The Appellate Advocate

State Bar of Texas Appellate Section Report

Articles

Special Features

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Chair's Report

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Memories of Marvin

I would like to dedicate this column—my first as Chair of the Appellate Section—to a lawyer named Marvin S. Sloman. Marvin co-founded the Appellate Section nearly 30 years ago and served as one of its first chairs. On a more personal level, he was my law partner, mentor, and friend. As my wife once put it, "he was like a family member without the warts." But most importantly, he inspired me to practice appellate law. In some small way, I hope these memories of Marvin will inspire each of you as well.

Above all else, Marvin Sloman was a master craftsman with a relentless eye for detail and a refined sense of style. Over a ten-year period, Marvin singlehandedly designed and built a house in East Texas. No ordinary country home, this one was octagonally-shaped with customized door knobs, hand-laid brick floors, and a vaulted ceiling that didn't move a millimeter when the temporary supports were removed. As proud as Marvin was of the finished product, I always sensed that he was disappointed when the work was finally done.

Marvin brought this same discipline to his appellate practice. Some of my most rewarding professional moments were spent in a conference room with Marvin, watching him pour over the draft of a brief with a pen in one hand and a cigarette in the other. We would spend hours reviewing, discussing, and rewriting the draft—word by word, sentence by sentence, paragraph by paragraph—until finally he would proclaim that it was "strong as new rope." Yet, like the construction of his East Texas house, he seemed to relish the process of writing the brief more than the finished product itself.

Watching Marvin prepare for an oral argument was a thing of beauty. Possessed of a slow Texas drawl (refined by his years as a Sullivan & Cromwell associate in New York), Marvin would search high and low for just the right word, just the right tone. I can still hear his opening lines in one oral

argument before the Fifth Circuit: "May it please the Court. This appeal turns on three exhibits and two cases . . . ." It looked and sounded effortless, but I knew how much thought and practice he had put into it.

Perhaps most impressively, Marvin did not let the law, his cases, or the firm's clients define who he was or what he believed. He was an iconoclast with an unquenchable thirst for living and learning. Russ Nelms, another former law partner and now a federal bankruptcy judge, described these traits more eloquently than I could:

> What I took away from my time with Marvin was the certain knowledge that there is a pace and a rhythm to life and that the end we labor to attain is never as valuable as the laboring to attain it. . . . We spend so much of our lives trying to get "there," to get that girl, get that degree, get that job, get that car, get that house, and get to that place in our careers. Because when we get "there," we'll finally be happy. And yet, when we get there, there is no there there. As Marvin would tell us, if you're not already there in your heart and in your mind, you're never going to get there.[1]

Marvin died in July 2008, struck down by a debilitating stroke the evening of our firm holiday party in 2007. More than five years after Marvin's death—as I approach the same age he was when we first met in 1982—I still find myself asking, "What would Marvin do?"

[1] Russell F. Nelms, Remarks to Dallas/Fort Worth Joint Inns of Court, January 2009.

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Texas Supreme Court Advisory— Chief Justice Jefferson Announced his Resignation

Osler McCarthy, Supreme Court of Texas Staff Attorney for Public Information, Austin

Chief Justice Wallace B. Jefferson announced his resignation from the Supreme Court of Texas effective October 1, 2013.

Under his leadership, the Court drastically reduced the number of cases carried over from one term to another and significantly increased the use of technology to improve efficiency, increase transparency and decrease costs.

"I was fortunate to have served under Chief Justice Thomas R. Phillips, who in his nearly 17 years transformed the Court into a leader not only in jurisprudence, but also in the hard work of administering justice fairly," Jefferson said. "I am most proud to have worked with my colleagues to increase the public's access to the legal system, which guarantees the rights conferred by our Constitutions."

Under his leadership cameras came to the Court in 2007, allowing the public to view oral arguments live to bolster the public's understanding of the Court's work. The Court implemented a new case-management system and required all lawyers to submit appellate briefs electronically for posting on the Court's website so that the arguments framing the great issues of the day are accessible to Texas citizens.

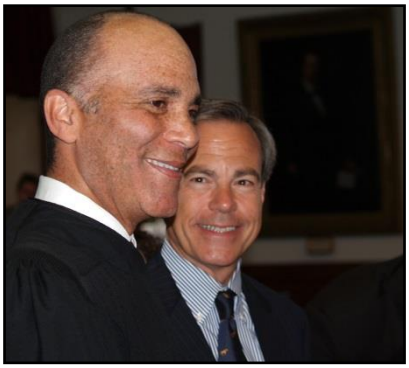
The Court mandated electronic filing of court documents last year, which will decrease the cost of litigation and increase courts' productivity. The Court fought for increased funding for basic civil legal services and established the Permanent Judicial Commission for Children, Youth, and Families. Jefferson led efforts to preserve historic court documents

throughout the state and helped to reform antiquated juvenile-justice practices.

Appointed by Governor Rick Perry, Jefferson joined the Court in 2001. Before his appointment, he practiced appellate law with Crofts, Callaway & Jefferson in San Antonio, where he successfully argued two cases before the U.S. Supreme Court. Governor Perry elevated him to chief justice in September 2004 after Phillips' retirement. He is Texas' 26th chief justice.

During his tenure on the Court, he served with 21 different justices.

"Chief Justice Jefferson has been an extraordinary and effective leader for the Supreme Court and the Texas judiciary," said Nathan L. Hecht, the Court's senior justice. "The people of Texas are greatly indebted to him for his years of exemplary service."



Beyond his work in Texas, Jefferson served as president of the Conference of Chief Justices, an association of chief justices from the 50 states and U.S. territories. He also served on the federal Judicial Conference Committee on Rules of Practice and Procedure, the Council of the American Law Institute, the Board of the American Bar Foundation and the Board of Advisors of the Justice Sandra Day O'Connor Judicial Selection Initiative. He holds honorary degrees from Michigan State University, University of New Hampshire School of Law, Hofstra Law School and Pepperdine University and is the namesake for the Wallace B. Jefferson Middle School in San Antonio.

"I owe a tremendous debt of gratitude to Governor Perry, who entrusted me with the awesome responsibility of leading the judicial branch in Texas," Jefferson said. "The courts exist to serve the people. I am profoundly grateful that through three elections they have afforded me the opportunity of a lifetime—to devote so much of my life to their cause."

Texas Supreme Court Advisory—Governor Appoints Hecht to be Chief Justice

Osler McCarthy, Supreme Court of Texas Staff Attorney for Public Information, Austin

Gov. Rick Perry has appointed Justice Nathan L. Hecht of Austin as chief justice of the Supreme Court of Texas. Justice Hecht's term became effective October 1, 2013, and is set to expire at the next general election. He will serve as the 27th chief justice of the Supreme Court of Texas.

"I am proud to appoint Justice Hecht as chief justice of the highest court in the state," Gov. Perry said. "I know Justice Hecht to be a man of the most upstanding character and integrity, with an uncompromising commitment to protecting the interests of the citizens of Texas. As the most senior justice on the Court, his dedication to the rule of law and wealth of knowledge and judicial experience will be invaluable as he serves in this new role."

Justice Hecht was first elected to the Supreme Court of Texas in 1988 and is the senior justice on the Court. Justice Hecht has won re-election four times. During his time on the Court, Justice Hecht has authored more than 350 opinions. He is also responsible for the Supreme Court's efforts to assure that all Texans, including those living below the poverty level, have access to basic civil legal services.

Prior to his service on the Supreme Court of Texas, he served as a justice of the Texas 5th Court of Appeals and as judge of the 95th Judicial District Court in Dallas County. He is also a former associate attorney and shareholder of Locke, Purnell, Boren, Laney and Neely, PC, now known as Locke,

Lord, Bissell and Liddell, LLP, and is a former law clerk to Judge Roger Robb of the US Court of Appeals for the District of Columbia Circuit. Justice Hecht is a member of the State Bar of Texas, the District of Columbia Bar, and the American, Dallas, and Austin Bar associations. He is a commissioner of the Texas Access to Justice Commission, a life fellow of the American Law Institute, a fellow of the American, Texas, and Dallas Bar foundations, and a past member of the US Judicial Conference Advisory Committee on Rules of Civil Procedure.

He served as a lieutenant in the US Navy Reserve Judge Advocate General's Corps (JAGC).

Justice Hecht received a bachelor's degree from Yale University and a law degree from Southern Methodist University School of Law.

"In Light of this Court's Opinion . . . ." Drafting Unambiguous Appellate Judgments

Hon. Charles A. Spain, City of Houston Municipal Courts, Houston
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I. Introduction

The principal procedural rule governing appellate opinions seems straightforward: "The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal." TEX. R. APP. P. 47.1.

But what about the judgments on which appellate opinions are based?[1] After scrutinizing an appellate court's opinion, does anyone ever apply the same level of scrutiny to the corresponding judgment? And why would an appellate court even render a separate judgment if the opinion explains it all?

The simple answer is, "Because the rules say so." *See* TEX. R. APP. R. 43.2 (types of judgments), 47.2–.7 (listing details of opinions inapplicable to judgments), 48.2–.3 (distribution of opinions and judgments). 12.6 (distribution of judgments and mandates). Appellate courts could, in theory, issue opinions and judgments as unitary documents, as happens in original proceedings.[2] Nonetheless, for cases on appeal, the courts issue opinions and judgments separately.

[1] At least in principle—we all know the opinion is written first.

[2] It wasn't always the case that appellate original proceedings were unitary documents. Through most of the last century there were both opinions explaining the court's action and judgments that taxed costs. *See, e.g.*, *Citizens State Bank of Frost v. Miller*, 115 S.W.2d 1183, 1185 (Tex. Civ. App.—Waco 1938, orig. proceeding). After the 1980s "mandamus explosion" and adoption of the 1986 Texas Rules of Appellate Procedure, original proceedings became "different" for no real

This article is written for appellate lawyers—those who practice before the appellate courts, work for them, or serve as appellate judges. As a group, we fancy ourselves as the people who know the law and care about the practical implications of its application at the appellate level. If there is an operative document issued by courts in every appeal that we typically don't care about, don't read, or don't understand, then something is wrong. The real reason why we currently don't care about appellate judgments is that we often don't understand them.

While there are a lot of appellate opinions scrutinizing trial court judgments, very little has been written about appellate judgments.[3] We all know that a messy trial court judgment makes for a lively appeal, especially when there is no underlying opinion to dissect. But there are very few appellate opinions addressing appellate judgments. This is not surprising; appellate courts are not likely to subject their own less-than-clear appellate judgments to the same critical scrutiny, particularly since judgments at the appellate level are accompanied by opinions to dissect. Do appellate lawyers do much to help appellate courts draft good judgments? No. So there are practical reasons why there are few opinions about appellate judgments, and the ones that do exist

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jurisprudential reason. Even "orders" in original proceedings became "opinions" to satisfy the statistical reports of the Office of Court Administration that tracked the number of opinions issued by the courts. Appellate courts occasionally act directly (and incorrectly) on the underlying order, rather than ordering the respondent to act. That may be because original proceedings no longer are accompanied by judgments that would make it clear that the proceeding are *personal* to the trial court judge or other respondent, and the underlying order itself is not before the appellate court, subject to direct modification.

[3] The standout exception is Chief Justice Calvert's article. Robert W. Calvert, *Appellate Court Judgments or Strange Things Happen on the Way to Judgment*, 6 TEX. TECH. L. REV. 915 (1975).

predictably explain why a train wreck of an appellate judgment isn't as bad as it looks.

Our goal for this article is to start a dialogue about why we should care about appellate judgments, how to draft an unambiguous judgment at the beginning of an appeal and then use it as a template for developing your arguments thereafter, and how members of the appellate bench and bar can work together to produce intelligible, useful judgments.[4]

II. The Difference Between Judgments and Opinions

We all learned as first-year law students that a "judgment" refers to a court's written statement defining the rights of the parties. Simply put, the judgment answers the question, "What happened?"

In Texas, an appellate judgment generally either:

- dismisses the appeal;
- affirms the trial court judgment;
- modifies the trial court judgment;
- reverses the trial court judgment; or
- vacates the trial court judgment.

TEX. R. APP. P. 42.1, 43.2. This is big-picture stuff, but a judgment is the writing that is binding on the parties and to which the rules of claim and issue preclusion apply.

An "opinion," by contrast, explains how the appellate court reached its judgment, and must address "every issue raised and necessary to final disposition of the appeal." TEX. R. APP. P. 47.1. Opinions answer the question, "Why did it happen?"

Because the opinion should explicitly overrule or sustain "every issue raised and necessary to final disposition of the appeal," it is similar to a jury verdict. Questions (issues) are

[4] The authors bring experience from both the bench and bar. Kevin Dubose has represented appellate clients for 34 years, and Charles Spain has served as a briefing attorney for the Supreme Court of Texas and a staff attorney for the First and Third Courts of Appeals for a total of 23 years.

asked and answered (by either overruling or sustaining issues on the merits, unless the issues are dismissed without reaching the merits). But the verdict is not the same thing as the judgment, and the process of getting from verdict to judgment isn't always easy. Thus, it should come as no surprise that getting from opinion to judgment in the appellate court can also be difficult.

Unlike verdicts, opinions are subject to the doctrine of stare decisis. They form the basis of the common law that affects non-parties. If you are not a party to the appeal, you don't care about the judgment, but you may care a lot about the opinion.

Errors in the opinion are merged into the appellate judgment and may constitute grounds for reversal by a higher court. But, so long as an appellate court's statement of *what* happened (the judgment) is correct, its erroneous explanation of *why* it happened does not constitute reversible error. To fix erroneous language in an appellate court's opinion, the higher court should issue an opinion that includes something to the effect of: "While we affirm the judgment of the court of appeals, we nonetheless disapprove of the language in its opinion." Ouch. This is obviously not the opinion that any judge in the court of appeals wants to read when the court's judgment is affirmed.

So, while connected, appellate judgments and opinions serve two fundamentally different purposes, just as the verdict and judgment do below. Like all judgments, the appellate judgment should formally declare the rights of the parties. Like all well-drafted final judgments it should also be an integrated document (with the exception of the statement of costs, which this article will discuss below). In this respect, a judgment is like a contract—it should be unnecessary to refer to extrinsic documents to understand its meaning. And following the "plain-English movement" that began in the 1970s, attorneys and judges should strive to write appellate judgments using language that is intelligible and unambiguous—which is perhaps the biggest challenge of all.

III. Why We Should Care About Improving Appellate Judgments

If you have a "simple" appeal, in which the rights and obligations of all the parties are clearly dictated by the way the court in its opinion overruled or sustained the necessary issues on appeal, drafting the appellate judgment may not be difficult. But how often does that happen? Then there's the vanity factor; aren't appellate lawyers the people who are supposed to know everything? Shouldn't it be worth some of our time to make this another area where we can provide answers?

Consider the advice we give to trial lawyers: draft the charge at the beginning of the litigation so you know what you have to plead and prove. If you, as the appellate lawyer, don't know what the desired appellate judgment should look like at the end of the appeal, how can you serve the best interests of your client while navigating the beginning and the middle of the appeal?

Thinking up-front about the things you want included in the appellate judgment should help in two ways. First, knowing where you want to be at the end of the appeal will help as you read the record in search of reversible error. Second, knowing your desired judgment will dictate how you write your appellate brief. If you don't know what you want, you're probably not going to ask for it properly. Do you want a rendition judgment that deletes an award of punitive damages in addition to rendering judgment that plaintiff take-nothing on actual damages? If so, then you need to brief it and ask for it—otherwise you almost certainly won't get it.

IV. A Proposed Form for Appellate Judgments and Related Papers

The appendix to the article has a modest proposal for standard forms of an appellate judgment, mandate, and statement of costs. The following section will discuss each element of those forms. There likely will not be universal agreement about each of these elements, but the conversation has to start somewhere.

A. Caption

For heaven's sake, call it a "final judgment." There is no reason that the lessons of *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 206 (Tex. 2001), need to be limited to trial court judgments. Be smart, and refer to the "case," not the "cause." *See* TEX. R. APP. P. 12.1–.2.

List *all* the appellants and appellees. If you're a party, you need to be specifically named, not lumped together in an "et al." But this can be trickier than it looks.

Texas Rule of Appellate Procedure 3.1(a) defines an appellant as "a party taking an appeal to an appellate court." Rule 25.1(c) requires a party who seeks to alter the trial court's judgment or other appealable order to file a notice of appeal. So everyone who files a notice of appeal is an appellant. If an appellant doesn't file a brief, the court of appeals ideally should give notice of an intent to dismiss the unbriefed appeal before submission. *See* TEX. R. APP. P. 38.8(a)(1); 42.3; *Showbiz Multimedia, LLC v. Mountain States Mort. Ctrs., Inc.*, 303 S.W.3d 769, 771 n.2 (Tex. App.—Houston [1st Dist.] 2009, no pet.). If the court does not, counsel for appellee should file a motion requesting this no later than the deadline to file appellee's brief. A non-briefing appellant should be dismissed for want of prosecution, and the appellate judgment should recite that. *See Showbiz*, 303 S.W.3d at 772.

Texas Rule of Appellate Procedure 3.1(c) defines an appellee as "a party adverse to an appellant." Unlike an appellant, who must file a notice of appeal and identify himself or herself, an appellee need not be definitively identified until the appellant's brief is filed. An appellee, however, must be a party to the trial court's final judgment and must be someone against whom the appellant raises issues or points of error in an appellant's brief. *See Showbiz*, 303 S.W.3d at 771 n.3. If you are counsel for a potential appellee and the appellant does not raise any issues or points of error against your client, then you should consider whether to notify the court that your client isn't a party to the appeal based on the briefing and that you will therefore not file an appellee's brief. Depending on the court, this is a tough call,

but waiting until after submission to bring this up is probably not a good idea.

The lesson here is to know who the appellants and appellees are. Absent fundamental error, only the proper appellants and appellees should be bound by the appellate court's judgment on the merits.

B. Identifying the Ruling Appealed From

Identify the final judgment, decree, or order, or explain that it's an interlocutory appeal. This is also a shorthand method of establishing subject-matter jurisdiction.

C. Clarifying the Proper Scope of Appellate Review

Absent fundamental error, the court of appeals should review the appeal based on the appellate record and the arguments properly raised by the parties, i.e., arguments preserved in the trial court and raised on appeal as "issues." *See* TEX. R. APP. P. 34.1 (appellate record), 33.1 (preservation of error); *W. Steel Co. v. Altenburg*, 206 S.W.3d 121, 124 (Tex. 2006) (holding that appellate courts should not decide cases on unassigned, non-fundamental errors). The rationale behind the inclusion of this language in appellate judgments is that, unless the error is fundamental, the appellate court's review is limited to the arguments properly before it. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 577 (Tex. 2006).

Appellate judgments often indicate that no reversible error exists in the trial court's judgment. But it's not the appellate court's job to review every aspect of the trial court's judgment for error. When an appellate court affirms a lower court's judgment, it merely means that no fundamental error exists in the trial court's judgment and no reversible error exists in the judgment as to the issues properly raised on appeal. There could be reversible, non-fundamental error in a trial court's judgment that was not preserved in the trial court or raised as an issue on appeal. But issues that are not properly before the court should not be included in the scope of appellate review.

Candidly, this is something for appellee to discuss. Counsel for appellant may try to bring unpreserved issues on appeal, and counsel for appellee should not be shy about aggressively arguing waiver. The State does this quite successfully in criminal cases, albeit with the benefit of always representing the same side.

This is the place in the appellate judgment where using technically correct language would be the most beneficial in terms of focusing the parties and the court on what the appellate process should be. People have a natural desire for "justice" when something bad has happened. But there is a process by which appeals are properly decided, and if we believe in the power of words, then it would help that process if the language of the appellate judgment properly reflected what the court is doing and can do.

D. Crafting the Operative Language

Crafting the operative language of an appellate judgment can be difficult, which makes coming up with generally accepted principles to govern appellate judgments a difficult task. For now, here are a few suggested guiding principles to start this discussion:

- The reviewing court has a duty to examine the lower court's judgment for fundamental error, regardless of whether it was preserved in the trial court and properly raised on appeal.
- Absent fundamental error, the reviewing court should limit its review to arguments preserved in the trial court and properly raised as issues on appeal.
- The court affirms the trial court judgment based on the issues it overrules in the opinion.
- The court reverses only the portion of the trial court judgment related to the issues it sustains in the opinion.
- If the court dismisses all of the issues, the court's judgment is not based on the merits (a situation that is beyond the scope of this article).

As discussed above, an appellate court's opinion is similar to a jury verdict in that the appellate judgment must correspond to the court's disposition of the necessary issues.

1. Rendition and reversal

When necessary issues are sustained, if possible, "the court must render the judgment the trial court should have rendered." TEX. R. APP. P. 43.2(c), 43.3. That means it should render judgment in the form appropriate to the trial court, such that the trial court's judgment—as reversed and rendered—is capable of being abstracted and executed like any final judgment. Similar to when the court affirms (because all necessary issues are overruled), when the court reverses and renders, the trial court "need not make any further order in the case." TEX. R. APP. P. 51.1(b). It's hard to imagine how the trial court would have jurisdiction to make further orders other than orders relating to post-judgment execution.

This is the hardest aspect of appellate judgments to draft, it is rarely done properly, and it is usually done without any substantive input from the parties—quite unlike the drafting of judgments in the trial court. *See* TEX. R. CIV. P. 305 (allowing parties to submit proposed judgments). This also is the place where counsel for appellant can potentially get exactly what the client seeks by providing sample rendition language.

Beware of broad requests to reverse the entire trial court judgment. The court should only reverse the specific portion of the trial court judgment that contains reversible error, based on necessary issues that were sustained. The rest of the judgment should remain as rendered by the trial court.

A polite variation on reversing and rendering is modifying the trial court judgment and affirming it as modified. Although it is functionally the same for the parties (in civil appeals there must be reversible error), an affirmed-as-modified judgment is reported to the Office of Court Administration as an affirmance. For trial judges who keep score—and they do—this result is strongly preferred over a reversal. If you are counsel for appellant, consider offering this alternative to the appellate court.

2. Remands

If rendition is impossible or impractical, then the court remands the case to the trial court. The scope of the remand should be specific.

If the remand should be limited to specific actions, then specify them. Again, this is an opportunity for counsel for appellant to get exactly what the client seeks by providing sample language for the scope of remand. And if neither party asks for a limited remand, someone's client may be back in the trial court dealing with issues that have already been, or could have been, litigated and were not appealed. That might be an unwanted second chance that could, and should, have been avoided.

If the remand is a general "do over," then the appellate judgment should direct a remand for "further proceedings." A remand for trial is improper unless the appellate court is specifically rendering judgment that the trial court proceed to trial, which is rare. For example, the court should not reverse a summary judgment and remand the case to the trial court for "trial," as that suggests (and opposing counsel might argue) that the trial court should not consider any subsequent motions for summary judgment.

3. The "in part" dispositions

If the court sustains necessary issues on appeal and therefore reverses in part the trial court judgment, then the court does not "affirm the remainder of the trial court judgment" merely because the entire trial court judgment was not reversed. It's tempting to do that, but unless there are also necessary issues that were overruled, then affirming the portion of the trial court judgment that the court didn't reverse is improper.

Remember, absent fundamental error, the court only affirms or reverses the trial court judgment based on arguments preserved in the trial court and properly raised as issues on appeal. Not affirming the remainder of the trial court judgment may seem counterintuitive, but otherwise the court is affirming portions of the trial court judgment no one asked it to review.

If the appellate court affirms in part and reverses in part, the court should specify the portion of the trial court judgment to be reversed and then affirm the remaining portion of the trial court judgment only insofar as it is related to arguments preserved in the trial court and sustained as issues raised on appeal.

These judgments may not be aesthetically pretty, but reviewing more of the trial court judgment than asked is effectively raising and ruling on issues sua sponte. Don't do it!

Bonus point: If the court reverses in an interlocutory appeal, the court should never remand the case to the trial court. Remember that the case isn't on appeal, only the interlocutory order. You can't remand what was never there.

If you think this all seems like high school geometry theorems and Venn diagrams, you're correct. Translating the overruled and sustained issues in an opinion into a judgment that affirms in part and reverses in part can quickly get messy. But give some serious thought to what winning actually means for your client, and be very careful what you ask for.

Another way to look at this as counsel for appellant is to step back and think about what appellate judgment your client wants. Then figure out if you can get there, and make sure you raise all the issues you need. That's a far more focused approach than just looking for reversible error in the record, and it avoids you having to ask for mandamus relief to fix things that you didn't ask for on appeal (assuming that's possible). *See In re Columbia Medical Center*, 306 S.W.3d 246, 248 (Tex. 2010) (holding that mandamus relief will lie to fix supreme court's judgment that did not reverse punitive-damage award).

E. Appellate Costs

It appears as though very few litigants actually care about appellate costs. But the Rules do provide that the court of appeals should award costs to the prevailing party—though it also states that "the court of appeals may tax costs otherwise as required by law or for good cause." TEX. R. APP. P. 43.4. This amounts to a money judgment on appeal if the appellate

judgment incorporates the statement of costs by reference. *See* TEX. R. APP. P. 51.1(a).

If the judgment and statement of costs allowed appellate costs to be awarded as the TRAPs envision, would litigants turn down the money? Doubtful. The problem is that most appellate judgments don't clearly render a money judgment, the cost of litigating payment of appellate costs far exceeds the value, and prevailing parties have simply given up on collection. The solution is drafting both the appellate judgment and statement of costs in plain language that clearly awards costs in accordance with the Rules.

F. The Supersedeas Bond

Yes, some litigants care about the supersedeas bond, even though it may not be at the forefront of their consciousness during the initial thrill of victory or the agony of defeat. The appellate court should render an appropriate judgment that requires no further action in the trial court other than execution. It's a waste of the client's money to have the trial court order payment on the supersedeas bond when it could—and should—be done in the appellate judgment.

G. The Mother Hubbard Clause

Why put a *Lehmann/Har-Con* Mother Hubbard clause in the appellate judgment? We traditionally haven't done that. But we should include language of finality in appellate judgments, for most of the same reasons articulated in *Lehmann* and *Har-Con*.

H. The Mandate

Few people understand mandates because they are written in archaic language, and because they arrive several weeks after the appeal is "over" and we have already mentally closed the file. Rule 18.6 explains what a mandate does in an interlocutory appeal, and the Texas Supreme Court would do everyone a favor by making the rule apply to all appeals.

A mandate is a writ directing the lower court to enforce the judgment of the higher court because the appellate judgment has "taken effect." *See generally* TEX. R. APP. P. 18.6, 51.1(b). Before the lower court receives the mandate, it's

debatable whether the lower court has jurisdiction to conduct "further proceedings" in the case or whether the prevailing party can otherwise execute on the appellate judgment. If the appellate court drafted this writ in plain English and the appellate clerk issued it promptly, then we wouldn't be talking about this.

V. Submitting a Draft Appellate Judgment: A Proposed Paradigm Shift

You may ask, "Won't the court of appeals be offended if I offer a draft appellate judgment? This is a fair question because it's not the way we currently do things, and under current procedures, attaching a draft judgment to the initial briefs seems a bit presumptuous. But many trial courts have required litigants to attach draft orders to motions for years, and that is no less presumptuous. Appellate judgments are not going to improve without making some changes in our culture and our procedures, and that will require cooperation from both the bench and bar.

Here are some proposals to the bench:

- Courts of appeals should encourage counsel to tender draft judgments. The court would not be bound to follow them, but it would help counsel and the court to be thinking about what the appellate judgment should look like.
- The Texas Supreme Court should consider amending Rule 38.1(j) to change the "Prayer" to "Conclusion and Request for Specific Relief." This part of an appellant's brief should provide an option to summarily wrap up the argument. But it should always ask for the specific relief, possibly in bullet points, that the appellant seeks in a favorable appellate judgment. Calling this part of a brief a "prayer" encourages arcane language more suited to reflections on the mysteries of spirituality. What everyone really needs is for appellant to tell the appellate court what it means if the court sustains appellant's issues and what relief the appellate judgment should grant.

- The Texas Supreme Court also should consider amending Rule 38.1(k)(2) to expressly allow an appellant to include a draft appellate judgment in the appendix as "optional contents." Ideally, the draft judgment should be non-argumentative.
- Finally, the Texas Supreme Court should consider adopting an appellate process similar to Texas Rule of Civil Procedure 305 in which the appellate court could issue its opinion and ask the parties to submit draft rendition language. Without such a procedure, the appellate court's only viable option is often to remand the case to the trial court, likely at a significant expense to the client.

There are appeals so complex—usually with multiple parties on the same "side" who aren't aligned on all issues—in which it isn't practical for the parties to offer a comprehensive draft judgment before submission. If the court issued the opinion disposing of all necessary issues and allowed the parties to submit a proposed judgment, then the motions for rehearing would deal solely with the original issues, rather than also addressing errors arising for the first time in an appellate judgment that doesn't match up with the opinion. The bench and the bar should recognize these cases are really hard and not be afraid to collaborate.

For members of the Supreme Court Advisory Committee, hello! This paradigm shift will likely not happen without you.

VI. In Light of the Court's Opinion . . . .

Some appellate judgments refer to the court's opinion, and direct either a remand or rendition "in light of this Court's opinion." These are judgments in name only. How would you abstract this kind of rendition judgment? Short answer: you can't. So let's put this practice out of its misery and go to a little extra trouble to use specific language to direct a specific result. That may avoid a lot of unnecessary trouble and confusion down the road.

VII. Conclusion and Request for Specific Relief

Working together, the bench and bar can draft unambiguous appellate judgments. We owe it to the parties and our clients to focus on the document that ultimately controls the outcome of their case.

Finally, we know this is merely the beginning. Whatever your thoughts about appellate judgments, let the dialog begin!

[Remainder of page intentionally left blank.]

APPENDIX A

[state seal]

Court of Appeals for the

** District of Texas

FINAL JUDGMENT

No. 0**-13[1]-00**-CV

Trial court case no. **

**, Appellant(s) v. **, Appellee(s)

Appeal from the ** Judicial District Court/County Civil Court at Law No. ** of

** County, Texas

This case is an appeal from the final judgment [decree] [order] [appealable interlocutory order] signed by the trial court on **date**.[2] After submitting the case limited to the appellate record[3] and the arguments preserved below[4] and properly raised by the parties,[5] the Court holds that the trial court's judgment [decree] [order] [appealable interlocutory order] and any postjudgment orders[6] contain no reversible[7] or fundamental error[8] [reversible/fundamental error].

[1] Over a decade after the Millennium bug terrorized the world, Rule 12.2(a)(2) perpetuates the two-digit problem. It wouldn't hurt to fix this and use all four digits for the year.

[2] *See generally* TEX. CIV. PRAC. & REM. CODE ANN. §§ 51.012, .014 (West Supp. 2012).

[3] TEX. R. APP. P. 34.1.

[4] TEX. R. APP. P. 33.1.

[5] *See W. Steel Co. v. Altenburg*, 206 S.W.3d 121, 124 (Tex. 2006).

[6] *See, e.g.*, TEX. R. CIV. P. 324(b).

The Court **affirms** the trial court's judgment [decree] [order] [appealable interlocutory order] [**reverses** and [**remands** the case to the trial court for further proceedings [limited to **]/**renders** judgment as follows: **rendition text**]].[9]

The Court **taxes the appellate costs**[10]—including costs in the Supreme Court of Texas if that court declines to grant a petition for review[11]—as follows: (1) any filing fee for a motion to extend time[12] or to withdraw as counsel is taxed against the party who filed the motion to extend time or to withdraw as counsel and (2) all remaining appellate costs (the fee for filing the appeal, the fees for filing motions other than motions to extend time and to withdraw as counsel, the charges for preparing the appellate record, and the fee for filing a petition for review in the Supreme Court of Texas)[13] are taxed against appellant(s) [appellee(s)][, jointly and severally].

[If there are appellate costs that have not previously been paid because a party was exempt under Civil Practice and Remedies Code section 6.0001, then those costs must be paid within ten days from the date of this judgment.[14] All nonindigent parties are jointly and severally liable for those

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[7] TEX. R. APP. P. 44.1

[8] *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 577 (Tex. 2006).

[9] TEX. R. APP. P. 43.2, 43.4.

[10] TEX. R. APP. P. 43.4.

[11] TEX. R. APP. P. 18.5.

[12] *See generally* Tex. Fin. Code Ann. § 304.005(b) (West 2006).

[13] TEX. R. APP. P. 18.5.

[14] TEX. CIV. PRAC. & REM. CODE ANN. § 6.001 (West 2002); *Rodeheaver v. Alridge*, 601 S.W.2d 51, 54 (Tex. Civ. App.—Houston [1st Dist.] 1980 writ ref'd n.r.e.); Op. Tex. Att'y Gen. No. DM-459 (1997).

unpaid appellate costs, regardless of how costs have been taxed.[15]]

The Clerk of this Court shall prepare a statement of costs to issue with the mandate, and that statement of costs is incorporated into this judgment.[16]

The Court **renders judgment** that appellee(s) [appellant(s)] recover from appellant(s) [appellee(s)][, jointly and severally,] all appellate costs listed in the statement of costs that have been taxed against appellant(s) [appellee(s)] and have been paid by appellee(s) [appellant(s)], along with **% postjudgment interest,[17] compounded annually,[18] on that amount beginning on the date this judgment is rendered and ending on the date the judgment for appellate costs is satisfied.[19] Appellate costs must be included with the trial court costs in any process to enforce the trial court's judgment. If any unpaid appellate costs due to either the Clerk of this Court or the Clerk of the Supreme Court of Texas are collected, the Court **orders** the trial court clerk to remit to the appropriate appellate court clerk the unpaid appellate costs.[20]

[The Court **renders judgment** against **, the surety on appellant's supersedeas bond filed in the trial court on **date**, jointly and severally with appellant, to the limit of

[15] *Roby v. Hawthorne*, 84 S.W.2d 1108, 1110 (Tex. Civ. App.—Dallas 1935, writ dism'd); Op. Tex. Att'y Gen. No. DM-459 (1997).

[16] TEX. R. APP. P. 51.1(a).

[17] TEX. FIN. CODE ANN. §§ 304.001, .002, .004 (West 2006).

[18] TEX. FIN. CODE ANN. § 304.006 (West 2006).

[19] TEX. FIN. CODE ANN. § 304.005(a) (West 2006).

[20] TEX. R. APP. P. 51.1(b).

the surety's liability on the bond, for (1) the judgment against appellant and (2) the appellate costs taxed against appellant.][21]

[The Court **discharges** appellant and his/her/its surety ** from their liability on their supersedeas bond filed in the trial court on **date**.][22]

The Court **orders execution** to issue for this judgment in the trial court when the clerk of the trial court receives this Court's mandate.[23]

The Court **denies** all relief not specifically granted in this case. This judgment finally disposes of all appellate parties and all appellate claims, and if allowed by law, a party to this judgment may seek review from the Supreme Court of Texas.[24]

Judgment rendered **, 2013.

Panel consists of Justices **, ** and **.[25]

[21] TEX. R. APP. P. 43.5.

[22] *Cf.* TEX. R. APP. P. 43.5.

[23] TEX. R. APP. P. 51.1(b).

[24] *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 206 (Tex. 2001).

[25] *See* TEX. R. APP. P. 47.2(a).

APPENDIX B

[state seal]

Court of Appeals for the

** District of Texas

MANDATE[26]

No. 01-13-00**-CV

Trial court case no. **[27]

**, Appellant(s) v. **, Appellee(s)

Appeal from the ** Judicial District Court/County Civil Court at Law No. ** of

** County, Texas

The State of Texas[28] to the **th Judicial District Court/County (Civil/Criminal) Court at Law No. ** of ** County,[29] Greetings:

On **, 2013, the Court of Appeals for the ** District of Texas rendered judgment as follows:

"**judgment**"

Because the judgment of the Court of Appeals in this case is no longer subject to further review by the courts of this State[30] [Because the parties have agreed that this mandate should issue[31]] [Because good cause has been demonstrated

[26] TEX. R. APP. P. 18.1.

[27] TEX. R. APP. P. 18.3.

[28] TEX. R. CIV. P. 15.

[29] TEX. R. APP. P. 15.1(b).

[30] TEX. R. APP. P. 18.1(a).

[31] TEX. R. APP. P. 18.1(c).

for issuing this mandate[32]], you are ordered to enforce the judgment of the Court of Appeals when the trial-court clerk receives this mandate, which is accompanied by a statement of costs.[33]

Issued and signed at **, Texas on _____ by the Clerk of the Court of Appeals for the ** District of Texas with the Court's seal affixed.[34]

[Court's seal][35]

**[36]

Clerk of the Court

[32] *Id.*

[33] TEX. R. APP. P. 51.1.

[34] TEX. R. APP. P. 15.1(a).

[35] *Id.*

[36] *Id.*

Appendix C

[state seal]

Court of Appeals for the

** District of Texas

STATEMENT OF COSTS[37]

No. 01-13-00**-CV

Trial court case no. **

**, Appellant(s) v. **, Appellee(s)

Appeal from the ** Judicial District Court/County Civil Court at Law No. ** of

** County, Texas

I certify that the following appellate costs were incurred in this appeal as follows:

Date	Cost	Party	Payment status	Payment type
**	**	**	**	**

Appellate costs in the Supreme Court of Texas, if any, are included in this statement of costs if the Supreme Court declined to grant a petition for review and the Supreme Court provided those costs to this Court.[38]

This statement of costs is incorporated into this Court's **date** judgment.

Issued and signed at **, Texas on _____ by the Clerk of the Court of

[37] Tex. R. App. P. 51.1(a).

[38] Tex. R. App. P. 18.5.

Appeals for the ** District of Texas with the Court's seal affixed.

[Court's seal]

**

Clerk of the Court

Texas Citation Writ Large(r): Consequential Necessity or "Tyranny of the Inconsequential"?

Dylan O. Drummond, K&L Gates, LLP, Austin

I. Why Should Anyone Care About Citation?[1]

As former Philadelphia 76er Allen Iverson once famously and indelibly described more than a decade ago his slight regard for basketball practice,[2] most attorneys similarly feel towards citation:

> We're sitting here, and I'm supposed to be the [Super Lawyer®], and we're in here talking about [*citation*].
>
> I mean, listen, we're talking about [*citation*], not a [trial], not a[n oral argument], not [voire dire], we're talking about [*citation*].

[1] I would like to extend special thanks to the following colleagues, upon whose work I've brazenly plagiarized or heavily relied: (1) University of Texas School of Law Professor Wayne Schiess (Wayne Schiess, *Citation Form: The Tyranny of the Inconsequential*, Legalwriting.Net Blog by Wayne Schiess (Aug. 9, 2012), http://j.mp/10KEhgh [hereinafter *Tyranny of the Inconsequential*]); (2) Chad Baruch (Chad Baruch, *The* Blue Book: *Why it Matters and How it Has Changed, or … How I Learned to Stop Stressing About Citations and Sleep at Night*, *in* State Bar of Tex. Prof. Dev. Program, State Bar College 14th Annual Summer School ch. 10 (2012)); and (3) Bradley Clark (Bradley B. Clark, *Yes, Judges Really Do Care About That! Lawyers' Most Common Citation Mistakes*, *in* State Bar of Tex. Prof. Dev. Program, Consumer and Commercial Law Course (2007) [hereinafter *Judges Really Do Care About That!*]).

