated to the merits of the benefits claim. Congress could have stripped the courts of Section-1361 jurisdiction as well as jurisdiction under sections 1331 and 1346, but it did

not. Therefore, Congress intended to preserve mandamus jurisdiction for claims that are procedural in nature under the Medicare Act.

PREJUDGMENT INTEREST

***Arete Partners, LP v. Gunnerman*, 643 F.3d 410 (5th Cir. 2011)**

The Fifth Circuit held the interest rate earned on funds deposited into a district court's registry does not replace Texas's statutory minimum prejudgment interest rate that the prevailing party is entitled to recover as compensation for the lost time value of money.

Arete Partners, LP ("Arete") sued Gunnerman, and the parties settled before trial. Gunnerman, however, stopped making settlement payments to Arete, so Arete sued Gunnerman for fraud and breach of the settlement agreement. Arete prevailed in the district court and elected recovery on its fraud theory, which allowed for the recovery of exemplary damages. Gunnerman appealed the ruling to the Fifth Circuit and, on the date the district court's judgment was entered, deposited $1,113,469.61 into an interest-bearing account in the court's registry in lieu of a supersedeas bond. The Fifth Circuit found for Gunnerman on appeal and remanded to the district court to allow Arete to elect recovery on its breach-of-contract claim. The Fifth Circuit also instructed the district court to award Arete "pre-judgment and post-judgment interest according to law." In the district court, Arete sought prejudgment interest at the statutory rate of 5% from the date Gunnerman breached the settlement agreement to the date of a final judgment awarding Arete damages on its contract claim.

Gunnerman conceded Arete could recover prejudgment interest through the date Gunnerman deposited funds into the court's registry. But Gunnerman argued that, from the date Gunnerman deposited funds into the court's registry, Arete could only recover prejudgment interest to the extent interest was actually earned on those funds. The district court rejected Gunnerman's argument and awarded Arete pre- and post-judgment interest at 5%.

The Fifth Circuit agreed with the district court and noted the purpose of prejudgment interest is to compensate a prevailing party for the lost time-value of the damages award. Arete's lost use of those funds was in no way mitigated by Gunnerman's decision to deposit the funds into the court's registry. Gunnerman had inappropriately analyzed interest from his own loss rather than Arete's compensation.

Gunnerman's deposit did not alter Arete's right to prejudgment interest. The court therefore made an "*Erie* guess" that the Texas Supreme Court would award Arete prejudgment interest at the statutory rate, rather than the rate actually earned on the funds deposited into the court's registry.

RELIGIOUS LAND USE—INSTITUTIONALIZED PERSONS ACT

Elijah Group, Inc. v. City of Leon Valley, 643 F.3d 419 (5th Cir. 2011)

The Fifth Circuit held a city violates the Equal-Terms clause of the Religious Land Use and Institutionalized Persons Act (RLUIPA) when it allows nonreligious private clubs to obtain Special Use Permits but denies churches the same ability.

The Elijah Group (the "Church") brought various claims against the City of Leon Valley (the "City") for the City's restriction of the Church's performance of religious services in areas with a certain zoning classification. The Church argued, among other things, that the City had violated the Equal Terms clause of the RLUIPA by allowing private clubs and social organizations, but not churches, to appeal to the City for a Special Use Permit to operate in areas with the zoning classification. The district court granted the City's motion for summary judgment and dismissed all of the Church's claims.

The Fifth Circuit reversed, finding the City's actions violated the Equal Terms provision of the RLUIPA. The court noted the RLUIPA's Equal Terms provision requires a religious organization to show more than that its religious use is forbidden and some other nonreligious use is permitted. The "less than equal terms" under which the religious organization is treated must be measured by the ordinance itself and the criteria by which it treats institutions differently. Under this standard, the Church was treated differently than similar institutions because religious institutions were barred altogether from seeking Special Use Permits, while other, nonreligious, entities could seek them.

STANDARDS OF REVIEW—MANDAMUS

***In re Amy Unknown*, 636 F.3d 190 (5th Cir. 2011)**

The Fifth Circuit, in a panel rehearing, clarified its mandamus standard of review and held the proximate causation requirement of 18 U.S.C. section 2259(b)(3)(F), which defines the scope of restitution a victim of sexual abuse may seek under the Crime Victims' Rights Act (CVRA) of 2004, 18 U.S.C. section 3771, does not permeate the other subparagraphs of section 2259(b)(3). Therefore, a victim need not show proximate cause to claim restitution under subsections A-E.

"Amy" is a woman who was sexually abused as a child. Two photos of her abuse were in defendant Doyle Randall Paroline's possession when he was arrested for possession of child pornography, a charge to which he plead guilty. At Paroline's sentencing, Amy filed a victim impact statement and requested restitution pursuant to the Mandatory Victims Restitution Act and the CVRA. The claim included over $3 million in lost wages, attorney fees, and ongoing psychological care. The district court denied her request, finding the CVRA required Amy to prove that Paroline's possession proximately caused her injury. Amy filed both a direct appeal and a petition for a writ of mandamus. The Fifth Circuit initially affirmed the district court's opinion but then granted rehearing.