Incidentally, Bradley holds the distinct if dating honor of publishing the first (and late) Texas-centric legal blog—the *Texas Law Blog*—waaay back in the internet dark ages circa 2003.

[2] ESPN, Original Allen Iverson Practice Rant, http://j.mp/10KE10C (last visited Mar. 20, 2013).

> Not a [contested-case hearing]. Not the [legal system] that I go out there and die for and [try every case] like it's my last, not the [opening or closing statements], we're talking about [*citation*] man.
>
> I mean, how silly is that?[3]

So silly, in fact, that University of Texas School of Law Professor Wayne Schiess has dubbed such strict adherence to proper citation form—particularly if it is clung to wholly apart from the underlying merits of the legal argument being made—the "tyranny of the inconsequential."[4]

And he's absolutely right. Yet accurate citation is also and almost paradoxically an essential persuasive arrow in a legal writer's quiver. Because here in Texas, incorrect citation can not only make you look intellectually fatuous—even when you're not—it can also result in the precedential denudation of an improperly cited case.

Consequently, accurate citation is something more than the pedant cherry atop an otherwise cogent legal argument, it is instead one of the buttressing foundations of establishing both an author's credibility to his audience as well as a basic demonstration of one's elemental understanding of persuasive writing.

II. The Tyranny of Proper Citation[5]

> Mastering the arcana of citation forms . . . is not a productive use of judges' or law clerks' time. The purpose of citations is to assist researchers in identifying and finding the sources; a form of citation that will serve that end is sufficient.

[3] D.J. Gallo, *Allen Iverson's 'practice' rant: 10 years later*, ESPN Playbook: Fandom (May 7, 2012, 9:53 AM), http://j.mp/10KE7Wb (emphasis added).

[4] *Tyranny of the Inconsequential*, at http://j.mp/10KEhgh.

[5] Not only this heading, but portions of this article's text are lifted wholesale from the defunct musings of an "itinerant shepherd with a penchant for blogging from the pasture," whose now-dated "vaguely legally-tinged ode[s] to arcana" may still be found at http://sophisticmiltonianserbonianblog.wordpress.com/.

In addition, the form of citation should be consistent to avoid the appearance of lack of craftsmanship and care.[6]

As Professor Schiess has observed, this statement from the *Judicial Writing Manual* is undoubtedly accurate, but does not reflect the reality of the scarlet hue that attaches to one marked by improper citation.[7]

Many lawyers, some judges, and most every law clerk "will judge you by your citation form, as inconsequential as it may be."[8] Often, a lawyer's legal prose may be the only hallmark by which court staff know an attorney, and the sole measure by which a lawyer is judged in the back halls of the courthouse.[9] In some instances, even courts resort to citational "benchslapping"[10] of one another.[11]

[6] *Tyranny of the Inconsequential*, at http://j.mp/10KEhgh (quoting FEDERAL JUDICIAL CENTER, JUDICIAL WRITING MANUAL 24 (1991)).

[7] *Id.*

[8] *Id.*

[9] *Judges Really Do Care About That!* at 3.

[10] *See* Article III Groupie (aka David Lat), *Bench-Slapped! Reinhardt v. O'Scannlain*, UNDERNEATH THEIR ROBES (June 24, 2004), http://j.mp/10KEzDL (describing the derivation and origination of the term, "bench-slap"); *see also* Debra Cassens Weiss, *Is 'Benchslap' Worthy of Black's Law Dictionary? Editor Tweets Question*, ABA JOURNAL LAW NEWS NOW, (Dec 3, 2012 7:15 AM), http://j.mp/10KEHDe (recounting a discussion on *Twitter* between *Black's Law Dictionary* Editor in Chief, Bryan Garner, and *Above the Law* & *Underneath Their Robes* founder, David Lat, regarding potential inclusion of the term in the 10th edition of *Black's Law Dictionary*); @BryanAGarner, *"@dodrummond: We need to remedy this in the 10/e. @BryanAGarner | @DavidLat #benchslap pic.twitter.com/qzHr8Kb1xt" The entry has been drafted.*, TWITTER (Mar. 29, 2013, 9:30 PM), http://j.mp/190FDGS (Bryan Garner indicating an entry for "benchslap" has been drafted for inclusion in the forthcoming 10th edition of *Black's Law Dictionary*).

[11] *See*, *e.g.*, *Thorne v. Jones*, 765 F.2d 1270, 1275 (5th Cir. 1985) (appending a "sic" notation to the U.S. Supreme Court's citation of *one of its own* prior cases, merely because the High Court adhered to its own style guide instead of the *Bluebook*); James W. Paulsen, *An Uninformed*

Of course, a legal writer must put forth a well-reasoned argument, but slovenly citation will invariably detract from the credibility otherwise established by compelling reasoning. Although good citation form may not—in and of itself—"win over many readers, poor form will assuredly put off those who prize accuracy."[12]

All too often, however, those who employ suspect citation tend to evidence similar diligence in their legal reasoning as well. Back many moons ago, when it was my job to read briefs submitted by others, it was a very rare occurrence indeed when a brief that jumped out at me as being offensively lax in its citation was inversely impressive for its thoughtful analysis. The converse was also true: rarely were briefs that shone with impeccable citation burdened by makeweight reasoning.

Once you've lost credibility through incorrect citation, it's difficult to regain it through unassailable logic. Ultimately, it is always best to try to avoid engendering snickering from one's legal reader.

That said, oftentimes which *Bluebook* or *Greenbook* rule (or combination thereof) exactly applies to a given citation is not always clear. I remain convinced that, as long as you appear to generally have a clue as to how to cite something (i.e., it "looks right"), no briefing or staff attorney will hold it against you if your attempt isn't strictly correct. They're substantively checking your cites for—and judging your credibility based upon—the accuracy with which you cite the material relied upon, not the running tally of *Bluebook*[13] or

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System of Citation, 105 HARV. L. REV. 1780, 1784 (May 1992) (book review) [hereinafter *Uninformed System*].

[12] Bryan A. Garner, *Foreword*, THE GREENBOOK: TEXAS RULES OF FORM iii (Texas Law Review Ass'n ed., 12th ed. 2010).

[13] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th ed. 2010) [hereinafter BLUEBOOK]. My references to the *Bluebook* throughout this article will be technically incorrect because I refuse to include a prefatory article ("the") in my references to a publication merely because it is included as part of its title.

Greenbook[14] rules of which you may have technically run afoul.[15]

III. Citation Resources upon Which to Rely

The two main resources one should consult for all citation guidance in Texas are the *Bluebook* and the *Greenbook*. Both have been the primary citation guides in circulation,[16] both nationally since 1926[17] and in Texas since 1966.[18] Also

[14] The Greenbook: Texas Rules of Form (Texas Law Review Ass'n ed., 12th ed. 2010) [hereinafter Greenbook]. *See supra* note 13 (explaining my obstinate refusal to include, "the," in my reference to either the *Bluebook* or the *Greenbook*).

[15] *See*, *e.g.*, Hon. Richard A. Posner, *The* Bluebook *Blues*, 120 Yale L.J. 850, 852 (2011) [hereinafter Bluebook *Blues*] (a "system of citation forms has basically two functions: to provide enough information about a reference to give the reader a general idea of its significance and whether it's worth looking up, and to enable the reader to find the reference if he decides that he does want to look it up").

[16] As the current Dean of my legal alma mater documented, legal citation has been traced to Roman antiquity in 71 A.D., and the earliest-known citation manual, the *Modus Legendi Abbreviaturas in Utroque Iure*, was first published around 1475. A. Darby Dickerson, *An Un-Uniform System of Citation: Surviving with the New* Bluebook (*Including Compendia of State and Federal Court Rules Concerning Citation Form)*, 26 Stetson L. Rev. 53, 58 n.13 (Fall 1996) [hereinafter *Un-Uniform System*] (citing Byron D. Cooper, *Anglo-American Legal Citation: Historical Development and Library Implications*, 75 L. Libr. J. 3, 4, 20, 20 n.140 (1982)).

[17] *Uninformed System*, 105 Harv. L. Rev. at 1782. During the summer of 1926, a second-year law student at Harvard named Erwin Griswold had a printer in his hometown of Cleveland, Ohio prepare a 26-page style guide which "largely codified existing [citation] practices," and expanded upon the 8-page internal manual then-relied upon by *Harvard Law Review* editors—a manual that would later become known as the first "*Bluebook*." A Uniform System of Citation 1 (Harvard Law Review Ass'n ed., 1st ed. 1926); *see also Un-Uniform System*, 26 Stetson L. Rev. at 55 n.1, 57 n.10. *Compare Uninformed System*, 105 Harv. L. Rev. at 1782, 1782 n.14 (recounting the general history of the original edition of the *Bluebook*), *with Bluebook Blues*, 120 Yale L.J. at 854 (discussing the content of the 1st edition of the Bluebook, as well as revealing Judge Posner's affinity for its strictures). Mr. Griswold

went on to serve as Editor in Chief of the *Harvard Law Review*, Dean of Harvard Law School, and U.S. Solicitor General. *Un-Uniform System*, 26 STETSON L. REV. at 57 n.11.

Notably, the *Bluebook* did not attain its familiar cerulean cover until 1939, when its then-brown cladding was thought too reminiscent of Adolph Hitler's "brownshirts." Alan Strasser, *Technical Due Process?*, HARV. 12 C.R.-C.L. L. REV. 507, 508 (1977). Sometime between the appearance of the cobalt-hued 6th edition in 1939, and the publication of the white-with-blue-trim-colored 11th edition in 1967, the moniker, "Bluebook," attached to the legal vernacular—but did not adhere to the official title until the publication of the 15th edition in 1991. *See Un-Uniform System*, 26 STETSON L. REV. at 55 n.1, 58–59. *Compare* A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 6th ed. 1939), *with* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 15th ed. 1991).

[18] The original edition of the *Texas Rules of Form* was published in 1967. Telephone interview with Paul Goldman, Texas Law Review Association, Publications Office (Mar. 25, 2013); *see also* TEXAS RULES OF FORM ii (Texas Law Review Ass'n ed., 1st ed. 1966). The earliest recorded reference I can find to the *Greenbook* either in caselaw or the literature is a mention of the 3d edition, published in 1974, in the 1977 case of *Cont'l Oil Co. v. Dobie*, 552 S.W.2d 183, 187 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

Other notable Texas-centric citation guides include: (1) former Texas Supreme Court Chief Justice Joe Greenhill's 1964 *Texas Bar Journal* article laying out *Uniform Citations for Briefs*; (2) former Texas Attorney General Crawford Martin's 1967 *Uniform Citations for Opinions, Correspondence and Briefs*—still on the shelves of the State Law Library; or (3) that institution's first Director, Marian Oldfather Boner's 1971 *Simplified Guide to Citation Forms*. MARIAN O. BONER, SIMPLIFIED GUIDE TO CITATION FORMS (Tarlton Law Library 1971) (it is my contention that Professor Boner has, to this day, one of the single coolest middle names ever placed on a Texas birth certificate); HON. CRAWFORD C. MARTIN, UNIFORM CITATIONS FOR OPINIONS, CORRESPONDENCE AND BRIEFS (Office of the Attorney General 1967); Hon. Joe Greenhill, *Uniform Citations for Briefs: With Observations on the Meanings of the Stamps or Markings Used in Denying Writs of Error*, 27 TEX. B.J. 323 (May 1964).

invaluable to legal writing in Texas is the *Manual on Usage and Style* (the "*MUS*").[19]

Perhaps less well-known is that the *Bluebook* maintains an online "update" page, wherein various corrections and updates to the current print edition are catalogued—presumably before incorporation into the 20th edition.[20] And there is also now a mobile app[21] that is officially licensed by the *Bluebook* to use its content, called *rulebook*™. It not only contains all the material from the printed 19th edition of the *Bluebook*, but seamlessly incorporates the interim updates from the *Bluebook*'s website as well.[22] For this reason, as well as for its mobile (and stationary) utility, I highly recommend practitioners explore using the *Bluebook* mobile app in place of the printed edition.[23]

[19] THE MANUAL ON USAGE & STYLE (Texas Law Review Ass'n, ed., 12th ed. 2011) [hereinafter MUS].

[20] THE BLUEBOOK, UPDATES, http://j.mp/10KESOZ (last visited Mar. 21, 2013).

[21] If you have to refer to this footnote to discover what a "mobile app" is, you probably won't find apps of any kind useful in your practice. *See*, *e.g.*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, "MOBILE APP," http://j.mp/13fenzN (last visited Aug. 5, 2013) ("A mobile application (or mobile app) is a software application designed to run on smartphones, tablet computers and other mobile devices.").

[22] Because the content of the *rulebook*™ version of the *Bluebook* is technically different and updated from that contained in the 19th edition paper edition, I recommend citing it as follows: "THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th ed. for *rulebook*™ 2013)."

[23] For that matter, I also highly recommend the *Black's Law Dictionary* app, which contains material from the 9th edition, and helpfully includes page number references as well for accurate citation. Incidentally, while the e-content in the iPhone version of *Black's Law Dictionary* is identical to that in the 9th edition, I prefer to modify its citation slightly to denote the different source (as suggested by the app's *Info* page): "BLACK'S LAW DICTIONARY (9th ed. for iPhone/iPad/iPod Touch 2011)."

There exists another national citation guide, the *ALWD Citation Manual* (the "*ALWD*"), but, from my vantage point,[24] it is as widely seen in Texas as a yeti. In fact, I have yet to actually witness one opened or used in law school, on the editorial board of my law-school journal, during my clerkship, or in private practice—ever. Therefore, I do not recommend becoming overly familiar with its mandates for use in Texas practice.

This is not a comment upon its substantive merits, which colleagues more learned than I assure are many,[25] but merely a comment upon perhaps the most efficient way to spend your six-minute increments boning up on citation form.

IV. All That's Wrong With the *Greenbook* and the *Bluepages*

One aspect of the debate regarding the efficacy of accurate legal citation that often goes unmentioned is that every major citation manual always seems to be changing—and often for no discernibly rational reason.

We've had 19 versions of the *Bluebook*,[26] and 12 apiece for the *Greenbook*[27] and *MUS*.[28] Invariably, a new edition will

[24] Which, admittedly, may be dated at this point.

[25] *See*, *e.g.*, *Judges Really Do Care About That!* at 4–5 (noting that the *ALWD* has now been adopted by some 72 law schools—including the University of Texas School of Law and St. Mary's University School of Law, as well as the Eleventh Circuit Court of Appeals); K.K. DuVivier, *The Scrivener: Modern Legal Writing:* The Bluebook *No. 18—"Thank God for competition . . . ."*, Colo. Law., Nov. 2005, at 112 [hereinafter Bluebook *No. 18*] (estimating the *ALWD*'s use by some 90 law schools); *see also* ALWD Citation Manual: A Professional System of Citation (Ass'n of Legal Writing Directors & Darby Dickerson, 4th ed. 2010) (Texas Tech University School of Law Dean Dickerson has served as the principal author of the *ALWD* since the 1st edition debuted in 2000).

[26] Bluebook at iii.

[27] Greenbook at iv–v.

[28] MUS at i. Of note, the 2d edition of the *MUS* first appeared in 1967, the forward to which was penned by federal practice authority Charles Alan Wright. *Id.* at ix–x.

emerge from both the Ivy-League and bovine catacombs every other year or so, often dramatically altering some long-practiced citation form with little—if any—convincing explanation for the revision. This is one of the primary reasons the Texas bar as a whole tends to look somewhat derisively—the more so the longer one has been in practice—at the utility of staying current with whatever the newest citation fad may be. No doubt in part due to advancing age, I am now beginning to fall prey to this worldview as well.

The periodic revision of citational dogma has now resulted in the wholly unnecessary and duplicative creation of two separate citation regimes—one for legal periodicals and another for everything else. Because one system is hypertrophic enough[29]—let alone two—I prefer to treat justices, judges, and court staff like adults (or at the very least, like 2L law students) and refuse in practice to cite sources differently than I would to academia.

A. How Yet Another Citation Regime Came To Be

Beginning in earnest with the advent and apparent growing popularity of the *ALWD*, as well as the publication of the 18th edition of the *Bluebook*, a wave of "practitioner"-friendly alternative citation forms began to circulate widely in legal-writing circles, each of which were aimed at establishing a different paradigm of citation directives for practitioners' legal documents (i.e., briefs, pleadings, memoranda, etc.).[30]

The infancy of this endeavor originated in 1981, when the 13th edition of the *Bluebook* first included, on the inside of the front and back covers, alternative "Basic Citation Forms"

[29] *Bluebook Blues*, 120 Yale L.J. at 851 (describing the cottage-industry dominated by the *Bluebook* as "hypertroph[ic] in the anthropological sense," because "[i]t is a monstrous growth, remote from the functional need for legal citation forms, that serves obscure needs of the legal culture and its student subculture").

[30] Bluebook *No. 18*, Colo. Law., Nov. 2005, at 111–12.

for "Briefs and Memoranda."[31] By the 15th edition in 1991, these alternative citation forms were expanded into ten pages of "Practitioners' Notes."[32]

The publication of the 18th edition of the *Bluebook* in 2005 brought the alternative-citation movement to full flower, wherein the *Bluebook* expanded fourfold the former 10-page "Practitioners' Notes" into a 40-page section called the "Bluepages."[33] In the current 19th edition,[34] the *Bluepages* now span some 48 pages.[35]

B. Why Any of this Matters in Texas

The only reason why this exposition is remotely relevant to the art of modern-day citation is that, beginning with the 11th edition of the *Greenbook*, the student editors chose to revise the entirety of the *Greenbook*'s typographic conventions to comport not with the *Bluebook* itself, but with its *Bluepages* instead.[36] In other words, since 2005, the entire *Greenbook* has really been one big "Greenpages."

One can (& I do) easily enough ignore the existence of the *Bluepages* when citing a given source and still be technically "correct" as per the 19th edition of the *Bluebook*. However,

[31] *Id.* at 111. This quick-reference guide still exists in the 19th edition but is now reprinted on the inside back cover and facing page. BLUEBOOK at 512 (please note that page 512 doesn't actually exist as the facing page to the inside back cover of the Bluebook has no page designation—but the flip side of that page is 511—hence page 512).

[32] Bluebook *No. 18*, COLO. LAW., Nov. 2005, at 111.

[33] *Id.* at 112; *see generally* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

[34] Of which Judge Posner has expressed his desire to read all 511 pages in the 19th edition as approximating the famous dying words of the character from *Apocalypse Now*: "The horror … the horror …." *Bluebook Blues*, 120 YALE L.J. at 852 (quoting APOCALYPSE NOW (Zoetrope Studios 1979)).

[35] BLUEBOOK at 3–51

[36] TEXAS RULES OF FORM iv–v (Texas Law Review Ass'n ed., 11th ed. 2005).

since 2005, if one does this here in Texas—citing a Texas source generally[37]—your citation form may be understood to be incorrect by an exacting legal reader.

This is maddening because the entire reason for the existence of the *Bluepages* grew out of the difficulty many practitioners had in complying with the use of small caps, italics, and other typeface accents that—once upon a time—were difficult to apply. This is a kind way of saying that, when most word-processing was performed not on computers but on typewriters, italics and small caps were understandably problematic to use.[38] Hopefully, no one you know or practice with still prepares anything vaguely legal on any device that doesn't have a power cord and a screen. Because the ease of applying these typefaces with any modern word-processing program has exponentially increased over the last 30 years or so, it is baffling why any legal writer would advocate the use of typographic conventions more appropriate to the industrial—instead of the internet—age.[39]

[37] "Except as modified herein [the 12th edition of the *Greenbook*,] *The Bluebook* should be followed." GREENBOOK at iv.

[38] MATTHEW BUTTERICK, TYPOGRAPHY FOR LAWYERS: ESSENTIAL TOOLS FOR POLISHED & PERSUASIVE DOCUMENTS 41, 78 (Jones McClure Publ'g 2010) [hereinafter BUTTERICK] (examining how many common typeface and formatting practices are holdovers from the typewriter-era).

[39] The *Bluepages* still list examples of case cites with underlined styles for goodness sake. *See*, *e.g.*, BLUEBOOK at 3–13; BUTTERICK at 78. One might as well attach a buggy whip as an exhibit to the pleading you submit as deign to underline a case style in public. *See* HON. ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 136 (Thomson/West 2008) [hereinafter MAKING YOUR CASE] (quoting MARK P. PAINTER, THE LEGAL WRITER 35 (2002) ("I have seen firms spend hundreds of thousands of dollars on technology only to make their briefs and other documents look like they were typed on a 1940 Underwood ….")); *see also Judges Really Do Care About That!* at 6; BUTTERICK at 78 (underlining is a "holdover from the typewriter age" when the "only way to emphasize text was to back up the carriage and type underscores beneath the text").

I argue that, not only is the typeface variety long favored by the *Bluebook* not too terribly difficult to learn and employ effectively, it actually serves the purpose of citation in the first place, which is to aid the reader in comprehending and evaluating the authorities provided.

Particularly now, it is all the more important to keenly adjudge your legal audience before deciding which citational route to take in the prose you submit for their review. Most—if not every—justice, judge, and attorney of moderately-recent or more seasoned vintage will likely assume the practitioners' conventions followed by the *Greenbook* and the *Bluepages* are just flat-out wrong (i.e., underlined case styles, elimination of small caps in all citations, etc.). However, younger lawyers and clerks especially—to whom most every judge I have ever known graciously and perhaps eagerly defer on matters of citation—may think your stubborn use of small caps and italics is not out-and-out incorrect per se, but perhaps just a sign of generational disconnect.

Either way, the potential for an otherwise correct cite form to be understood to be incorrect or sloppy by an attorney's reader simply due to the paradigmatic whim of *Greenbook* editors nearly a decade ago is both silly and unnecessary.

V. Precedential Order of Citation

Now we come to the only part of any examination of Texas citation practice to which you should really listen—subsequent history. Everything else is no doubt important aesthetically and tactically, but failing to correctly note the subsequent history of a Texas case can precedentially neuter the material cited.

Depressingly, as frightfully corpulent as the subsequent-history notation system is in Texas, it is actually much worse than most fear. Because of the complexity inherent in our court system as it has developed, it has been the natural tendency of the Texas bar to drift towards simplifying our citational approach so that no lawyer need be conversant in decades of legal arcana in order to simply cite a case. But this urge to streamline our citation may have had the unintended

effect of reducing our collective comprehension of what is truly precedential in Texas in the first place.

Unfortunately, to fully explore this topic takes much more time and print than is afforded here, so I will instead refer you first to Exhibit A to the *Appendix* of this article, which contains a "Precedential Order of Citation" outline that notes the varying precedential value accorded a given case in Texas appellate practice, depending on the date and court from whence it issued.[40]

The *Precedential Order of Citation* outline is organized to note that all types of cases under category I control over those under category II, and so forth.[41] However, those types of cases listed under any given subcategory (A, B, C.1, etc.), while generally a shade more authoritative than the subcategory below it, do not necessarily or explicitly control over a latter-listed type of opinion.[42] For example, an authored Texas Supreme Court (the "Court") opinion technically carries the same precedential weight as does a petition-refused intermediate appellate court case, or an adopted or approved opinion of the Texas Commission of Appeals, or even a per curiam Court opinion.[43] But even though they may have the same precedential import per se, one would never intentionally cite to a per curiam Court opinion for a given point of law if the same issue is addressed in an authored

[40] *See* Dylan O. Drummond, *Citation Writ Large*, 20 APP. ADVOC. 89, 109 (Winter 2007) [hereinafter *Citation Writ Large*], *cited in Gonzalez v. Texas*, No. 13-07-00270-CR, 2009 Tex. App. LEXIS 5860 at *12 n.2 (Tex. App.—Corpus Christi July 30, 2009, no pet.) (mem. op.); *Tex. S. Rentals, Inc. v. Gomez*, 267 S.W.3d 228, 239 n.8 (Tex. App.—Corpus Christi 2008, no pet.); Andrew T. Solomon, *Practitioners Beware: Under Amended Trap 47, "Unpublished" Memorandum Opinions in Civil Cases are Binding and Research on Westlaw and Lexis is a Necessity*, 40 ST. MARY'S L.J. 693, 702 n.34 (2009).

[41] *See id.* at 89–90.

[42] *See id.*

[43] *See id.* at 91–95.

opinion from the Court.[44] This is because per-curiam opinions: (1) have traditionally been used primarily as error-correction vehicles; and (2) frequently merely parrot the seminal holding from an authored opinion.[45]

So the precedential difference between the citation outline's subcategories lies in the shades of precedential persuasiveness inherent to each type of opinion. Therefore, it may have the most utility in enabling one to distinguish the authority upon which the opposition relies, or winnow weaker cases from one's own arguments.[46]

Of course, regardless of precedential weight, nearly any source can be persuasive to a future justice, panel, or court—regardless of its inherent precedential authority.[47]

[44] *See id.* at 93–94.

[45] *See id.*; Hon. Robert H. Pemberton, *One Year Under the New TRAP: Improvements, Problems and Unresolved Issues in Texas Supreme Court Proceedings*, *in* State Bar of Tex. Prof'l Dev. Program, Advanced Civil Appellate Practice Course ch. B, B-18 (1998). *Compare*, *e.g.*, *Tooke v. City of Mexia*, 197 S.W.3d 325, 328 (Tex. 2006), *with Satterfield & Pontikes Const., Inc. v. Irving Indep. Sch. Dist.*, 197 S.W.3d 390, 391 (Tex. 2006) (per curiam) (hinging its holding on the "reasons explained in" *Tooke*).

[46] *See Citation Writ Large*, 20 APP. ADVOC. at 89.

[47] *See id.* at 90; *see also* Jim Paulsen & James Hambleton, *Confederates & Carpetbaggers: The Precedential Value of Decisions from the Civil War and Reconstruction Era*, 51 TEX. B.J. 916, 918–19 (Oct. 1988) [hereinafter *Confederates & Carpetbaggers*]; *Robinson v. Crown Cork & Seal Co.*, 335 S.W.3d 126, 162 n.21 (Tex. 2010) (Willett, J., concurring, joined by Lehrmann, J.) (citing STAR TREK II: THE WRATH OF KHAN (Paramount Pictures 1982)); Dylan O. Drummond, *A Vote By Any Other Name: The (Abbreviated) History of the Dissent from Denial of Review at the Texas Supreme Court*, APP. ADVOC., Spring 2006, at 11–15 (cataloguing the persuasive impact dissents from denial of review at the Texas Supreme Court have had on subsequent majority opinions).

VI. Common and Not-So Common Citation Tips, Tricks & Traps

Some of the following are citational mandates you must follow pursuant to the strictures of the *Bluebook* and/or *Greenbook*, while others are my own persnickety preferences that have evolved over the years, which I urge you to consider adopting. Mandatory rules are denoted by citation to the governing portion of either the *Bluebook* or the *Greenbook*, while I expressly identify my own advisory suggestions.

A. Federal Appellate Courts

1. SCOTUS

If a U.S. Supreme Court opinion is published in the *U.S. Reports* ("U.S."), cite only to that reporter.[48] Do not include parallel citations to the *Supreme Court Reporter* ("S. Ct.") or the *United States Supreme Court Reports, Lawyers' Edition* ("L. Ed.").[49] If the decision has not yet appeared in the U.S., cite to the S. Ct., and then to L. Ed., in that order.[50] Be aware that there is no space in the reporter abbreviation, "U.S.," but there is a space in both "S. Ct." and "L. Ed."[51]

2. Circuit & District Courts

The Federal Appendix is likely one of the clearest examples of an existential jurisprudential oxymoron. This is because it exists to publish every federal circuit appellate opinion that has not been designated for publication in the *Federal Reporter*.[52] In other words, it *publishes unpublished* federal appellate opinions.

Circuit and district court reporter cite-abbreviation spacing is similarly (& seemingly pointlessly) confusing as are U.S., S. Ct., and L. Ed. cites: see "F.3d," but see also

[48] Bluebook at 215.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] Black's Law Dictionary 685 (9th ed. for iPhone/iPad/iPod Touch 2011).

"F. App'x" and "F. Supp. 2d."[53] Moreover, always be careful in the spacing applied to court abbreviations in date parentheticals: "5th Cir.," "D.C. Cir.," "W.D. Tex.," but "S.D.N.Y."[54]

B. Texas Subject-Matter Codes

You'll notice that the Court rarely, if ever uses "Ann.," "West," or dates in statute citations within its opinions. This is because the Court's internal style guide directs judicial staff not to.[55] The explanation for this is that Texas law is not proprietary, and therefore, providing attribution to a commercial reprinting service in a citation is unnecessary and—dare I say—slightly unseemly. Regarding omitting dates from Texas statute cites, the Court's style guide sensibly advises that dates should only be included if relevant to the analysis.[56]

Indeed, the original reason for including a reference either to "Vernon" (now "West") or "Supp." was to indicate to the reader which bound or loose-leaf volume to pull from the shelves in which to check the accuracy of a citation. Because virtually no one physically "shelf-checks" citations anymore, any substantive need for inclusion of this terrestrial information has long since passed.

I tend to agree with the Court (particularly when briefing before it), so I never include, "Ann.," "West," or a date when citing Texas statutes in any forum. If I need to cite a historical provision, I'll cite to a session law.

[53] Bluebook at 215–16.

[54] *Id.* at 215–17.

[55] Rules of Form for the Texas Supreme Court 4 (2004) (on file with the author).

[56] *Id.*

C. Texas Appellate Courts

1. SCOTX

Between 1886 and 1962, Court cases were printed in both the *Southwestern Reporter* series and the *Texas Reports*.[57] Although the most recent edition of the *Greenbook* abandons the previous requirement to include parallel citations to both reporters,[58] I would advise to consider continuing to note each. If both reporters are cited, remove the "Tex." designation from the date parenthetical.[59]

Court opinions issued during Reconstruction (dubbed the "Military Court") from 1867–70 (30 Tex. 375 to 33 Tex. 584) are not precedential because the Court operated without constitutional authority during that era.[60] A table summarizing the Military Court's duration and precedential authority is attached hereto at Exhibit B to the *Appendix*.[61]

Opinions issued by the so-called "Semicolon Court" that sat from 1870–73 (33 Tex. 585 through 39 Tex.), while technically precedential, are often not accorded jurisprudential respect because of the juridic pall that hung over that Court.[62] A table summarizing the Semicolon Court

[57] Greenbook at 9.

[58] *Compare*, *e.g.*, Greenbook at 9, *with* Texas Rules of Form 8 (Texas Law Review Ass'n ed., 10th ed. 2003) [hereinafter 10th Greenbook].

[59] Greenbook at 9. The reason for this is that it the dual reporter citation noting publication in the *Texas Reports* obviates the need for a "Tex." designator in the date parenthetical. *Persuasive Tool?* at 12 n.107.

[60] *Confederates & Carpetbaggers*, 51 Tex. B.J. at 920; *see also Peck v. City of San Antonio*, 51 Tex. 490, 492 (1849); *Citation Writ Large*, 20 App. Advoc. at 92. For a more comprehensive examination of the Military Court, its jurisprudence, and its testy relationship with the Court's Clerk—famed Texas lawyer, George W. Paschal—please see Dylan O. Drummond, *George W. Paschal: Justice, Court Reporter, and Iconoclast*, J. Tex. Sup. Ct. Hist. Soc'y, Summer 2013, at 11–12.

[61] *See Confederates & Carpetbaggers*, 51 Tex. B.J. at 920.

[62] *Confederates & Carpetbaggers*, 51 Tex. B.J. at 920; *see also Citation Writ Large*, 20 App. Advoc. at 92–93.

era and precedential import is also attached hereto at Exhibit B to the *Appendix*.[63]

Finally, remember that you can say the Court acted in many different ways, but do not say that it "found" something, when you're really just referring to its holding. Technically, the Court can't "find" anything, because it is constitutionally-barred from adjudging facts.[64] This is a minor nit, but jurisdictionally important, and one that I will relay to you that some Court staff notice in briefing.

2. Texas Courts of Appeals

a. Subsequent History

Perhaps no other peculiarity of Texas caselaw citation is as complicated, misunderstood, and precedentially crucial as Texas subsequent history. Accordingly, I have included a separate section briefly discussing the weight of authority denoted by certain subsequent-history notations at Part V, *supra*, as well as appended a *Precedential Order of Citation* at Exhibit A of the *Appendix*.[65] The tips and traps discussed below have less to do with precedential heft per se than with purely citational concerns.

For quick and easy reference, please consult Rules 4.4.1 and 4.4.2, as well as *Appendices D* & *E* in the *Greenbook* for an abbreviated discussion of the various subsequent history notations used in Texas.[66] Even better still is a table compiled by former Texas Supreme Court Justice Gordon Simpson in his 1949 *Texas Bar Journal* article entitled, "Notations on

[63] *See Confederates & Carpetbaggers*, 51 TEX. B.J. at 920.

[64] TEX. CONST. art. V, § 6.

[65] For a much more thorough examination, please see *Citation Writ Large*, 20 APP. ADVOC. 89.

[66] GREENBOOK at 22, 106–12. While the current *Greenbook*'s treatment of subsequent history offers a good cursory overview, *Appendices A* & *B* from the 9th edition, second printing, are much more thorough, and I highly recommend consulting them. TEXAS RULES OF FORM 84–88 (Texas Law Review Ass'n ed., 9th ed., 2d prtg. 1998).

Applications for Writ of Error," which is attached hereto at Exhibit C to the *Appendix*.[67]

In order to be able to determine whether the notations, "no pet." or "no pet. h." are appropriate, you must investigate whether: (1) a petition for review has been filed; (2) a motion for rehearing or en banc review is still pending; or (3) 45 days have elapsed since the appellate court's judgment or the court's ruling on a motion for rehearing or en banc review.[68] If no petition for review has been filed, and any combination of events (motions for rehearing, motions for extension of time, etc.) has occurred to prevent: (1) an intermediate appellate court's judgment from becoming final; or (2) the 45-day time period in which to file a petition for review from expiring; an intermediate appellate decision should be appended with the subsequent notation, "no pet. h."[69] If no petition for review has been filed in a given case, and the 45-day period has conclusively lapsed, the proper subsequent notation is "no pet."[70] In order to discern the present posture of a case, it may be necessary to check the website of a particular court of appeals or that of the Court to determine if either a motion for rehearing or motion to extend time has been filed.

Currently, there is no defined notation for a cause at the Court in which briefing on the merits has been ordered. This is because the existing "pet. filed" notation expressly applies only to matters in which merits briefing has not been ordered.[71] Therefore, I recommend using the "pet. pending"

[67] Hon. Gordon Simpson, *Notations on Applications for Writ of Error*, 12 TEX. B.J. 547, 574–75 (Dec. 1949) [hereinafter *Writ of Error Notations*].

[68] *See* TEX. R. APP. P. 53.7(a); GREENBOOK at 22, 108–09.

[69] GREENBOOK at 22, 108.

[70] *Id.* at 22, 109.

[71] GREENBOOK at 108.

notation to denote causes in which full briefing has been orderd.[72]

Last, I may be the only person left in Texas who still feels so, but I find it both quicker and easier to look up subsequent history of cases using *Thomson Reuters*'s annually printed *Texas Subsequent History Table*,[73] than logging onto either *Westlaw* or *Lexis*, retrieving a case, and then clicking on the subsequent history link.

b. Everything Else

Always be sure to double-check 1997 intermediate appellate court opinions to determine whether they were issued before or after September 1, 1997: (1) if issued before September 1st, any subsequent history notation should reference the application for "writ" of error, and (2) if issued on or after September 1st, any subsequent notation should reference the "pet." for review.[74]

Because Texas's intermediate appellate courts had no criminal jurisdiction from 1911 to August 31, 1981, refer to courts from this period in citations as "Tex. Civ. App." instead of "Tex. App."[75]

Also remember that any intermediate appellate court opinion issued before January 1, 2003 that was affirmatively designated, "do not publish," has no precedential value, but may be cited with the parenthetical notation, "(not designated for publication)."[76] It is erroneous and without precedential effect if a court of appeals mistakenly affixes a "do not

[72] *Citation Writ Large*, 20 APP. ADVOC. at 102 n.156. Indeed, the Court has already used this notation in select instances. *See*, *e.g.*, *Lamar Homes, Inc. v. Mid-Cont. Cas. Co.*, 239 S.W.3d 236, 241 (Tex. 2007).

[73] THOMSON REUTERS, 2012 TEXAS SUBSEQUENT HISTORY TABLE (West 2012).

[74] GREENBOOK at 22–23.

[75] *Id.* at 18.

[76] TEX. R. APP. P. 47.7(b).

publish" designation to a decision issued after January 1, 2003.[77]

D. Texas Legislative Materials

If the session law being cited has no formal name (i.e., the "Tanning Facility Regulation Act"), then note the date of enactment in the citation ("Act of May 29, 1993").[78] This rule leads to one of the most common citation mistakes that befall practitioners—affixing the proper date of enactment to a session law. The date of enactment of a session law is the "final relevant legislative action on the bill, not the date of executive approval."[79] Typically, this date is the day upon which the remaining legislative body (House or Senate) approved the measure. The easiest way to investigate not only pertinent dates of legislative action, but bill text, and a host of other information is by visiting the Texas Legislature Online website, which provides a search feature dating back to the 71st Regular Legislative Session in 1989.[80]

E. Internet-Specific Tips

1. URL Shortening and Archive Services URL[81] addresses are long and awkward, and make the spacing of a particular citation sentence either in text or in a footnote disjointed.

[77] *Id.* at 47.2(c), 47.7(b).

[78] Greenbook at 53–55.

[79] *Id.* at 54.

[80] *See* Texas Legislature Online, http://www.capitol.state.tx.us/ (last visited Mar. 25, 2013).

[81] "URL" is short for "uniform resource locator," and is a term that denotes, in essence, a website's address. *See*, *e.g.*, Wikipedia, the Free Encyclopedia, "Uniform Resource Locator," http://j.mp/13feICM (last visited Aug. 5, 2013) ("A uniform resource locator, abbreviated URL, also known as web address, is a specific character string that constitutes a reference to a resource."). For example, *TexasBarCLE*'s URL is: http://www.texasbarcle.com/CLE/Home.asp.

There is a way in text to manually wrap a URL address to the next line using a hard-return, and yet still preserve the link itself. Specifically, simultaneously depress the "Ctrl + Shift + Enter" keys at any point in the URL address you deem will best fit the remaining space on a given line (i.e., "eyeball" it). Oftentimes, it takes a bit of trial and error to find just the right wrapping point. Once you do split the URL address, then both the spacing after the line above and the spacing above the new line below need to be adjusted to "0," because the default will include unwanted spacing between the two. Of note, however, this functionality in MS Word works only in body text, but not in footnotes.

Because of the unwieldly length of most URL addresses, consider using a URL-shortening service like *Bit.ly* (https://bitly.com/), *Ow.ly* (http://ow.ly/url/shorten-url), or my favorite—which I have used almost exclusively throughout this article and also offers a handy Google Chrome extension—*J.mp* (https://bitly.com/).

Perhaps contrary to assumed typical convention for most internet citations, no parenthetical indicating the date of the user's last visit should be used.[82] Instead, the date provided on the page itself should be cited, including "last updated" or "last modified" date designators (as explained in Rule 18.2.2(c)).[83] A "last visited" date parenthetical should only be used if the web content itself is undated.[84] This level of date attribution is only meant to denote that the website existed as cited on the date last visited, but offers no guarantee of its content or even its permanence going forward.

Because of the inherent transience both of the content and location of website resources, citing them is fraught with difficulty both substantively and procedurally.

First and foremost, always consider whether an internet resource is the most persuasive and authoritative for a given

[82] BLUEBOOK at 168.

[83] *Id.*

[84] *Id.*; *Judges Really Do Care About That!* at 9.

point. Most times it is not, but that dynamic is admittedly changing.

To logistically assist with the impermanence of internet resources, consider using an archive service, which (presumably for as long as the provider is a going business concern) will affix both a permanent URL as well as preserve the website's content and links. The two services I recommend are: (1) *Evernote* (https://evernote.com/)—which I prefer, in part, due to its mobile app and *Google Chrome* extension called "Web Clipper"; or (2) *Iterasi* (http://www.iterasi.com/). Please see footnotes 22, 82, and 155 for examples of the utility of these types of services.

So, it is now technically possible to address both the typographical difficulty of inserting large URLs into text, as well as the transience of the URL itself and its content. Combining the use of, say for example, a *j.mp*-shortened URL with an *Evernote* web clipping should negate both issues.

Although perhaps a useful way to cite any internet resource, I would recommend only going to the trouble using an archive service when the cited source is inherently subject to user editing—such as *Wikipedia*. Remember, however, to always test your links after creating them to be sure they send your reader where you have told them they're going!

2. Can I Cite *Wikipedia*?

This question was posed and thoroughly examined by outstanding Houston appellate lawyer Robert Dubose in 2011.[85] The answer is a resounding … maybe.[86] Incredibly, as of a few years ago, some 550 judicial opinions have cited to *Wikipedia*.[87] And, although its content is both user-

[85] Robert Dubose, *Can I Cite Wikipedia? Legal and Ethical Considerations for Appellate Lawyers Citing Facts Outside the Record in the Age of the Internet*, *in* State Bar of Tex. Prof. Dev. Program, 25th Annual Advanced Civil Appellate Practice Course (2011).

[86] *Id.* at 1, 8.

[87] *Id.* at 1.

generated[88] and user-edited, *Wikipedia* is surprisingly and durably accurate as well.[89] Be advised, however, that substantive risks in relying upon *Wikipedia* as a source in briefing include the potential for litigants to manipulate online entries and for other material inaccuracies to occur.[90] The possibility of substantive manipulation of a given entry during litigation may be blunted by the use of a URL archiving service, discussed *supra*, with a parenthetical notation of the date the web page was archived.

F. Substantive Citation Usage Tips

1. Persuasive Strategy Before Courts

a. "Describe and Cite Authorities with Scrupulous Accuracy"[91]

Avoid the appearance of misdirection and distortion at all costs or your credibility to your reader will quickly be forfeit.[92]

b. "Cite Authorities Sparingly"[93]

Envision citing authority lightly and illustratively, akin to "pictures in a book," rather than making one's reasoning the "servant of his authorities."[94]

[88] Other common websites that rely on user-generated content include: *Facebook*, *YouTube*, *Urban Dictionary*, and *Yelp*. *Id.* at 4.

[89] *Id.* A study by *PC Pro* magazine in 2007 found that errors intentionally inserted into ten different *Wikipedia* pages, ranging from "obvious" to "deftly subtle," were corrected by the *Wikipedia* community in under an hour. *Id.*

[90] *Id.*

[91] Making Your Case at 123.

[92] *Id.*

[93] *Id.* at 125.

[94] *Id.* at 126 (quoting Howard C. Westwood, Brief Writing (1935), *in* Advocacy and the King's English 563, 565 (George Rossman ed., 1960)).

c. Quote Authorities Even Less Than You Cite Them[95]

Do not merely assemble or compile someone else's thoughts and work.[96] Instead, the best way to show a court your reasoning is in your own words.[97]

d. Use Signals Appropriately

The proper use of signals is paramount in establishing one's credibility to the reader.[98] Scrupulously study *Bluebook* Rule 1.2 to avoid giving your reader the impression that what may have been an inadvertent mistake was, in fact, aimed at recasting the import of cited authority in one's favor.[99]

e. Pincite Sources

One of the quickest and certain ways not only to damage your credibility before a court and its staff, but to annoy them as well is to fail to pincite (i.e., including specific pages where the proposition being cited is found) your sources.[100] Neglecting to do so gives the impression to the reader that the author was either lazy or inept—neither of which make for very persuasive writing.

2. Parenthetical Usage

Generally, it is always a good idea to include a short parenthetical letting your reader know why you have cited a case, particularly if the relevance of the case is not overtly clear.[101] Formally, the use of parentheticals is "strongly

[95] *Id.* at 127.

[96] Scott P. Stolley, *Writing on Writing: Quotation Disease*, HEADNOTES, July 2011, at 10.

[97] *Id.*

[98] MAKING YOUR CASE at 123.

[99] *See* BLUEBOOK at 55–56.

[100] *Id.* at 67; *Judges Really Do Care About That!* at 6.

[101] BLUEBOOK at 59.

recommended" with the use of "*cf.*," "*compare*," "*but cf.*," and "encouraged" with "*see also*" signals.[102]

One of the signals of which I have grown quite fond is "*compare*."[103] If space is not at a premium, I find comparing two sources with accompanying explanatory parentheticals to be far more compelling and illustrative than just a "*see*" cite with a parenthetical often can be.

Well-crafted parentheticals must: (1) tell the reader why you are citing the source if it's not clear from the preceding sentence; (2) show the reader where the case fits into the theme or focus of the piece as a whole; and (3) do so in a clear and concise manner.[104] Deftly combining these three elements should produce a parenthetical that: (1) is a "participle parenthetical," which begins with an "-ing word"; or (2) consists of a single-sentence quotation.[105]

Conversely, poorly drafted parentheticals generally contain two hallmarks: (1) unnecessary length; and (2) duplication of and mere echoing of the text to which the citation is affixed.[106] Specifically, verbose parentheticals can "turn fluid prose into a choppy mess."[107] In order to remedy this, *Circuit Splits*[108] founder, Nicholas Wagoner, suggests thinking of parentheticals as a *Twitter* post—140 characters or less.[109]

[102] *Id.* at 54–55.

[103] *See* BLUEBOOK at 55.

[104] Nicholas Wagoner, *Tips for Writing Better Parentheticals – Part 2*, LEGAL SKILLS PROF BLOG (Jan. 29, 2012), http://j.mp/11JmRDc (citing ROSS GUBERMAN, POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES (Oxford Univ. Press 2011)).

[105] *See id.*

[106] Nicholas Wagoner, *Guest Blogger Nick Wagoner on "Common Parenthetical Pitfalls*," LEGAL SKILLS PROF BLOG (Jan. 19, 2012), http://j.mp/11JpZiv [hereinafter *Common Parenthetical Pitfalls*].

[107] *Id.*

[108] CIRCUIT SPLITS, http://www.circuitsplits.com/ (last visited Mar. 26, 2013).

[109] *Common Parenthetical Pitfalls*.

Always denote in a parenthetical any procedural information specific to the handling of the case cited (i.e., (per curiam),[110] (orig. proceeding),[111] (en banc);[112] (not designated for publication),[113] (op. on reh'g),[114] (mem. op.),[115] etc.).

Oft confused in practice is the difference between parentheticals referring to another source whose content is being referenced in the cited source, (i.e., "(citing …." or "(quoting ….")),[116] and explanatory phrases indicating the cited source is referenced in another source (", *cited in* …." or ", *quoted in* ….").[117] Always remember to add an additional "close-parens" after the referenced source's date parenthetical in any "quoting" or "citing" parenthetical (i.e., "(citing … (1967))").[118]

At times, parentheticals can stack up at the tail end of a citation. In those instances, generally organize the order of parentheticals as follows: (1) weight-of-authority parentheticals; (2) "quoting" or "citing" parentheticals; and (3) explanatory parentheticals.[119] For example: "*X v. Y* (court date) [hereinafter *X*] (en banc) (Lastname, J., concurring) (per curiam) (emphasis added) (citations omitted) (quoting *U v. W*), *rev'g S v. T*."[120]

[110] *See* TEX. R. APP. P. 47.2(a), 59.1; BLUEBOOK at 100; GREENBOOK at 14.

[111] *See* TEX. R. APP. P. 52.8(d); GREENBOOK at 32–35.

[112] *See* TEX. R. APP. P. 41.2; BLUEBOOK at 100.

[113] *See* TEX. R. APP. P. 47.7(b); GREENBOOK at 14, 16.

[114] *See* TEX. R. APP. P. 49.3, 64.3.

[115] *See* TEX. R. APP. P. 47.2(a), 47.4; BLUEBOOK at 100; GREENBOOK at 14, 16.

[116] *See* BLUEBOOK at 100–01.

[117] *See* BLUEBOOK at 100–01.

[118] *See id.* at 100.

[119] *Id.* at 101.

[120] *Id.* at 60.

G. Typographical Citation Usage Tips

1. Spacing

Use only one space after any punctuation—including after sentences![121] I understand the typographic outrage this pronouncement may evoke—I used to be an avowed "2-spacer" myself. My argument was that having 2 spaces after a sentence helped more effortlessly orient one's eye to the sentence structure on a given page. While I still think that's true, I find now that I do indeed prefer 1 space to 2, and that the text flows much better without the extra space. Plus, doublespacing after the end of a sentence is another artifact from the typewriter era that has no place in digital drafting and publication.[122]

To insert a nonbreaking space, simultaneously depress "Ctrl + Shift + Space bar."[123] Nonbreaking spaces should be used between section symbols and section numbers (i.e., "§ 1983"), as well as with paragraph symbols (i.e., "¶ 9"), chapter designations (i.e., "ch. 3"), and the like.[124] I also prefer to use nonbreaking spaces between "Tex." and the year in Texas Supreme Court citations (i.e., "Tex. 2012"), with reporter cites (i.e., "1 S.W.3d 75"), between any two-word procedural phrase (i.e., "per curiam," "pet. denied," "en banc," "orig. proceeding," "mem. op.," etc.). My practice is the same for "Tex. App." notations within a citation, for Texas and federal rule citations ("Tex. R. Evid. 902"), in short-cites between "at" and the pincite, as well as for full date phrases ("Jan. 1, 2013"). I also consistently use nonbreaking spaces to ensure that numbered-list numerals stay on the same line as the first word of the text they introduce ("this list: (1) stays together; because (2) of nonbreaking spaces"). Basically, my preference is to never

[121] Butterick at 41–44 (citing Bryan A. Garner, The Redbook: A Manual on Legal Style 83 (2d ed. 2006)).

[122] *See id.* at 41, 43.

[123] *Id.* at 63.

[124] *See id.*

strand a date, year, procedural descriptor, or a source numeral so that the reader has to search for the remainder of the citation. One other advantage generally in using a nonbreaking space is that it will reduce the amount of space between the two linked characters when text is fully justified.[125]

2. Ellipses

Both the *Bluebook* and *MUS* mandate that an ellipses should be 7 characters long ("• • • •") and expressly direct practitioners not to use a shorter version containing only 5 characters ("• … •").[126] I am at a loss to divine what citational calamity would befall the legal community if ellipses were uniformly trimmed by 2 characters (mere spaces no less!). Therefore, I never use the longer version in my writing to any audience. Explaining that simply typing three periods together is too short, and following the *Bluebook* and *MUS* rule of including spaces between each period is too long, Matthew Butterick (of *Typography for Lawyers* fame) recommends using the MS Word character for the 3-dot ellipsis—which may be entered by holding down the "Alt" key and typing "0133."[127]

If you insist on inserting actual spaces between the periods, do so only with nonbreaking spaces so that the ellipses itself remains intact.[128] This is particularly

[125] The resulting spacing irregularity is one of the many reasons why Matthew Butterick disfavors the use of full-justification without hypenation. BUTTERICK at 135.

[126] BLUEBOOK at 78; MUS at 5–6. The MS Word character for the 3-dot ellipsis can be created by holding down the "Alt" key and typing "0133" (even though the *Bluebook* and *MUS* explicitly counsel against its use). *See* BUTTERICK at 53. Noted legal typography expert, Matthew Butterick, advises that simply typing three or four periods together is too short, and following the *Bluebook* and *MUS* rule of including spaces between each period is too long. BUTTERICK at 53. If you insist on inserting actual spaces between the periods, do so only with nonbreaking spaces so that the ellipses itself remains intact. BUTTERICK at 54.

[127] *See* BUTTERICK at 53.

[128] *Id.* at 54.

recommended when using ellipses in conjunction with quoted material, so that the ellipses stays with the quoted text.

3. Em and En Dashes

The differing applications of "em" and "en" dashes[129] are often confusing. En dashes should always be used when denoting a range of values ("1–6"),[130] and em dashes are uniformly used in Texas intermediate appellate citations to denote which court of appeals issued the opinion (i.e., "Tex. App.—Austin").[131] Em dashes are also utilized to set off words, phrases, or short sentences that clarify or elaborate on the preceding text.[132]

While there is some debate what precise role an em dash should play in one's writing (whether it interchangeably replaces a colon, semicolon, or parentheses;[133] or whether it operates as a stronger alternative to a comma, but weaker than a colon, semicolon, or parentheses),[134] em dashes are generally regarded as underused in legal writing.[135] Typically, I use em dashes when I want to emphasize a point visually more so than could be done with just a comma, or if the preceding passage is already replete with commas and to add more would only confuse.

[129] Interestingly, the terms, "em" and "en" don't refer to the horizontal distance above an "m" as compared to an "n" (which is what I had always been told). *See id.* at 49. *But see MUS* at 12–13. Instead, they are artifacts of the typesetting age, where an "em" was a typographical unit of measurement spanning the vertical distance from the top of a piece of type to its bottom. BUTTERICK at 54. In turn, an "en" was half that distance. *Id.* In modern digital fonts, however, em and en dashes run narrower than they did historically. *Id.*

[130] BUTTERICK at 49; MUS at 15.

[131] *See* GREENBOOK at 14–15.

[132] MUS at 12; BUTTERICK at 49.

[133] *See* MUS at 12.

[134] BUTTERICK at 49.

[135] *Id.*

Usually, em dashes are used to set off a phrase or an aside, which requires em dashes on either end of the passage. However, em dashes can also be used effectively to highlight a parting thought at the end of a sentence, in which case only a preceding em dash is needed. One trap to be wary of, however, is beginning or ending a thought within a sentence with an em dash, but using a comma or semicolon on the other end of the aside.

4. Semicolons

In addition to its traditional use of separating a related or derivative clause in a compound sentence, semicolons may also be used to separate items in a series containing complex punctuation.[136] I tend to use semicolons in this way if the preceding listed items already contain commas; I will distinguish between distinct thoughts with semicolons.

5. Commas

In Texas legal writing, the serial or "Oxford" comma (to which it is sometimes referred) is favored (i.e., "x, y, and z").[137] Traditionally, numbered lists were to be preceded by a colon, the numbers encased in parentheses, and each discrete item separated by a semicolon (i.e., "the list: (1) blah; (2) blaher; and (3) blahest"). However, the newest edition of the MUS now counsels that—in contrast to previous editions—numbered lists should follow this format (1) no colon, and (2) only commas to separate thoughts.[138] Either due to old age or stubbornness (perhaps both), I prefer and employ the former approach.

6. Symbols

When citing sections and paragraphs, use the "§" and "¶" symbols.[139] A common trap to avoid is to remember when

[136] MUS at 7.

[137] *Id.* at 7–8.

[138] *Id.* at 21–22.

[139] BLUEBOOK at 69.

pinciting to either, do not precede the symbol with "at" (i.e., "*Id.* § 7" & "Moore et al., *supra* n.5, ¶ 56.07").[140]

Another tip is to remember to spell out "section" in text, and reserve the use of the "§" symbol for use in citation sentences. The current edition of the MUS has reversed course on this and now appears to allow section symbols in text, but I don't recommend leaping off that typesetting cliff just yet.[141]

7. Quotation Marks and Apostrophes

Always use "curly" quotation marks and apostrophes, not "straight" ones.[142] The only reason the straight version of these marks exist is due to the mechanical constraints of typewriters during at the turn of the *last* century when the physical space on metal typesets was limited.[143] Consequently—barring typographical nostalgia—no reason presently exists to employ straight marks.

H. Footnote or Foot*not*?

Almost uniformly, in persuasive writing before a court, avoid putting substantive arguments in footnotes.[144] That said, while the cogent and streamlined argument should remain in the text, the footnotes can be useful in laying out potentially helpful elaboration, addressing the opposing side's weaker arguments, or even addressing arguments likely to occur to the judge or the judge's staff.[145]

Academic writing is another matter. As this article exemplifies (for better or worse), I revel in the substantive footnote when confined to a legal periodical. To my mind, it is often far more interesting to read the footnotes of some

[140] *Id.*

[141] *See* MUS at 28.

[142] Butterick at 38.

[143] *Id.* at 38–39.

[144] Making Your Case at 129–30.

[145] *Id.* at 131.

articles (where the meat of the exposition tends to be) than the text itself.

There is little consensus amongst both the bench and bar regarding whether or not to footnote.[146] My preference is to favor footnotes generally because they allow the bulk of the citational baggage to be stored below, out of sight. If your reader really wants to investigate, it's there waiting for them, but they are not forced to leap over large swaths of referential real estate if they do not. Ultimately, of course, I recommend getting to know your target audience as well as you can and structuring your writing from top to bottom—including citation—to best fit their preference.

I. Grammatical Reminders & Suggestions

The *MUS* continues to be my go-to grammatical guide for legal writing. Amazingly, it is at once both comprehensive and concise.

1. Commonly Misused Words

The latest edition of the *MUS* provides an invaluable appendix containing 10 pages of commonly-misused words and explanations and addressing the proper usage of each—including some of the most oft-confused pairs: (1) "that" versus "which"; (2) "because" versus "since"; and (3) "who" versus "whom."[147]

2. Italics of Foreign Words

The *MUS* also contains a very useful listing of which foreign words and phrases should be italicized and which should not (i.e., "de novo" versus "*mens rea*").[148]

[146] *See*, *e.g.*, *id.* at 132–35 (Professor Bryan Garner and U.S. Supreme Court Justice Antonin Scalia disagreeing regarding the efficacy of footnoting in briefing).

[147] MUS at 69–79.

[148] *Id.* at 46.

3. Comma Use with "That" Preceding Contingent Phrases

Also remember that, when you precede a contingent phrase with "that," it must be bookended by commas (i.e., "that, because [x], [y] occurred"; "that, although [x], [y] occurred"; "that, if [x], then [y]"; "that, while [x], [y] is nonetheless true"; "that, under [x], [y] governs").

4. Alternatives to "Held"

Sometimes it just gets monotonous to always state that a court "held" something. So here are some other suggestions you can use to describe the action taken by a court: acknowledged, adapted, allowed, analyzed, approved, clarified, concluded, confirmed, corrected, decided, declared, decreed, determined, developed, elaborated, evaluated, expanded, explained, implemented, instructed, interpreted, justified, limited, maintained, noted, observed, ordered, opined, professed, pronounced, proposed, propounded, reasoned, recited, reinforced, reported, revealed, reviewed, revised, ruled, simplified, solved, stated, streamlined, supported, surmised, and utilized.[149]

5. "Pleaded" Versus "Pled"

Despite the fact that no self-respecting attorney would ever phonetically utter it in court, "pleaded" has somehow become the preferred past-tense of "pled" in written materials.[150] If it sounds too ridiculous to say, it must also be too ridiculous to write.[151] Despite being labeled as the minority usage, recent polls and studies have found both lawyers and

[149] *See*, *e.g.*, Nicholas Wagoner, *More on Writing Good Parentheticals from our Guest Blogger Nick Wagoner*, LEGAL SKILLS PROF BLOG (Feb. 12, 2012), http://j.mp/1crGdkF.

[150] *See* BLACK'S LAW DICTIONARY 1270 (9th ed. for iPhone/iPad/iPod Touch 2011); MUS at 76; John Chandler & Brian Boone, *War of the Words: Pleaded vs. Pled*, LTN: LAW TECHNOLOGY NEWS (Jan. 16, 2013), http://j.mp/11IgMa4 [hereinafter *War of the Words*].

[151] *See War of the Words*.

courts prefer "pled."[152] In addition, favoring "plead" as the past-tense form is confusing since it shares the same spelling as the present-tense form.[153] Indeed, Gen. George S. Patton didn't "leaded" the Third Army to victory at the Battle of the Bulge—he "led" them.[154] Undoubtedly, if it's good enough for Patton and the Free World, it's certainly good enough for legal prose.

J. Requisite Abbreviations

Case styles should be properly abbreviated in footnotes.[155] In doing so, one should consult several abbreviation tables in the *Bluebook*, including: *T6* (general and common abbreviations),[156] *T7* (court names),[157] *T9* (legislative abbreviations),[158] T10 (geographical terms—including U.S. states and select cities),[159] *T11* (judicial abbreviations),[160] *T12* (months (only June & July are not abbreviated),[161] *T13* (legal periodical titles),[162] *T14* (publishing terms),[163] *T15*

[152] *Id.*

[153] *See id.*

[154] *See, e.g.*, Wikipedia, the Free Encyclopedia, "George S. Patton: Battle of the Bulge," http://j.mp/1crGW5B (last visited Aug. 5, 2013).

[155] *See* Bluebook at 94–95.

[156] *Id.* at 430–31.

[157] *Id.* at 432–34.

[158] *Id.* at 435–36.

[159] *T10.1* lists abbreviations for U.S. states as well as select territories and cities. *Id.* at 436–37. *T10.2* & *T10.3* list abbreviations for foreign countries and regions. *Id.* at 438–43.

[160] *Id.* at 443.

[161] *Id.* at 444.

[162] *Id.* at 444–67.

[163] *Id.* at 468.

(service publishers and reporters),[164] and *T16* (subdivision abbreviations).[165]

Common abbreviated terms that are often confused in citations are "*L.*" for "*Law*" versus "*Law.*" for "*Lawyer*."[166] In addition, "*Law Review*" is abbreviated to "*L. Rev.*" but "*Law Journal*" is abbreviated to "*L.J.*"[167] Of note, the 19th edition of the Bluebook now includes an abbreviation for "*County*": "*Cnty.*"[168]

Abbreviations for all the Texas subject-matter codes, as well as for Texas legal periodicals that may not necessarily appear in the *Bluebook*'s *T13*, are found in *Appendix H.1* of the *Greenbook*.[169]

Although there seems to be some aversion among some in the bar to doing so, in case styles within a footnote abbreviate every word for which exists an abbreviated form[170]—including the first word.[171]

Finally, remember that, when case styles are referenced in text (as opposed to footnotes), only the following terms may and ought to be abbreviated: "*Ass'n*," *Co.*," "*Corp.*," "*Inc.*," "*Ltd.*," and "*No.*"[172]

K. Remaining Odds & Ends

1. Punctuation Within and Without Quotations

Although this rule is rarely, if ever, consistently followed, periods and commas should be placed within quotation marks,

[164] *Id.* at 468–72.

[165] *Id.* at 472–73.

[166] *Id.* at 456.

[167] *See id.* at 445–67.

[168] *Id.* at 430.

[169] *Compare* Bluebook at 444–67, *with* Greenbook at 117–18.

[170] This includes abbreviations found in *Bluebook T6–7*, *T9–16.* Bluebook at 430–73.

[171] *See id.* at 94.

[172] *Id.* at 93.

question marks and exclamation points should be placed within quotation marks only if in the original quoted text, and colons and semicolons should be placed outside the quotation marks.[173]

This is the "American" style of quotation punctuation. But because it is so confusing, few rarely comply with it—either intentionally or unintentionally. There is another, simpler system—the "British" style—which at least one Chief Justice on the Texas Supreme Court strongly prefers. The British style directs a practitioner to only include that punctuation which originally appears in the material being quoted.[174]

2. Spacing Peculiar to Certain Cite Forms

Do not insert spaces between subparts of statutes or rules: (i.e., "§ 22.001(a)(6)," *not* "§ 22.001 (a) (6)").[175] But never omit a space (which should be nonbreaking) between the section symbol and the section number reference.[176]

When citing to footnotes, do not insert a space between the "n." abbreviation and the footnote number ("n.4" not "n.•4").[177]

3. Requisite Separate Citation Sentences

This rule is one of which I run afoul most often. When using multiple signals in a citation sentence, signals of different types (supportive (i.e., *see*, *see also*, *e.g.*, *c.f.*, *accord*), comparative (i.e., *compare* …, *with*), contradictory (i.e., *contra*, *but see*, *but see also*, *but c.f.*) or background (i.e., *see generally*)) cannot be separated merely by a semicolon, but must instead be placed in different citation sentences.[178]

[173] MUS at4.

[174] *See*,. *e.g.*, THE NEW FOWLER'S MODERN ENGLISH USAGE 646 (3rd ed. 1996).

[175] *Compare* BLUEBOOK at 115, 117, *with* GREENBOOK at 42, 45.

[176] BUTTERICK at 63.

[177] BLUEBOOK at 68.

[178] *Id.* at 56.

4. Goofy-Looking (But Correct) Possessive Forms

As ridiculous as it undoubtedly looks, the correct possessive form for an action by a given court of appeals is "court of appeals's."[179] This is because there is only one entity—the singular court—carrying out the action.[180] The same is true for "'Texas"—always add "'s" to possessive forms of Texas (i.e., "Texas's").[181]

5. Hyphenation Rules

When two or more words combine to modify a noun as an adjectival phrase, combine the words with a hyphen (i.e., "long-range plan").[182] But never hyphenate a proper noun (i.e., "Royal Memorial Stadium field").[183]

Do not hyphenate a two-word adjectival phrase if the first word is the adverb, "very," or any other adverb ending in "ly" (i.e., "very large shipment" or "heavily laden ship").[184] Also do not hyphenate a three-word adjectival phrase if the first two words are adverbs (i.e., "very heavily laden ship").[185] But do hyphenate an adjectival phrase that begins with "well" (i.e., "well-established facts").[186]

L. A Few Recommendations

1. Footnote Anchor and Reference Sizing

If you are one of the afflicted few who actually enjoy seeking out and perusing footnotes, have you ever been frustrated by the seeming inability to find the note anchor in

[179] *See* MUS at 1.

[180] *See id.*

[181] *Id.* And really, is there any other form of Texas than a possessive one?

[182] *Id.* at 15.

[183] *Id.*

[184] *Id.* at 17.

[185] *Id.*

[186] *Id.*

the text because it's so small it just blends into the overall print milieu? So, what I propose (and what I've utilized throughout this article) is making the note anchor in text one point-size larger and bold formatted. Here, I've used 13-point font in text, but the note anchors are in bold, 14-point font. Similarly, while the footnote text itself is 11 point, I've made the note references 12 point and bold as well. There's no real manual that endorses this approach, but I submit it for your consideration nonetheless.

When a style guide of publication permits (or you're writing before a court), I also recommend considering using a sans-serif font for both footnote anchors and references (in conjunction with the size increase). Just as sans-serif fonts work well in setting apart and highlighting headings,[187] I believe they perform a similar function with footnote anchors and number references.

2. Legal Periodical Citation Conventions

Whenever I cite to legal periodicals where one of the authors is a judge or justice, I've taken to noting this by inserting "Hon." before their name in the citation.[188] Apart from judges and justices having earned their title, I cannot help but think that noting the author of a given point of law is or was a jurisprudential ninja may wind up being fractionally more persuasive.

I also prefer to include both a season or month (whichever is noted by the given publication), along with the year, in the date parenthetical of a cited legal periodical. This is not required by the *Bluebook* but takes up little space and provides a little added contour to the context of the citation itself.[189]

The final citation convention I employ is one I feel strongly about and hope to convince you to utilize as well. When short-citing a legal periodical, the *Bluebook* directs authors to use

[187] *See* BUTTERICK at 109.

[188] *See*, *e.g.*, *supra* notes 16, 19, 40, 46, 68.

[189] *Contra* BLUEBOOK at 150.

the author's last name, along with a "supra" notation back to the footnote in which the source was first cited, as well as the page number referenced (i.e., "Posner, *supra* note 16, at 854").[190]

This is asinine—not to mention profoundly unhelpful to the reader. It forces one's audience to either physically flip back through the preceding pages or scroll upwards until the original footnote is located before the merit of the source can even be weighed. Instead, I recommend (and have used throughout this article) using a "hereinafter" notation after every secondary source you cite more than once (picking whichever approximation of the title is most likely to remind the reader of the source itself), and appending that chosen moniker to a short-form of the periodical citation akin to how case short-cites are treated.

So, "Hon. Richard A. Posner, *The* Bluebook *Blues*, 120 Yale L.J. 850, 854 (2011) [hereinafter Bluebook *Blues*]" becomes "Bluebook *Blues*, 120 Yale L.J. at 854" instead of "Posner, *supra* note 16, at 854."

Hopefully, this approach allows the reader to recall the source itself before they look it up, as well as enables readers to copy the cite directly to their nearest electronic search engine. I leave it you to decide whether this short-cite form for a legal periodical actually has more utility than the conventional *supra* cite, but my vote is with the former.

VII. Going Forward

After 30 some-odd pages of exposition, let me be clear that, at the end of the day, I recommend you utilize whatever citational, grammatical, and typographical strategy you deem best given your audience and your own preferences.

Citation, although girded by long and sometimes fervently held dogma, remains more art than science.

One of your primary aims as a legal writer is to avoid appearing uninformed so as to best persuade your reader.

[190] *Id.* at 157–58.

Ernest but not slavish attention to citational detail should be sufficient to accomplish this task.

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Appendix

[191] *Citation Writ Large*, 20 App. Advoc. at 109.

[192] *Confederates & Carpetbaggers*, 51 Tex. B.J. at 920.

[193] *Writ of Error Notations*, 12 Tex. B.J. at 574–75.

Ex. A—Precedential Order of Citation

I. Texas Supreme Court Equivalent

A. Authored majority opinions

⁂ Jan. 1840 (Dallam 357) to 1867 (30 Tex. 374)

⁂ 1871 (33 Tex. 585) to present

B. (per curiam)

C.1 Adopted or approved opinions of the Texas Commission of Appeals

⁂ Feb. 9, 1881 to Aug. 31, 1892

⁂ Apr. 3, 1918 to Aug. 24, 1945

C.2 (pet ref'd) (writ ref'd)

⁂ June 14, 1927 to present

D. (Tex. Ct. App. 18__)

⁂ Apr. 18, 1876 to Aug. 31, 1892

II. Texas Commission of Appeals Equivalent

A. (Tex. Comm'n App. 1____, holding approved)

⁂ Feb. 9, 1881 to Aug. 31, 1892

⁂ Apr. 3, 1918 to Aug. 24, 1945

B. (Tex. Comm'n App. 1____, judgm't adopted)

⁂ Feb. 9, 1881 to Aug. 31, 1892

⁂ Apr. 3, 1918 to Aug. 24, 1945

(Tex. Comm'n App. 1____, judgm't approved)

⁂ Feb. 9, 1881 to Aug. 31, 1892

⁂ Apr. 3, 1918 to Aug. 24, 1945

(Tex. Comm'n App. 1____, judgm't aff'd)

⁂ Feb. 9, 1881 to Aug. 31, 1892

⁂ Apr. 3, 1918 to Aug. 24, 1945

III. Intermediate Appellate Court Equivalent

A. (writ ref'd) (writ denied)

⁂ Before Feb. 20, 1916 (writ dism'd) (writ dism'd w.o.j.)

⁂ Sept. 1, 1892 to June 30, 1917

⁂ June 14, 1927 to June 19, 1987 (writ ref'd n.r.e.)

⁂ Before June 20, 1987 (writ dism'd judg't cor.)

(writ ref'd w.o.m.)

B. (writ ref'd)

⁂ Feb. 20, 1916 to June 13, 1927
(writ ref'd n.r.e.)

⁂ June 20, 1987 to Dec. 31, 1987
(writ denied)

⁂ Jan. 1, 1988 to Aug. 31, 1997
(writ dism'd by agr.)
(writ dism'd)
(writ granted w.r.m.)
(pet. denied)
(pet. struck)
(pet. dism'd)
(pet. granted, judgm't vacated w.r.m.)
(pet. dism'd by agr.)
(pet. dism'd w.o.j.)
(pet. withdrawn)
(pet. abated)
(pet. filed)

C. Published (mem. op.)

⁂ Sept. 1, 1941 to Aug. 31, 1986

⁂ Sept. 1, 1997 to present

D. holding approved per curiam / holding disapproved per curiam / reasoning disapproved per curiam

IV. Non-Precedential in Appellate Courts

A. (Tex. Comm'n App. 18__)

⁂ Oct. 7, 1879 to Feb. 8, 1881

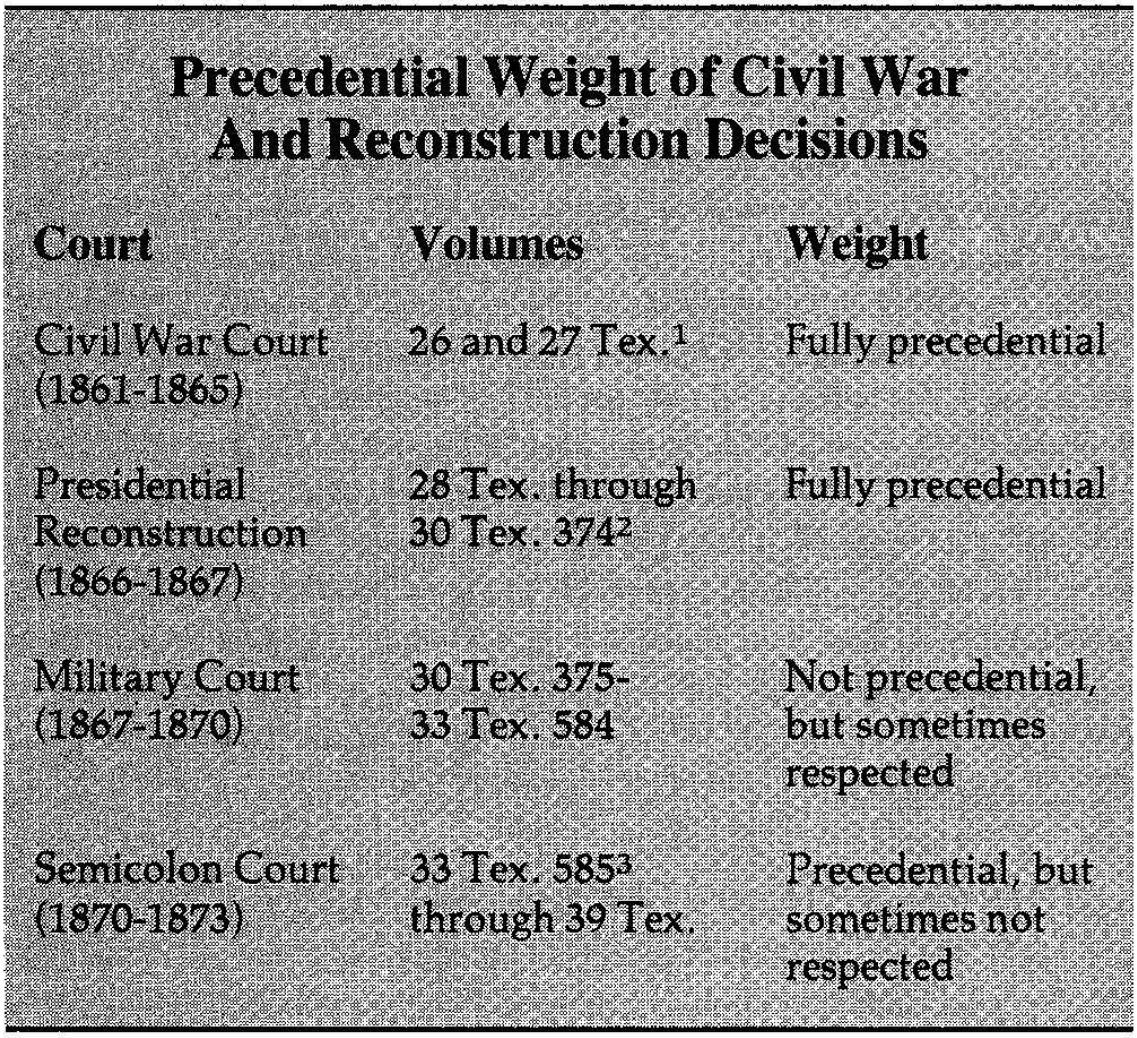
B. (not designated for publication)

⁂ Before Jan. 1, 2003

C. (____ Dist. Ct., ____ Cnty., [date])) (Cnty. Ct. at Law No. __, ____ Cnty., [date])

D. (____, J., dissenting from denial of review) (____, J., dissenting from denial of application for writ of error)

Ex. B—Texas Supreme Court Precedential Era



Precedential Weight of Civil War And Reconstruction Decisions

Court	Volumes	Weight
Civil War Court (1861-1865)	26 and 27 Tex.[1]	Fully precedential
Presidential Reconstruction (1866-1867)	28 Tex. through 30 Tex. 374[2]	Fully precedential
Military Court (1867-1870)	30 Tex. 375-33 Tex. 584	Not precedential, but sometimes respected
Semicolon Court (1870-1873)	33 Tex. 585[3] through 39 Tex.	Precedential, but sometimes not respected

Table

Ex. C—Writ of Error Table

Notation	Date[1]	Statute or Rule Defining Notation	Meaning
Refused	Sept. 1, 1892 to June 14, 1927	None. Cf. Acts 1892, 1st C. S., Ch. 14, p. 20; Art. 943, R. S. 1895; Art. 1544, R. S. 1911; Art. 1746, R. S. 1925.	Supreme Court approved result reached by C. C. A. but did not necessarily approve opinion. Brackenridge v. Cobb, 85 Tex. 448, 21 S. W. 1034; Fleming v. Texas Loan Agency, 87 Tex. 238, 27 S. W. 126. Refusal might not even mean approval of result reached, where error was not preserved and presented to Supreme Court. See Terrell v. Middleton, 108 Tex. 14, 17, 191 S. W. 1138, 1139; City of San Angelo v. Deutsch, 126 Tex. 532, 540, 91 S. W. 2d 308, 312.
	June 14, 1927 to present	Acts 1927, Reg. Sess., ch. 144, p. 214, amending Art. 1728, R. S. 1925; Rule 483, Texas Rules of Civil Procedure.	Judgment of C. C. A. correct and principles of law declared in opinion correctly determined. Hamilton v. Empire Gas & Fuel Co., 134 Tex. 377, 383, 110 S. W. 2d 561, 565; Ohler v. Trinity Portland Cement Co., Tex. Civ. App., 181 S. W. 2d 120, 123.
Refused for Want of Merit; Ref. Want Merit; Ref. W. M.	Sept. 1, 1941 to Feb. 1, 1946	Rule 483, Texas Rules of Civil Procedure.	Judgment of C. C. A. correct but Supreme Court not satisfied that opinion in all respects has correctly declared the law.
Refused. No Reversible Error. Ref. N. R. E.	Feb. 1, 1946 to present	Rule 483, Texas Rules of Civil Procedure.	Supreme Court not satisfied that opinion of C. C. A. in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal.

[1]Date of Supreme Court's action on the application. See tables of cases reviewed, published in the Texas Reports, for exact date of action.