On rehearing, the panel granted the petition for a writ of mandamus, and clarified the mandamus standard of review in *In re Dean*, 527 F.3d 391 (5th Cir. 2008), would apply in all mandamus petitions, regardless of the petition's context. In particular, mandamus can only be granted if, as in Amy's case, all three "*Cheney* factors" are fulfilled. The first *Cheney* factor, which Amy easily fulfilled, requires the petitioner to show she likely has no other means for obtaining review of the district court's decision. The third factor, also easily met by Amy, requires the issuing court to be satisfied that the writ is appropriate under the circumstances.

The second *Cheney* factor, that the petitioner must have a clear and indisputable right to the issuance of a writ of mandamus, was the most contentious. Particularly, it was unclear whether all of 18 U.S.C. section 2259(b)(3), mandating restitution to a victim for "the full amount" of harm caused by child sex abuse, was limited by a proximate-cause requirement in subsection 2259(b)(3)(F). Subsections A-E list particular categories of restitution to which a victim is entitled, and Subsection F then states the victim can recover "any other losses suffered by the victim as a proximate result of the offense."

The question was whether the proximate-cause requirement of subsection F applied to subsections A-E, or whether Amy could recover under subsections A-E without proving proximate cause. The court, relying on history, policy, and principles of statutory construction, held the proximate-cause requirement applied only to restitution claimed under subsection F. Thus, Amy was free to prove her claim against Paroline under subsections A-E without proving proximate cause.

TORT LIABILITY—SUCCESSORS IN INTEREST

***Ford Bacon & Davis, L.L.C. v. Travelers Ins. Co*, 635 F.3d 734 (5th Cir. 2011)**

The Fifth Circuit held the product-line successor-liability rule does not apply in Texas because the Texas legislature, unlike California's or Washington's, has explicitly stated that an acquiring company will not be held responsible for liabilities, or insurance protection, of the transferring entity unless the acquiring company expressly assumes those things.

In 1996, S&B Acquisitions purchased certain assets from Ford, Bacon & Davis, Inc. ("FBD Inc."). The sale expressly excluded the liabilities and insurance coverage of FBD Inc. With the assets, S&B became Ford, Bacon & Davis, LLC ("FBD LLC"). FBD Inc. continued business as SFB Companies, Inc (SFB). Years later, people harmed by asbestos allegedly traceable to FBD Inc.'s presale actions began suing FBD LLC for damages. As the first claims were made, FBD LLC referred them to SFB, who, in turn, informed the asbestos plaintiffs that it, and not FBD LLC, was the successor to FBD Inc. However, SFB soon dissolved after many new lawsuits were filed against FBD LLC. Unable to refer the suits to the defunct SFB, FBD LLC sought to force Travelers Insurance Company ("Travelers") to provide a defense to the claims under FBD, Inc.'s policy. FBD LLC now claimed it was the successor to the policy, notwithstanding the exclusion of insurance from S&B's original purchase of FBD Inc.'s assets. Travelers refused, and FBD LLC sued.

Under other states' laws, a successor cannot acquire most of a predecessor's assets while disclaiming liability for the predecessor's products or insurance coverage. In those states, both liability and liability insurance follow the assets. In Texas, however, the legislature has explicitly stated that an acquiring company cannot be held responsible for the liabilities of a predecessor unless the successor expressly assumes such liabilities. "Texas law explicitly rejects product-line successor liability." Thus, because FBD LLC acquired FBD Inc.'s assets but not the liabilities or the insurance, neither liabilities nor insurance could pass to FBD LLC by operation of law, and Travelers had no duty to FBD LLC.

Alan Curry, HARRIS COUNTY DISTRICT ATTORNEY'S OFFICE, Houston

COURT OF APPEALS JURISDICTION—FAILURE TO ORALLY PRONOUNCE SENTENCE IN THE DEFENDANT'S PRESENCE

***Keys v. State*, 340 S.W.3d 526 (Tex. App.—Texarkana 2011, no pet.)**

A court of appeals does not have jurisdiction over a defendant's appeal if the trial court failed to orally pronounce the sentence in the defendant's presence. In such a case, the appeal should be abated, so that the trial court can make such an oral pronouncement.

After finding the defendant guilty of driving while intoxicated, the jury assessed the defendant's punishment at a $2,000.00 fine "and/or" confinement for a period of 183 days. The trial court sentenced the defendant to 183 days in the county jail, in addition to a fine in the amount of $2,000.00, but never actually orally pronounced the sentence in the defendant's presence. On appeal, the defendant claimed that the trial court committed fundamental error in failing to impose the sentence in open court.

The court of appeals held that, because the trial court failed to impose sentence orally in the defendant's presence, the court of appeals did not have jurisdiction to hear this appeal. Under Article 42.03 of the Texas Code of Criminal Procedure, courts are required to pronounce sentence orally in the defendant's presence. The State claimed Article 42.03 was satisfied because the sentence was imposed in the defendant's presence. The State noted the second page of the judgment was signed by the defendant, and his signature appeared below the section entitled "Execution/Suspension of Sentence (select one)." The box that was checked was followed by the statement that: "The Court ORDERS Defendant's sentence Executed." The judgment still did not reflect the sentence was orally pronounced in the defendant's presence, and the Texas Court of Criminal Appeals has unequivocally continued to require oral pronouncement of a defendant's sentence in his or her presence. Because the trial court failed entirely to pronounce punishment on the charged offense and the enhancement, the court of appeals was without jurisdiction to hear the defendant's appeal from his conviction. But the court of appeals did not dismiss the defendant's appeal. Instead, the court of appeals ordered the appeal abated under Texas Rule of Appellate Procedure 44.4 , so that the trial court could orally pronounce the sentence in the defendant's presence.

CREDIT FOR TIME SERVED—RELEASE ON AN APPEAL BOND

***Ex parte Thiles*, 333 S.W.3d 148 (Tex. Crim. App. 2011)**

A defendant who has been released on an appeal bond is entitled to credit for time that he would have been incarcerated if he was never made aware that his conviction had been affirmed, that the appellate court's mandate had issued, or that a warrant had been issued for his arrest.

The defendant began serving a sixteen-year sentence for the offense of aggravated sexual assault. He timely filed a notice of appeal from his conviction. The court of appeals reversed the defendant's conviction because of a defective plea admonishment, and the State then filed a petition for discretionary review with the Texas Court of Criminal Appeals. The defendant had an appeal bond set by the Court of Criminal Appeals, and the defendant was released from jail on that bond. The terms of the appeal bond did not include conditions requiring the defendant to report to the bondsman, or to make an appearance in the trial court without first being called to appear. The Court of Criminal Appeals later reversed the judgment of the court of appeals and remanded the cause to that court to consider the defendant's remaining grounds of error that had not been previously determined. The court of appeals subsequently affirmed the defendant's conviction, and the appellate court's mandate was issued.

No warrant issued on the appellate court's mandate until over twenty years later. Almost two years after that, the defendant was stopped and arrested by police near his home in Missouri for driving while intoxicated. He was later transferred from Missouri to Texas and began serving his prison sentence. From the time the defendant was released on the appeal bond—January 25, 1985—until the date of his arrest—May 21, 2009—the defendant accrued no additional criminal convictions. He remained a productive member of society during that time, lived openly under his own name, and made no effort to conceal his whereabouts. The defendant filed an application for a postconviction writ of habeas corpus, in which he claimed he had been "constructively released" from custody, erroneously and through no fault of his own, and was therefore entitled to his credit for the time that he would have served in prison (his "street time").

The Court of Criminal Appeals noted one line of cases has held a defendant is entitled to credit for time that he would have been incarcerated if he has been erroneously released. But the court noted this particular case was not a case of erroneous release. Rather, the defendant was legitimately released on an appeal bond after his conviction had been reversed by the court of appeals. But the defendant

should have been re-incarcerated once his conviction was final in 1987. The Court of Criminal Appeals also noted that another line of case law has held a defendant is *not* entitled to credit for time that he would have been incarcerated if he was erroneously allowed to remain at large after the issuance of an appellate court's mandate. This line of cases appears to have been decided on the basis of the defendant's awareness of the appellate court's decision. The Court of Criminal Appeals held that the defendant in this case was entitled to credit for time that he would have been incarcerated because he was never made aware that his conviction had been affirmed, that the appellate court's mandate had issued, or that a warrant had been issued for his arrest.

MOOTNESS—CAPABLE OF REPETITION, YET EVADING REVIEW

***Ex Parte Bohannan*, No. AP-76363, 2011 WL 1775727 (Tex. Crim. App. May 11, 2011)**

The defendant's challenge to the timeliness of a preliminary hearing for a parole violation was moot when the defendant was in fact granted such a hearing. The defendant's challenge was not "capable of repetition, yet evading review."

In 1983, the defendant was convicted of aggravated rape and was sentenced to twenty-five years in prison. In 2009, the defendant was found to be a sexually violent predator and was civilly committed for outpatient treatment and supervision. Shortly thereafter, a judge issued a warrant for the defendant's arrest for violating the terms of his civil commitment, and the defendant was arrested. In the meantime, the prison system also issued a parole-violator warrant. The defendant was indicted for violating the terms of his civil commitment. Several months later, the defendant received a preliminary hearing at prison, which was not conducted earlier because of the prison system's policy of not holding a preliminary hearing while new criminal charges are pending. Nevertheless, the defendant filed an application for a writ of habeas corpus, in which he claimed he was denied a timely preliminary hearing to determine whether there was probable cause to believe he violated a condition of his parole.