Notation	Date	Statute or Rule Defining Notation	Meaning
Dismissed; Dismissed for Want of Jurisdiction; Dismissed WOJ	Sept. 1, 1892 to July 1, 1917[2]	None. Cf. Acts 1892, 1st C. S., ch. 15, §5, p. 26; Art. 996, R. S. 1895; Art. 1591, R. S. 1911; Acts 1892, 1st C. S., ch. 14, p. 20; Art. 940, R. S. 1895; Art. 1521, R. S. 1911, and amending acts.	Lack of jurisdiction in Supreme Court to consider application. Examples: jurisdiction final in C. C. A., Burnett v. Powell, 86 Tex. 382, 24 S. W. 788, 25 S. W. 17 (boundary suit), Gulf, C. & S. F. R. Co. v. Buford, 85 Tex. 430, 21 S. W. 678 (amount in controversy), Meade v. Leon & H. Blum Land Co., 85 Tex. 513, 22 S. W. 514 (question of fact); defective application, Homes v. City of Henrietta, 91 Tex. 318, 42 S. W. 1052; application filed too late, Schleicher v. Runge, 90 Tex. 456, 39 S. W. 279; subject matter of controversy has ceased to exist, Robinson v. State, 87 Tex. 562, 29 S. W. 649; judgment of C. C. A. not one which "practically settles the case", Gulf, C. & S. F. R. Co. v. Riordan, 85 Tex. 511, 22 S. W. 514 (1892-1913).
	July 1, 1917[2] to June 14, 1927	Cf. Art. 1591, R. S. 1911, and Acts 1917, Reg. Sess., ch. 75, p. 141, amending Art. 1521, R. S. 1911; Arts. 1728 and 1821, R. S. 1925.	Same as above, except extended to include cases otherwise within jurisdiction of Supreme Court where error committed, if any, was not "of such importance to the jurisprudence of the State as in the opinion of the Supreme Court required correction." Decker v. Kerlicks, 110 Tex. 90, 95, 216 S. W. 385, 386; National Compress Co. v. Hamlin, 114 Tex. 375, 385, 269 S. W. 1024, 1028.
	June 14, 1927 to March 1, 1939	Acts 1927, ch. 144, p. 214, amending Art. 1728, R. S. 1925; Art. 1821, R. S. 1925.	(1) Lack of jurisdiction in Supreme Court to consider application. See examples above. (2) In cases within jurisdiction of Supreme Court, judgment correct but Supreme Court not satisfied that opinion of C. C. A. in all respects has correctly declared the law. Bain Peanut Co. of Texas v. Pinson & Guyer, 119 Tex. 572, 574, 34 S. W. 2d 1090, 1091. (Cf. "Refused" prior to 1927.)
	March 1, 1939 to present	Supreme Court Rule 5a, 131 Tex. v; Rule 483, Texas Rules of Civil Procedure.	Lack of jurisdiction in Supreme Court to consider application. See examples above. Wood v. Bankers Life & Loan Ass'n of Dallas, 132 Tex. 505, 125 S. W. 2d 262.
Dismissed for Want of Jurisdiction—Correct Judgment; Dismissed, WOJ—Correct Judgment; Dism. Judgm. Cor.	March 1, 1939 to Sept. 1, 1941	Supreme Court Rule 5a, 131 Tex. v.	In cases within jurisdiction of Supreme Court, judgment correct but Supreme Court not satisfied that opinion of C. C. A. in all respects has correctly declared the law. Republic Ins. Co. v. Highland Park Ind. Sch. Dist., 133 Tex. 545, 125 S. W. 2d 270.

[2]The 1917 act provided that it should become effective on July 1, 1917, but that it should not affect business before the Supreme Court at that time. Records in the clerk's office indicate that applications filed after July 1, 1917, were not acted on by the Supreme Court until after January 1, 1919.

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United States Supreme Court Update

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Sharon Finegan, Assoc. Prof., South Texas College of Law
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Arbitration

American Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013)

The Italian Colors Restaurant (the "Restaurant") entered into an agreement with American Express to accept its credit cards as payment. As part of the agreement, both parties agreed to submit any disputes to arbitration. The agreement also foreclosed class arbitration. The Restaurant nonetheless filed a class action lawsuit alleging antitrust violations. American Express moved to compel individual arbitration pursuant to the agreement. The district court granted the motion and dismissed the lawsuit, but the Second Circuit reversed, holding that the class action waiver was unenforceable in light of the prohibitive costs of proceeding on an individual basis.

The Supreme Court held that an agreement limiting disputes to individual arbitration foreclosed a class action suit alleging antitrust violations.

The Supreme Court reversed in an opinion by Justice Scalia. The Federal Arbitration Act ("FAA") requires strict enforcement of arbitration agreements unless the FAA has been superseded by a specific, contrary mandate from Congress. The Court concluded that neither the antitrust statutes nor Federal Rule of Civil Procedure 23 contain such a mandate. Nothing in the antitrust laws guarantees an affordable procedure, and Rule 23 imposes strict class certification rules that exclude most class action claims. The Court also rejected application of the effective vindication exception, concluding that prohibitive

expenses for establishing a remedy under the antitrust laws do not eliminate the right to pursue the remedy. In reaching that conclusion, the Court looked to its decision in *AT&T Mobility LLC v. Concepcion*, where it rejected the argument that class arbitration was necessary to pursue claims that might otherwise be unenforceable.

Justice Thomas filed a concurring opinion to emphasize that the result in this case is mandated by the plain meaning of the FAA, which requires enforcement of an arbitration agreement absent a successful challenge to the agreement's formation. Here, the Restaurant's arguments do not implicate contract formation, so the agreement must be enforced.

Justice Kagan authored a dissenting opinion joined by Justices Ginsburg and Breyer. In the dissenters' view, the effective vindication rule should have been applied to nullify the arbitration clause. Under the effective vindication rule, arbitration will be barred if it forecloses a party from vindicating its rights under another federal statute. According to the dissenters, the arbitration clause here effectively prevents the Restaurant from pursuing its rights under the antitrust laws and thus should not be given effect.

Justice Sotomayor took no part in the consideration or decision of the case.

Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064 (2013)

John Sutter, a pediatrician, entered into a contract with Oxford Health Plans LLC to provide medical care to Oxford's patients. Later, Sutter brought a class action suit against Oxford alleging that Oxford was underpaying him and other doctors operating under similar contracts. The contract included an arbitration clause and the state court referred the matter to arbitration. The parties agreed that the arbitrator should decide whether the contract authorized class arbitration. The arbitrator reasoned that because the arbitration clause required "civil actions" to be arbitrated, it included all types of civil actions including class litigation to

be arbitrated. Oxford sought to have the decision vacated in federal court, but the district court denied relief and the Third Circuit affirmed. After the Supreme Court issued an opinion in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.,* 559 US 662 (2012) holding that class arbitration requires a contractual basis "for concluding that a party agreed to do so", Oxford sought reconsideration from the arbitrator. He reconfirmed his prior holding, the district court again denied vacatur, and the Third Circuit again affirmed.

The Supreme Court held that, where parties agreed to submit the availability of class arbitration to an arbitrator, and the arbitrator based his determination on the language of the arbitration provision, the arbitrator's determination was not subject to reversal even if it were legally erroneous.

The Supreme Court affirmed, explaining that "the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." Because the arbitrator attempted to interpret the contract language, the Court held that the decision was immunized from review. The Court distinguished *Stolt-Nielsen*, because the parties in *Stolt-Nielsen* agreed that the contract did not contain any agreement to class arbitration. Therefore, the arbitration panel in *Stolt-Nielsen* could not have been interpreting the contract "because it lacked any contractual basis for ordering class procedures."

Justice Alito, joined by Justice Thomas, concurred. Justice Alito wrote to highlight that central to the majority's decision was the fact that the parties to the appeal conceded that the contract authorized the arbitrator to decide whether to contract allowed class arbitration. Because absent members of the plaintiff class had not conceded this fact, the concurrence argued that it was unclear whether an arbitrator's resolution of class arbitrability could bind absent class

members. The concurrence argued that this possibility should "give courts pause" before determining that the availability of class arbitration is a question the arbitrator should decide.

Criminal Law

Alleyne v. United States, 133 S. Ct. 2151 (2013)

Allen Alleyne worked with an armed accomplice to rob a store manager of the store's deposits. Alleyne was charged under 18 U.S.C. § 924(c)(1)(A) with using or carrying a firearm in relation to a crime of violence (robbery). That firearms offense is punishable by imprisonment for a minimum of five years and a maximum of life. If the firearm is brandished, however, the statute requires imprisonment for a minimum of seven years. The sentencing judge found that the firearm was brandished and thus sentenced Alleyne to seven years' imprisonment. The Fourth Circuit affirmed, noting that the Supreme Court's ruling in *Harris v. United States* foreclosed Alleyne's argument that brandishing should be treated as an element of a separate offense, which must be submitted to a jury under the Sixth Amendment.

The Supreme Court held that facts that constrain a judge's discretion by increasing the mandatory minimum sentence for a crime are "elements" that must be submitted to a jury under the Sixth Amendment.

The Supreme Court, in an opinion by Justice Thomas, reversed and overruled *Harris*, holding that facts triggering a mandatory minimum sentence are "elements" of a distinct crime and must be proved to a jury, even if the facts do not increase the maximum authorized sentence. The Court relied on its earlier decision in *Apprendi v. New Jersey*, which the Court read for the principle that any fact that increased the prescribed "range" of punishment is an element. The Court noted that the legally prescribed range of punishment "*is* the penalty affixed to the crime," and that an

increase in the statutory floor aggravated the punishment above what is otherwise authorized. The Court made clear, however, that its ruling applies only to facts that establish the legal limits on the exercise of the judge's discretion, not any fact that influences sentencing discretion within that range.

Chief Justice Roberts, joined by Justices Scalia and Kennedy, dissented. He argued that the Sixth Amendment is a protection for defendants from *judicial* overreaching, but that the jury's findings here authorized the judge to impose a sentence of anywhere from five years to life in prison. The dissent argued that the Court's ruling transformed the jury-trial right from a defense of defendants from judicial power into a defense of judges from legislative constraints.

Justice Alito filed a dissenting opinion, arguing that the Court lacked a good reason to disregard stare decisis and overrule *Harris.* In his view, the Court should overrule *Apprendi* if anything.

Justice Sotomayor, joined by Justices Ginsburg and Kagan, filed a concurrence responding to Justice Alito and advancing their view that *Harris* was an outlier and that its precedential force had eroded.

Justice Breyer also filed a concurrence, stating that he disagreed with *Apprendi* but that it has been the law for over a decade, and thus he voted to rely on it to overrule *Harris*.

Descamps v. United States, 133 S. Ct. 2276 (2013)

Matthew Descamps was convicted of being a felon in possession of a firearm. The Government sought to enhance his sentence under the Armed Career Criminal Act (ACCA), which establishes a mandatory minimum sentence of 15 years for the crime if the violator has three prior qualifying convictions. One of the categories of qualifying convictions is "burglary, arson, or extortion." Descamps argued that one of the convictions the Government relied on, a California Law burglary conviction, could not support an ACCA enhancement. The Supreme Court had previously adopted a

categorical approach to determining whether a crime qualified as burglary, arson, or extortion under the ACCA, holding that a crime qualified if its elements were identical to or narrower than the elements of the commonly understood "generic" crimes of burglary, arson, or extortion. Descamps claimed that his burglary conviction did not qualify because statute the California statute was broader than the traditional crime of burglary, because it does not require unauthorized entry.

The Supreme Court held that, under the ACCA, a crime that penalizes a broader range of conduct than the generic crimes of burglary, arson, or extortion will not qualify as burglary, arson, or extortion for sentencing enhancement purposes.

The District Court rejected Descamps's argument. It believed that a "modified categorical approach," created by courts to address whether crimes with alternative elements qualified under the ACCA, allowed it to review the record to determine whether the factual basis of the conviction met the elements of generic burglary. The Ninth Circuit affirmed.

Justice Kagan, writing for the Court, began by describing the "modified categorical approach." The Court described the modified categorical approach, not as an exception to the categorical approach, but as a tool, because it allows a court to determine whether a conviction was based on the traditional elements of generic crime contained within an alternative-element crime. Because the modified categorical approach does not serve as an exception to the categorical approach, the majority held that the modified categorical approach "has no role to play in this case." And because Descamps was convicted of a crime that does not correspond to "the relevant generic offense," it does not qualify for ACCA enhancement.

Justice Kennedy concurred with the opinion but wrote separately to suggest that Congress amend the ACCA because the absence of uniformity in state criminal statutes disrupts

the federal policy underlying the statute. Justice Thomas wrote a separate concurrence arguing that the modified categorical approach is unconstitutional, because it allows judges to make a fact finding to enhance a sentence beyond the statutory maximum in violation of the Sixth Amendment.

Justice Alito dissented. The dissent argued that the majority opinion was highly technical and that he would give the ACCA a more practical reading, allowing a conviction to qualify where the "defendant necessarily admitted or the jury necessarily found that the defendant committed the elements of generic burglary."

Peugh v. United States, 133 S. Ct. 2072 (2013)

Marvin Peugh was convicted of bank fraud occurring in 1999 and 2000. The Sentencing Guidelines in place at the time of his offense yielded a sentencing range of 30 to 37 months. By the time Peugh was sentenced, the Guidelines had increased the recommended penalty to 70 to 87 months. But the Sentencing Guidelines range had also gone from being "mandatory" to merely "advisory" under *Booker*. Peugh argued that applying the current Guidelines range nevertheless violated the Ex Post Facto Clause. But the Seventh Circuit had already ruled that the *Booker* switch to merely advisory Guidelines cured any ex post facto concern.

The Supreme Court held that a defendant cannot be sentenced using a Sentencing Guidelines range that is higher than the range under the Guidelines version in place at the time of the offense, even if the new, higher range is only advisory and not mandatory.

The Supreme Court, in an opinion by Justice Sotomayor, reversed. The Court acknowledged that its cases have not precisely defined what counts as an "*ex post facto* Law," but the Court approved a focus on whether a change in the law creates a "significant" risk of increasing the punishment for a crime. The Court then relied on a factually similar precedent, which applied a now-abandoned legal test, but recognized the principle that an

increase in a defendant's recommended sentence can amount to an ex post facto law. Relying on that principle, the Court noted the central role of the Guidelines range in modern sentencing, even under an advisory Guidelines regime.

Justice Thomas, joined by Chief Justice Roberts and Justices Scalia and Alito, dissented. They explored the use of advisory Guidelines after *Booker* and found that, while they might nudge sentencing towards the recommended range, they do not meaningfully constrain judges' discretion. They may be persuasive in finding a sentence that best fits penological goals, but the dissent argued that an improved recommendation on how judges exercise discretion is not a "law."

Justice Alito, joined by Justice Scalia, wrote separately to note that they had no occasion in this case to reconsider the merits of the prevailing "significant risk of increased punishment" test. Justice Thomas filed a separate dissent to criticize the "significant risk" test, arguing that the Ex Post Facto Clause looks to the punishment *authorized* by statute, not the likelihood of a particular sentence within that limit. In contrast, Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, filed an opinion resisting Justice Thomas's view and arguing that a "basic principle of fairness" underlying the Ex Post Facto Clause supports the Court's ruling.

Salinas v. Texas, 133 S. Ct. 2174 (2013)

Petitioner, a suspect in a double-homicide, agreed to accompany police officers to the station for questioning. Petitioner was not given his *Miranda* warnings, nor was he in custody. Petitioner answered most of the officers' questions; however he remained silent when asked whether shells from his shotgun "would match the shells recovered at the scene of the murder." Petitioner did not testify at trial, and objected to the prosecution's use of his silence in response to the question posed during the interview. The court allowed his silence to

be used at trial, and he was convicted. The appellate court rejected the Petitioner's argument that the use of his silence at trial violated his Fifth Amendment rights. The Texas Court of Criminal Appeals affirmed.

The Supreme Court held that a criminal defendant is required to assert the privilege against self-incrimination in response to a police officer's questioning in order to benefit from the right at trial.

In a plurality opinion by Justice Alito, the Supreme Court affirmed. Justice Alito, joined by the Chief Justice and Justice Kennedy, noted that a witness must claim the privilege against self-incrimination in order to be protected by it. The Court explained that an express invocation of the right puts the government on notice that the witness intends to rely upon the privilege. The Court further noted two exceptions to the express invocation requirement: first, that the defendant need not take the stand to assert the privilege at trial; and second, that failure to invoke the privilege is excused "where governmental coercion makes his forfeiture of the privilege involuntary." The Court found that neither of those exceptions applied in this case, and rejected the Petitioner's argument that a third exception be adopted which would allow for a defendant to invoke the right by remaining silent and declining to answer questions that officials suspect would result in incriminating responses.

Justice Thomas, joined by Justice Scalia, concurred in the judgment asserting that Petitioner's claim would fail even if he had expressly invoked the privilege because the prosecutor should be permitted to comment at trial on a defendant's silence in a pre-custodial interview.

Justice Breyer, joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan, dissented, arguing that the privilege against self-incrimination should be deemed invoked in a pre-custodial interview if the questioning officer can "fairly infer from an individual's silence and surrounding

circumstances an exercise of the Fifth Amendment's privilege."

***Sekhar v. United States*, 133 S. Ct. 2720 (2013)**

Defendant Giridhar Sekhar managed a fund that was pursuing an investment by the State of New York, but the general counsel to the state comptroller recommended against investing in the fund. Sekhar emailed the attorney, threatening to expose an alleged extramarital affair unless he changed his recommendation. Sekhar was caught and convicted of attempted extortion under the Hobbs Act. The Second Circuit affirmed, reasoning that the attorney had a property right in rendering sound legal advice to his client.

The Supreme Court held that a government lawyer's recommendation that his client invest in a fund is not considered "property" that can be extorted for purposes of the Hobbs Act, which punishes use of threats or force to take another person's property.

The Supreme Court, in an opinion by Justice Scalia, held that "what was charged in this case was not extortion." The Court viewed "property" that can be extorted as something that is capable of passing from one person to another, i.e., some "transferable" or "obtainable" property that can be "exercised, transferred, or sold." The Court viewed the alleged property here—the attorney's integrity in decisionmaking—as too loose of a fit with that concept of "property." The Court reasoned that the scheme here did not involve taking from the attorney anything that Sekhar could himself *obtain and exercise*. Rather, the attorney's recommendation to his client was inherently personal to him and unalienable.

Justice Alito, joined by Justices Kennedy and Sotomayor, filed a concurrence to emphasize that "property" has a broad meaning in this context, although they agreed that it does not include a salaried government employee's internal recommendation about government action. The concurrence also suggested that, although the counsel's recommendation

itself is not "property" that can be extorted, the government could have charged Sekhar with trying to extort *money* from the government by threatening its agent, the general counsel.

United States v. Davila, 133 S. Ct. 2139 (2013)

Anthony Davila obtained a court-appointed attorney to help him defend multiple charges of tax fraud. He became dissatisfied with his attorney's advice to plead guilty and requested new counsel. During an *in camera* hearing with Davila and his attorney, the magistrate judge agreed with the advice of counsel and, in light of the evidence, counseled Davila to plead guilty. Three months later, Davila pleaded guilty to a charge of conspiracy, and the Government dropped its other charges. In doing so, Davila affirmed he was not pressured into pleading guilty and made no reference to the *in camera* hearing. Davila later moved to vacate his plea and dismiss the indictment but again made no reference to the *in camera* hearing. The district court denied the motion but the Eleventh Circuit reversed, holding that the magistrate judge's advice violated Federal Rule of Criminal Procedure 11 and thus required automatic vacatur of the guilty plea.

The Supreme Court held that a magistrate judge's advice to a defendant to plead guilty violated Rule 11 of the Federal Rules of Criminal Procedure but did not require automatic vacatur of the guilty plea.

The Supreme Court reversed in an opinion authored by Justice Ginsburg. The Court agreed with Davila that the magistrate judge's actions violated the requirements of Rule 11(c), which forbids the court from participating in plea discussions. Nonetheless, the Court rejected Davila's contention that such a violation requires automatic vacatur. Rather, under Rule 11(h), any violation of Rule 11 is subject to the harmless error analysis embodied in Rule 52 unless the violation impacts substantial rights. But the Court held that was not the case here, where Rule 11 is designed as a protective measure and is not compelled by any constitutional right. Thus, Rule 52 applied and the court of appeals erred in

failing to review the entirety of the record to determine whether Davila was prejudiced by the magistrate judge's actions. The Court remanded to the court of appeals to conduct the prejudice analysis and consider the parties' other arguments.

Justice Scalia authored a concurring opinion joined by Justice Thomas that agreed with the Court's holding but reasoned that reliance on the Rule Advisory Committee's comments was unnecessary where the text of the Rules themselves was enough to decide the case.

United States v. Kebodeaux, 133 S. Ct. 2496 (2013)

Anthony Kebodeaux was a member of the Air Force who was court-martialed and convicted in 1999 for a sex offense. At the time of his release, federal law required him to register as a sex offender, and Congress updated and strengthened those laws in 2006 when it enacted the Sex Offender Registration and Notification Act (SORNA). In 2007, Kebodeaux moved from El Paso to San Antonio and failed to update his sex-offender registration as required. He was charged and convicted in district court, and the Fifth Circuit initially affirmed, rejecting his argument that Congress lacked authority to punish his failure to register a purely intrastate change of address. The en banc Fifth Circuit reversed, however, holding that Congress had no authority to punish Kebodeaux because, by the time it enacted SORNA, Kebodeaux had fully served his criminal sentence and had no continuing special relationship with the government.

The Supreme Court ruled that Congress has Article I power to require a former member of the Air Force to register as a sex offender, and to punish his failure to register, for a sex crime he committed while he was in the Air Force.

The Supreme Court, in an opinion by Justice Breyer, reversed and held that that Congress had power to enact SORNA as applied here. The Court explained that Congress has power to regulate the armed forces and that the

Necessary and Proper Clause confers a broad ancillary power that includes the ability to define military crimes, confine prisoners, and ensure the public's safety from released prisoners through systems of parole and supervised release. Those powers, the Court held, allowed Congress to create the civil registration requirement to which Kebodeaux was first subject, and they allowed Congress to update those requirements in SORNA. Contrary to the Fifth Circuit's view, Kebodeaux had not been "unconditionally released" from federal supervision when released from jail, and Congress could validly update his registration requirements.

Chief Justice Roberts concurred in the judgment, writing to argue that the Court's broader analysis of the general public safety benefits of registration was unnecessary and beside the point.

Justice Alito also concurred in the judgment and wrote separately to note that his reasoning was narrow and based on the fact that the military's (as opposed to the states') jurisdiction over sex crimes by military offenders may create a "gap" in sex-offender-registration laws, which Congress could address under the Necessary and Proper Clause.

Justice Thomas, joined in part by Justice Scalia, dissented and argued that SORNA was not reasonably adapted to carrying into execution Congress's power to regulate the military, as SORNA was instead meant to protect the public from sex offenders.

Justice Scalia also wrote separately to express a somewhat broader view of the Necessary and Proper Clause than Justice Thomas adopted, but to argue that the registration requirements still were not adapted to carrying into effect Congress's power to regulate the military.

Defense of Marriage Act

United States v. Windsor, 133 S. Ct. 2675 (2013)

Edith Windsor and Thea Spyer were married in Canada. They then returned to New York, which subsequently passed legislation that recognized their same-sex marriage. When Spyer died, she left her estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses, but section 3 of DOMA, which excludes a same-sex partner from the definition of "spouse" in federal statutes, precluded the exemption. Windsor paid the taxes under protest and filed suit to challenge DOMA's constitutionality. The district court held DOMA unconstitutional and the Court of Appeals affirmed.

The Supreme Court held that section 3 of the Defense of Marriage Act (DOMA) was unconstitutional.

Justice Kennedy writing for the majority, first addressed the standing of the parties. Unusually, both Windsor and the United States agreed that section 3 of DOMA was unconstitutional. Thus the lower court had allowed the limited intervention of the Bipartisan Legal Advisory Group (BLAG) as an interested party that sought to defend the constitutionality of DOMA. The Court began by distinguishing between Article III standing, which requires a "case or controversy" and flexible rules of prudential standing that embody "judicially self-imposed limits on the exercise of federal jurisdiction." Justice Kennedy held that the "case or controversy" requirement was met by the government because the judgment ordered the United States to pay Windsor her tax refund, which amounted to a real and immediate economic injury." The Court then noted that though there was sufficient Article III standing, the government's failure to defend the statute did raise prudential considerations, but that those considerations were mitigated by BLAG's "sharp adversarial presentation of the issues."

The majority then addressed the substance of the appeal, beginning with a summary of history demonstrating that authority regarding marriage has traditionally been the province of the states and that the "incidents, benefits and obligations of marriage are uniform for all married couples within a State." Though the Court noted that DOMA rejected these historical facts by subjecting marriage to a uniform rule and simultaneously making the incidents of marriage inconsistent within a state, it held that it was unnecessary to determine whether DOMA was an unconstitutional intrusion on state power. The Court instead based its finding of unconstitutionality on due process and equal protection principles, holding that DOMA's "avowed purpose and practical effect" was to "impose a disadvantage, a separate status, and so a stigma upon all who enter into same sex marriages made lawful by the unquestioned authority of the States." Justice Kennedy cited to legislative history stating that DOMA's purpose was to express "moral disapproval of homosexuality" and to promote "traditional moral teachings reflected in heterosexual-only marriage laws." In practice, the majority held, when New York acted to eliminate inequality, DOMA frustrated that objective for no legitimate purpose.

Chief Justice Roberts dissented, arguing that Congress had a legitimate purpose in creating uniformity and stability in the application of its laws. The dissent also emphasized that the federalism aspects of the majority's decision limit make it inapplicable to challenges regarding state laws defining marriage as heterosexual-only.

Calling the majority's standing holding a "breathtaking revolution in our Article III jurisprudence [,]" Justice Scalia dissented, joined by Justice Thomas and, in part, the Chief justice. Justice Scalia argued that the case or controversy requires "not just a plaintiff (or appellant) who has standing to complain but an *opposing party* who denies the validity of the

complaint." Justice Scalia also argued that, though the majority claimed to limit its holding to DOMA, its logic declares "anyone opposed to same sex marriage an enemy of human decency" and "arms well every challenge to a state law restricting marriage to its traditional definition."

Justice Alito also dissented, joined in part by Justice Thomas. Justice Alito argued that though the United States lacked standing to appeal because it did not complain of the judgment, BLAG possessed standing because Congress is the proper party to defend the validity of a statute when the executive refuses to do so on constitutional grounds. But Justice Alito disagreed with the majority's analysis of the substance, arguing that section 3 does not encroach on a state's authority to define marriage because all section 3 "does is to define a class of persons to whom federal law extends special benefits and upon whom special federal law imposes special burdens."

Driver's Privacy Protection Act

Maracich v. Spears, 133 S. Ct. 2191 (2013)

A group of attorneys pursuing a lawsuit against car dealerships in South Carolina filed several requests for information from the South Carolina Department of Motor Vehicles under the state Freedom of Information Act seeking contact information for thousands of individuals. Using the information they received, the attorneys mailed over 34,000 letters advising individuals of the lawsuit and enclosing a reply card for those interested in participating. A group of those who received the letter filed suit claiming a violation of the federal Driver's Privacy Protection Act (the "Act"). The attorneys argued they were covered by an exception to the Act allowing use of personal information "in connection with any civil, criminal, administrative, or arbitral proceeding," which includes "investigation in anticipation of litigation." The

district court ruled that the attorneys' actions fell within the statutory exception, and the Fourth Circuit affirmed.

The Supreme Court reversed in an opinion by Justice Kennedy. The Court concluded that the litigation exception to the Act did not include an attorney's actions in soliciting clients to participate in litigation. Applyin g the rule that statutory exceptions should be read narrowly to preserve the policy underlying the statute, the Court interpreted the exception to apply when an attorney is acting as an officer of the court. The Court found support for its interpretation in the scope of the litigation exception, which allows access to the most sensitive personal information, and in the language of another exception to the Act, which allows use for solicitation purposes only where express consent has been given. In reaching its decision, the Court rejected the attorneys' argument for a distinction in favor of solicitation tied to a specific proceeding, concluding that the focus is on whether the primary purpose of the communication was solicitation, regardless of the stage of litigation. Accordingly, the Court remanded to the court of appeals to determine whether the primary purpose of the letters was to solicit business.

The Supreme Court held that a provision of the Driver's Privacy Protection Act that permits access to otherwise protected information for use "in connection with" or as part of an "investigation in anticipation of" litigation did not apply to communications made with a primary purpose of soliciting business.

Justice Ginsburg, joined by Justices Scalia, Sotomayor, and Kagan, dissented. According to the dissent, the attorneys' actions fell squarely within the litigation exception. The attorneys obtained and used the information as part of an "investigation in anticipation of litigation" and for communications "in connection with" an ongoing proceeding. In the dissenters' view, the exception should apply any time otherwise protected information is used as part

of a specific proceeding that is either imminent or ongoing with identified parties on both sides of the controversy. This would provide a meaningful limitation on the exception while avoiding the extreme civil and criminal penalties faced by the attorneys as a result of the Court's decision.

Employment Law

University of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013)

Naiel Nassar is a doctor who complained that he was denied permanent employment at a medical center as retaliation after complaining of unlawful discrimination by his supervisor. The medical center argued that, regardless of any retaliatory intent, it would not have hired Nassar anyway for legitimate reasons. The jury found for Nassar and awarded him damages. The Fifth Circuit affirmed, holding that Nassar's retaliation claim required that retaliation be only one motivating factor of the employer's action, not the but-for cause of the action.

The Supreme Court held that when an employee sues under Title VII alleging retaliation on account of the employee's complaint of unlawful discrimination, the employee must prove that the injury would not have occurred but for the prohibited retaliatory motive, not just that the retaliation was one motive among several that would have each led to the employer's decision.

The Supreme Court, in an opinion by Justice Kennedy, reversed and held that the but-for causation standard applies. Congress had earlier amended Title VII to allow a plaintiff to recover at least attorney's fees, costs, and injunctive relief upon a showing that discrimination based on characteristics such as race, religion, or nationality was one motivating factor for the employer's action. If the employer does not then show that it would have taken the same action even without the discriminatory animus, the employee is further entitled to damages and correction of the employment decision. In contrast to that regime, Title VII's

antiretaliation provision appears in another section and requires proof that the employee was injured "because" of certain criteria. The Court interpreted that separate codification and language to require the employee to prove that the desire to retaliate was the but-for cause of the employer's action.

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented. They argued that Title VII's ban on discrimination and ban on retaliation have traveled together, as retaliation for a complaint about race or sex discrimination, for example, *is* discrimination based on race or sex. The dissent argued that Congress intended to reach both types of prohibited conduct when approving the lower mixed-motive burden of proof, that the Court should have deferred to the EEOC's position, and that having different burdens will confuse juries given that the two claims are often brought together.

Vance v. Ball State Univ., 133 S. Ct. 2434 (2013)

Maretta Vance was employed by Ball State as a catering assistant. Vance filed complaints with Ball State and the Equal Employment Opportunity Commission (EEOC) alleging that her co-worker, Saundra Davis, racially harassed and discriminated against Vance. Vance subsequently filed a lawsuit against Ball State. The District Court granted summary judgment to Ball Sate because Ball State could not be held liable for Davis's actions because she was not Vance's supervisor because she did not have the authority to "hire, fire, promote, transfer, or discipline" Vance. The Seventh Circuit affirmed.

Under Title VII, the Court held that an employer is only vicariously liable for the actions of a "supervisor" if the alleged supervisor was empowered by the employer to take tangible employment actions against the Title VII plaintiff.

The Supreme Court affirmed. Justice Alito, writing for the Court, began by noting that *Burlington Industries, Inc. v. Ellerth*, 524 U. S. 742 (1998), and *Faragher v. Boca Raton*, 524 U. S. 775 (1998), an employer may be held vicariously liable

where a supervisor harasses an employee, but that neither case defined the term supervisor. In defining the term, the Court reviewed both colloquial and legal meanings of the term supervisor noting that the term has varying meanings in both contexts. The Court then turned to *Ellerth* and *Faragher*, finding that both contemplated a clear class of supervisors who had the authority to "alter a subordinates terms or conditions of employment." The Court also noted that limiting supervisors to those who have authority to take tangible employment decisions against an employee created a workable rule "that can be readily applied." The Court rejected the rule promulgated by the EEOC, which would extend supervisory status to employees with authority over the work of another employee, as "too murky." Finally, the majority noted that its rule would not leave employees unprotected because under Title VII and employer may be held liable for harassment of non-supervisors where the employer was negligent with respect to offensive behavior.

Justice Thomas concurred, arguing that prior cases, which allow Title VII recovery where no tangible employment action is taken, were wrongly decided. But that, because the majority "provides the narrowest and most workable rule" for these cases, he joined the majority.

Justice Ginsburg, joined by Justices Sotomayor and Kagan, dissented. The dissent argued that the distinction drawn between supervisors and employees in prior Title VII case law "corresponds to the realities of the workplace." The dissent argued that the majority's limited definition ignored these practical realities because it insulates employers from liability where a "supervisor" has extensive authority to supervise and control an employee's day-to-day activities, but lacks the authority to take a tangible employment action. The dissent closed by encouraging Congress to "correct the error into which this Court has fallen."

Equal Protection Law

Fisher v. University of Texas at Austin, 133 S. Ct. 2411 (2013)

Petitioner was a Caucasian applicant to the University of Texas at Austin who was denied admission. At the time of the Petitioner's application, the University's admissions process involved assigning applicants a score under a "Personal Achievement Index" (PAI). The PAI score took into account race as a meaningful factor, although it was not assigned a specific numerical value. Other factors taken into account were leadership and work experience, awards, extracurricular activities, community service, and other special circumstances. Petitioner sued the University and various University officials, arguing that the University's use of race in its admissions process was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The district court granted summary judgment for the University. The Fifth Circuit affirmed, finding that Supreme Court precedent required courts to afford substantial deference to state university decisions on whether diversity benefits constituted a compelling state interest, and whether the university's admissions process was narrowly tailored to meet such an interest.

The Supreme Court held that a state university's admissions program which uses racial categories or classifications must be examined using a strict scrutiny standard and a reviewing court must give no deference to the university's determination that its admissions process is narrowly tailored to meet the goal of diversity.

In an opinion by Justice Kennedy, the Court reversed. The Court began by noting that decisions by state universities based on race or ethnic origin are subject to strict scrutiny review under the Equal Protection Clause of the Fourteenth Amendment. The Court then noted that the creation of a diverse student body can be a compelling state interest. However, the Court explained that the procedures used to achieve this compelling state interest are only constitutional if they are narrowly tailored to meet the goal of

a diverse student body. Thus, the Court reasoned that a university must demonstrate that the use of the racial classification in its admissions process is necessary to accomplish the goal of a diverse student body. The Court noted that deference is given to a university's determination that diversity is a compelling state interest, however the Court held that it gives no deference to a university's determination that the methods chosen by the school are narrowly tailored to achieve that diversity. The Court found that the appellate court failed to verify that it was necessary for the University of Texas to use race in its admissions process to achieve the goals of diversity.

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

Justice Scalia concurred in the judgment, asserting that it is unconstitutional for state educational institutions to discriminate based on race, but noting that the Petitioner did not argue the invalidity of diversity as a compelling state interest.

Justice Thomas concurred, noting that he would overrule prior Supreme Court precedent permitting the use of race in the admissions process of state higher education institutions.

Justice Ginsburg dissented, arguing that the Fifth Circuit properly applied the strict scrutiny standard to the University of Texas' admissions policies.

Federal Courts

Hollingsworth v. Perry, 133 S. Ct. 2652 (2013)

In 2008, the California Supreme Court held that limiting the official definition of marriage to opposite-sex couples violated the equal protection clause of the California Constitution. Later that year, California voters passed Proposition 8, a ballot initiative that amended the state constitution to recognize only the union of a man and a woman as marriage, thus leaving same-sex couples to enter into "domestic partnerships" instead of "marriage" under

California law. Two same-sex couples who wished to marry sued in federal court, challenging Proposition 8 on due-process and equal-protection grounds. The various state officials named as defendants, such as the governor and attorney general, refused to defend the law in court. The district court thus allowed the proposition's sponsors to intervene and defend it. Following a trial, the district court declared Proposition 8 unconstitutional and enjoined the named defendants and persons under their control from enforcing it.

The Supreme Court held that sponsors of California's "Proposition 8" did not have standing to defend that proposition's constitutionality on appeal.

The state officials chose not to appeal the ruling, bu t the proposition's sponsors did appeal. The Ninth Circuit then certified to the California Supreme Court the question whether, under the state constitution or law, the proponents of a ballot initiative have their own interest in its validity or can assert the state's interest when state officials refuse to defense the initiative. The California Supreme Court said that the initiative's proponents have at least the ability to defend it on behalf of the state when public officials decline to do so. Relying on that answer, the Ninth Circuit held that the proponents had standing to appeal. Reaching the merits, the Ninth Circuit then affirmed the district court, viewing Proposition 8 as unconstitutionally taking away from same-sex couples the official designation of "marriage" without a legitimate reason.

The Supreme Court, in an opinion by Chief Justice Roberts, held that the proponent's sponsors lacked standing to appeal to the Ninth Circuit or the Supreme Court. The Court explained that, once the district court declared Proposition 8 unconstitutional and enjoined the state officials from enforcing it, the plaintiffs no longer had any injury to redress, and that the proponent's sponsors were not themselves subject to any adverse court order and did not

have an injury that affects them in a "personal and individual way," as opposed to a "generalized grievance" about government. The Court noted that the sponsors had a special role in the process of *enacting* Proposition 8. But once it became law, the Court reasoned, the sponsors had no role in its enforcement distinguishable from the general interest of every California citizen in enforcement of state law. And the Court rejected the argument that the California Supreme Court had already determined that the initiative proponents could act for *the state* to defend the proposition's validity. The Court found no doctrinal support for treating a state's authorization of *private parties* to defend state law as sufficient, under federal law, to confer standing on those private parties as state agents.

Justice Kennedy, joined by Justices Thomas, Alito, and Sotomayor, dissented, arguing that the State of California has standing to defend the validity of its own law and that the California Supreme Court had already determined, as matter of state law, that an initiative's proponents have authority to defend the state's initiative-enacted laws when public officials do not. In the dissent's view, those conclusions dictate that the initiative proponents have standing, derivative of the state's standing, to defend the law's validity. The dissent noted that California views the ability of an initiative's proponents to defend its validity, even when public officials will not, as essential to the integrity of the initiative process, which is designed to allow citizens to enact laws without the approval of public officials.

Horne v. Dep't of Agriculture, 133 S. Ct. 2053 (2013)

Farmers Marvin and Laura Horne grow raisins in California. A federal regulation governing the marketing of crops required the Hornes to turn over a portion of their crop to the government, to limit supply and stabilize prices. The Hornes believed this scheme violated the Fifth Amendment by taking their property without just compensation, and they

refused to surrender their raisins. The relevant agency issued an order fining the Hornes for noncompliance, and the Hornes sought judicial review in federal district court, arguing that the agency's marketing regulations were an unconstitutional taking of property without just compensation. The district court rejected the defense on the merits. The Ninth Circuit, however, held that it lacked jurisdiction to address the defense because a takings claim must be raised in the first instance in the Court of Federal Claims.

The Supreme Court held that when an agency fines a farmer for violating an agency order regarding the marketing of crops, the farmer may raise a Takings Clause defense in the federal court proceeding to impose the fine and need not reserve the defense, pay the fine, and then make a trip to the Court of Federal Claims to seek to recover the fine.

The Supreme Court, in a unanimous decision by Justice Thomas, reversed. The Court explained that the Takings Clause served as a defense to the agency's enforcement action, similar to any other defense challenging the agency's authority for the underlying regulation. The Court thus held that the defense was ripe in the same way the whole dispute was ripe—the Hornes were subject to the concrete injury of an agency order imposing a fine. And the Hornes could not be expected to go to the Court of Federal Claims to seek recovery of the fine under the Tucker Act. The statute authorizing the regulations at issue provides a detailed judicial review scheme that displaces the Tucker Act's general availability to pursue compensation for a taking. And that makes good sense, the Court reasoned: Congress would not intend for a person who is challenging a fine as based on an unconstitutional regulation to pay the fine in one proceeding, only to turn around and sue for recovery of that same money in another proceeding.

First Amendment

Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc., 133 S. Ct. 2321 (2013)

The Leadership Act provides for a multifaceted approach to fighting HIV/AIDS around the world, including the appropriation of billions of dollars to nongovernmental organizations fighting the diseases. The funds come with two conditions: (1) the funds may not be used to promote prostitution or sex trafficking; and (2) the funds may not provide assistance to a group that lacks a policy explicitly opposing prostitution and sex trafficking (with specific, named exceptions). One organization who received funds under the Leadership Act did not wish to modify its policies, fearing the required change would hamper its work with prostitutes to control HIV/AIDS, would alienate host governments, and would require censorship of internal discussions. The organization sued for a declaration that the required policy change violated its First Amendment rights. The district court granted a preliminary injunction, ruling that the requirement imposed an unconstitutional condition on funds. The Second Circuit affirmed.

The Supreme Court held that the First Amendment prohibited a provision of the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 that required any group that took funding for combating those diseases abroad to have a "policy explicitly opposing prostitution."

The Supreme Court, in a decision by Chief Justice Roberts, affirmed. It noted that the Spending Clause gives the government broad latitude to spend for the general welfare, including spending with limits on how funds are used. But the Court explained that a condition on funding may in some cases result in an unconstitutional burden on First Amendment rights, even if the person has no entitlement to the funds. The critical distinction under that doctrine is between conditions that limit the use of government funds, on the one hand, and

conditions that leverage funding to control speech outside of the contours of the program, on the other hand. Although the line is not always clear, the Court explained, the policy requirement here runs afoul of it because it is about compelling a recipient to adopt a particular belief as a condition of funding, not just identifying recipients with whom the government already agrees or limiting how recipients may actually use the funds. The Court also rejected the government's argument that a grant of federal funds would free private funds for disfavored uses, and thus the policy requirement is needed; the Court found no support for the assumption that federal funding would be so used.

Justice Scalia, joined by Justice Thomas, dissented. They argued that the Constitution does not prohibit government spending that discriminates against and injures points of view to which the government is opposed, giving the example of anti-smoking programs. The dissent noted that the government's view is that the suppression of prostitution will fight the transmission of HIV, and the dissent argued that limiting the funding program to those who believe in that goal is reasonably related to implementing that permissible government view.

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

Habeas Law

McQuiggin v. Perkins, 133 S. Ct. 1924 (2013)

The Petitioner, Perkins, was convicted of first-degree murder in 1993; his conviction became final in 1997. In 2008, Perkins filed a petition for habeas relief, claiming ineffective assistance of counsel. Perkins further claimed newly discovered evidence of actual innocence. Specifically, Perkins identified three affidavits that pointed to another murderer. The affidavits were created in 1997, 1999, and 2002. The district court held that the petition was time-barred under the

Antiterrorism and Effective Death Penalty Act (AEDPA). The lower court reasoned that Perkins had one year from the latest affidavit to file his petition, and he failed to meet that deadline. The Sixth Circuit reversed, finding that Perkins' actual innocence claims provided a gateway to present his claims for ineffective assistance of counsel, even though the claims were untimely and he did not diligently pursue his rights following his conviction.

The Supreme Court held that a prisoner's proof of actual innocence allows him to seek habeas relief on other claims, despite the expiration of the statute of limitations for the filing of a habeas petition.

In an opinion by Justice Ginsburg, the Court affirmed. The Court reasoned that the miscarriage of justice exception allows for petitioners to overcome various procedural faults in order to pursue constitutional claims. The Court held that a petitioner's credible showing of actual innocence allows for the application of such an exception. The Court cautioned that the exception is extremely limited and only applies to cases in which the petitioner provides evidence that shows "it is more likely than not that no reasonable juror would have convicted [the petitioner]." The Court further noted that while there is no threshold diligence requirement under the exception, the petitioner's lack of diligence can be considered in determining the credibility of the actual innocence claims.

Scalia, joined by the Chief Justice, Justice Thomas, and Justice Alito dissented, argued that actual innocence was not an exception available to bypass a statutory bar to habeas relief but was only an equitable power to circumvent judge-made barriers to such relief.

Nevada v. Jackson, 133 S. Ct. 1990 (2013)

Respondent Jackson was convicted of rape and other crimes in a Nevada state court. At trial, the defendant sought to introduce police reports and other extrinsic evidence showing the victim's prior false accusations. The trial court

permitted questioning on this topic, but did not permit the introduction of the extrinsic evidence because, under state law, the defendant was required to notify the prosecution that he intended to introduce such evidence. Jackson provided no such notice. The state supreme court held that the evidence was properly excluded. Jackson filed a habeas petition, arguing that the state trial court violated his constitutional right to present a defense. The federal district court denied relief, and the Ninth Circuit reversed. The Ninth Circuit held that the extrinsic evidence was critical to the defense and the Nevada Supreme Court's decision to the contrary was an unreasonable application of Supreme Court precedents, therefore violating the Antiterrorism and Effective Death Penalty Act (AEDPA).

The Supreme Court held that the application of a Nevada state evidentiary rule, requiring a criminal defendant to provide notice of intent to introduce extrinsic evidence regarding an alleged rape victim's prior fabricated allegations, was not unreasonable under established Supreme Court precedent.

In a per curiam opinion, the Supreme Court reversed. The Court explained that relief is only available to a prisoner under the AEDPA when the prisoner can show that his conviction "involved an unreasonable application of . . . Federal law, as determined by the Supreme Court of the United States." The Court reasoned that no prior decision of the Supreme Court clearly established the unconstitutionality of a requirement mandating that a defendant provide notice before introducing extrinsic evidence of a rape victim's prior fabricated allegations. Thus, the Court found that the Defendant had failed to show that there was "no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents."

Ryan v. Schad, 133 S. Ct. 2548 (2013)

An Arizona state court jury found Edward Schad guilty of capital murder, for which he was sentenced to death. After an extensive series of state-court and federal-court proceedings ended with the Supreme Court denying Schad's petition for certiorari, the Ninth Circuit refused to issue its mandate as normally required by the Federal Rules of Appellate Procedure. Instead, the Ninth Circuit *sua sponte* construed Schad's motion to stay the mandate as an invitation to review a prior ruling on one of Schad's motions. Based on review of that previously rejected motion, the Ninth Circuit, in a divided opinion, issued a stay a few days before Schad's scheduled execution date and remanded the case to the district court.

The Supreme Court held that the Ninth Circuit abused its discretion in failing to issue its mandate under Federal Rule of Appellate Procedure 41 after the denial of Shad's petition for a writ of certiorari.

The Supreme Court, in a per curiam opinion, reversed and held that the Ninth Circuit's refusal to issue its mandate was an abuse of discretion. The Court explained the default rule under Federal Rule of Appellate Procedure 41(d)(2)(D) is that a court of appeals *must* issue its mandate when the Supreme Court denies certiorari review. The Court did not decide whether this rule had an equitable exception. The Court simply held that, if it did, the exception would require extraordinary circumstances, which were not present here because the Ninth Circuit had already had the chance to review the arguments that Schad renewed after his failure to secure certiorari review.

Trevino v. Thaler, 133 S. Ct. 1911 (2013)

A Texas state court jury convicted Carlos Trevino of capital murder and imposed the death penalty. Texas has a bifurcated review scheme for capital cases, in which a defendant's direct appeal and collateral post-conviction challenge proceed at the same time. Here, Trevino's attack on his trial counsel's alleged ineffectiveness at sentencing was

raised, not in the direct appeal, but in the collateral challenge. The state-provided attorney in that collateral challenge, however, did not argue that the alleged ineffectiveness arose in part from trial counsel's failure to adequately develop and present mitigating circumstances at sentencing. In other words, the post-conviction counsel was himself arguably ineffective in presenting the claimed violation of Trevino's Sixth Amendment rights.

Trevino did not win his direct appeal or his state collateral challenge. He then petitioned in federal court for a writ of habeas corpus, claiming that his trial couns el was constitutionally ineffective for failing to develop and present mitigating circumstances. The federal court denied that claim on procedural grounds, holding that it was unexhausted and now barred under state law because Trevino had not raised it in his state post-conviction challenge. The Fifth Circuit affirmed, holding that Trevino's failure to raise his argument in state court barred its consideration for the first time in federal court.

The Supreme Court held that, when a state does not *require* a defendant to raise his ineffective-assistance-of-trial-counsel claim in a collateral post-conviction proceeding, but rather adopts rules that *encourage* the defendant to do so, the ineffectiveness of the defendant's state post-conviction counsel in failing to perfect the claim would allow the defendant to raise the claim for the first time in a federal habeas petition.

The Supreme Court, in an opinion by Justice Breyer, reversed in reliance on the Court's decision last Term in *Martinez v. Ryan*. There, the Court held that a challenge to trial counsel's performance may be raised in a federal habeas proceeding, even if not previously raised in state court, if the reason for not raising the claim in state court was ineffective counsel in the only proceeding in which the claim could have been raised. That proceeding, under Arizona law, was the collateral post-conviction

challenge. Texas law, in contrast, does not require the claim to be raised in the collateral proceeding. Rather, Texas law has procedures for counsel on direct appeal to expand the record to include evidence about trial counsel's performance, which can then be litigated on direct appeal. But the Court reasoned that the time limits Texas imposes on that procedure and other features of Texas law strongly encourage defendants to raise such claims in their collateral challenge, not on direct appeal. Accordingly, if counsel in the state collateral challenge fails to present the claim, the failure can itself be ineffective assistance that excuses the procedural default and allows the claim to be heard for the first time in a federal habeas petition.

Chief Justice Roberts, joined by Justice Alito, dissented. He first described the general rule that a prisoner has no right to appointed counsel in his collateral post-conviction challenge, so attorney error in that proceeding does not excuse a procedural default arising from failing to present all meritorious claims in the collateral challenge. The Chief Justice noted that *Martinez* professed to create a limited exception for instances in which, under state law, a claim could be raised *only* on collateral review—and thus not during the appeal that carries a constitutional right to appointed counsel. But the dissent argued that the Court was now bypassing that limit, as Texas law allowed Trevino to bring his claim on direct appeal, even if also on collateral review.

Justice Scalia, joined by Justice Thomas, filed a separate dissent simply resting on the reasons for his dissent in *Martinez* and noting that he had predicted then that the limit on the Court's holding would not last.

Indian Child Welfare Act

Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013)

The ICWA mandates that a party seeking "involuntary termination of parental rights to an Indian child" must show that active efforts were made to prevent the "breakup of the Indian family." Further, the Act requires that involuntary termination of parental rights to an Indian child should not occur unless evidence demonstrates "that the continued custody of the child" by the Indian parent will likely result in serious harm to the child. Finally, the Act requires that state law give adoption preference to a member of the child's family or tribe. In this case, the child's biological father is a member of the Cherokee nation and her biological mother is not of Indian descent. The biological father and mother never married and separated prior to the birth of their child. Further, before the child's birth, the biological father relinquished his parental rights to the child and the biological mother decided to put the child up for adoption. The biological mother selected the Adoptive Couple, non-Indian residents of South Carolina, who supported the biological mother throughout the remainder of her pregnancy. The biological father provided no financial assistance to the biological mother during the pregnancy or the first four months of the child's life. Four months after the child's birth, the Adoptive Couple served the biological father with notice of the adoption proceedings. The biological father subsequently sought custody and contested the adoption. The state family court denied the Adoptive Couple's petition for adoption under the ICWA, finding that

The Supreme Court held that the Indian Child Welfare Act (ICWA) does not bar the involuntary termination of an Indian parent's custody of his child where the parent never had custody of the child and abandoned the child before birth and that adoption preferences for Indian children do not bar a non-Indian family from adopting an Indian child where no other eligible candidates have sought to adopt the child.

they had not shown the child would suffer harm from the biological father's custody. The South Carolina Supreme Court affirmed.

In an opinion by Justice Alito, the Supreme Court reversed. The Court first held that the ICWA's bar on involuntary termination of parental rights unless evidence demonstrates harm from continued custody of the Indian parent is inapplicable to circumstances where the Indian parent never had custody of the child. The Court then held inapplicable the Act's requirement that termination of parental rights shall only occur where the party seeking such termination has shown efforts to prevent the breakup of an Indian family. The Court reasoned that this requirement does not apply where the Indian parent abandoned his child prior to birth because no "breakup" can occur where there is no relationship to be discontinued. Finally, the Court found that no adoption preference needed to be given to a member of the child's family or tribe because no eligible alternative party sought to adopt the child. The Court explained that the biological father was not an eligible party because he did not seek to adopt the child, but rather contested the termination of his parental rights.

Justice Thomas concurred, noting that the arguments of the birth father and the United States raised significant constitutional issues, but that the Court's interpretation of the ICWA properly avoided those constitutional problems.

Justice Breyer concurred, noting that the statute does not provide guidance on how to treat absentee Indian fathers and that the decision is limited to the specific facts of the case.

Justice Scalia dissented, arguing that the Court incorrectly interpreted the term "continued custody."

Justice Sotomayor, joined by Justices Ginsburg and Kagan and joined, in part, by Justice Scalia, dissented, arguing that the majority ignored congressional intent and that the ICWA required the rejection of the adoption petition.

Interstate Compacts

Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120 (2013)

After trying unsuccessfully to purchase water to bolster its supply, the Tarrant Regional Water District (the "District") applied for a permit from the Oklahoma Water Resources Board (the "Board"), seeking to obtain water pursuant to an interstate water compact (the "Compact"). Anticipating that the permit would be rejected based on an Oklahoma statute, the District also filed suit seeking an injunction against enforcement of the Oklahoma statute on the basis of the Compact and its rights under the Commerce Clause. The district court granted summary judgment to the Board, and the Tenth Circuit affirmed.

The Supreme Court held that an Oklahoma statute preventing out-of-state parties from diverting water outside of Oklahoma did not violate either an interstate compact or the Commerce Clause.

The Supreme Court affirmed in a unanimous opinion by Justice Sotomayor. Under the Compact, four regional states, including Texas and Oklahoma, agreed on how to allocate rights to water in the Red River basin. The parties' dispute focused on how the Compact's reference to "equal rights" to the water affects cross-border water usage. The Court acknowledged that the language of the Compact was ambiguous, but applying standard contract law principles, the Court concluded that the Compact did not grant cross-border rights to the water. First, because there is a strong presumption in favor of states retaining control over their own resources, the Court found it unlikely that the parties to the Compact would give up control without expressly saying so. Second, looking to other interstate compacts on water rights, the Court concluded that the customary practice when dealing with cross-border rights is to address them expressly, something that was not done in the Compact. Third, the Court noted that, in the customary dealings of the parties, this

is the first time in the nearly thirty-year history of the Compact that any party has asserted a cross-border right.

The Court likewise rejected the District's Commerce Clause argument. The District argued that the Oklahoma statute discriminated against interstate commerce by preventing water that was not allocated under the Compact from leaving the state, but the Court rejected the District's premise, holding that all of the water was allocated under the Compact.

Patent Law

Association for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107 (2013)

Respondent discovered the location and sequence of two human genes, BRCA1 and BRCA2. Mutations of these genes can significantly increase the likelihood of breast and ovarian cancer. Respondent obtained patents related to this discovery which gave them the exclusive right to isolate an individual's BRCA1 and BRCA2 genes in the method they discovered. The patents would further give the Respondent the exclusive right to create a synthetic complementary DNA (cDNA). Petitioners, researchers, patients, advocacy groups, and doctors, filed suit seeking a declaration that Respondent's patents were invalid. The district court granted summary judgment to Petitioners, concluding that the patents were invalid because they covered products of nature. The Federal Circuit reversed. The Supreme Court granted certiorari, vacated the judgment, and remanded the case in light of *Mayo Collaborative Services v. Prometheus Laboratories, Inc*, 132 S. Ct. 1289 (2012). On

The Supreme Court held that naturally occurring DNA segments are not patent eligible because they are a product of nature, however synthetically created strands of complementary DNA are patent eligible because they are not naturally occurring.

remand, the Federal Circuit reversed in part and affirmed in part, finding that both the DNA and cDNA strands were patent eligible.

In an opinion by Justice Thomas, the Supreme Court affirmed in part and reversed in part. The Court held that the Respondent's discovery of the BRCA genes does not render the genes "new . . . composition[s] of matter" that render them patent eligible. The Court reasoned that the Respondent's extensive efforts to discover the genes do not satisfy the requirements under 35 U.S.C. § 101 because the genes are naturally occurring. The Court held that synthetically created strands of cDNA are patent eligible, reasoning that those strands are not naturally occurring. However, the Court stated that where a short strand of cDNA is indistinguishable from natural DNA, that strand is not patent eligible. Finally, the Court noted that its decision did not implicate a method patent or patents on new applications of knowledge.

Justice Scalia concurred in part and concurred in the judgment, stating that he was unable to affirm the majority opinion's discussion of the finer details on molecular biology.

FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013)

The Hatch-Waxman Act creates a structure that allows a generic pharmaceutical manufacturer to file an Abbreviated New Drug Applications (ANDA) to avoid the bulk of the drug testing process if it can 1) show that its drug has the same ingredients and is "biologically equivalent" to a name-brand drug and 2) assure the FDA that the new drug will not infringe the brand name's patents or that the name-brand's patent is invalid. The first generic manufacturer that files an approved ANDA is granted a 180 day exclusivity period, where it alone may manufacture a generic. Once a generic manufacturer has filed an ANDA, the name-brand manufacturer can file a patent-infringement suit to prevent the generic manufacturer from launching its product. Solvay

Pharmaceuticals launched a new drug, Androgel. Later that year Actavis, Inc. filed an ANDA. Subsequently another manufacturer, Paddock Laboratories, also filed an ANDA. Solvay filed suit against Actavis, Paddock, and other related parties, but settled after the FDA approved Actavis' ANDA. The settlement, commonly called a reverse payment settlement, provided a license to Actavis to launch a product, but not for nine years, and provided that Solvay would pay the defendants between $250 and $350 million during that time. The Federal Trade Commission (FTC) filed suit against the parties to the settlement, claiming that the settlement violated antitrust law. The district court dismissed the suit and the Eleventh Circuit affirmed, holding that "absent sham litigation or fraud in obtaining the patent," reverse payment settlements were immune from antitrust attack provided the anticompetitive effects fell within the scope of the patent.

The Supreme Court held that the Federal Trade Commission could maintain an antitrust action to challenge a settlement agreement between a pharmaceutical patent holder and generic manufacturers that had challenged the patent in litigation.

The Supreme Court granted certiorari and reversed. The Court began by noting that only a valid patent provides the ability to exclude others from use of the patented product. In this case, both the patent's validity and its scope were put at issue by the litigation. And the reverse-payment settlement, which provided payments to the defendants even though they had no claim for damages, was unusual and suspect. The Court then reviewed a number of cases allowing antitrust litigation related to patents to proceed, summarizing the case law as seeking "to accommodate both patent and antitrust policies." Finally, the Court rejected the Eleventh Circuit's concern that the possibility of antitrust scrutiny might discourage settlement and require parties to

unnecessarily litigate patent issues. First the court reiterated the heightened likelihood and evidence of collusion and harm, noting that some analyses suggest that many ANDA reverse-payment settlements, including the one at issue, actually pay the generic manufacturer more than it would have profited had it won the litigation and launched its generic. The Court noted also that an FTC lawsuit might not necessitate a full relitigation of the patent issue because the size and terms of the settlement, if unexplained by "traditional settlement considerations, such as avoided litigation costs or fair value for services," might be a suitable surrogate for litigation of a patent's weakness. The Court held that on balance considerations regarding the potential for anticompetitive abuse outweighed the possible discouragement of settlements and held that the FTC's litigation should not have been dismissed.

Chief Justice Roberts, joined by Justices Scalia and Thomas, dissented. The Chief Justice argued that the majority opinion was unworkable because it envisions litigation where a court would "simply conduct an antitrust analysis of the settlement without regard to the validity of the patent." The dissent posited a situation where a party settles a suit with an initial challenger by paying a large sum, but wins a patent suit involving the same issue against a subsequent challenger. The dissent argued that under the majority's rule, the first settlement would be subject to attack even though it lies within the scope of a valid patent. The dissent also argued that reverse-payment settlements were not sufficiently distinct from traditional patent settlements and the majority's rule would therefore discourage settlement of patent litigation in general.

Preemption Law

American Trucking Assns., Inc. v. Los Angeles, 133 S. Ct. 2096 (2013)

The Port of Los Angeles (the Port) regulates short-haul trucks that transport cargo between the Port and Los Angeles through a municipal ordinance called a tariff. The tariff requires trucking companies to enter into a concession agreement with the Port containing a number of regulatory requirements, including a requirement that trucks carry a specific placard outside the Port and that trucking companies submit a plan for off-street parking outside the Port. The tariff makes it a misdemeanor for a terminal operator to allow an unregistered truck into the Port. American Trucking Associations (ATA) sued the Port seeking an injunction against the concession agreement's requirements, arguing that they were preempted by the FAAAA and that even if they were not preempted that the Port could not enforce them by withdrawing a right to operate at the port under *Castle v. Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954). The District Court rejected both arguments. The Court of Appeals affirmed and ATA sought Supreme Court review of the placard and parking requirements and the enforceability of all requirements under *Castle*.

The Supreme Court held that elements of trucking regulations promulgated by the Port of Los Angeles were preempted by the Federal Aviation Administration Act (FAAAA).

The Supreme Court reversed. The FAAAA preempts any regulation that has the "force and effect of law related to a price, route, or service of any motor carrier." The Port conceded that the concession agreements terms involved a price, route, or service of a motor carrier, but argued that the agreements involved the Port's own business interest and therefore did not amount to a regulation having the "force of law." The Court agreed that the FAAAA draws a "rough line

between a government's exercise of regulatory authority and its own contract based participation in the market." But, the Court held, the Port was not acting as a private party because it was not "contracting in the way that the owner of an ordinary commercial enterprise could mimic." The Port's concession agreement was enforceable by criminal sanctions and the Court held that "when the government employs such coercive mechanisms, available to no private party, it acts with the force and effect of law, whether or not it does so to turn a profit." Because the concession agreements terms had the force and effect of law, they were preempted by the FAAAA.

The Court did not reach ATA's argument that Castle precluded enforcement by withdrawing a right to operate. The Court first noted that *Castle*, which prohibits a state from denying access to freeways to a trucking entity for prior violations of state trucking regulations, applies only to prior violations and does not prevent a state from "taking off the road a vehicle that is contemporaneously out of compliance with such regulations." Because the Court found no basis to conclude that the Port would necessarily enforce the concession agreements to punish past violations by revoking rights to operate in the Port, the Court decided not to decide ATA's *Castle* based challenge.

Justice Thomas concurred to note a constitutional concern with the FAAAA. Although the Port waived any claim that the FAAAA's preemption was unconstitutional, Thomas argued that, though Congress could regulate activity within the Port, it was "doubtful whether Congress has the power to decide where a drayage truck should park once it has left the port or what kind of placard the truck should display while offsite."

***Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013)**

Respondents, individual Arizona residents and a group of nonprofit organizations, sought to enjoin the implementation of Arizona Proposition 200. Proposition 200 requires Arizona voters to present proof of citizenship when they register to vote and identification on election day. The law lists several ways in which the proof-of-citizenship requirement is satisfied. The Election Assistance Commission (EAC) did not include these new requirements on the state-specific Federal Form. Thus, the Federal Form for Arizona requires that Arizona applicants meet state-specific voting requirements, but does not call for "concrete evidence of citizenship" as required by Proposition 200. In the district court, Respondents argued that the proposition was preempted by the NVRA. The district court denied the motions for preliminary injunction. A two-judge panel for the Ninth Circuit enjoined the proposition pending appeal. The Supreme Court vacated the Ninth Circuit order and permitted the 2006 election to proceed under Proposition 200. On remand, the district court granted the Petitioner's motion for summary judgment. The Ninth Circuit affirmed in part and reversed in part, holding that Proposition 200 conflicted with the NVRA.

The Supreme Court held Arizona's mandate that voters present concrete evidence of citizenship is preempted by the National Voter Registration Act (NVRA) requirement that States "accept and use" the Federal Form which requires only that applicants aver, under penalty of perjury, that they are citizens.

In an opinion by Justice Scalia, the Court affirmed. The Court noted that the Elections Clause of the Constitution confers on the federal government the power to alter or supplant the "time, place, and manner" of state voting procedures. Thus, the Court reasoned that the Elections Clause provides Congress the power to preempt state laws on voting requirements. Further, the Court found that the

requirements of Proposition 200 are not required by the Federal Form, and therefore the Arizona requirements of proof of citizenship are inconsistent with the NVRA's directive that states "accept and use" the Federal Form. However, the Court explained that the Elections Clause does not allow for federal law to preempt state laws on *who* is eligible to vote in elections, it only allows for preemption regarding *how* those elections are conducted. The Court noted that the NVRA permits states to challenge, in an administrative proceeding, the EAC's rejection of a request to include state-specific instructions on the Federal Form. The Court explained that if Arizona renewed its request to include the additional proof of citizenship requirements in the Federal Form, and the EAC rejected this renewed request, the State would have the opportunity to demonstrate to a reviewing court that the requirements are necessary to effectuate the state requirement of citizenship to vote.

Justice Kennedy concurred in part and concurred in the judgment, noting that he disagreed with the Court's rejection of the presumption against preemption in this case.

Justice Thomas dissented, arguing that the Court should have adopted an interpretation of the Arizona requirements that would have avoided the constitutional issues.

Justice Alito dissented, arguing that the NVRA permits Arizona to require proof of citizenship as a requirement for voter registration.

Hillman v. Maretta, 133 S.Ct. 1943 (2013)

Warren Hillman named his then-spouse Judy Maretta as the beneficiary of his Federal Employees' Group Life Insurance policy. He subsequently divorced Maretta, and married Jacqueline Hillman. Warren Hillman never changed the named beneficiary and, on his death, Maretta claimed the benefits. Jacqueline Hillman sued in Virginia Court under a state-law statute that, in its section A, revokes life insurance beneficiary designations when an insured divorces. Section D

of the statute provides in that if section A's revocation is preempted by federal law, the person who would recover had the designation been revoked has a cause of action against the beneficiary for the amount of the benefit. Jacqueline Hillman conceded that FEGLIA preempted section A, but argued that the section D cause of action was not preempted. The trial court held Maretta liable to Hillman, but the Virginia Supreme Court reversed, holding that section D was preempted by FEGLIA.

The Supreme Court held that the beneficiary designation provision of the Federal Employees' Group Life Insurance Act (FEGLIA) preempted a state statute that created a cause of action that allowed a current spouse to recover insurance death benefits paid to the insured's prior spouse.

The Supreme Court affirmed. The Court began by clarifying that its review was limited to conflict preemption because that was the only basis considered by the Virginia Supreme Court. The Court reiterated that, in reviewing conflict preemption, it determines whether the state law conflicts with Congress's "purposes and objectives" in passing the relevant federal statute. Hillman argued that the "purpose and objective" of FEGLIA's beneficiary designation was to promote administrative convenience by simplifying the government's determination of who to pay. Because section D only altered what happened after the government disbursed funds, section D would not conflict with this administrative convenience. The Court stated that if administrative convenience were the only purpose, there might be no conflict. But the Court held that FEGLIA has another purpose. FEGLIA's beneficiary designation protected an insured's freedom of choice in selecting a beneficiary by guaranteeing disbursed funds "belong to the named beneficiary and no other." In reaching this determination, the Court pointed to similar schemes in other federal insurance programs and to regulations holding that an

employee's "right" of designation "cannot be waived or restricted." Because the purpose of FEGLIA was to guarantee that disbursed funds belong to the designated beneficiary, the court held that section D's cause of action conflicted with FEGLIA's purpose, and was preempted by FEGLIA, because it "directs that the proceeds actually 'belong' to someone other than the named beneficiary[.]"

Justice Thomas concurred in the judgment. He wrote separately to argue that the "purposes and objectives" framework is an "illegitimate basis" for preemption analysis. Instead, Justice Tomas argued that a court should find preemption only when the "ordinary meaning" of federal law effectively repeals contrary state law. Justice Thomas then analyzed section D under this rubric, holding that, because the right to designate a beneficiary under FEGLIA necessarily includes the right of the designee to retain the benefits, section D's functional reallocation of those benefits directly conflicts with FEGLIA.

Justice Alito also concurred. Justice Alito argued that the majority went too far in holding that one of the purposes of the FEGLIA order of precedence was to make certain that the beneficiary designation was enforced over any other expression of intent. Instead, Justice Alito would hold that the purpose was to effectuate "the insured's *expressed* intent above all other considerations." The concurrence would uphold the judgment on the basis that section D acts as a "blunt instrument to override the insured's express declaration" of intent, but left open the possibility that a statute that instead relied on a later expression of the insured's intent, such as a will, might not be preempted.

Mutual Pharm. Co. v. Bartlett, 133 S. Ct. 2466 (2013)

In 2004 Respondent was prescribed a drug to alleviate shoulder pain. Her pharmacist dispensed a generic form of the drug sulindac, manufactured by Petitioner. Soon thereafter, Respondent developed a severe case of toxic epidermal necrolysis, which left her severely disfigured and nearly blind. At the time of the prescription, the sulindac label did not warn specifically of toxic epidermal necorlysis as a potential adverse reaction. In 2005, the FDA recommended changes to the sulindac label to include a specific warning regarding toxic epidermal necrolysis. Respondent sued Petitioner in state court on state law failure-to-warn and design-defect claims. Petitioner removed the case to federal court and the district court dismissed the failure to warn claim. A jury found in favor of respondent on her design-defect claim. The First Circuit affirmed.

The Supreme Court held state design-defect laws on the inadequacy of a drug's warning labels are preempted by federal law.

In an opinion by Justice Alito, the Supreme Court reversed. The Court first noted that, under the Supremacy Clause, state laws that conflict with federal law have no effect. The Court further explained that a federal law need not have an express preemption provision in order to preempt state law. Where it is "impossible for a private party to comply with both state and federal requirements" the state law is preempted. The Court then examined the Petitioner's obligations under state law, finding that under New Hampshire's design-defect law, the drug manufacturer was required to strengthen sulindac's warnings. However, the Court noted that federal law prevents generic drug manufacturers from altering their labels. Thus, because the Petitioner could not comply with both state and federal law, the Court held that federal law preempted the state design-defect law. The Court rejected the appellate court's determination that the manufacturer could comply with both state and federal law by ceasing production of sulindac, finding the argument incompatible with Supreme Court precedent.

Justice Breyer, joined by Justice Kagan, dissented, arguing that no special weight should be given to the FDA's findings and that it was not impossible for the manufacturer to comply with both state and federal law.

Justice Sotomayor, joined by Justice Kagan, dissented, arguing that the majority incorrectly expanded preemption principles and that federal law posed no barrier to Petitioner's state law cause of action.

Regulatory Takings

Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013)

Coy Koontz sought permits to develop his property that contained wetlands from the St. Johns River Water Management District (the District). The District rejected his permit. After rejecting his permit, the District suggested that it would approve his permit if he reduced the size of the development and deeded a conservation easement to the District or, alternatively, if he hired contractors to make improvements to District-owned wetlands nearby. Koontz then filed a lawsuit against the District under a state statute that provided damages for unreasonable state actions that constitute a taking. The trial court found the District's actions unlawful because they violated *Nollan v. California Coastal Comm'n*, 483 U.S. 825, and *Dolan v. City of Tigard*, 512 U. S. 374, which held that the government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a nexus and rough proportionality between the government's demand and the effects of the proposed land use. The State Supreme Court reversed holding that, unlike *Nollan* and *Dolan*,

The Supreme Court held that a governmental agency's denial of a land-use permit unless the landowner granted a conservation easement or paid a similarly valued monetary exaction required the government to establish a nexus and rough proportionality between the government's demand and the effects of the proposed land use.

the District here had denied the application and a demand for money cannot give rise to a taking.

The Supreme Court reversed. It began by rejecting the distinction the Florida Supreme Court advanced between granting a permit with the condition that the applicant turn over property and denying a permit because the applicant refuses to do so. The Court pointed out that such a distinction would allow government to entirely evade *Nollan* and *Dolan* by merely denying any permit until a condition was met. The Court then addressed the alternative argument that the Koontz's claim fails because the District merely demanded money. The Court rejected that because then any unconstitutional taking of property could be immunized by being paired with an alternative demand for money equal to or greater than the value of the taking. The Court also argued that, because the monetary exaction was tied to ownership of a specified parcel of land, it was distinguishable from a general exaction of money because it burdened that particular property. The Court then reversed and remanded, holding that monetary exactions tied to permit approval must satisfy the requirements *Nollan* and *Dolan.*

Justice Kagan dissented, joined by Justices Ginsburg, Breyer, and Sotomayor. The dissent agreed that the *Nollan-Dolan* standard applied to a condition when a government denied a permit until a condition was met. However, the dissent argued that the *Nollan-Dolan* standard would not apply because requiring Koontz to spend money on the government's behalf does not take a specific and identified property interest from Koontz and therefore does not trigger a constitutional taking. The dissent also advanced two independent arguments to support affirmance. First, the District had never made an explicit demand for money from Koontz as a condition of approval. Instead, the District had—in negotiation after denial of Koontz's initial application—proposed multiple general options that it believed would make

Koontz's application satisfy Florida law and indicated it was open to other proposals. Second, the dissent noted that Koontz had not paid any money to the District, and had therefore not suffered a taking that would be compensable under the Florida statute.

Search and Seizure Law

Maryland v. King, No. 133 S. Ct. 1958 (2013)

When Alonzo King was arrested for felony assault, a sample of his DNA was taken by means of a cheek swab. His DNA was matched with an unsolved rape six years earlier. King challenged the evidence in the resulting trial, arguing that the DNA sample was taken in violation of his Fourth Amendment rights. The trial court denied King's motion and he was convicted of rape. On appeal, the Maryland Court of Appeals set aside the conviction, holding that the state statute authorizing collection of DNA from felony arrestees was unconstitutional.

The Supreme Court held that a state statute authorizing collection of DNA samples from individuals arrested for violent crimes did not violate the Fourth Amendment.

The Supreme Court, in an opinion by Justice Kennedy, reversed. The statutory provision at issue authorizes law enforcement officials to take DNA samples from individuals charged with violent crimes. Because the statute deals with those who have already been taken into custody based on probable cause, the relevant standard is the reasonableness of the search, which is measured by weighing the governmental interests against the intrusion on the individual's privacy. The Court first addressed the legitimate governmental interests in obtaining DNA samples. Comparing the process to fingerprinting, the Court found a strong governmental interest in identifying those taken into custody in order to, among other things, evaluate the risks posed by a new detainee, accurately assess bail, and free those who may have been wrongfully imprisoned

for the act in question. By contrast, the Court found little intrusion on individual privacy. Any legitimate privacy expectations are necessarily diminished in the context of being taken into valid custody based on a reasonable arrest. And the intrusion of a cheek swab to collect the sample is minimal at best. The Court also looked to the process used to match DNA samples and likewise found it minimally intrusive. The process involves segments of DNA that do not reveal genetic traits or private medical information, and the statute provides further protections against such a result.

Justice Scalia dissented in an opinion joined by Justices Ginsburg, Sotomayor, and Kagan. The dissenting justices rejected the Court's comparison to fingerprinting and its reliance on the governmental interest in identifying individuals in custody. In the dissent's view, the purpose for taking DNA samples is to investigate crime, which alone cannot justify a suspicionless search. Instead, under the Fourth Amendment, there must be a basis for believing the individual is guilty of the crime or possesses incriminating evidence before a search, including a DNA sample, can be made.

Voting Rights Act

Shelby County v. Holder, 133 S. Ct. 2612 (2013)

Congress passed the Voting Rights Act (the "Act") in 1965 to address racial discrimination in voting. Section 4 of the Act establishes a formula for determining "covered jurisdictions," which become subject to Section 5 of the Act. Section 5 in turn requires preclearance by the federal government of any change in voting procedure by the covered jurisdictions. Shelby County, Alabama, which is subject to preclearance under the Act, filed suit seeking a declaratory judgment that Sections 4 and 5 of the Act are unconstitutional. The district court found both provisions to be constitutional. The D.C. Circuit affirmed, holding that, based on the Congressional

record, preclearance remained necessary and that the formula for establishing preclearance was constitutional.

The Supreme Court, in an opinion by Chief Justice Roberts, reversed. Under the Constitution, federal law preempts state law, but the Tenth Amendment reserves broad autonomy to the states in areas not covered by federal law, including the power to regulate elections. The principle of equal sovereignty likewise requires the federal government to treat the states equally. The Act sets aside both of these principles by targeting specific states and subjecting them to requirements that submit their traditional control over elections to federal oversight. The Court concluded that while the situation in 1965 justified such departures, the current situation does not. In reauthorizing the Act, Congress enacted the same preclearance formula for Section 4, which looks to the existence of voter registration conditioned on passing a test and low minority voter turnout rates in the 1960s and early 1970s, even though conditions have improved since that time. Tests have been banned for more than 40 years, voter registration and turnout rates approach parity, and minority candidates have been elected at unprecedented levels. The Fifteenth Amendment is protective rather than punitive in nature; accordingly, the Act can only be applied with reference to current conditions. The Court rejected arguments that the Congressional record supplied justification for Section 4 of the Act. First, the Court held that nothing in the record demonstrated the pervasive voter discrimination at issue in 1965. Second, the Court concluded that by re-enacting a 40-year-old formula, Congress was not relying on the current record to fashion a reasonable remedy under Section 4.

The Supreme Court held that Section 4 of the Voting Rights Act as re-enacted in 2006 was unconstitutional because it relies on long-past conditions to impose on specific states current burdens that are inconsistent with principles of equal sovereignty and the Tenth Amendment.

Justice Thomas concurred in the judgment of the Court, but would have gone farther and also struck down Section 5 of the Act for the same reasons the Court found Section 4 to be unconstitutional: the extraordinary burdens Section 5 imposes on state sovereignty combined with the lack of findings to support an ongoing need for imposing such a burden.

Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, dissented. In the dissent's view, the Court failed to view the Act with the substantial deference required for legislation enacted to enforce the Fourteenth and Fifteenth Amendments. Viewed with the appropriate level of deference, the dissenters concluded that the legislative record supported Congress's purposes for reauthorizing the Act: to build on the progress realized since the original passage of the Act and to prevent backsliding.