The defendant asserted his claim was not moot because it was "capable of repetition, yet evading review." That doctrine is limited to the situations in which: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. In this case, the Court of Criminal Appeals refused to assume that the defendant would again be held in custody facing the prospect of a preliminary hearing to determine whether there was

probable cause to believe he violated a condition of his parole. Therefore, the defendant's claim was not justiciable under the doctrine of "capable of repetition, yet evading review."

PRESERVATION OF ERROR—CHALLENGE TO THE SUFFICIENCY OF EVIDENCE ON A PLEA OF GUILTY

***Baggett v. State*, No. 06-10-00193-CR, 2011 WL 1586074 (Tex. App.—Texarkana Apr. 28, 2011, no pet.)**

For the first time on appeal, a defendant who has entered a plea of guilty can challenge the State's failure to introduce evidence demonstrating the defendant's guilt.

At the hearing on the defendant's plea of guilty, the State did not offer a written stipulation of evidence, and no written plea papers were completed. The record only revealed the defendant entered a plea of guilty to the charged offense of driving while intoxicated and that he entered pleas of true to two prior instances of DWI. After the trial court admonished the defendant on the range of punishment, he accepted the defendant's plea and found her guilty of felony DWI.

For the first time on appeal, the defendant claimed the State did not comply with Article 1.15 of the Texas Code of Criminal Procedure, which requires the State to introduce evidence demonstrating the defendant's guilt, even on a plea of guilty or no contest. The court of appeals held Article 1.15 constituted an absolute or systemic requirement, and that a claim of error for noncompliance with the statute was not forfeited or waived by the failure to object.

PRESERVATION OF ERROR—JAIL TIME CREDIT

***In re Brown*, No. WR-75485-01, 2011 WL 1417041 (Tex. Crim. App. Apr. 13, 2011)**

When a defendant is not indisputably entitled to credit for previous jail time that he has served, he must preserve that issue in the trial court. He cannot pursue the normal route of filing a motion for a judgment *nunc pro tunc* and pursuing a writ of mandamus.

The defendant was arrested and charged with murder. After a co-defendant claimed the defendant was not involved in the murder, but only helped destroy the body, the State instead re-indicted the defendant for tampering with evidence. The defendant plead guilty to this new offense in accordance with a plea bargain with the State. The terms of the plea bargain did not embrace credit against the defendant's sentence for any pre-trial jail time. At the plea hearing, defense counsel stated he intended, at some *later* date, to make an issue of whether the defendant should be credited for the time he spent in jail on the original murder charge, before he was re-indicted for tampering with evidence. But it was made clear that this particular issue was not to affect the defendant's plea of guilty. The trial court accepted the guilty plea and sentenced the defendant to ten years in prison, crediting him with no more than the seventy-eight days between the date of re-indictment for tampering with evidence and the date of sentencing. The defendant later filed a motion for judgment *nunc pro tunc*, which the trial court denied. The defendant then filed an application for writ of mandamus in the court of appeals, and that court denied mandamus relief. The defendant then sought mandamus relief in the Texas Court of Criminal Appeals.

When a defendant can show indisputably that he has been denied jail-time credit for a period of pre-trial incarceration for the "case" for which he was convicted and sentenced, he is entitled to relief from the convicting court in the form of a judgment *nunc pro tunc* and, failing that, by writ of mandamus in the court of appeals. The question in this case was whether the defendant's incarceration under the original murder indictment should count as incarceration for the same "case" as the tampering with evidence "case" for which he was later indicted and convicted. It was not disputed that the murder and evidence tampering arose from the same core facts. Whether that should suffice to render them the same "case" for purposes of Article 42.03, section 2(a)(1) of the Texas Code of Criminal Procedure, however, is a matter of statutory construction—manifestly a judicial rather than a ministerial function. Such a manifestly judicial function is not subject to revision by a judgment *nunc pro tunc* because any error in the judicial decision is not a "clerical" one, and an appellate court may not

properly mandamus a trial court to enter a judgment *nunc pro tunc* in these circumstances. If a claim of pretrial jailtime credit involves a question of the proper construction of the statute, as here, trial counsel would do well to try to preserve the issue for appellate resolution.

PRESERVATION OF ERROR—STATE'S APPEAL

***State v. Rhinehart*, 333 S.W.3d 154 (Tex. Crim. App. 2011)**

The State cannot raise a claim that a criminal district court was without jurisdiction to review a juvenile court's prior decision to transfer a juvenile case to the criminal district court, unless the State had first raised that objection at trial.

The defendant was charged as a juvenile with committing the offense of aggravated robbery. The State filed a motion to transfer the defendant's case to a criminal district court three days after the defendant had turned eighteen. The juvenile court transferred the case to the criminal district court, but the criminal district court granted a motion to quash the indictment, in which the defendant argued the State had not used due-diligence in proceeding against the defendant before his eighteenth birthday. The State's only argument at the hearing in the criminal district court was that it had used due diligence.