Texas Supreme Court Update

Patrice Pujol, Forman Perry Watkins Krutz & Tardy, LLP, Houston
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Appeals

***Dallas County, Tex. v. Logan*, 407 S.W.3d 745 (Tex. 2013) (per curiam)**

In this case involving claims brought under the Whistleblowers Act, Dallas County ("County") filed a plea to the jurisdiction, which the trial court denied. The Dallas Court of Appeals affirmed and declined to consider the additional grounds argued by the County in support of the jurisdictional plea because the County did not raise them in the trial court.

The Supreme Court reversed and, following its decision in *Rusk State Hospital v. Black*, 392 S.W.3d 88 (Tex. 2012), held that section 51.014(a) does not preclude an appellate court from having to consider new grounds first asserted on appeal. This Court also recognized that although *Black* was not a "prior" decision under Government Code section 22.001(a)(2), the conflict found to exist among the courts of appeals in *Black* gave the Court jurisdiction over this appeal.

New or additional challenges raised in an interlocutory appeal under Civil Practice and Remedies Code section 51.014(a) must be considered by the appellate court, regardless of whether the challenges were presented to or determined by the trial court.

***Brighton v. Koss*, No. 12-0501, 2013 Tex. LEXIS 602, 56 Tex. Sup. J. 953, 2013 WL 4493580 (Tex. Aug. 23, 2013) (per curiam)**

On October 19, 2010, a Dallas County District Court signed the divorce decree of Tara Brighton and Gregory Koss. Thirty days later, Brighton filed a "Motion to Modify, Correct, or Reform Judgment" that asked the trial court (1) to correct the original decree to identify the properties against which the equitable lien attaches; (2) to reform the decree to include repayment terms of the economic contribution award; and (3) to order Koss to sign a lien note and/or deed of trust to secure the equitable lien. Six days after that, Koss filed his notice of appeal. On December 22, 2010, the trial court signed a second judgment, titled "Nunc Pro Tunc Final Decree of Divorce" that granted only part of the relief Brighton requested. Seventy-five days later, Brighton filed her notice of appeal, which was docketed with Koss's. Later, Brighton filed a second notice of appeal to address the trial court's denial of her affidavit of indigence. The Dallas Court of Appeals initially docketed this second matter as a separate cause but later consolidated it with the earlier appeals. Sometime after that, the appellate court dismissed Brighton's appeal as untimely, while leaving Koss's appeal pending.

When a subsequent judgment does not grant all the relief requested in a post-judgment motion, the motion remains as a viable complaint about the subsequent judgment and extends the appellate deadlines.

After receiving clarification as to the finality of its order from the court of appeals, the Supreme Court reversed that court's judgment. Brighton timely filed a post-judgment motion that sought to modify the judgment. While it still had plenary power, the trial court entered a second judgment that included the properties against which the equitable lien was to attach—part of the relief Brighton sought in her motion—but

did not address her other complaints. Because the second judgment did not correct all of the errors or omissions asserted in Brighton's previous motion to modify, the motion operated to extend the appellate timetable applicable to the second judgment. Under this extended timetable, Brighton's notice of appeal was timely, and the court of appeals erred by dismissing her appeal.

Class Actions

***Phillips Petroleum Co. v. Yarbrough*, 405 S.W.3d 70 (Tex. June 21, 2013)**

This suit was filed as a putative class action on behalf of Texas royalty owners alleging that various Phillips Petroleum Company entities (collectively "Phillips") underpaid oil and gas royalties. In September 2000, the trial court signed its first certification order, certifying three subclasses of royalty owners. The Fourteenth Court of Appeals reversed the order and held that all three subclasses were improper under Rule of Civil Procedure 42. On remand, the trial court signed a second order that again certified three subclasses of royalty owners. The Fourteenth Court of Appeals reversed this order, again holding that all three subclasses were improper and observing that the order impermissibly split the class members' causes of action, resulting in the waiver of all unasserted breach of contract claims. The Supreme Court held that the court of appeals correctly decertified two subclasses, but incorrectly decertified the third class, the Gas Royalty Agreement ("GRA") class. *Bowden v. Phillips Petrol. Co.*, 247 S.W.3d 690

A trial court's order changes the fundamental nature of a class, and is therefore subject to interlocutory appeal under Civil Practice and Remedies Code section 51.014(a)(3), if it modifies the class in such a way as to raise significant concerns about whether certification remains proper.

(Tex. 2008). The Court also directed the trial court to conduct a res judicata analysis to determine whether certification was appropriate. *Id.*

Back at the trial court for a third time, Royce Yarbrough, the sole representative of the only remaining subclass, amended his petition to allege that "the manner and method used by [Phillips] to market the GRA gas and pay royalties under the uniform GRAs" breached Phillips's "express and implied obligations under the GRAs." Arguing that the amended petition added new class claims that required a certification hearing, Phillips filed several motions, all of which were denied. The trial court subsequently entered a trial plan order and an order denying further proceedings on res judicata, declaring that the class definition resolved the issue. Following entry of the trial plan order, Phillips filed a "Motion for Partial Summary Judgment on Implied Covenant Claims or, in the Alternative, Motion to Sever the Implied Covenant Claims or, in the Alternative, Motion for Order Clarifying that Plaintiff Yarbrough's Implied Covenant Claims Are Not Included in [the GRA class]" ("Alternative Motions"), which the court denied. Phillips then filed an interlocutory appeal of the res judicata order and the order denying the Alternative Motions, as well as a petition for writ of mandamus. The court of appeals dismissed the interlocutory appeal for want of jurisdiction, holding that trial court's orders were simply denials of the requested relief and did not alter the fundamental nature of the class. The court also denied Phillips' mandamus petition. Phillips then sought both remedies in the Supreme Court.

As to the interlocutory appeal, the Supreme Court reversed. First, the Court determined that it had jurisdiction because the trial court's denial of Phillips' Alternative Motions changed the fundamental nature of the class in allowing the addition of the new implied-covenant claim, which requires different proof of different conduct than the

original claim evaluated in *Bowden*. Thus, the order was appealable and the court of appeals erred in holding that it had no jurisdiction. Next, in the interest of judicial economy, the Supreme Court analyzed the order revamping the certified class and held that the trial court must conduct a certification hearing. The effect of the order was to certify a new class without the benefit of a motion for certification or a certification hearing. Because the new claim raised issues of typicality and predominance that were not considered by the trial court, it abused its discretion by failing to conduct the rigorous analysis required to certify a class. Third, the Supreme Court held that the trial court failed to conduct a rigorous analysis of the res judicata issue that was set out in the Court's mandate in *Bowden*. The importance of the res judicata analysis should not be overlooked, as a class representative's decision to abandon certain claims may be detrimental to absent class members for whom those claims could be more lucrative or valuable. Because the trial court's order did not explain how the court determined the risk of preclusion was not high enough to refuse certification, the Supreme Court remanded the case to that court for this analysis, along with the other issues. Finally, in light of its decision on the appeal, the Court dismissed Phillips' petition for writ of mandamus as moot.

Contracts

McCalla v. Baker's Campground, Inc., No. 12-0907, 2013 Tex. LEXIS 601, 56 Tex. Sup. J. 965, 2013 WL 4493899 (Tex. Aug. 23, 2013) (per curiam)

Baker's Campground, Inc. and Kelli and Kourtnie Graves (collectively "Baker's Campground") are successors-in-interest to 380 acres of land previously owned by Baker (now deceased). Anthony and Cheryl McCalla leased this property from Baker; their agreement contained an option to buy the land if Baker decided to sell it. While the McCalla lease was

ongoing, Baker leased the same land to the Davises. The McCallas sued Baker and the Davises seeking to void the Davises' lease and to exercise their purchase option. After obtaining a favorable jury verdict that allowed them to exercise the option but before the judgment was rendered, the McCallas and Bakers entered into a settlement agreement releasing one another from any claims related to the lawsuit and setting out the basic terms of the future sale of the property to the McCallas. The agreement also contained two handwritten provisions, including "I agree to enter an agreement as discussed above." With the claims settled between the McCallas and Baker, the trial eventually entered judgment against the Davises, which was upheld on appeal.

A settlement agreement that includes all the terms necessary for the contract's enforcement is an enforceable contract as a matter of law, even if some of its terms seem to imply that the parties contemplate forming an additional contract in the future.

After Baker died, the McCallas attempted to exercise their option to buy the property, but Baker's Campground declined and filed a declaratory judgment action to void the settlement agreement. The trial court rendered a partial summary judgment for the McCallas, finding that the settlement agreement was an enforceable contract. But the Waco Court of Appeals reversed and remanded, holding that because the settlement agreement's handwritten terms said that "I will agree" and "I agree to enter an agreement", the contract was ambiguous as to whether it was presently binding or merely an agreement to agree.

The Supreme Court reversed. Agreements to enter into future contracts are enforceable if they contain all material terms. Here, the settlement agreement did contain all the material terms of the future contract: a general release, a description of the real property to be sold, the timeline for closing the real property sale, the identities of the transferor

and transferee of the real property, and the price of the real property. In addition, the agreement did not indicate that these or any other terms remained open for negotiation. Thus, if a court was trying to enforce the settlement agreement, it could find all the terms necessary for its enforcement. Therefore, the Supreme Court reversed the court of appeals' decision, and remanded the case to the trial court to address issues it had not yet reached.

***Dynegy Inc. v. Yates*, No. 11-0541, 2013 Tex. LEXIS 679, 56 Tex. Sup. J. 1092, 2013 WL 4608711 (Tex. Aug. 30, 2013)**

James Olis, a former officer of Dynegy, was indicted on multiple counts of securities fraud, mail and wire fraud, and conspiracy arising out of work he performed while at Dynegy. Dynegy's board of directors passed a resolution authorizing payment of attorneys' fees for Olis's defense, provided that Olis acted in good faith, in Dynegy's best interests, and in compliance with applicable law. The resolution also allowed Dynegy to modify or revoke it at any time. Olis hired attorney Terry Yates to represent him. Both Olis and Dynegy's counsel told Yates that the company would pay for Olis's defense. Nevertheless, Olis and Yates entered into a written fee agreement requiring Olis to pay his legal fees. Dynegy's promise to Yates to pay Olis's fees was never reduced to writing. Months later, Olis went to trial and was convicted. Although Dynegy paid Yates's first two invoices, it refused to pay the third and final invoice for nearly $450,000, deciding that Olis did not meet the "good faith" requirement of the resolution.

A plaintiff relying on a primary obligor theory under the main purpose doctrine must plead and establish facts to take a verbal contract out of the statute of frauds.

Yates sued Dynegy for the unpaid fees, asserting breach of contract and fraudulent inducement claims and seeking benefit-of-the-bargain damages. The jury found for Yates on both claims and Yates elected to recover under his fraudulent

inducement claim. The trial court rendered judgment on that claim and denied Dynegy's subsequent motion on its statute of frauds defense. The San Antonio Court of Appeals initially reversed and rendered judgment for Dynegy, but later reversed itself based on the main purpose doctrine and held that Dynegy intended to bind itself to a primary obligation rather than a promise to pay the debt of another, and the statute of frauds was therefore inapplicable.

The Supreme Court reversed and rendered judgment that Yates take nothing, holding that Yates failed to secure a favorable finding on the main purpose doctrine, and therefore waived it. Because Dynegy asserted the statute of frauds affirmative defense, it had the initial burden of establishing its application. The statute of frauds' suretyship provision under Business and Commerce Code section 26.01(b)(2) applies to "a promise by one person to answer for the debt, default, or miscarriage of another person." Dynegy met this burden by showing that Dynegy orally promised to pay attorneys' fees for Olis's defense that under a written contract were solely Olis's obligation. At this point, the burden shifted to Yates to establish an exception that would take the verbal contract out of the statute of frauds, namely the main purpose doctrine. One element of this exception—which requires a jury finding—is that Dynegy intended to create primary responsibility in itself to pay the debt. But Yates never submitted this element to the jury, and therefore failed to secure a finding on the main purpose doctrine. Consequently, the court of appeals erred by considering the intent element of the main purpose doctrine in conjunction with determining whether Dynegy met its initial burden to show the applicability of the statute of frauds.

Justice Devine dissented, arguing that Dynegy's promise to pay did not fall within the suretyship provision of the statute of frauds because (1) Dynegy did not assert that it intended to act as a guarantor of Olis's debt, and (2) the jury

agreed that Dynegy's promise to pay Yates's fees through Olis's trial was not conditional. Justice Devine also argued that Dynegy had at least two self-serving reasons to promise to pay Yates to represent Olis: (1) to protect the company's interests; and (2) to comply with its by-laws. Therefore, Yates should have been able to enforce Dynegy's oral contract because the company was acting for its own purposes and not merely as a guarantor of its employee's obligation.

Defamation

Neely v. Wilson, No. 11-0228, 2013 Tex. LEXIS 511, 56 Tex. Sup. J. 766, 2013 WL 3240040 (Tex. June 28, 2013)

Dr. Byron Neely is a neurosurgeon in Austin. In 1999, he performed brain surgery on Paul Jetton. After surgery, an infection set in, leaving Paul in a debilitated state even after 12 subsequent brain surgeries. Paul and his wife, Sheila, sued Neely and others, and Neely settled. Neely also performed surgery on Wei Wu in 1999. He removed a brain tumor but reported seeing melanoma deposits on Wu's brain. After Wu learned of the melanoma, he committed suicide, although his autopsy revealed no melanoma. Wu's family sued Neely, but that case was dismissed.

If the gist of a television newscast story differs materially from the truth of the disciplinary report on which that story is based, then a fact issue is created that defeats summary judgment.

In 2003, the Texas Medical Board ("Board") investigated Neely and found that he (1) had self-prescribed medications between 1999 and 2002; (2) had a prior history of hand tremors; and (3) was subject to disciplinary action due to his "inability to practice medicine with reasonable skill and safety to patients, due to mental or physical condition" and his self-prescription of medications. Neely entered into an agreed order ("Order") that suspended his license, but stayed the suspension, placed him on probation

for three years, ordered physical and psychiatric evaluations, and prohibited him from prescribing drugs to himself or his family.

In 2004, KEYE-TV in Austin ran a seven-minute investigative report by Nanci Wilson (collectively "KEYE") about Neely. The report pieced together comments by Paul and Sheila Jetton and others, as well as commentary by Wilson. After the report aired, Neely's business collapsed and his home went into foreclosure. Neely and his professional association (collectively "Neely") sued KEYE for libel. KEYE moved for summary judgment, which the trial court granted without specifying the grounds. Relying on *McIlvain v. Jacobs*, 794 S.W.2d 14 (Tex. 1990), the Austin Court of Appeals affirmed, holding that none of the statements were actionable as a matter of law because KEYE accurately reported third-party allegations.

The Supreme Court reversed, holding that summary judgment was improper because Neely raised a fact issue as to the truth or falsity of the gist of KEYE's broadcast (i.e., KEYE's substantial truth defense). The Court first determined that the court of appeals' reading of *McIlvain* was incorrect, and that the case actually stands for the proposition that if a broadcast reports that allegations were made and an investigation proves those allegations to be true, the defamation claim was brought within the scope of the substantial truth defense. Thus, the central issue here was KEYE's liability for republishing Paul Jetton's allegedly defamatory statements. Because one can be liable for republishing someone else's defamatory statements, the court of appeals erred in holding that KEYE could not be liable, even if it reported them accurately. Second, the gist of KEYE's broadcast was defamatory because, based on the content and placement of comments by Paul Jetton and a Board representative, a person of ordinary intelligence would conclude that Neely was disciplined for operating on patients

while he was taking the drugs. Although the Order reflects Neely was disciplined for self-prescribing, he was not disciplined for taking or using the drugs. Because Neely provided summary judgment evidence that he was not operating on patients while taking or using drugs, this fact issue defeated KEYE's summary judgment based on the truth defense.

The Court also ruled on other issues raised in the appeal:

- It affirmed the court of appeals holding that the official/judicial proceedings privilege shielded the portion of the broadcast in which Sheila Jetton implied Neely was performing unnecessary surgeries. The Court so held because an ordinary viewer could conclude this comment was made in the Jetton's lawsuit.
- Neither the official/judicial proceedings privilege nor the fair comment privilege shielded the portions of the broadcast implying that Neely was disciplined for operating under the influence of drugs.
- Neely was not a limited purpose public figure, and thus did not need to prove actual malice on remand.
- Neely raised a fact issue as to KEYE's negligence that precluded summary judgment.
- Just like any corporation under the Business Organizations Code, Neely's professional association could maintain a cause of action for defamation.

Thus, the Court remanded the case to trial court for further proceedings consistent with its opinion.

Chief Justice Jefferson, joined by Justices Green and Lehrmann, dissented. Agreeing that the gist of KEYE's broadcast was that Neely operated on patients while taking drugs, the dissent maintained that it was reasonably derived from the medical board's findings, the doctor's testimony, and witness observations, and was therefore substantially true.

The dissent relied on Neely's own admission that he took all 15 of the drugs identified in the Order, including others; the Board's finding that Neely's three years of refills of some medications were not part of a legitimate treatment plan; and the Board's requirement that Neely undergo physical and psychiatric exams. Therefore, KEYE's broadcast did not present an inaccurate gist or distort the substantial truth, and thus, there was no need revisit *McIlvain*, whose holding the majority limited needlessly.

Family Law

Office of the Att'y Gen. of Tex. v. Scholer, 403 S.W.3d 859 (Tex. 2013)

Richard Scholer and his wife, Denise Wilbourn, had a child, C.E.S., in 1993. One year later, they divorced in California. The divorce decree awarded Wilbourn sole physical custody of C.E.S., gave Scholer visitation rights, and ordered him to pay $450 in monthly child support. In 2000, after the parties moved separately to Texas, Scholer complained that Wilbourn was interfering with his relationship with C.E.S., and threatened to sue for shared custody. He alternatively offered to sever his ties altogether if Wilbourn would agree that he no longer had to pay child support. Several weeks later, Wilbourn's lawyer sent Scholar a letter containing an affidavit to end his parental rights, which he signed and returned to the lawyer.

Because payment of child support reflects a parent's duty to his child, furthering the child's welfare and best interests, estoppel is not an affirmative defense to a child support enforcement action.

But neither the affidavit nor a termination proceeding was ever filed in court. Eventually, Scholar was contacted by the Texas Attorney General's Office ("OAG") in 2009 about his support arrearages, which totaled more than $81,000. At the trial court, Scholer denied that he owed the money, claiming

that Wilbourn, and thus the OAG, were estopped from pursuing child support payments because Wilbourn led him to believe that his parental rights had been terminated nine years earlier. The trial court rejected Scholer's estoppel defense and ordered him to pay more than $1,000 per month in current and back child support, and to provide health insurance for C.E.S. The Fort Worth Court of Appeals reversed, reasoning that because the OAG was enforcing the child support order on the mother's behalf as her assignee, it was subject to all affirmative defenses that could be asserted by one private party against another, including estoppel.

The Supreme Court reversed, holding that the estoppel defense is not available to defeat a proceeding to enforce child support. Family Code section 157.008, entitled "Affirmative Defense to Motion for Enforcement of Child Support," provides a single defense to such proceedings: that the obligee voluntarily relinquished possession and control of the child to the obligor and the obligor provided actual support to the child. Although an obligor may counterclaim or receive an offset for amounts actually paid, he has no other defenses to the claim, including estoppel. Moreover, the two similar cases on which Scholar relied that permitted the estoppel defense both predate the enactment of section 157.008 and therefore do not control the outcome. Ultimately, a child's welfare underlies child support enforcement suits, and providing monetary support is part of a parent's contribution to that welfare. As a result, the parents' actions, either collectively or alone, cannot affect the support duty, except as provided by statute. Because estoppel was not included as a defense to a child support enforcement action, Scholer's arguments failed. Therefore, the Supreme Court reversed the court of appeals' judgment and reinstated the trial court's judgment.

In re E.C.R., 402 S.W.3d 239 (Tex. 2013)

After M.R. was seen punching and dragging her four-year-old daughter, Y.C., down the street, a witness called the authorities. Y.C.'s face and body showed evidence of physical abuse. M.R. was arrested, charged, and jailed, and eventually pleaded guilty to bodily injury of a child.

After sending Y.C. to live with her father, the Department of Family and Protective Services ("Department") removed M.R.'s son, eight-month-old E.C.R., from the home under Family Code section 262.104. E.C.R. showed no signs of abuse, and appeared clean and healthy. Because his paternity was unknown, the Department filed a petition to be named temporary managing conservator of E.C.R. Evidence at the hearing showed that M.R. twice attempted suicide in jail, slept on the streets after her release, left E.C.R. with her abusive and unstable boyfriend, and returned to jail on another charge. She also abused an older son who was already in the permanent managing conservatorship of foster parents. After a full adversarial hearing, the trial court appointed the Department as temporary managing conservator of E.C.R. The court also ordered M.R. to comply with a family service plan setting out the steps she needed to take for E.C.R. to be returned to her. This she failed to do.

The "abuse or neglect of the child" sufficient to result in the termination of parental rights includes placing the child's physical health or safety at substantial risk, even if that child has not yet been abused or neglected.

Almost one year later, the trial court held a termination hearing. The Department argued that E.C.R. was removed because of the risk of physical abuse based on M.R.'s abuse of Y.C., as well as her failure to comply with several major components of the family service plan. The trial court terminated M.R.'s parental rights under subsection O of Family Code section 161.001(1), finding that the termination

was in E.C.R.'s best interest. M.R. appealed, asserting that termination under subsection O was improper because E.C.R. was removed due to the risk of abuse based on her conduct toward his sibling, but not for actual abuse or neglect. The First Court of Appeals agreed with M.R., holding that to terminate parental rights under section 161.001(1)(O), a trial court "must find that the child who is the subject of the suit was removed as a result of the abuse or neglect of that specific child."

The Supreme Court reversed and held that the Department proved grounds for termination as a matter of law. Subsection O authorizes termination if the court finds, by clear and convincing evidence, that a parent has "failed to comply with the provisions of a [family service plan] … to obtain the return of the child who has been in the … conservator-ship of the Department … for not less than nine months as a result of the child's removal … under Chapter 262 for the abuse or neglect of the child." Following *In re J.F.C.*, 96 S.W.3d 256, 277 (Tex. 2002), the Court agreed that subsection O requires proof of abuse or neglect, but disagreed that those terms could never be read to include risk. The standard used repeatedly throughout chapter 262 is "danger to the physical health or safety of the child" which is centered on risk, not just a history of actual abuse or neglect. The Court also held that sufficient evidence supported the trial court's finding that terminating M.R.'s parental rights was in E.C.R.'s best interest. The Court, therefore, reversed part of the court of appeals' judgment and remanded to that court for it to decide M.R.'s challenge of the factual sufficiency of the evidence supporting the best interest finding.

Forfeiture

***State v. $1,760 in U.S. Currency*, 406 S.W.3d 177 (Tex. June 28, 2013) (per curiam)**

In this civil forfeiture case, game room owner Sammy Barnes sought the return of 37 gaming machines, called "eight-liners," that were seized by the State of Texas as gambling devices. Penal Code section 47.01(4) defines a gambling device as "any electronic, electromechanical, or mechanical contrivance not excluded under Paragraph (B) that for a consideration affords the player an opportunity to obtain anything of value…." Section 47.01(4)(B) provides several exclusions, including "any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prizes, toys, or novelties…." At issue was the definition of "novelties," a term that was not defined in the statute.

A gaming device that awards tickets redeemable for future play on another day is considered a "gambling device" subject to forfeiture.

At the de novo forfeiture trial in the county court at law, Barnes testified that the eight-liners accepted cash, which the machine converted into points. When a player redeemed points from an eight-liner, it dispensed tickets based on the number of points earned during play. The tickets could then be redeemed for future play on the eight-liners. Finding that the eight-liners did not fall under the exclusion, the county court ordered them forfeited to the State. The Fort Worth Court of Appeals reversed, holding that the eight-liners fell within the exclusion because the non-immediate rights of replay could be considered "novelties" under the exclusion, which the court of appeals defined as a "new event."

The Supreme Court reversed. The critical inquiry was whether non-immediate rights of replay qualified as "noncash

merchandise prizes, toys, or novelties." Applying the same analysis it did in *Hardy v. State*, 102 S.W.3d 123 (Tex. 2003), the Court interpreted "novelties" as a term similar to the other terms of the exclusion—"noncash merchandise prizes [and] toys"—and held that the court of appeals' definition of "new event" was inconsistent with the meanings of these other terms. In *Hardy*, the Court held that eight-liners that awarded players tickets exchangeable for either gift certificates redeemable at local retailers or cash to play other machines did not fall within the exclusion. Here, the Court observed that although the tickets were not redeemable for cash, they still awarded additional play. Thus, while the method of awarding additional play differed from that in *Hardy*, the result was the same. The Court reversed the judgment of the court of appeals and reinstated the judgment of the county court at law.

Insurance

Lennar Corp. v. Markel Am. Ins. Co., No. 11-0394, 56 Tex. Sup. J. 893, 2013 WL 4492800 (Tex. August 23, 2013)

Lennar Corporation built homes using an exterior insulation and finish system ("EIFS"). When it learned through news media and other sources that the EIFS was seriously defective, Lennar undertook to remove the EIFS from the 800 or so homes with the product. It contacted its clients and settled with all but three homeowners. But Lennar's insurers refused to cooperate with this remediation program, preferring instead to wait until the homeowners sued. Thus, Lennar's claim was denied. Lennar then sued its carriers, and a lengthy litigation process ensued for the next 12 years. This case involves Lennar's claims against one last insurer, Markel American Insurance Company ("Markel"). During an earlier appeal, neither Lennar nor Markel sought review of the following appellate holding: that Markel's liability under the policy was not excused unless it could

prove, as a matter of fact, that it had been prejudiced by Lennar's settlements with homeowners.

At trial, the jury found that Lennar's defective use of EIFS in home construction "create[d] an imminent threat to the health or safety of the inhabitants of the homes," and that Lennar took "reasonable steps to cure the construction defect as soon as practicable and within a reasonable time." Lennar argued that these findings established its legal liability to the homeowners under the Residential Construction Liability Act ("RCLA"), which, in turn, triggered coverage under its policy with Markel. The jury failed to find that Markel w as prejudiced by Lennar's "failure to obtain Markel's consent (a) to enter into any compromise settlement agreement, or (b) to voluntarily make any payment, assume any obligation, or incur any expense." The trial court rendered judgment awarding Lennar roughly $2.5 million in damages, $2.4 million in attorney's fees, and $1.2 million in prejudgment interest. The Fourteenth Court of Appeals reversed and rendered judgment for Markel on two grounds: (1) Lennar did not establish its legal liability to the homeowners to trigger Markel's coverage because the RCLA did not make Lennar legally liable to the homeowners as it does not create a cause of action; and (2) Lennar failed to offer evidence of property damages covered by the policy, but instead only showed the cost of removing and replacing EIFS as a preventative measure.

Absent prejudice to the insurer, an insured's settlements with homeowners established its legal liability for property damages and the basis for determining the amount of the loss.

The Supreme Court reversed and reinstated the trial court's award. First, the Court held that Markel failed to prove it was prejudiced in any way by Lennar's settlements. Although Markel argued at trial that it was prejudiced, the jury held that Lennar's approach was reasonable and actually

avoided increased costs by acting sooner rather than later. Thus, the jury resolved the issue in Lennar's favor. The Court also rejected Markel's attempts to recast their burden of proof by arguing that it need not show prejudice under a separate clause in the policy. That clause, according to the Court, operated identically to the policy provision requiring a showing of prejudice. In so holding, the Court concluded that Lennar's loss as shown by the settlements was the amount Markel was obligated to pay under the policy.

Second, the Court held that Lennar's evidence of damages supported the jury's verdict. The cost evidence Lennar presented was for removing all the EIFS from damaged houses, repairing the damage, and recovering the houses with conventional stucco. This was appropriate evidence to prove damages because, even in homes without water damage, the EIFS still needed to be removed and replaced with non-defective material. The Court further held that Lennar did not need to prove the specific amount of damage to each house during the policy period because the Markel policy did not require that. Finally, based on its holding in *American Physicians Insurance Exchange v. Garcia*, 876 S.W.2d 842 (Tex. 1994), the Court rejected Markel's argument that it was responsible only for its pro rata share of the total remediation coverage. Thus, the Court reinstated the trial court's judgment.

Justice Boyd issued a concurring opinion to address the Court's precedent requiring a showing of prejudice. Absent that precedent, Justice Boyd would hold that Markel's insurance policy does not cover Lennar's liabilities because Lennar incurred those liabilities through settlements to which Markel did not consent. But if the Court is going to continue imposing the prejudice requirement, the Court should admit it is doing so on public policy grounds, rather than continue its well-intended but ultimately inadequate efforts to justify its holdings on the basis of contract principles.

Jurisdiction

***Moncrief Oil Int'l Inc. v. OAO Gazprom*, No. 11-0195, 2013 Tex. LEXIS 675, 56 Tex. Sup. J. 1023, 2013 WL 4608672 (Tex. Aug. 30, 2013)**

Moncrief Oil International, Inc. ("Moncrief") is a Texas-based company that entered into a series of contracts in 1997 and 1998 with two subsidiaries of a Russian company, OAO Gazprom ("Gazprom"), regarding development of a Russian gas field known as the Y-R Field. In 2003 to 2005, the entities began working on a proposal for Gazprom to enter the American downstream natural gas market in a joint vent ure that would include California-based Occidental Petroleum Corporation ("Occidental"). They had initial discussions in Moscow and Washington, D.C., during which Moncrief allegedly provided trade secrets to Gazprom. Later, the parties met in Houston, Boston, and Fort Worth, where Moncrief provided additional trade secrets. Then Gazprom representatives met just with Occidental Representatives in California, where Occidental pulled out of the venture after Gazprom refused to participate.

What a defendant thought, said, or intended is generally irrelevant to its jurisdictional contacts if those contacts are sufficient in their quality and nature to confer specific jurisdiction over that defendant.

Moncrief sued Gazprom and two subsidiaries (collectively, "Gazprom Defendants") for tortious interference, trade-secret misappropriation, conspiracy to tortiously interfere, and conspiracy to misappropriate trade secrets. The Gazprom Defendants specially appeared, asserting that their contacts with Texas were random, not purposeful, and that Moncrief unilaterally disclosed the trade secrets. The trial court granted the special appearances. The Fort Worth Court of Appeals affirmed, holding that sufficient evidence supported an implied finding that the location of the two Texas meetings was "merely random or fortuitous" as to

the trade secrets claims. As to the tortious interference claims, the court held that the record conclusively established if any tortious interference occurred, it took place in California. The appellate court also held that the trial court did not abuse its discretion in refusing to allow Moncrief additional depositions.

The Supreme Court reversed in part and affirmed in part. First, the Court held that the Gazprom Defendants' contacts with Texas were purposeful. Assessing the quality and nature of these contacts, as opposed to the quantity, the Court noted the Gazprom Defendants were not unilaterally haled into forming contacts with Texas; rather, they agreed to attend Texas meetings. They also accepted Moncrief's alleged trade secrets at those meetings. Additionally, their contacts were purposeful and substantial because their activity was aimed at getting extensive business in or from Texas. Therefore sufficient evidence supports minimum contacts in Texas as to the trade secrets claim. As for the fair play and substantial justice prong of the jurisdictional analysis, the Court held that, given the Gazprom Defendants' meetings in Texas and their increased familiarity with the forum and legal system through establishing a subsidiary headquartered here, the burden of litigating in Texas was not so severe as to defeat jurisdiction. Thus, the trial court had jurisdiction over the Gazprom Defendants as to the trade secrets claim.

The tortious interference claims, however, were another matter. The Court held that they did not arise from the Texas meetings or the receipt of trade secrets. Instead, the claim was principally concerned with the California meeting and the competing Texas enterprise, not the purported misappropriation of alleged trade secrets. Moreover, the Court rejected Moncrief's allegation that establishing a competing Gazprom enterprise in Texas supported specific jurisdiction. Because the court of appeals rejected Moncrief's alter ego theory regarding the relationship between the

enterprise and the Gazprom Defendants, the enterprise could not be imputed to the Defendants.

Finally, the Court rejected Moncrief's request for further depositions because it did not demonstrate what additional jurisdictional facts the depositions would provide. Thus, the trial court did not abuse its discretion in denying this request. Ultimately, the Supreme Court reversed the judgment of the court of appeals in part, affirmed in part, and remanded to the trial court for further proceedings.

***Masterson v. Diocese of Nw. Tex.*, No. 11-0332, 2013 Tex. LEXIS 676, 56 Tex. Sup. J. 1048, 2013 WL 4608632 (Tex. Aug. 30, 2013)**

The Episcopal Church of the Good Shepherd ("Good Shepherd"), a Texas non-profit corporation created as a church, was formed in 1965 and approved by the Episcopal Church of the United States ("TEC") and the Episcopal Diocese of Northwest Texas ("Diocese"). The original and later-acquired tracts of land for the church were conveyed to Good Shepherd's non-profit corporation. In 2006, Good Shepherd's congregation suffered a schism based on church doctrine. The parish called a meeting to vote on resolutions that, among other things, would amend the corporate bylaws, break from the TEC and Diocese, and establish a new, independent church called the Anglican Church of the Good Shepherd ("Anglican Church"). After this vote, the Diocese Bishop, Rev. Ohl, took the position that Good Shepherd could not unilaterally break off from the Diocese. He organized a meeting of church members loyal to the TEC and Diocese, where a new priest-in-charge was appointed and a new vestry elected. Bishop Ohl also recognized the new vestry as the "continuing Episcopal Parish operating Good Shepherd." When the Anglican

In disputes involving church entities, courts should apply the neutral-principles approach to resolve non-ecclesiastical issues over which it has jurisdiction.

Church continued to use the parish property, two members of the Good Shepherd, its new priest, and the Diocese (collectively "Episcopal Leaders") sought a declaratory judgment to foreclose use of church property by the Anglican Church and give possession and control of the property to the Episcopal Leaders. Leaders of the Anglican Church answered and filed a counterclaim to quiet title of the property to them.

The Episcopal Leaders moved for summary judgment, asserting in part that (1) the TEC was a hierarchical church; and (2) when congregations of hierarchical churches split, Texas courts deferred to the decisions of the church's superior hierarchical authority as to which faction comprised the true church. Although they did not plead that they were entitled to the property based on neutral principles of law, they argued in their reply to the Anglican Leaders' response that they were entitled to the property under both deference and neutral principles analyses. The trial court granted summary judgment for the Episcopal Leaders. The Austin Court of Appeals affirmed.

The Supreme Court reversed. As an initial matter, the Court determined that the legal methodology to be applied to this dispute was the neutral principles methodology because it conformed better to the courts' duty to decide disputes within their jurisdiction while still respecting constitutional limits on that jurisdiction. Under the neutral principles methodology, courts decide non-ecclesiastical issues (like property ownership) based on the same neutral principles of law applicable to other entities. Applying these principles to the substantive issues, the Court agreed with the court of appeals that the record conclusively showed TEC was a hierarchical organization. But the Court disagreed that the trial court had jurisdiction to determine the fundamental issues of the case, including whether Bishop Ohl was authorized to form a parish and recognize its membership, whether he could or did authorize that parish to establish a vestry, and whether he

could or did properly recognize members of the vestry. To the Court, these were ecclesiastical matters of church governance over which the trial court lacked jurisdiction. Moreover, the Episcopal Leaders' motion did not plead or argue that they were entitled to the property on the basis of neutral principles. Thus, summary judgment was improper. On remand, the trial court should follow certain guidelines when determining its jurisdiction. As to corporate control, absent specific, lawful provisions to the contrary in the articles of incorporation or bylaws, whether and how a corporation's directors or those entitled to control its affairs can change its articles of incorporation and bylaws are secular, not ecclesiastical, matters. As for control of property, although there would be ecclesiastical issues outside the court's purview, the court could review the property deeds. Indeed, under neutral principles of law, the deeds conveying the property to the corporation expressed no trust or limitation upon the title and the corporation owned the property. Thus, the Supreme Court reversed the judgment of the court of appeals, and remanded the case to the trial court for further proceedings consistent with this opinion.

Justice Boyd, joined by Justice Willett, issued a concurring opinion, essentially agreeing with the Court's holding, but asserting that the Court should have afforded the parties an opportunity to fully develop their pleadings and the record under the neutral-principles approach before deciding the fact-intensive issues it addressed.

Justice Lehrmann, joined by Chief Justice Jefferson, dissented, arguing that the majority misapplied the neutral-principles approach. In deciding that the secular law governing corporations controls the outcome here, the Court placed undue emphasis on the local church's incorporated status. Although a corporation has authority to amend its bylaws and articles of incorporation, it cannot do so when this circumvents an ecclesiastical decision made by a higher

authority within a hierarchical church structure. Because the decision about whether a subordinate church entity can withdraw necessarily involved a matter of church polity—which is clearly an ecclesiastical issue—the Court had no jurisdiction.

***Episcopal Diocese of Ft. Worth v. Episcopal Church*, No. 11-0265, 2013 Tex. LEXIS 694, 56 Tex. Sup. J. 1034, 2013 WL 4608728 (Tex. Aug. 30, 2013)**

In this case involving a direct appeal, the facts raised the same ownership question addressed in *Masterson v. Diocese of Northwest Texas*. Here, a doctrinal controversy arose within the Episcopal Church ("TEC"), leading the Fort Worth Corporation of the Episcopal Diocese of Fort Worth ("Diocese") to amend its bylaws and articles of incorporation to formally withdraw from the TEC and join the Anglican Province of the Southern Cone. The Fort Worth Corporation transferred the property used by the withdrawing parties to three parishes who did not agree with these actions and withdrew from the Diocese. Eventually, a dispute arose over the property. TEC, the Diocese Bishop Rev. Ohl, and the clergy and lay people loyal to TEC (collectively "TEC") filed suit against the Diocese, the Fort Worth Corporation, and others seeking title to and possession of the property held in the name of the Diocese and the Fort Worth Corporation. Both TEC and the Diocese moved for summary judgment. As a fundamental issue, the parties disagreed as to whether the "deference" (also known as the "identity") or "neutral principles of law" methodology applied to the property issue. The trial court agreed with TEC that deference principles should apply, applied them, and granted summary judgment

Following *Masterson*, courts should apply the "neutral principles of law" methodology, rather than the "deference" methodology to resolve church property disputes.

for TEC. The Diocese filed a direct appeal to the Supreme Court.

The Supreme Court reversed. As a fundamental matter, the Court first held that it had jurisdiction to hear this direct appeal because the trial court's order raised the issue of whether the Non-Profit Corporation Act would violate the First Amendment if it were applied in this case. Thus, the Court had jurisdiction under Government Code section 22.001(c). Next, the Court addressed the application of the "deference" and "neutral principles" methodologies to resolve property issues when religious organizations split. Relying on its holding in *Masterson*, the Court held that the trial court erred by granting summary judgment to TEC on the basis of deference principles. Rather, the neutral principles methodology should be applied. Because fact questions exist under neutral principles of law about who holds title to each property and in what capacity, the Court could not render judgment on the current record. Finally, the Court could not determine the constitutionality of the neutral principles because they were not applied. Thus, the Court remanded the case to the trial court for further proceedings.

Justice Willett, joined by Justices Lehrmann, Boyd, and Devine, filed a dissenting opinion, arguing that the Court lacked jurisdiction over this direct appeal. The Court's direct-appeal jurisdiction is "rare," "restricted," and "very limited." Because the trial court's order nowhere mentions any constitution or statute, much less the constitutionality of a statute, these justices would have dismissed the appeal for want of jurisdiction.

Univ. of Houston v. Barth, 403 S.W.3d 851 (Tex. 2013) (per curiam)

Stephen Barth is a tenured professor at the University of Houston ("UH"). In 1999, he reported various incidents of malfeasance against his college's dean, Alan Stutts, to UH's chief financial officer ("CFO"), general counsel, internal auditor, and an associate dean. Barth later suffered several professional setbacks: he received a "marginal" rating from Stutts in one area of his annual evaluation (which affected his merit raise), he was denied travel funds, and his annual symposium was cancelled. Barth filed two grievances against Stutts, but they were left unresolved. In 2001, UH's CFO asked UH's internal auditor to investigate Stutts on alleged violations of civil and criminal law, as well as UH's administrative policies known as the System Administrative Memorandum ("SAM"). The investigation found no criminal wrongdoing, but determined that Stutts violated the SAM. After UH issued the report, Barth sued for retaliation, claiming liability under the Whistleblower Act ("Act") based on his reporting of alleged violations of (1) the Texas Penal Code, (2) the SAM, and (3) civil statutes on government contracting. At trial, the jury awarded Barth $40,000 in actual damages and $245,000 in attorney's fees. On the case's first appeal, the Supreme Court held that jurisdiction could not be waived under the Act, and remanded the case to the court of appeals to determine that issue. 313 S.W.3d 817 (Tex. 2010). On remand, the First Court of Appeals affirmed, holding the trial court had subject-matter jurisdiction because Stutts's violation of the SAM's internal policies was sufficient to establish jurisdiction under the Act.

In the Whistleblower Act, the phrase "a rule adopted under a statute or ordinance" encompasses policies that are enacted by a governing body under an enabling statute or other state law, but not policies merely created by the governing body to conduct its business.

The Supreme Court reversed. First, the Court held there was no evidence that the University's Board of Regents enacted the SAM's administrative rules pursuant to authority granted to it in the Texas Education Code. Although the enabling statute under the Education Code gave UH's Board of Regents the authority to "enact bylaws, rules, and regulations", there was no evidence that the Board actually passed or enacted them. Moreover, merely "adopting" them is insufficient. In addition, the Court held that there was no good faith reporting to an appropriate law enforcement authority because none of the people to whom Barth reported his allegations could have investigated or prosecuted criminal law violations outside of UH. Because UH's immunity from suit was not waived under the Act, the trial court lacked subject-matter jurisdiction over Barth's cause of action. The Supreme Court reversed the court of appeals' judgment and dismissed Barth's suit.

***Canutillo Indep. Sch. Dist. v. Farran*, No. 12-0601, 2013 Tex. LEXIS 690, 56 Tex. Sup. J. 1174, 2013 WL 4609203 (Tex. Aug. 30, 2013) (per curiam)**

Yusuf Farran sued his former employer, the Canutillo Independent School District ("District") for violation of the Texas Whistleblower Act ("Act") and for breach of contract. Farran made several complaints to the District superintendent, assistant superintendent, internal auditor, and school board of the District regarding employee theft, falsification of time cards, and overpayment of a specific contractor in charge of disposing of grease-trap waste. As to this latter claim, Farran claimed that the contractor violated state laws in its disposal practices. Despite a warning to stop his complaints, Farran persisted. Eventually, Farran was suspended after making threatening telephone calls to a man he suspected of having an inappropriate relationship with his wife. While on suspension, Farran continued to make complaints about the disposal issue, this time to the FBI.

Ultimately, after a due process hearing, the District fired Farran.

The trial court granted the District's plea to the jurisdiction, but the El Paso Court of Appeals reversed in part, holding that the trial court erred in granting the plea as it related to Farran's whistleblower claim that he was fired for reporting financial improprieties that violated of the Texas Education Code and Texas Constitution. But the appellate court agreed that Farran's other claims should be dismissed.

Success on a whistleblower claim depends on a supervisor's power to regulate or enforce the law, not just ensure internal compliance with the law.

The Supreme Court reversed, holding that the trial court properly dismissed Farrar's whistleblower claim. Following its decisions in *University of Houston v. Barth*, ___ S.W.3d ___, 2013 Tex. LEXIS 472, *14 (Tex. 2013), and *University of Texas Southwestern Medical Center v. Gentilello*, 398 S.W.3d 680, 686 (Tex. 2013), the Court held that the Act's restrictive definition of "appropriate law enforcement authority" requires that the reported-to entity be charged with more than mere internal adherence to the law allegedly violated. In other words, the language centers on law enforcement, not law compliance. Farran's reports to the District superintendent, assistant superintendent, internal auditor, and school board of the District were not in good faith under the Act because they had no authority to "regulate under or enforce the law alleged to be violated" or to "investigate or prosecute a violation of criminal law."

In addition, the Supreme Court affirmed the appellate court's holding that Farran's report to the FBI was not a proper basis for his Whistleblower claim. Because he made the report *after* he was suspended and *after* the Board gave notice of its intent to terminate him, his FBI report could not have caused his termination. In addition, the Court agreed

that Farran's breach of contract claim was correctly dismissed because he failed to exhaust his administrative remedies with the District. Thus, the Supreme Court reversed the court of appeals' judgment in part, affirmed in part, and dismissed the case.

***City of Houston v. Bates*, 406 S.W.3d 539 (Tex. June 28, 2013)**

Roger Bates, Michael Spratt, and Douglas Springer retired after long careers with the Fire Department with the City of Houston ("City"). Upon retirement, the City paid the retired fire fighters termination pay pursuant to sections 143.115 and 143.116 of the Local Government Code. The retired fire fighters sued the City, seeking reimbursement for (1) overtime pay that the City docked from their termination pay (the "debit dock" claim), and (2) additional termination pay based on the City's exclusion of premium pay from the calculation of their salaries for purposes of paying out the termination pay. In their debit dock claim, the firefighters alleged that they were owed for days that they were on authorized leave, which was overtime moneys that should have been included as part of their termination pay because it exceeded the number of hours they were required to work per week. As for the termination pay claim, the firefighters alleged that a City ordinance excluding reimbursement for unused and accrued sick leave and vacation pay was preempted by the state law, specifically Local Government Code sections 143.115 and 143.116. The trial court found in favor of the retired fire fighters on both claims, awarding two of the retired fire fighters reimbursement for overtime pay and all of the retired fire fighters additional termination pay for accrued and

The statutory scheme under Local Government Code sections 143.115 and 143.116, which set forth the payment of accumulated benefit leave upon retirement, preempts city ordinances that limit the valuation of accumulated benefit leave to base salary and longevity pay only.

unused sick and vacation leave. The Fourteenth Court of Appeals affirmed.

The Supreme Court affirmed in part, and reversed and rendered in part. As to the debit dock claim, the Court reversed and rendered, holding that the firefighters were not entitled to reimbursement. The claim is governed by Local Government Code section 142.0017(e)(2), specifically, the Court's interpretation of the meaning of "any other authorized leave." Based on the surrounding statutory scheme, the Court concluded that this language encompassed only other forms of paid leave. Because the debit dock claim was based on unpaid leave, the City was not required to reimburse the firefighters for this time. Thus, the court of appeals erred when it affirmed the trial court's judgment on this claim.

As to the termination pay claim, the Supreme Court affirmed, holding that the Local Government Code's statutory scheme regarding the payment of accumulated benefit leave upon retirement preempted the City's ordinances that limited the valuation of accumulated benefit leave to base salary and longevity pay only. In Local Government Code sections 143.115 and 143.116, the Legislature clearly intended "salary" to encompass all components of compensation that a firefighter receives regularly, which necessarily includes premium pay. The provisions of the City's ordinances that exclude forms of premium pay from the definition of "salary" for purposes of termination pay irreconcilably conflict with sections 143.115 and 143.116. Thus, the ordinances are preempted.

Justice Hecht, joined by Justice Lehrmann, issued a concurring and dissenting opinion. They agreed with the Court's resolution of the firefighters' debit dock claim but not the termination pay claim. Although everyone agreed that firefighters' base pay was separate from premium pay, the issue was whether both are included in the "salary" on which

termination pay is calculated. The predecessor provisions on which sections 143.115 and 143.116 are based distinguished a firefighters "salary" and "base salary" from his premium pay. Because nothing material has changed in the provisions since they were enacted, premium pay should have continued to be distinguished from "salary" for purposes of calculating termination pay.

In addition, Justice Guzman, joined by Justice Boyd, issued a concurring and dissenting opinion. They agreed with the Court's holding on the termination pay claim, but not the debit dock claim. These justices asserted that the plain meaning of leave is an authorized absence and does not exclude unpaid leave—which should end the Court's inquiry. But because the Court applied the statutory-interpretation canon of *ejusdem generis*, it created an ambiguity and ignored legislative intent. Authorized leave means what it says, which necessarily includes unpaid leave. Because the City refused to pay the firefighters at overtime rates for leave it approved but did not pay for, Justices Guzman and Boyd would affirm the judgment of the court of appeals on the debit dock claim.

Legal Malpractice

Elizondo v. Krist, No. 11-0438, 2013 Tex. LEXIS 677, 56 Tex. Sup. J. 1074, 2013 WL 4608558 (Tex. Aug. 30, 2013)

Jose Elizondo was working at the BP Amoco Chemical Company ("BP") facility in Texas City when an explosion occurred. He received medical treatment for neck and back injuries and psychological problems he claimed were from the blast. He and his wife hired attorney William Wells, who later associated Ronald Krist, Kevin Krist, and the Krist Law Firm as additional counsel. They sued BP and later demanded $2 million. In response, BP offered $50,000 to settle all the claims. After discussing the offer with his attorneys, Elizondo agreed to settle and signed BP's form release. His wife did not sign the release because she could neither speak nor read

English. A year and a half later, after learning that one of his lawyers went to work for BP, Elizondo and his wife sued Wells, Ronald Krist, Kevin Krist, and the Krist Law Firm (collectively "Krist") for legal malpractice, asserting a variety of claims that included the failure to obtain an adequate settlement on their behalf. Krist filed several summary judgment motions, the most critical of which asserted no evidence of damages. In response, Elizondo provided an eight-page affidavit by his expert, attorney Arturo Gonzalez, who opined that (1) Krist failed to exercise due diligence while representing the Elizondos, (2) BP's offer to the Elizondos was basically nuisance value, and (3) if Krist had worked up the case longer, they would have gotten more than $50,000. The trial court granted some of the summary-judgment motions, including the motions on damages. The divided Fourteenth Court of Appeals affirmed, holding that the Elizondos did not present more than a scintilla of competent evidence of damages.

In a legal malpractice case based on an insufficient settlement, an expert's affidavit that declares the case's value absent malpractice must also detail the relevant factors in determining that value and explain the expert's application of those factors in calculating the case's value.

The Supreme Court affirmed. Using *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999), as a guide, the Court held that Gonzalez's affidavit was conclusory and therefore failed to raise a genuine issue of material fact sufficient to defeat summary judgment. Some things about the affidavit were good: Gonzalez's credentials were sufficient, it explained in some detail the factors or criteria that should inform a determination of the value of the case, and it confirmed that Gonzalez considered the facts relevant to the case. But the affidavit did not offer specifics on why the value of the case was $2-3 million as opposed to the $50,000 received in settlement. Gonzalez did not undertake to

compare the Elizondo settlement with other actual settlements obtained in the BP litigation. He also offered no analysis on how the various valuation factors applied to the Elizondos' case. Thus, a fatal analytical gap divided Gonzalez's recitation of the facts of the Elizondo case and his declaration of its apparent settlement value. In so holding, the Court also rejected Krist's argument that because a legal-malpractice case is a "suit within a suit," proof of malpractice damages required evidence of what the plaintiff would have recovered by way of a judgment after trial. The Court held that legal malpractice damages are measured by the difference between the result obtained for the client and the result that would have been obtained with competent counsel, regardless of whether the case was tried to a final judgment.

In addition, the Court held that discovery disputes in the trial court did not warrant denial of the summary judgment motions. The Court found that none of the discovery disputes indicated the Elizondos needed discovery on the dollar amount of other settlements in similar cases so their expert could make a valid, non-conclusory determination of the adequacy of their settlement, or that the summary judgment motions should be continued until this discovery was provided. Finally, the Court held that Elizondos' testimony of actual damages did not raise a material issue of fact because expert testimony is required, given the complexity of factors involved in determining malpractice damages.

Justice Boyd, joined by Justice Lehrmann, dissented and argued that the Majority imposed too strict a standard at this summary-judgment stage. To avoid summary judgment, Gonzalez did not have to establish that the case was worth $2-3 million as opposed to $50,000; he only had to establish that the case was worth more than $50,000. Because Gonzalez provided specifics on why $50,000 reflected the value of a case that had "basically" no merit, and specifics on why the

Elizondos' case had merit, the dissent would hold that the Elizondos created a fact issue on the existence of malpractice damages.

Medical Liability Act

PM Management-Trinity NC, LLC v. Kumets, 404 S.W.3d 550 (Tex. 2013) (per curiam)

After their loved one, Yevgeniya Kumets, was discharged from the Trinity Care Center ("Trinity"), the Kumets family sued Trinity, alleging her discharge was in retaliation for their complaints about the care she was receiving. The Kumets asserted a variety of health care claims, as well as a retaliation claim under Health and Safety Code section 260A.015 and a fraudulent billing claim. After the Kumets filed their expert report, Trinity argued that it was deficient, to which the trial court agreed and granted a 30-day extension. The court later found the amended report deficient and dismissed the case except for the retaliation claim. Trinity appealed, arguing that the retaliation claim was a health care liability claim ("HCLC"). The Kumets cross-appealed, asserting that the court erred in dismissing their fraudulent billing claim, which they argued was not a HCLC. A divided Austin Court of Appeals affirmed.

When a plaintiff asserts a claim that is based on the same underlying facts as his health care liability claim, both claims are health care liability claims and must be dismissed if the plaintiff fails to produce a sufficient expert report.

The Supreme Court reversed the court of appeals' judgment as to the retaliation claim. Following its decision in *Yamada v. Friend*, 335 S.W.3d 192, 196-97 (Tex. 2010), the Court held that claims based on the same facts as HCLCs are themselves HCLCs and must be dismissed absent a sufficient expert report. Here, the Kumetses' breach of fiduciary duty claim—whose dismissal they did not appeal—was based on certain facts on which they also based their fraudulent billing claim. Because

these two claims were based on the same facts, the fraudulent billing claim was also a HCLC. And because their retaliation claim was based on the same underlying facts, the trial court should have dismissed that claim as an HCLC as well. Therefore, the Court reversed the court of appeals' judgment respecting the retaliation claim, affirmed the remainder of the court of appeals' judgment, and remanded the case to the trial court with orders to dismiss the case and award appropriate attorney's fees and costs of court to Trinity.

CHCA Woman's Hosp., L.P. v. Lidji, 403 S.W.3d 228 (Tex. 2013)

Scott and Angela Lidji, on behalf of their daughter, R.L., sued CHCA Woman's Hospital, L.P. ("CHCA") for injuries sustained by R.L. following her premature birth. The Lidjis filed a health care liability claim against CHCA on April 2, 2009 (the First Suit). On July 27, 2009, 116 days after filing their original petition, they nonsuited their claim, but refiled the lawsuit on August 15, 2011, this time against CHCA and several other health care providers (the Second Suit). The same day they filed the Second Suit, the Lidjis served an expert report on CHCA. CHCA filed a motion to dismiss the suit, arguing the expert report was untimely. The trial court denied the motion, and the First Court of Appeals affirmed.

A claimant's nonsuit of a health care liability claim before the expiration of the 120-day period tolls the expert-report period until suit is refiled.

The Supreme Court also affirmed. The Medical Liability Act ("MLA") neither expressly allows nor expressly prohibits tolling of the expert-report period in the event of a claimant's nonsuit. But prohibiting the tolling of the period would interfere with a claimant's absolute right to nonsuit his claim. Moreover, tolling the expert-report period was consistent with the statute's overall structure, confirming the legislative intent that a claimant provide the expert report within the context of pending litigation. Construing the MLA

to require service of an expert report in the absence of a pending lawsuit would create procedural complications neither envisioned nor addressed in the statute.

***Psychiatric Solutions, Inc. v. Palit*, No. 12-0388, 2013 Tex. LEXIS 598, 56 Tex. Sup. J. 946, 2013 WL 4493118 (Tex. Aug. 23, 2013)**

Kenneth Palit, a psychiatric nurse at Mission Vista Behavioral Health Center ("Mission Vista"), was injured at work while physically restraining a patient during a behavioral emergency. Palit sued Mission Vista for negligence, seeking damages for personal injury. Over 120 days later, Mission Vista moved to dismiss Palit's suit, claiming the suit alleged a health care liability claim ("HCLC") and should be dismissed because Palit failed to serve an expert report as required by section 74.351 of the Medical Liability Act ("MLA"). The trial court denied the motion to dismiss, and the San Antonio Court of Appeals affirmed.

An employee's claim that the employer provided improper security of a psychiatric patient and inadequate safety for the employee is a health care liability claim under the Medical Liability Act.

The Supreme Court reversed, holding that Palit's claim alleging his employer provided improper security of a psychiatric patient and inadequate safety for him was an HCLC under the MLA. In its decision in *Texas West Oaks Hospital, LP v. Williams*, 371 S.W.3d 171, 179 (Tex. 2012), the Court held that a mental health professional employee's claims against his employer, a mental health hospital, based on inadequate security and training were HCLCs based on the 2003 amendments to the MLA. Those amendments broadened the scope of a HCLC to claims asserted by "claimants," not just "patients". Palit, a claimant, alleged he was injured "as a result of improper security of a dangerous psychiatric patient" because Mission Vista "failed to provide a safe working environment and failed to make

sufficient precautions for [his] safety." In *West Oaks*, the Court held that these allegations fell under both the safety and health care components of an HCLC, indicating both an alleged departure from the accepted standards of safety and that Palit's health care provider employer violated the standard of health care owed to its psychiatric patients. As such, expert health care testimony was needed to support or refute these claims. Because he failed to timely serve an expert report, Palit's claim should be dismissed. The Court, therefore, reversed the court of appeals' judgment and remanded the case to the trial court to dismiss Palit's claim and consider Mission Vista's request for attorney's fees and costs.

Justice Boyd, joined by Justice Lehrmann, concurred with the Court decision, but wrote separately to address the majority's broad construction of the "safety standards" component of the MLA's definition of a "health care liability claim." In contrast to the majority's definition, Justices Boyd and Lehrmann assert that the Legislature intended the phrase "directly related to health care" to modify the terms "safety" and "professional or administrative services." Therefore, claims asserting a departure from accepted safety standards are health care liability claims *only* if the safety standards are "directly related to health care." Although this reading of the statutes would not change the outcome here, these Justices anticipate future cases where this disagreement may come into play.

Zanchi v. Lane, 408 S.W.3d 373 (Tex. 2013)

Juameka Ross died after undergoing surgery at a Paris, Texas hospital. On April 21, 2010, Reginald Lane, individually and as Ross's estate representative, sued anesthesiologist Michael A. Zanchi, M.D. and others, alleging negligence under the Medical Liability Act ("MLA"). Lane had problems serving Zanchi with the lawsuit, and as a result did not serve him until September 16th. But Lane served the

required expert report on Zanchi by certified mail on August 19th, within the time set forth in the MLA.

In response, Zanchi filed a motion to dismiss the lawsuit, arguing that he was not a "party" under the MLA and, therefore, service of the expert report—before he was served with the lawsuit—was improper. Zanchi also argued that even if he was a "party" under the Act, service of the report by certified mail was ineffectual because it did not comply with Rule of Civil Procedure 106. Zanchi did not file objections to the substance of Lane's expert report. The trial court denied Zanchi's motion to dismiss. The Texarkana Court of Appeals, with one justice concurring and one justice dissenting, affirmed, holding that "one is a 'party' if so named in a pleading, whether or not yet served [with process]."

A claimant asserting a health care liability claim may serve his expert report via certified mail on a defendant who has not yet been served with process.

The Supreme Court affirmed, holding that Zanchi was a "party" under the MLA even though he had not been served with the lawsuit. Although the MLA does not define "party," the Supreme Court previously stated that "because [a health care provider] was named in the original petition as a party to this suit, the [claimants] were required to serve it with a report before the statutory period expired," indicating that one becomes a "party" when named in the lawsuit. *Gardner v. U.S. Imaging, Inc.*, 274 S.W.3d 669, 671 (Tex. 2008). Moreover, in the context of the MLA, this construction makes sense given that the statutory period to serve an expert report runs from the date of filing the suit, not the date on which citation is served. In conjunction with this definition of "party," the Court further held that Zanchi's twenty-one-day period for objecting to the report did not begin to run until he was served with the lawsuit. "Because the statute does not appear to contemplate the exact factual scenario presented here, . . . the construction we adopt here

best fits the common usage of the term 'party,' does the least damage to the statutory language, and best comports with the statute's purpose." Finally, regarding the proper means of serving the expert report, the Court held that Rule 106 did not apply because by its express language, it applied solely to service of citation. Thus, Lane's service of the report by certified mail was sufficient.

Justice Hecht filed a concurring opinion, asserting that resolution of the issue cannot turn on the meaning of "party" in the abstract because that term has many meanings depending on the circumstances and context of its use. Nothing supports the Court's conclusion that "construing 'party' to mean someone named in a lawsuit better comport[s] with the common usage of the term", a conclusion that was rejected by five courts of appeals. Instead, the term must be interpreted to include a person named but not served, not because that meaning is better in some abstract sense, but because that interpretation is the one that avoids defeating the very statute the Court is construing.

New Trials

In re Toyota Motor Sales U.S.A. Inc., 407 S.W.3d 746 (Tex. 2013) (orig. proceeding)

Richard King died after being ejected from his Toyota 4Runner, which rolled over several times after he swerved to avoid a truck and lost control. King's family sued Toyota, alleging that the vehicle's defective seat belt system caused his ejection from the car and his subsequent death. The family asserted that King was wearing his seat belt, but State Trooper Justin Coon testified in his deposition that King was not wearing his seat belt because it was stowed in its straight-up position when Coon arrived at the accident scene to conduct his investigation. The trial judge granted the Kings' motion precluding any opinion that King was not wearing his seat belt. But at trial, the Kings' own attorney introduced Coon's

deposition statement suggesting that King was not wearing his seat belt. After that, Toyota's counsel conducted the direct examinations of two experts, each of whom referenced Coon's statement introduced by the Kings' attorney. In response to these references, the Kings' attorney objected to only one. And although Toyota's attorney was warned by the judge not to refer to Coon's statement in his closing argument, but did, the Kings' attorney never moved to strike the reference or any of the previous references to Coon's statement, nor did he ever request a limiting instruction.

An appellate court may conduct a merits review of the bases for a new trial order after a trial court has set aside a jury verdict; if the record does not support the trial court's rationale for ordering a new trial, the appellate court may grant mandamus relief.

The jury returned a verdict for Toyota, and the Kings filed a motion for new trial, arguing that Toyota violated the court's limine order in reading Coon's statement in closing arguments. The trial court granted the motion for new trial (1) because Toyota violated the limine order and "purported to present evidence outside the record," thus warranting a new trial "in the interest of justice"; and (2) to sanction Toyota for violating the limine order, because a limiting instruction could not eliminate the harm. Toyota sought a writ of mandamus from the El Paso Court of Appeals, which denied relief, holding that a merits review of the grounds specified in the order was not required.

The Supreme Court granted mandamus relief to Toyota. Citing its decision in *In re Columbia Medical Center of Las Colinas*, 290 S.W.3d 204 (Tex. 2009), the Court held that because a trial court's discretion to grant a new trial was "not limitless," an appellate court may conduct merits-based mandamus review of a trial court's articulated reasons for granting new trial. The Court also cited *In re United Scaffolding, Inc.*, 377 S.W.3d 685 (Tex. 2012), which addresses

the quality of the reasons set out by the trial court in a new trial order and required the reasons to be "legally appropriate" and "specific enough" to address the particular concerns necessitating a new trial. The Court viewed the issue raised by Toyota to be the next case in the progression begun by *Columbia* and *United Scaffolding*. Here, the trial court abused its discretion because the court's reasons for the order were not supported by the record. Although on its face, the order complies with *Columbia*'s form requirements and *United Scaffolding*'s demand for legally appropriate and specific reasons, the record squarely conflicts with the trial judge's expressed reasons for granting new trial. Simply articulating understandable, reasonably specific, and legally appropriate reasons is not enough; the reasons must be valid and correct.

The trial court initially granted the Kings' motion in limine to preclude Coon's statement about King's seat belt usage, but a limine order alone does not preserve error. Moreover, where, as here, the party that requested the limine order itself introduces the evidence into the record, and then fails to immediately object, ask for a curative or limiting instruction or, alternatively, move for mistrial, the party waives any subsequent alleged error on the point. Because the Kings waived this error, it could not be the basis of a new trial. And once the evidence was in the record—without objection or a request that it be stricken or that the jury be instructed to disregard—it was in for all purposes and a proper subject of Toyota's closing argument. Thus, the trial court abused its discretion in sanctioning Toyota for that conduct. The Court conditionally granted relief and ordered the trial court to withdraw its order and render judgment on the verdict.

Justice Lehrmann, joined by Justice Devine, issued a concurring opinion. They observed that determining whether the order granting a new trial was an abuse of discretion was "relatively straightforward." But while review of a cold

record appeared to be exactly what was needed in this case to evaluate the substantive merit of the new-trial order, that limitation frequently places appellate courts at a disadvantage in evaluating whether there is good cause to grant a new trial. Often, the trial court's presence and observations throughout the trial are indispensable in evaluating whether the requisite good cause exists to justify setting aside a jury verdict and granting a new trial. Recognizing the need to defer to trial courts with respect to such determinations is crucial to ensuring that parties receive a fair trial.

Oil & Gas

Merriman v. XTO Energy Inc., 407 S.W.3d 244 (Tex. 2013)

Homer Merriman owns the surface estate of 40 acres in Limestone County, and leases other tracts for his cattle operation. Once yearly, he uses the 40-acre tract to sort and work the cattle. The tract's severed mineral estate was leased by XTO Energy Inc. XTO contacted Merriman about locating a gas well on the tract, but Merriman opposed it. XTO forged ahead anyway, and eventually built the gas well. Merriman filed suit for a permanent injunction requiring removal of the well. Both parties filed summary judgment motions. Merriman motion argued that that XTO failed to accommodate his existing use of the surface for the annual sorting and working part of his cattle operation so XTO's acts exceeded its rights in the mineral estate and constituted a trespass. XTO's hybrid summary judgment motion argued, in pertinent part, that Merriman could not produce evidence that XTO failed to accommodate his use of the surface, thus there was no evidence of the "wrongful act" Merriman alleged would support injunctive relief. The trial court granted XTO's motion. The Waco Court of Appeals affirmed, holding that (1) under the accommodation doctrine, the surface owner must show that any alternative uses of the surface, other than the existing use, are impractical and

unreasonable under all of the circumstances; and (2) the availability to Merriman of several tracts of land he leased was relevant when determining whether he presented evidence that he did not have reasonable, alternative methods of conducting his cattle operation.

The Supreme Court affirmed, but its analysis differed from that of the court of appeals. In contrast to the appellate court's judgment, the Supreme Court held that Merriman's burden did not include a showing that he could not alternatively conduct his cattle operations on the tracts he leased. To do so would alter the balance between the rights of the mineral holder and the surface estate holder: it would reduce the mineral owner's obligation to accommodate existing uses of the surface because of the fortuity that the surface owner had separate holdings. Thus, the court of appeals improperly considered the land leased by Merriman in determining whether he produced evidence that he had no reasonable alternatives to continue his cattle operation.

To permanently enjoin a mineral estate holder's use of property, the surface owner must show that he has no reasonable alternative method to maintain the existing use of that property; evidence that the mineral lessee's operations result in inconvenience and some unquantified amount of additional expense to the surface owner is not enough.

The Supreme Court further held that when balancing the rights of both parties, the analysis should not address the reasonable alternative to *any* type of "agricultural" use of the tract. Rather, this inquiry should focus on Merriman's use of the tract for his cattle operation and its essential parts, including the roundup, sorting, working, and loading of the cattle. Merriman's evidence on this element showed only that XTO's well precluded or substantially impaired the use of his existing corrals and pens, that it created an inconvenience to him, and would result in some amount of additional expense and reduced profitability. But evidence that the mineral lessee's operations result in

inconvenience and some unquantified amount of additional expense to the surface owner does not rise to the level of evidence that the surface owner has no reasonable alternative method to maintain the existing use. Thus, Merriman did not produce evidence sufficient to raise a material fact issue as to part of the initial element on which he had the burden of proof: that he had no reasonable alternative means of maintaining his cattle operations on the 40-acre tract.

Postjudgment Interest

Phillips v. Bramlett, 407 S.W.3d 229 (Tex. 2013)

The family of Vicki Bramlett and Benny Phillips, M.D., were opposing parties in a health care liability case that was tried in 2005. The case was appealed to the Amarillo Court of Appeals and then to the Supreme Court, which reversed and remanded the case to the trial court to enter a new judgment consistent with its holding. On remand and after a hearing at which the trial court admitted no new evidence, the trial court entered a new judgment ("remand judgment") that, among other things, awarded postjudgment interest calculated from the date of the remand judgment and expressly "vacated" the original judgment. In addition to filing a writ of mandamus with the Supreme Court, the Bramletts appealed to the Amarillo appellate court arguing that the trial court (1) should have calculated postjudgment interest from the date of the original judgment, not the date of the remand judgment, and (2) should not have vacated its original judgment. The Supreme Court dismissed the mandamus petition, and Phillips moved to dismiss the appeal, contending that the court of appeals lacked jurisdiction because the Supreme Court had exclusive jurisdiction to enforce its mandate. Holding that it had jurisdiction, the court of appeals denied the motion to dismiss, further held that the trial court had erred by vacating its original judgment and by calculating postjudgment interest from the date of the remand judgment

rather than the date of the original judgment, and remanded the case back to the trial court. The Bramletts appealed all three holdings.

The Supreme Court affirmed and explained each procedural issue individually. First, the court of appeals had jurisdiction to address the Bramlett's appeal. A court of appeals has jurisdiction, consistent with section 22.220(a) of the Government Code, to review a trial court's final judgment after remand from the Supreme Court. Although the Supreme Court retains jurisdiction to enforce its judgments and mandates, and is authorized to exercise its writ power to do so, the Court's enforcement jurisdiction does not deprive the courts of appeals of jurisdiction to review a trial court's remand judgment.

Postjudgment interest accrues from the date of the original judgment when an appellate court remands a case to the trial court and the trial court was not required to admit new or additional evidence to enter that judgment.

Second, the court of appeals correctly held that the trial court erred in calculating postjudgment interest from the date of a remand judgment. When an appellate court remands a case to the trial court for entry of judgment consistent with the appellate court's opinion, and the trial court is not required to admit new or additional evidence to enter that judgment, the date that the trial court entered the original judgment is the "date the judgment is rendered," and postjudgment interest begins to accrue and is calculated as of that date. The Court, however, refrained from holding that this rule applied in every remanded case and particularly in cases in which the trial court is required to conduct a new trial or other evidentiary proceeding before entering the remand judgment.

Finally, the trial court's order vacating the original judgment was unnecessary but harmless because that judgment was already reversed in its entirety. The Supreme Court did not agree with the court of appeals that the trial

court "exceeded its jurisdiction" by vacating the original judgment. Instead, the original judgment no longer had any effect on remand, so "vacating" it was harmless error. As for the trial court's failure to include the certain recitals that were contained in the original judgment, the Court held that this was not error because the recitals were not part of the judgment's decretal language, material to the ultimate disposition of the case, or part of the jury's findings. Thus, the Supreme Court affirmed the court of appeal's judgment and remanded the case to the trial court.

Proportionate Responsibility

Dugger v. Arredondo, 408 S.W.3d 825 (Tex. 2013)

Joel Martinez died several hours after snorting lines of black tar heroin mixed with Tylenol PM, ingesting several tequila drinks, and smoking marijuana. Martinez was with his friend, Geoffrey Dugger, who also engaged in this activity while they were at the home of Dugger's parents. When paramedics arrived on the scene, Dugger told them that Martinez ingested only tequila and marijuana. After Martinez died, his mother, Mary Ann Arredondo, sued Dugger for wrongful death and survival, alleging he delayed in calling 911 and failed to tell paramedics about the heroin, both of which caused her son's death. In his answer, Dugger asserted the common law unlawful acts doctrine, which bars a plaintiff's recovery if it can be shown that, at the time of injury, he was engaged in an illegal act that contributed to his injury. Dugger moved for summary judgment on this affirmative defense, which the trial court granted. The Dallas Court of Appeals reversed, holding that Civil Practice and Remedies Code section 93.001 superseded the unlawful acts

The common law "unlawful acts doctrine" cannot be used as an affirmative defense in light of Texas's proportionate responsibility scheme and the statutory affirmative defense in Texas Civil Practice and Remedies Code section 93.001.

doctrine.

The Supreme Court affirmed, but on different grounds. The Court held that the Legislature's adoption of the proportionate responsibility scheme in Chapter 33 of the Civil Practice and Remedies Code evidenced its clear intention that a plaintiff's illegal conduct that did not fall within a *statutorily-recognized* affirmative defense should be apportioned rather than barring recovery completely. Because it was a common law doctrine, Dugger's unlawful acts defense could not coexist with the proportionate responsibility scheme. Moreover, after this scheme was enacted, the Legislature enacted section 93.001 of the Civil Practice and Remedies Code, which provided an affirmative defense based on a plaintiff's felonious conduct. Thus, by these two enactments, the Legislature intended to abrogate the common law unlawful acts doctrine as a complete bar to a plaintiff's recovery. Thus, the Supreme Court affirmed the reversal of the summary judgment and remanded the case to the trial court for further proceedings.

Justice Hecht, joined by Justices Willett and Devine, dissented, asserting that unlawful acts doctrine was not abrogated by either the comparative responsibility scheme in Chapter 33 or Section 93.001's affirmative defense. The majority misinterpreted Chapter 33 and Section 93.001, and this yields absurd results: a plaintiff cannot sue for breach of an illegal contract even if he himself was not at fault in the transaction, but a plaintiff directly injured by his own illegal conduct can sue in tort for damages. The dissent distinguished the unlawful acts doctrine, arguing that it was not merely contributory negligence that could be compared with other fault in allocating responsibility for a plaintiff's injuries. Rather, in appropriate cases, the unlawful acts doctrine protected the integrity of the legal system.

Real Property

***Finance Comm'n of Tex. v. Norwood*, No. 20-0121, 2013 Tex. LEXIS 491, 56 Tex. Sup. J. 696, 2013 WL 3119481 (Tex. June 21, 2013)**

Texas was the last state in the Union to allow its homeowners to take out home-equity loans and reverse mortgages. The constitutional amendment allowing these options became effective in 1998, but the methods to implement and regulate them were fraught with controversy and uncertainty. To solve these problems, the Legislature proposed a second constitutional amendment, which the voters adopted in 2003. This latter provision, section 50(u) of Article 16 of the Texas Constitution, empowered legislatively-designated state agencies to interpret the provisions governing home equity lending. Anticipating that the voters would pass the amendment, the Legislature statutorily delegated interpretative authority under Section 50(u) to the Finance Commission and the Credit Union Commission ("Commissions"). The Commissions then published proposed interpretations, that after a period of public comment and a hearing, were finalized and effective January 2004. Three weeks later, six homeowners ("the Homeowners") filed suit against the Commissions, challenging several of the interpretations. The Texas Bankers Association ("TBA") intervened. By final summary judgment, the trial court invalidated many of the interpretations. A divided Austin Court of Appeals affirmed in part and reversed in part.

The interpretation of constitutional provisions by the Finance Commission and the Credit Union Commission are subject to judicial review.

The Supreme Court reversed in part and affirmed in part. As an initial matter, the Court addressed its jurisdiction and held that the Commissions' interpretations of Section 50 were subject to judicial review. Section 50(u) expressly

contemplates that the constitutional provisions will be interpreted not only by the agencies delegated that task, but also by state and federal courts as well. Next, the Court held that the Homeowners had standing because injury to the interest in obtaining a home equity loan resulting from the Commissions' alleged misinterpretations of Section 50 is sufficient for standing.

The Court then turned to the substantive issues. Distilled to their essence, the three main disputes were (1) whether the Commissions erred by using Finance Code section 301.002(a)(4)'s definition of "interest" for interpreting the constitutional provisions, when such a definition would effectively remove the 3% cap on lenders fees; (2) whether the Commissions erred by interpreting a provision to allow a borrower to mail a lender the required consent to have a lien placed on his homestead and to attend closing through his attorney-in-fact, not in person; and (3) whether the Commissions erred by interpreting section 50(g) to allow a rebuttable presumption that the borrower received a required notice from the lender three days after the lender mailed it. Applying a *de novo* review, the Court held that applying the Finance Code's definition of "interest" undermined the constitutional provision because it allowed the Legislature to change the effect of the Commissions' interpretation and the meaning of Section 50(a)(6)(E) simply by amending the Finance Code. Therefore, consistent with the history, purpose, and text of Section 50(a)(6)(E), "interest" as used in that provision means the amount determined by multiplying the loan principal by the interest rate. In this holding, the Court reversed the court of appeals' judgment.

Also, reversing the appellate court's holding, the Supreme Court next held that the Commissions erred by allowing a borrower to mail a lender the required consent to have a lien placed on his homestead and to attend closing through his attorney-in-fact. Closing a loan is a process that should be

conducted at only one of the locations permitted by the constitutional provisions. The exceptions allowed by the Commissions' interpretation risk coercion and are therefore invalid.

Finally, the Court affirmed the court of appeals' judgment and held that interpreting section 50(g) to allow a rebuttable presumption that the borrower received a required notice from the lender three days after the lender mailed it was a reasonable procedure for establishing compliance. The Commissions' interpretation does not impair the constitutional requirement; it merely relieves a lender of proving receipt unless receipt is challenged.

Justice Johnson issued a concurring and dissenting opinion. He asserted that the Homeowners did not establish standing to bring their claims, and thus the Court lacked jurisdiction to address the merits of the suit. What results is an "advisory opinion" from the Court. Because of these concerns, Justice Johnson would remand the case to the trial court to allow the Homeowners to replead or otherwise attempt to show jurisdiction.

Morton v. Nguyen, No. 12-0539, 2013 Tex. LEXIS 605, 56 Tex. Sup. J. 955, 2013 WL 4493799 (Tex. Aug. 23, 2013)

In January 2007, Kevin Morton, as seller, and Hung and Carol Nguyen, as buyers, entered into a contract for deed. The Nguyens made payments for almost three years, during which time Morton sent annual statements reporting interest payments and principal balances, but not all of the information required under Property Code section 5.077. In November 2009, the Nguyens notified Morton that they were exercising their statutory right to cancel and rescind the contract for deed. They demanded return of all 34 monthly payments, the $5,000 down payment, and the taxes and insurance premiums they paid. Morton ordered the Nguyens off the property and began to harass them. Morton then sued the Nguyens for breach of contract, and the Nguyens

counterclaimed, seeking monetary damages, rescission, and statutory damages for alleged violations of the Property Code, Finance Code, and Deceptive Trade Practices Act ("DTPA"). Morton asserted various affirmative defenses, including setoff of the fair market rental value for the time the Nguyens occupied the house.