For the first time in a State's appeal from the trial court's order, the State argued that the defendant could not challenge the juvenile court's transfer of his case to a criminal district court until after he had been convicted in the criminal district court. The State claimed that: (1) the criminal district court was without jurisdiction to review the evidence underlying the juvenile court's decision to transfer this case because the defendant had no statutory right to appeal the sufficiency of the evidence in the juvenile court's transfer proceeding prior to being finally convicted in the criminal district court, and (2) the criminal district court erred in granting the defendant's motion to quash the indictment on a ground not authorized by law because the sufficiency of the evidence supporting a juvenile court's order to transfer a case to criminal district court is not a valid ground for granting a motion to quash an indictment.

The Texas Court of Criminal Appeals held the criminal district court did not lose jurisdiction over the case merely because the juvenile court may have erroneously transferred the case to the criminal district court or because the State may not have exercised due diligence in proceeding against the juvenile defendant before his 18th

birthday. Since the allegedly erroneous transfer was not jurisdictional, and because this was a State's appeal, the State—as the losing party in the trial court—failed to preserve the claims that it presented for the first time on appeal in the court of appeals.

RECORD ON APPEAL

Davis v. State, No. PD-0845-10, 2011 WL 2200812 (Tex. Crim. App. June 8, 2011)

> Even though the State has the burden to show good cause for a continuance, the defendant—as the appealing party—still must present a sufficient record to show that the State did not demonstrate good cause.

The defendant escaped from the custody of the Dallas County Jail while being treated at a hospital, stole a taxicab, and drove it north to Oklahoma. After leading Oklahoma lawmen on a dangerous and protracted high speed chase, he was apprehended, prosecuted, and imprisoned there. Subsequently, the Dallas County District Attorney's Office invoked Article IV of the Interstate Agreement on Detainers Act (IADA) to bring the defendant back to Texas for prosecution for the felony escape. Subsection (c) of Article IV provides the defendant's trial must begin within 120 days of his arrival in the receiving state, but a reasonable continuance may be granted on a showing of good cause.

The defendant arrived in Dallas County for prosecution on June 18, 2008. A trial date was set for October 6, 2008, 10 days before the 120-day time limit would expire on October 16, 2008. Defense counsel obtained an extension until October 13, 2008, on which date the trial court granted an agreed motion to amend the original indictment. The next day, in open court, the State requested a continuance on account of the hospitalization of its chief witness. The trial court made an express finding on the record that good cause was shown and granted the State a continuance until November 4, 2008. In the meantime, the State re-indicted the defendant. The next setting for which there were court reporter's notes was December 1, 2008, the day the jury was selected. At the conclusion of voir dire on that date, defense counsel pointed out he had previously objected to the trial judge granting the State's second motion for continuance, which the trial court acknowledged.

The State claimed that, under Texas Rule of Appellate Procedure 44.4, the appeal should have been remanded to the trial court, so that the trial court could make sure that the record reflected the State's proffer of good cause for the second continuance. But Rule 44.4 authorizes a remand to the trial court only when the record is inadequate

to present a claim due to some "erroneous action or failure or refusal to act" on the part of the trial court, as opposed to one of the parties. There is nothing in the language of Article IV, section (c) of the IADA that imposes a burden on the trial court to ensure that any proffer of good cause is memorialized by the court reporter. Therefore, Rule 44.4 could not be invoked to require an appellate court to remand the case for remedial action, and there was no other provision that assigned such a burden. Texas Rule of Appellate Procedure 13.1 requires the official court reporter to attend court sessions and make a full record of the proceedings. But that rules does not impose any duty on the trial court, but only on the official court reporter.

Nevertheless, the Court of Criminal Appeals noted its case law imposes an additional, independent burden on the appealing party to make a record demonstrating that error occurred in the trial court. Even though the State had the burden at trial to show good cause for the granting of a continuance, the defendant, as the appealing party, had an obligation to present a record in the court of appeals that demonstrated he was entitled to appellate relief. The defendant was required to present a record adequate to show that the State did not satisfy its trial-level burden to present good cause for the continuance.

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BRIBERY

United States v. Townsend., 630 F.3d 1003 (11th Cir. 2011)

As a matter of first impression, the Eleventh Circuit held intangibles, such as freedom from jail and incremental increases in freedom, constitute "things of value" for purposes of the federal bribery statute.

Humberto Febles was released on pretrial bond following his arrest for multiple drug-related offenses. Shynita Townsed, a Miami-Dade County Corrections Officer, was assigned to monitor Febles during his pretrial release. Hoping to obtain more favorable conditions of release, Febles gave Townsend a pair of diamond earrings. After receiving the earrings, Townsend relaxed the terms of Febles's supervised release and also falsified her reports when Febles violated those terms. When Febles was arrested during an unauthorized out-of-town trip for felony possession of a concealed weapon, he offered to pay Townsend $5,000 if she released him from jail immediately. Townsend accepted the money, released Febles from jail, and manufactured false documentation to show that Febles's trip had been pre-authorized.

Townsend was subsequently arrested and convicted of receiving bribes in violation of 18 U.S.C. section 666(a)(1)(B), which prohibits state agents from accepting "anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions . . . involving any thing of value of $5,000 or more." 18 U.S.C. § 661(a)(1)(B). Townsend appealed, arguing the government failed to prove that the value of what she provided to Febles was $5,000 or more.

As a matter of first impression, the Eleventh Circuit considered whether intangibles, such as freedom and incremental increases in freedom, may be considered "anything of value" under 18 U.S.C. § 666(a)(1)(B). Agreeing with four other circuits that have addressed the issue, the Eleventh Circuit held that, based on the broad and nonexclusive language of the statute, intangibles are things of value under 18 U.S.C. section 666(a)(1)(B). The court next considered how intangibles should be

valued for purposes of determining whether the $5,000 statutory threshold is met. Adopting the standard used by the Fifth, Seventh, and Eighth Circuits, the Eleventh Circuit held the value of an intangible is set at the monetary value of what a willing bribe-giver gives and what a willing bribe-taker takes in exchange for the intangible. Because Townsend accepted $5,000 in cash and $280 diamond earrings in exchange for Febles's freedom, the court found that the $5,000 threshold was met and affirmed Townsend's conviction.

COMMODITIES EXCHANGE ACT VIOLATIONS—PRICE MANIPULATION

United States v. Radley, 632 F.3d 177 (5th Cir. 2011)

As a matter of first impression, the Fifth Circuit examined the scope of 7 U.S.C. section 2(g)'s language exempting any "agreement, contract, or transactions" from the Commodities Exchange Act's (CEA) prohibitions against price manipulation and cornering. The court determined that based on the statute's language, the words "contract" and "transactions" in the exemptions applied to different activities, and the courts should rely on a plain-language meaning of "transactions" in applying section 2(g).

Several commodity traders working for BP Products North America ("BP") were indicted on multiple counts of price manipulation, attempted price manipulation, cornering the market, attempted cornering, wire fraud, and conspiracy to commit those crimes arising from futures trading in "TET propane." Unlike in an exchange, TET propane trades rely on an electronic interface that permits traders to submit anonymous bids, directly negotiate deals, or rely on brokers. There is no fixed price, although each bid includes the price and quantity, and the average price is determined and published following each day. The government alleged that the BP traders: (1) sought to artificially stimulate demand and inflate propane prices by submitting multiple bids at different prices and quantities; (2) refused to purchase propane at lower prices unless the seller agreed to keep the sale secret; and (3) made misrepresentations to others that they were not trying to corner the market.

The CEA makes it a felony for "any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce . . . or to corner or attempt to corner any such commodity." 7 U.S.C. § 13(a)(2). The CEA does not apply to any "agreement, contract, or transaction in a commodity other than an agricultural commodity" so long as it meets certain statutory conditions. The lower court dismissed

the indictment, holding the BP traders' transactions fell within the exemption for "transactions in a commodity." The government appealed.

On appeal, the Fifth Circuit noted the key issue was whether the traders' actions constituted a "transaction," and thus fell within the exemption in section 2(g). The government argued the traders' actions did not, citing *United States v. Futch*, 728 F.App'x. 387 (5th Cir. 2008), which held a trader's false statements about a commodity market to an industry publication were not part of any "agreement, contract, or transaction" and therefore fell outside the exemption's protection. The government also cited to cases interpreting section 2(g) to apply to mutual exchanges between parties or exchanges that create rights or arguments enforceable by law. The court rejected the government's argument, holding the cases on which the government relied focused on the common definition of "contracts," just one of the three terms within the section 2(g) exemption. Instead, the Fifth Circuit determined "agreement," "contract," and "transactions," should each carry an independent legal meaning based on a reading of the statute and basic rules of statutory interpretation. In defining "transactions," the court examined the definition of the term in *Black's Law Dictionary*: "[t]he act or an instance of conducting business or other dealings; [especially] the formation, performance, or discharge of a contract."

Applying this definition to the defendants' activities, the court held their actions fell within the statutory exemption of section 2(g). Placing bids, negotiating and communicating agreement terms, and business communications are all included as part of "the act or an instance of conducting business." This is true whether or not the acts result in a deal between the parties. To hold otherwise, reasoned the court, would mean criminality would occur only when an agreement did not occur. The court also distinguished this case from *Futch*, because *Futch* involved false reports about sales that did not occur, while BP traders submitted actual bids that other parties could choose to reject or accept. Because some parties accepted the BP traders' bids, the statements by the BP traders which formed the crux of this case were regarding actual transactions that fell within the section 2(g) exemptions, unlike in *Futch*.

EXTORTION

***United States v. Manzo*, , 636 F.3d 56 (3d Cir. 2011)**

The Third Circuit held, as a matter of first impression, that unsuccessful political candidates cannot be charged with extortion "under color of official right" in violation of 18 U.S.C. section 1951(a) (the "Hobbs Act").

Following a federal investigation into public corruption and money laundering, Louis Manzo and Ronald Manzo were indicted for conspiracy to commit extortion "under color of official right" and attempted extortion "under color of official right" in violation of the Hobbs Act. A person can commit extortion in violation of the Hobbs Act in one of two ways: (1) through threatened force, violence, or fear; or (2) under color of official right. The district court dismissed the conspiracy and attempt charges, concluding that neither Louis, an unsuccessful mayoral candidate, nor Ronald, his campaign manager, acted "under color of official right" within the meaning of the Hobbs Act. The government appealed, arguing the Manzos' lack of political success did not preclude liability for conspiracy to commit extortion and attempted extortion under the Hobbs Act.

As a matter of first impression, the Third Circuit considered whether an unsuccessful candidate for public office can attempt or conspire to obtain property from another with that person's consent induced "under color of official right" within the meaning of the Hobbs Act. To prove a violation of the Hobbs Act using the "under color of official right" theory, the government "need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." While acknowledging that the term "under color of official right" has been described as "vague almost to the point of unconstitutionality," the Third Circuit noted that, at common law, the "essence of the offense was the abuse of the public trust that inhered in the office." As such, the court concluded conduct committed "under color of official right" must be action in an official capacity or an action by someone who pretends to hold an office that he in fact does not. Because the Manzos neither acted nor pretended to act in an official capacity at the time of their relevant conduct, the court held their conduct was not "under color of official right." Without this essential element, the court held the Manzos could not be charged with conspiring to violate the Hobbs Act or with attempting to violate the Hobbs Act, stating that "[n]o court has extended application of the Hobbs Act this far, and we decline to do so now."

MONEY LAUNDERING

***United States v. Quinones*, 635 F.3d 590 (2d Cir. 2011)**

As a matter of first impression, the Second Circuit held that, in money-laundering cases involving the sale of contraband, the government is not required to prove that the "proceeds" of such sales were profits rather than gross receipts.

Antonio Quinones operated an Internet pharmacy that received prescription requests from online customers, which were filled by a licensed pharmacy owned by Quinones and then shipped to the customers by Federal Express. The prescription requests were reviewed by doctors for approval in an assembly-line fashion, without appropriate physician involvement. Quinones and his son were arrested and convicted of, among other things, conspiracy to money-launder in violation of 18 U.S.C. section 1956(a)(1)(A)(i), (a)(1)(B)(i), and (h). Under the federal money-laundering statute, it is a crime to conduct or attempt to conduct a financial transaction knowing the property involved in the transaction represents the "proceeds" of some form of unlawful activity when the transaction, in fact, involves the proceeds of the specified unlawful activity.

Quinones appealed his conviction, arguing that, based on the Supreme Court's plurality decision in *United States v. Santos*, 553 U.S. 507 (2008), his money-laundering conspiracy conviction was invalid because the government was required to prove the laundered funds were the "proceeds," rather than gross revenues, of an enterprise engaged in unlawful drug trafficking. .

As a matter of first impression, the Second Circuit considered the scope of the Supreme Court's plurality holding in *Santos*. In *Santos*, a divided Court held that the term "proceeds" in the federal money-laundering statute meant profits and not gross receipts. Id. at 510-14. The Second Circuit, paying close attention to the divided nature of the opinion, however, noted that *Santos* has been limited by other circuits to its facts and considered by some circuits to be inapplicable when the predicate offense is a drug offense. Furthermore, the Second Circuit, relying heavily on the justices' concurring and dissenting opinions in *Santos*, found that at the time *Santos* was decided, a majority of the justices agreed that the term "proceeds" did include gross revenue where the funds flowed from the sale of contraband and the operation of organized crime syndicates involving such sales. As such, the Second Circuit held that "proceeds" under 18 U.S.C. section 1956 are not limited to profits when the predicate offense involves the sale of

contraband. Because controlled substances become contraband when sold outside the usual course of professional practice, the court affirmed Quinones's conviction.

RESTITUTION

United States v. Qurashi, 634 F.3d 699 (2d Cir. 2011)

The Second Circuit held, as a matter of first impression, that a prejudgment interest award could be included in a criminal restitution order to ensure that a victim's losses were fully compensated.

Imran Qurashi and his brother, Adnan Qurashi, twice faked Adnan's death to collect on multiple life insurance policies they had purchased. The brothers were able to collect more than six-million dollars from the first faked death. On the second attempt, the insurance companies refused to pay and opened investigations. Imran was indicted and eventually pleaded guilty to mail fraud. Adnan still remains a fugitive. As part of his sentence, Imran was ordered to pay restitution that included a prejudgment interest at a rate of four percent. Imran appealed, arguing the district court erred by including the prejudgment interest rate in the restitution award because: (1) the insurers failed to show how the money would have been used had it not been given to Imran; and (2) the insurers would be compensated for more than their actual losses.

As a matter of first impression, the Second Circuit considered whether a criminal restitution order may include prejudgment interest. Under the Mandatory Victims Restitution Act, a defendant convicted of specific offenses in which there is an identifiable victim is required to make restitution to that victim. The sentencing court is to order restitution in the full amount of each victim's losses as determined by the court. The Second Circuit concluded that, in furthering the intended purpose of the statute to fully compensation a victim's losses, "there is no reason to exclude losses that result from the deprivation of the victim's ability to put its money to productive use." In fact, the court stated that prejudgment interest provides a "rough but fair approximation of such losses." Because the purpose of the statute is advanced, the Second Circuit held that prejudgment interest can be included in a criminal restitution order.

SENTENCING

***United States v. Hampton*, 633 F.3d 334 (5th Cir. 2011)**

As a matter of first impression, the Fifth Circuit held 18 U.S.C. section 3583(e)(3), which permits a district court, upon revocation of a term of supervised release, to require a defendant to serve in prison "all or part of the term of supervised release authorized by statute," does not impose an aggregate limit on the term of imprisonment that can be imposed.

After pleading guilty to a Class-D felony for conspiracy to possess stolen mail, Stephanie Hampton was sentenced to six months of imprisonment and two years of supervised release. Hampton violated the conditions of her supervised release, and her supervised release was revoked. As a result, Hampton was sentenced to an additional twenty-four months of imprisonment and twelve months of supervised release.

Hampton again violated the conditions of her supervised release. At the revocation hearing, Hampton argued that 18 U.S.C. section 3583(e)(3) capped the aggregate amount of revocation imprisonment that a defendant can serve to the amount of supervised release allowed for the original offense. For a Class-D felony, a sentencing court may impose a term of not more than three years of supervised release following the defendant's imprisonment. Thus, Hampton argued that, because she had served two years of imprisonment for the first revocation, she could not receive more than one year's imprisonment for the second revocation. The district court disagreed and sentenced her to two years of imprisonment. Hampton appealed.

As a matter of first impression, the Fifth Circuit considered whether the phrase "term of supervised release authorized by statute" caps the aggregate amount of revocation imprisonment at the amount of supervised release authorized by 18 U.S.C. section 3583(b). The Fifth Circuit, relying heavily on the natural language of the statute, concluded that 18 U.S.C. section 3583(e)(3) allows a court to "revoke a term of supervised release," and thus, "refers only to one particular revocation." For this reason, the Fifth Circuit found that 18 U.S.C. section 3583(e)(3) does not require a court to credit the defendant for prior terms of revocation imprisonment.

Moreover, the court found 18 U.S.C. section 3583(e)(3) was "harmonious" with the other provisions of the statute, most notably subsection (h). In fact, 18 U.S.C. section 3583(h) explicitly requires an aggregate cap on post-revocation supervised release. This aggregate cap applies to postrevocation supervised release

after serving a term of imprisonment for that revocation. The Fifth Circuit noted that, under 18 U.S.C. section 3583(h), "once a defendant has received as much revocation imprisonment as section 3583(b) authorizes for supervised release, the defendant is no longer eligible for post-revocation supervised release." In contrast to 18 U.S.C. section 3583(h), the Fifth Circuit held 18 U.S.C. section 3583(e)(3), authorizing a court to require a defendant to serve in prison "all or part of the term of supervised release authorized by statute," requires no aggregation of prior revocation imprisonment. The Fifth Circuit specifically stated that this provision gives:

> the revoking court the authority to impose a revocation sentence in excess of the amount of supervised release authorized by the original sentencing court, provided it does not exceed the term of supervised release authorized by section 3583(b), thereby "removing the otherwise arguable limitation a prison term imposed could never be longer than the term of the revoked supervised release."

Furthermore, the court rejected Hampton's constitutional argument that 18 U.S.C. section 3583(e)(3) "creates the possibility that a defendant could receive a greater punishment than that authorized for the original offense without the benefit of a trial in violation of a defendant's constitutional rights." In rejecting this argument, the Fifth Circuit firmly stated "it has always been the case that a defendant could be punished for the underlying offense with revocation imprisonment if she violates the conditions of supervised release even if the total amount of time that the defendant thereby spends in prison exceeds the statutory maximum for the underlying offense." For a Class-D felony, under 18 U.S.C. section 3583(e)(3), the district court can "impose up to two years' revocation imprisonment for violating the conditions of supervised release for such felony." Thus, the Fifth Circuit held Hampton's revocation sentence of twenty-four months of imprisonment was proper.