After a bench trial, the trial court found that Morton failed to comply with Subchapter D and rendered judgment for the Nguyens, awarding them (1) $63,693.47 in actual damages—which included all their payments under the contract for deed, their down payment, insurance and tax payments, and the value of improvements—for cancellation and rescission under Subchapter D; (2) $160,000 as liquidated damages for violations of Property Code section 5.077; (3) $300 as the statutory remedy for Finance Code violations; (4) $10,000 for mental anguish damages; (5) $67,020 in attorney's fees; and (6) $696.74 in costs. Both parties appealed. The Fourteenth Court of Appeals reversed the $300 award for Finance Code violations and the $160,000 award, remanding the latter to the trial court to determine whether Morton made a good faith attempt to comply with Subchapter D. The appellate court affirmed the rest of the judgment.

Under Chapter 5, Subchapter D of the Property Code, a buyer who exercises the statutory right to cancel and rescind a contract for deed must restore to the seller all benefits the buyer received under the contract because Subchapter D's cancellation-and-rescission remedy contemplates mutual restitution of benefits among the parties.

Only Morton appealed to the Supreme Court, which reversed the court of appeals' determination that Morton waived the issue as to whether Subchapter D's cancellation-and-rescission remedy incorporates the common law requirement of mutual restitution. After outlining Morton's arguments that showed he did not waive the issue, the Court held that mutual restitution was necessarily incorporated into the cancellation-and-rescission remedy under Subchapter D. In *Cruz v. Andrews Restoration,*

Inc., 364 S.W.3d 817 (Tex. 2012), the Court held the DTPA's restoration remedy contemplated mutual restitution. Similarly, Subchapter D's "recission" requires each party to restore property received from the other—in other words, mutual restitution—which is what the Legislature intended. Moreover, rescission is not a one-way street. Allowing a buyer to recover all benefits bestowed upon the seller upon rescission without also requiring the buyer to surrender the benefits that he received under the contract would result in a windfall inconsistent with the general nature of Subchapter D's cancellation-and-rescission remedy. Thus, the Court remanded the case to the trial court to determine the Nguyens' liability for the rental value of the property during their occupation. The Court also reversed the court of appeals' judgment on attorney's fees and mental anguish damages, holding that no claim supported these awards after the court of appeals reversed the claims for liquidated damages and Finance Code violations.

Justice Boyd, joined by Justices Willett and Lehrmann, issued a concurring and dissenting opinion. Although these justices agreed with the Court's decision to reverse the Nguyens' award of attorney's fees and mental anguish damages, their dissent stemmed from the Court's need to prevent a windfall to buyers under Subchapter D and ignore the statute as written. The statute repeatedly states that the purchaser is entitled to "receive a full refund of all payments made to the seller." As such, the Nguyens are entitled to this full refund without a reduction of the value of the benefits they received.

***Tex. Comm'n on Envtl. Quality v. City of Waco*, No. 11-0729, 2013 Tex. LEXIS 604, 56 Tex. Sup. J. 931, 2013 WL 4493018 (Tex. Aug. 23, 2013)**

O-Kee Dairy is a concentrated animal feeding operation ("CAFO") in Hamilton County and about 80 miles upstream from Lake Waco. Because CAFOs impact their environment, they must obtain water-quality permits from the Texas Commission on Environmental Quality ("TCEQ"). O-Kee filed the necessary paperwork for a permit to expand its herd from 690 to 999 cows and increase its total waste application acreage. After revisions to the proposed permit strengthened overall water-quality protections and required O-Kee to expand buffer zones on its property, the permit request was approved for public comment. The City of Waco submitted comments and requested a public hearing, which it received. At the hearing, some of the City's comments were incorporated to the proposed permit, but not all. The City then requested a contested case hearing, asserting it was an "affected person" with a personal justiciable interest in the O-Kee permit application process. Attached to its written request were various reports and the affidavits of two experts asserting that Lake Waco was affected by heavy algal growth caused by the waste and heavy phosphorus content from the North Bosque watershed, which serviced the O-Kee and other CAFOs. In addition, the City had received complaints for years about the offensive taste and smell of its drinking water, which comes from Lake Waco. The TCEQ denied the City's request for a contested hearing and granted O-Kee's permit. The City then sought judicial review of the TCEQ's order in district court. The district court affirmed

A person who meets the statutory definition of "affected person" as to a proposed water-quality permit has the right to request a contested case hearing, but the Texas Commission on Environmental Quality has discretion to deny the request under statutory criteria.

the TECQ's decision, but the Austin Court of Appeals reversed, holding that the City was an "affected person" entitled to a contested case hearing.

The Supreme Court reversed. The Court concluded sufficient evidence supported the TCEQ's determination that the proposed amended permit did not seek to significantly increase or materially change the authorized discharge of waste or otherwise foreclose TCEQ discretion to consider the amended application at a regular meeting rather than after a contested case hearing. After considering the management tools included in the revised permit, the TCEQ found that although there would be more cows at the dairy, the overall impact of the permit's requirements would reduce the likelihood that phosphorus would enter the watershed. In concluding that the proposed permit would effectively decrease, rather than increase, the amount of phosphorus discharged into the watershed, the TECQ rejected the City's argument that the City would be adversely affected by its granting the permit. This decision was not an abuse of discretion. Therefore, the Court reversed and rendered judgment affirming the TECQ's decision to deny the hearing request.

***City of Lorena v. BMTP Holdings, L.P.*, No. 11-0554, 56 Tex. Sup. J. 1115, 2013 WL 4730647 (Tex. Aug. 30, 2013)**

In January 2006, BMTP Holdings, L.P. ("BMTP"), a residential real estate developer, obtained approval from the City of Lorena ("City") to develop the final plat of BMTP's South Meadows Estates subdivision ("South Meadows"). By May of that year, BMTP finished building the infrastructure of the plat. Also during the spring of 2006, engineers told the City that its sewage system was over capacity and could pose problems if the volume continued to increase. The engineers recommended a temporary moratorium on sewer tap permits to allow the City time to remedy the problem. The City enacted its first moratorium on June 5, 2006, and followed

that with seven extensions, each of which lasted 120 days. These moratoria prevented BMTP from selling seven lots in South Meadows. The City denied BMTP's requests for exemptions on the lots, so while the sixth moratorium was in effect, BMTP sought a declaratory judgment that the moratorium and its extensions could not be enforced against the seven lots. In February 2009, BMTP amended its petition and added a claim for inverse condemnation, asserting that the wrongful application of the moratorium amounted to a regulatory taking because the value of the seven lots fell by 83% when the moratoria were in place. Both BMTP and the City moved for summary judgment on the declaratory judgment claim, and the City also moved for summary judgment on the inverse condemnation claim. The trial court granted summary judgment to the City, first on the declaratory judgment claim and subsequently on the inverse condemnation claim, and awarded attorney's fees and costs to the City. The Waco Court of Appeals reversed, holding that section 212.135 of the Local Government Code prohibited municipalities from enforcing moratoria against approved development. The court also remanded the inverse condemnation claim and the issue of attorney's fees.

Local Government Code section 212.135 insulates property approved for either subdivision development or construction development from later-enacted moratoria based on shortages of essential public facilities.

The Supreme Court affirmed. First, the Court rejected the City's argument that BMTP's claims were not ripe because BMTP failed to comply with the moratorium's application, appeal, or waiver procedures. The Court held that the application and waiver procedures set out in the moratorium did not apply to BMTP's claims, and the appeal procedure was nonexistent because it had no grant of sole authority to the City decide such issues. Determining that the

November 2008 moratorium was the subject of BMTP's declaratory judgment action, the Court held the plain language of Chapter 212 insulates the seven lots at issue from the later-enacted moratoria. The City approved BMTP's final plat in January 2006—almost two years before it passed the moratorium at issue and four months before it passed any moratorium. Because the City approved the residential subdivision for the seven lots, the property constitutes approved development under Chapter 212. As to the inverse condemnation claim and attorney's fees issue, the Court remanded these matter to the trial court, which must resolve factual disputes pertaining to the extent of the government's interference with the owner's use and enjoyment of its property before the merits of the takings claim can be judicially addressed. Moreover, the trial court must determine whether its grant of attorney's fees remains proper in light of the Court's decision that the moratorium cannot apply against BMTP's seven lots.

Justice Lehrmann issued a concurring opinion. She agreed with the majority's holding, noting that the "the plain language of [section 212.135] leaves no plausible alternative." She also agreed with the dissent that excluding development-approved properties from the effect of a moratorium may be insufficient to protect overburdened public facilities. The resolution lies with the cities, which "must be very careful when evaluating whether to grant permits authorizing development in the first instance."

Justice Hecht, joined by Chief Justice Jefferson, dissented. They disagreed that the "plain language" of sections 212.133 and 212.135 supports the majority's holding. Instead, the Court should focus on the purpose of the statutes. The Legislature's obvious purpose in enacting sections 212.133 and 212.135 was not to limit *where* a moratorium on development can be imposed, but to limit *how* one can be imposed. Because the findings set out in the November 2008

moratorium were supported by the evidence and the purpose of the moratorium, the majority's holding was incorrect.

Statutes of Repose

Nathan v. Whittington, 408 S.W.3d 870 (Tex. 2013) (per curiam)

Stephen Whittington sued former business partner, Evan Baergen, in Nevada and prevailed. To collect the judgment, Whittington filed a second suit in Nevada, this time against Marc Nathan, to whom Whittington alleged Baergren fraudulently transferred assets in violation of the Uniform Fraudulent Transfer Act ("UFTA"). Whittington filed the second suit in May 2008, just under four years after the date he alleged the fraudulent transfer occurred in May 2004. Six months later, the Nevada trial court dismissed the second suit, holding that it did not have personal jurisdiction over Nathan. Less than 60 days later, Whittington filed the same suit against Nathan, this time in Texas. Nathan moved for summary judgment, arguing that the four-year statute of repose under the Texas UFTA, otherwise known as section 24.010(a)(1) of the Business and Commerce Code, extinguished Whittington's claim. The trial court agreed and granted Nathan's motion for summary judgment. With on justice dissenting, the First Court of Appeals reversed, holding that section 16.064(a) of the Civil Practice and Remedies Code suspended the expiration of TUFTA's statute of repose and allowed Whittington to file this new suit within sixty days after the Nevada court dismissed the second Nevada suit for lack of jurisdiction.

A statute that suspends the running of a statute of limitations does not apply to a statute of repose that otherwise extinguishes a plaintiff's cause of action.

The Supreme Court reversed and reinstated the trial court's ruling. The Court first held that section 24.010(a)(1) was a statute of repose rather than a statute of limitations.

Section 24.010, entitled "Extinguishment Of Cause Of Action," does not just procedurally bar an untimely claim, it substantively "extinguishe[s]" the cause of action if not brought within a time certain. The Court further held that, by its express terms, section 16.064(a) applies only to a statute of limitations, not to a statute of repose. Moreover, applying section 16.040 here would undermine the purpose of a statute of repose like section 24.010, which is to eliminate uncertainties and create a final deadline for filing suit that is not subject to exceptions. Indeed, application of the revival statute here would effectively render the period of repose indefinite, a result that is clearly incompatible with the purpose for the statute. Therefore, the Supreme Court reversed the court of appeals' judgment and reinstated the trial court's judgment of dismissal.

Summary Judgments

Nall v. Plunkett, 404 S.W.3d 552 (Tex. 2013) (per curiam)

John Plunkett suffered severe and permanent injuries when he tried to stop a drunken friend from leaving a party hosted by the Robert and Olga Nall, and their son, Justin Nall. Plunkett sued the Nalls for "common law negligence" based on the Nalls' failure to "exercise due care in their undertaking," which was based on their failure to confiscate the car keys of intoxicated attendees. He also sued the Nalls for premises liability. The Nalls moved for summary judgment, asserting that they did "not have any duty to [Plunkett] in this case." Plunkett did not file any special exceptions in response. The trial court granted the motion as to all claims except for the premises liability claim, which Plunkett eventually nonsuited. On appeal, Plunkett argued that the Nalls failed to address the negligent undertaking claim, so summary judgment was granted in error. A divided Fourteenth Court of Appeals agreed, holding that the trial court erred by granting summary judgment because the Nalls

failed to address Plunkett's negligent-undertaking theory in their motion. The appellate court construed Plunkett's petition as alleging a claim for negligence based on an undertaking theory and the Nalls' summary judgment motion as arguing only that summary judgment was proper as to a negligence claim based on social host liability.

A summary judgment motion that argues "[defendants] do not have any duty to [plaintiff] in this case," absent exceptions, will encompass all claims requiring a duty.

The Supreme Court reversed. It construed the Nalls' motion as specifically moving for summary judgment on the duty element of Plunkett's negligence claim and that it made a two-part argument addressing the absence of a duty in both the social host context and the undertaking context. The Nalls' motion not only correctly pointed out that Texas did not recognized social host liability, but also referenced the Court's decision in *Graff v. Beard*, 858 S.W.2d 918, 921 (Tex. 1993), that foreclosed the assumption of any duty (i.e., an undertaking) by a social host. As to the substantive issue of whether a genuine issue of material fact existed to preclude summary judgment, that issue was not briefed and was therefore waived. Thus, the Supreme Court reversed the court of appeals' judgment and reinstated the trial court's judgment.

Taxation

Combs v. Health Care Servs. Corp., 401 S.W.3d 623 (Tex. 2013)

Health Care Services Corporation and its predecessor-in-interest, Blue Cross and Blue Shield of Texas, Inc. (collectively "HCS"), contracted with the federal government to administer two health-insurance programs. While performing these contracts, HCS incurred expenses that were reimbursed by the federal government. HCS paid sales and

use tax on some of these expenses and applied for a refund under the sale-for-resale exemption, Tax Code section 151.006(a)(1). The State Comptroller denied the refund. HCS then filed two tax-refund suits in which it claimed the sale-for-resale exemption for three general categories of property and services it used to perform the contracts: (1) tangible personal property (such as chairs, printers, and office supplies); (2) taxable services (such as printer repair services, landscape maintenance, and copier maintenance); and (3) leases of certain tangible personal property (such as leases of computers, audio equipment, and printers). The trial court granted the refunds and the Austin Court of Appeals affirmed.

The "essence of the transaction" test is not based on precedent or statutory definitions of "sale for resale" in the Tax Code, and is therefore inapplicable to the determination of property and services eligible for a sales-tax refund.

The Supreme Court affirmed in part and reversed in part, holding that HCS was entitled to a sales-tax refund for the tangible personal property and taxable services, but not for the leases of tangible personal property. In rejecting the Comptroller's argument that the exemption was inapplicable, the Court conducted a plain-text analysis of the Tax Code's definition of "sale for resale" and determined that its plain meaning included the tangible personal property and taxable services on which HSC sought reimbursement. Neither the slight definitional change to "sale for resale" in the amended statute nor the new Tax Code section 151.302(b) abrogated the Court's decision in *Day & Zimmerman, Inc. v. Calvert*, 519 S.W.2d 106 (Tex. 1975). Thus, based on the statutory language and its precedent, the Court rejected the Comptroller's "essence of the transaction" test as unfounded and inapplicable. Moreover, the Comptroller's attempt on appeal to recharacterize the taxable services as service contracts was unavailing because it did not

challenge the evidentiary sufficiency of the trial court's finding that characterized the services.

But as to the leases of tangible personal property, the Court held that these fell outside of the exemption. There was no evidence that HCS leased the property for the purpose of re-leasing it. In other words, using the property for the federal government contract was not the same as formally re-leasing the property to the federal government. Finally, the Court held that HCS need not produce documentation proving it did not receive federal government reimbursement for the sales tax it paid. The statute designed to prevent double recovery—Tax Code Section 111.104(f)—was inapplicable in light of the fact that HCSC never "collected" tax from the federal government, which is a prerequisite for the statute's application. Thus, the Court remanded the case to the trial court for further proceedings consistent with its opinion.

Tim Cole Act

In re Blair, 408 S.W.3d 843 (Tex. 2013) (orig. proceeding)

Michael Blair sought compensation for his wrongful conviction for the 1993 murder of seven-year-old Ashley Estelle. At the time of his arrest for this crime, Blair was on parole for two felonies for which he had served 18 months of a ten-year sentence. Upon his arrest, his parole was revoked. In 1994, Blair was convicted and sentenced to death for murdering Estelle, which he staunchly denied. But while giving an interview on death row in 2001, Blair admitted to sexually assaulting more than a dozen girls and boys. In 2003, Blair wrote to the district court and admitted he molested the children of a witness who later testified against him in the murder trial. Following an investigation of this claim, Blair later pleaded guilty in June 2004 to molesting four children and was given four life sentences, three concurring and one consecutive. In 2008, the Court of Criminal Appeals set aside Blair's murder conviction based on DNA evidence

establishing his actual innocence, and the State dismissed the charge.

In June 2009, Blair applied to the Comptroller for more than $1 million in compensation for having been wrongfully incarcerated from 1993, when he was arrested for murder, to 2004, when he was sentenced on the child molestation offenses. After the Comptroller denied his request, Blair moved for reconsideration. The Comptroller again denied Blair's request, reasoning in part that the Legislature intended to compensate only wrongfully-imprisoned inmates who were free. Moreover, even if Blair were entitled to compensation, it would not cover "the period during which he served [his 1988 sentences] concurrently with his sentence and incarceration for capital murder" as a result of his parole revocation. The Supreme Court denied Blair's mandamus petition.

If a claimant is convicted for a different felony before becoming eligible for compensation under the Tim Cole Act, he is not entitled to compensation.

In March 2011, Blair filed a second application, arguing that his situation was similar to that in *In re Smith*, 333 S.W.3d 582 (Tex. 2011), where the Supreme Court held that a probationer should be compensated for the time that he serves after his parole is revoked based on a wrongful conviction. The Comptroller denied Blair's application, citing differences between his case and Smith's case, specifically that unlike Smith, Blair was incarcerated for yet other offenses—the 2004 child molestation convictions—when he became eligible for compensation in 2009. Blair then filed a mandamus petition in the Supreme Court.

In a plurality opinion, the Supreme Court denied relief, agreeing that Blair was ineligible for compensation, but disagreeing with the Comptroller's policy argument that payments cannot be made to incarcerated recipients. Civil Practice and Remedies Code section 103.154(a) denies

compensation payments for wrongful imprisonment to a claimant who, during the time he would receive them, is convicted of a felony, regardless of when the conviction was adjudicated, whether before or after he became eligible for compensation. But the second sentence clarifies that if the adjudication occurs *after* the date of eligibility, compensation ceases, though the claimant is not required to refund payments already received. So for a claimant like Blair, who is convicted before being eligible for compensation, his payments never begin and a refund is not an issue. And though payments never begin, the right to compensation that the claimant would have afterward can be said to "terminate" the moment it arises. Thus, Blair was not entitled to any compensation.

As for the Comptroller's argument that payments could not be made to incarcerated recipients, the Court disagreed, holding that the Act provides reparations to those wrongfully convicted regardless of whether or not they remain incarcerated. It was simply a policy choice for the Legislature. [This was the sole decision by the Court supported by a majority of justices.]

Justice Boyd joined by Justice Willett and Lehrmann, issued a concurring opinion, asserting that the language the Legislature chose to use in section 103.154(a) does not support the plurality's construction. By its express terms, section 103.154(a) terminates compensation payments if the claimant is convicted of a felony "after the date the person becomes eligible for compensation." Because Blair was convicted of child molestation before he became eligible for compensation, there is no "subsequent conviction" to "terminate" his payments. Thus, section 103.154(a) does not apply. In light of the statute's language, these justices concluded that Blair's 2004 convictions prohibited him from receiving compensation for time served beginning in 2004, but did not prohibit him from receiving compensation for time served before that date.

Justice Boyd also wrote separately to address the procedural requirements for seeking compensation. They agreed with the Comptroller that the Act did not permit Blair to eschew the Act's procedural requirements or file a successive application seeking the same compensation, at least in the absence of any material change in circumstances. The Act did not permit Blair to file a second application and, even if it did, he failed to file an application to cure within ten days of the Comptroller's denial of that application—a prerequisite to mandamus review. Therefore, the Court correctly denied Blair's petition for writ of mandamus.

Finally, Justice Lehrmann, joined by Chief Justice Jefferson and Justices Johnson and Willett, issued a dissenting opinion asserting that Blair was not procedurally barred from seeking judicial review of the Comptroller's denial of his second application. The Act does not require claimants to submit an application to cure to the Comptroller after a denial of compensation "if there is nothing to cure." Thus, the Court should have held that Blair's 2004 felony conviction did not foreclose his eligibility for any compensation under the Act. The Act's plain language, when properly construed in context, confirms that an applicant who is convicted of a felony (meaning the act of conviction, not the status of being convicted) after he becomes eligible for compensation is not wholly deprived of such eligibility.

TORT CLAIMS ACT

Tex. Adjutant General's Office v. Ngakoue, 408 S.W.3d 350 (Tex. 2013)

Michele Ngakoue sued Franklin Barnum for negligence based on a car accident. At the time of the crash, Barnum was within the course and scope of his employment with the Texas Adjutant General's Office ("TAGO"). Barnum filed a motion to dismiss himself from suit under the Tort Claims Act ("TCA"), specifically Civil Practice and Remedies Code

section 101.106(f), which provides in part that if suit is filed against a government employee in his official capacity, then "[o]n the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant" within thirty days. Within thirty days, Ngakoue sued TAGO in her first amended petition, whose title indicated her intent to dismiss Barnum, but did not specifically request that relief. The trial court denied Barnum's motion to dismiss. TAGO then filed a plea to the jurisdiction and motion to dismiss, asserting that TAGO should be dismissed under section 101.106(b) and Barnum should be dismissed because Ngakoue did not comply with section 101.106(f). The trial court denied TAGO's motions. The Austin Court of Appeals reversed the trial court's order denying Barnum's motion to dismiss, but affirmed the denial of TAGO's plea to the jurisdiction, holding that Ngakoue's failure to comply with subsection (f) did not bar suit against TAGO.

A plaintiff who timely amends his petition to sue a governmental entity under the Tort Claims Act may proceed on the claim, even if he neglects to dismiss the government employee.

The Supreme Court affirmed both holdings of the court of appeals, but for different reasons as to TAGO's plea to the jurisdiction. The TCA provides a limited waiver of immunity for certain tort claims against the government. As is relevant here, the TCA imposes liability on a governmental unit for the negligent acts of employees acting in the scope of employment if the injury arose from "the operation or use of a motor-driven vehicle" and the employee would have been personally liable under Texas law. Section 101.106 is the TCA's election of remedies provision. Analyzing the interaction between subsections (b) and (f) in the context of Ngakoue's amended petition, the Court held that subsection (f) does not require

dismissal of the employee by the plaintiff to overcome the bar to suit against the government in subsection (b). Rather, subsection (f) provides the TCA plaintiff a window to amend his pleadings to substitute the governmental unit before the court dismisses the suit against the employee on the employee's motion where appropriate. If the plaintiff fails to substitute the government, and the employee was sued in his official capacity only, then the case must be dismissed. But a suit against the governmental unit for which immunity is otherwise waived may go forward, just as a suit proceeds against the government when an employee is dismissed under subsection (e). Because subsection (f) classifies a suit against the employee who was acting in the scope of employment (where the suit could have been brought under the TCA) as effectively constituting a suit against the government, and because subsection (f)'s procedural mechanism for dismissal of the employee does not affect this classification, a plaintiff who brings such a suit is not barred by subsection (b) from subsequently pursuing a claim against the governmental unit.

Therefore, Barnum was entitled to dismissal under subsection (f) as a matter of law because it is undisputed that the suit against Barnum was based on conduct within the general scope of his governmental employment and could have been brought against TAGO under the TCA. However, TAGO was not entitled to dismissal because subsection (b) does not apply when an employee is considered to have been sued in his official capacity only, and because immunity was otherwise waived under the TCA. Thus, the trial court correctly denied TAGO's motion to dismiss, and the Supreme Court affirmed the judgment of the court of appeals.

Justice Boyd, joined by Justices Johnson, Willett and Guzman, dissented. They argued that the Court substantially rewrote section 101.106 to reach its holding, revising the language of subsection (f) and rendering subsection (b) meaningless. Staying as true as possible to the language the

Legislature enacted, the dissent would hold that because Ngakoue failed to do the only thing subsection (f) allowed him to do to avoid dismissal—that is, dismiss the employee and name the governmental unit as the defendant—his claims against the governmental unit must be dismissed. Subsection (b) provides that a plaintiff who chooses to sue a government employee cannot later decide to sue the governmental unit: the decision to sue the employee "constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter." The sole exception in (b) is that a plaintiff who sues a government employee cannot sue or recover from the governmental unit "unless the governmental unit consents." Because TAGO did not consent to suit, its motion to dismiss should have been granted.

Workers' Compensation

City of Bellaire v. Johnson, 400 S.W.3d 922 (Tex. 2013) (per curiam)

Elbert Johnson lost an arm while working on a garbage truck driven by Rosa Larson and owned by the City of Bellaire ("City"). At the time, Johnson was an employee of Mangum Staffing Service ("Mangum"), which furnished workers to the City. The City paid Magnum for its services, which in turn paid Johnson, based on the hours he reported to the City. But the City set Johnson's work schedule, gave him his assignments, and supervised his work. And although Magnum provided Johnson with workers' compensation coverage, the City was required by Labor Code Section 504.011 to provide workers' compensation coverage to its employees, defined by Section 504.001(2)(A) to include "a person in [its] service … who has been employed as provided by law."

After his accident, Johnson sued the City and Larson, who in turn filed a plea to the jurisdiction and motion for summary

judgment, asserting governmental immunity based in part on the exclusive remedy under Sections 408.001(a) and 504.002(a)(6) of the Labor Code. The trial court dismissed the case. The Fourteenth Court of Appeals reversed, concluding that the exclusive remedy bar did not apply unless Johnson was *actually* covered, as opposed to being *legally required* to be covered, and the evidence did not establish actual coverage because he was paid by Magnum.

A city worker employed and paid through a staffing company, but controlled by the City that also covers him under its workers' compensation policy, is subject to the exclusive remedy bar.

The Supreme Court reversed, holding that Johnson was paid by the City *through* Magnum and was covered by the City's workers' compensation policy. The evidence showed that the City, through an interlocal agreement, actually provided the statutorily required workers' compensation coverage to its employees. The evidence further showed that the City controlled the details of Johnson's work and that he was paid by the City through Magnum on the basis of the hours he reported to the City, so he was considered a paid employee under the terms of City's policy. As a result, Johnson's exclusive remedy was the compensation benefits to which he was entitled through the City. Therefore, the Supreme Court reversed the judgment of the court of appeals and rendered judgment dismissing Johnson's claims against the City and Larson for want of jurisdiction.

***Liberty Mut. Ins. Co. v. Adcock*, No. 11-0934, 2013 Tex. LEXIS 692, 56 Tex. Sup. J. 1161, 2013 WL 4730738 (Tex. Aug. 30, 2013)**

After sustaining an injury in 1991, Ricky Adcock was awarded permanent Lifetime Income Benefits ("LIBs") in 1997. Liberty Mutual Insurance Company ("Liberty"), the workers' compensation carrier, did not seek judicial review of this decision. Over a decade later, Liberty sought a new

contested case hearing on Adcock's LIBs, alleging that his disability had diminished. The hearing officer determined that Liberty could re-open the previous LIB determination, but ultimately held Adcock remained entitled to LIBs. The appeals panel affirmed. On judicial review, the trial court granted Adcock's motion for summary judgment that the hearing officer lacked jurisdiction to re-open the previous LIB determination. The Fort Worth Court of Appeals affirmed, noting the Legislature had specifically removed the procedure to re-open LIB determinations in 1989 and the current Workers' Compensation Act ("Act") only provides for ongoing review of temporary income benefits.

The Workers' Compensation Act does not have a procedure to re-open Lifetime Income Benefits determinations; those benefits are paid until the recipient's death regardless of his improvement.

The Supreme Court affirmed and held that the current version of the Act does not have a procedure to re-open LIB determinations. In so holding, the Court rejected Liberty's argument that if an employee medically improves and no longer meets the statutory requirements for eligibility for LIBs, the Texas Department of Insurance, Division of Workers' Compensation ("Division") has "necessarily implicit" authority to reopen the LIB determination. In construing section 408.161 of the Act, the Court necessarily gave effect to the Legislature's intent. To this end, the Legislature's express mandate that LIBs "are paid until the death of the employee" manifested its intent to make LIB determinations permanent under section 408.161(a). Moreover, the Act's comprehensive framework, which the Court analyzed in *Texas Mutual Insurance Company v. Ruttiger*, 381 S.W.3d 430 (Tex. 2012), precludes the application of claims and procedures not contained within the Act. As part of this scheme, the Legislature established a dichotomy containing two distinct classes of income benefits: temporary benefits and permanent

benefits. The Legislature's express provision of procedures for re-evaluating temporary benefit eligibility and the absence of such a procedure for permanent benefits indicates a deliberate choice. Indeed, the Legislature removed the procedure to re-open LIB determinations in 1989. Because no mechanism exists for re-opening Adcock's eligibility to LIBs, the hearing officer had no jurisdiction to decide that issue. Thus, the Court affirmed the judgment of the court of appeals.

Justice Green, joined by Chief Justice Jefferson and Justices Hecht and Devine, issued a dissenting opinion, which found fault in the Court's holding as to LIBs involving functional losses as opposed to anatomical losses. Because of medical advances, some LIB recipients can improve, a result that the majority ignores in its holding. The dissent asserts that the Labor Code's scheme governing income benefits can be read to give the Division jurisdiction to ensure that only claimants who meet the statutory eligibility criteria receive LIBs. This reading is based in part on *American Zurich Insurance Co. v. Samudio*, 370 S.W.3d 363, 368 (Tex. 2012), where the Court held that the trial court had the power to remand an impairment rating decision to the Division even though "the statute [was] silent as to the court's power to remand" because the "regulatory scheme as a whole illustrate[d]" that was the Legislature's intent. In addition, the Division's interpretation of the Act is entitled to serious consideration. Here, both the hearing officer and the appeals panel held that the Division had jurisdiction to consider continuing eligibility to receive LIBs under section 408.161. Finally, the dissent views Liberty's claim as one seeking a new determination of Adcock's continuing LIB eligibility. As a new claim, as opposed to an appeal of the original LIB award, the Division's process for determining a claimant's continuing eligibility for LIBs should be the same as an original determination to grant or deny benefits. Because the Act

already provides a procedure for contesting a claimant's current eligibility to benefits, there would be no need for the Legislature to include a separate provision in the statute.

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Texas Courts of Appeals Update—Substantive

Jerry D. Bullard, Adams, Lynch & Loftin, P.C., Grapevine
David F. Johnson, Winstead P.C., Fort Worth

Construction/Joint Check Agreements

Plains Builders, Inc. v. Steel Source, Inc., **No. 07-11-00198-CV, 2013 Tex. App. LEXIS 9430 (Tex. App.—Amarillo, July 30, 2013, no pet.)**

This appeal arises out of dispute in which Plains Builders, Inc. (Plains) challenged an adverse money judgment in favor of Steel Source, Inc. (Steel Source); Plains and its surety, Travelers Surety Company (Travelers), challenged a finding of liability on a payment bond; and Steel Source claimed that the trial court failed to award all of its actual damages.

The Seventh Court of Appeals held that, in the absence of contract language demonstrating that a subcontractor had an obligation to retain funds necessary to keep its account current from each joint check as issued, the joint check rule does not apply to a contractual relationship between a contractor and subcontractor.

Plains Builders, who was general contractor for the construction of the Texas State Veterans' Home (Project), originally subcontracted with Construction Services to furnish material and labor for the Project. In turn, Construction Services subcontracted to Steel Source a portion of the labor and materials it was to supply.

After the contracts were signed, Plains Builders, Construction Services and Steel Source signed a joint check agreement. Plains Builders issued five cashier's checks made jointly payable to Construction Services and Steel Source. Construction Services refused to endorse each joint check unless Steel Source simultaneously delivered a cashier's check to Construction Services for a portion of the

amount of the joint check at the time of endorsement.

As the Project progressed, Construction Services began experiencing cash flow problems. Joint checks were issued by Plains Builders in April and May 2006 for $125,557.83 and $125,337.49, respectively. At the time, Steel Source had submitted a draw of $237,000 to Construction Services. Steel Source retained $50,000 from the April and May checks, but released the balance to Construction Services. According to Steel Source, the balance was released to Construction Services at its insistence and because of the risk that work on the entire Project would halt if Construction Services could not continue.

In June 2006, Construction Services notified Plains Builders that it was discontinuing its joint checking agreement with Steel Source because of Steel Source's alleged failure to complete punch out and reframing work. At the time, Steel Source did not know Construction Services had given such notice to Plains Builders. Following the June 2006 letter, Plains Builders issued four checks totaling $80,000 to Construction Services as the sole payee and four checks totaling $134,151.78 to Construction Services and West Texas Builders, a materials supplier, as joint payees.

Plains Builders ultimately discharged Construction Services from the Project and spent approximately $750,000 to complete the work left unfinished and to make up a payroll shortage of Construction Services. Steel Source alleged that Construction Services failed to pay what it owed under their subcontract agreement (i.e., $137,300). According to Steel Source, if Plains Builders had issued all checks due Construction Services pursuant to the terms of the joint check agreement, it would have received full payment.

Steel Source filed suit against Plains Builders, Travelers, and Construction Services. A default judgment was taken against Construction Services. Steel Source moved for summary judgment on the claim that Plains Builders breached the joint check agreement. The trial court entered partial summary judgment in favor of Steel Source on liability but reserved the issue of damages for trial. After a bench trial, the court rendered judgment in favor of Steel Source. The

judgment was entered jointly and severally against Plains Builders and Travelers on a claim for retainage and against Plains Builders only for breaching the joint check agreement.

On appeal, both Plains Builders and Steel Source challenged the amount of damages awarded. Plains Builders claimed that the joint check agreement was not enforceable because it lacked consideration. However, the court found that there was sufficient consideration to support the joint check agreement in that, by obligating itself to make payments jointly to Construction Services and Steel Source, Plains Builders incurred a detriment not otherwise required by its contract. In return, Plains Builders obtained a measure of security against a claim on its bond by Steel Source. Further, the court held that, because of the agreement, both Construction Services and Steel Source gained control over payments made by Plains Builders of funds destined for the other. Steel Source, which was placed in the position of having to receive and handle all funds paid Construction Services by Plains Builders, also gained a measure of assurance of payment on its subcontract with Construction Services.

Plains Builders also argued that it raised a fact issue supporting its affirmative defense of payment. Plains Builders's checks made jointly payable to Steel Source and Construction Services totaled $1,223,275.71. Steel Source deposited these checks to its bank account, but it ultimately received only $806,410 because it remitted the remaining amount totaling $417,165.71 to Construction Services. The maximum claim of Steel Source under its subcontract with Construction Services was $943,410. According to Plains Builders, the fact that it issued joint checks in amounts substantially more than Steel Source's maximum claim supported its affirmative defense of payment, thereby invoking the "joint check rule." The "joint check rule," which has been adopted in other jurisdictions, provides that when a subcontractor and a materialman are joint payees, and no agreement exists with the owner or general contractor as to allocation of proceeds, the materialman will be deemed to have received the money due him by endorsing the check.

However, the court declined to apply the "joint check rule" because the joint check agreement between the parties did not address the subject of allocation of check proceeds between Construction Services and Steel Source, which was a key fact in those jurisdictions in which the rule has been applied. To recognize the rule in this case, the court noted that it would have to read into the joint check agreement a provision that it does not contain. Therefore, in the absence of contract language supporting the contention that Steel Source had an obligation to retain funds necessary to keep its account current from each joint check as issued, the court declined to apply the joint check rule to support Plains Builders's payment defense.

Plains Builders also alleged that Steel Source waived any recovery for breach of the joint check agreement based on Steel Source's remission to Construction Services of parts of the proceeds of the joint checks. The joint check agreement the parties signed required joint payment, but did not contain provisions addressing the division of the proceeds between the joint payees. In the absence of such provisions, and without application of the joint check rule, the court held that there was no evidence that Steel Source intended to relinquish its right to enforce Plains Builders's further compliance with the agreement, or its right to seek damages for a breach.

Among its theories of recovery, Steel Source alleged that Plains Builders and Travelers were jointly and severally liable for damages on Plains Builders's payment bond underwritten by Travelers. In the judgment, Steel Source was awarded $80,000 for breach of the joint check agreement and $33,000, jointly and severally, against Plains Builders and Travelers for retainage on the payment bond claim. The court noted that, in order to recover under section 2253.073 of the Texas Government Code on a payment bond for a claim for payment of retainage, a payment bond beneficiary whose contract with a prime contractor or subcontractor provides for retainage must mail written notice of the claim on a payment bond to the prime contractor and the surety on or before ninety (90) days after the final completion of the public works contract. However, a payment bond beneficiary that does not have a

direct contractual relationship with the prime contractor for public work labor or material must give "additional notice" in order to recover in a suit under the Texas Government Code.

Steel Source claimed that it was not subject to the additional notice requirement of section 2253.047 because it had a direct contractual relationship with Plains Builders via the joint check agreement. However, the court held that the joint check agreement was not a contract between Steel Source and Plains Builders for labor used directly to carry out construction of the Project. Steel Source had a contract for that purpose, but its direct contractual relationship for supplying labor and materials was with Construction Services, not the prime contractor. Because no direct contractual relationship existed between Plains Builders and Steel Source for its public work labor, the notice requirements of section 2253.047 applied to Steel Source's claim for retainage.

In summary, the court held that, without contract language demonstrating that the subcontractor had an obligation to retain funds necessary to keep its account current from each joint check as issued, the joint check rule did not apply. Because no direct contractual relationship existed between the parties for the subcontractor's public work labor, the notice requirements of Texas Government Code section 2253.047 applied to the subcontractor's claim for retainage. Therefore, the trial court's judgment was reversed and rendered in part, and affirmed in part.

Discovery/Death Penalty Sanctions

JNS Enter., Inc. v. Dixie Demolition, LLC, No. 03-10-00664-CV, 2013 Tex. App. LEXIS 8785 (Tex. App.—Austin, July 17, 2013, no pet. h.)

JNS Enterprise, Inc. (JNS) and Leesboro Corporation (Leesboro) appealed the trial court's imposition of "death penalty" sanctions against them based on the court's finding that they fabricated documents. JNS, which is in the steel salvage business, hired Airways Recycling Group, LLC (Airways) to help it locate salvage business opportunities in the United States. Dixie Demolition, LLC (Dixie) owned the

salvage rights in the Alcoa plant in Rockport, Texas and was under contract with Alcoa to demolish the plant and abate all environmental liabilities at the site. Dixie agreed to sell its salvage rights in the Alcoa plant to Airways for $10 million, requiring $3 million up front and the remaining $7 million later. Airways, in turn, agreed to sell those same salvage rights to JNS for $11,275,000. JNS paid Airways $4,275,000 as a deposit and then sought to finance the remainder through its investors, which included Leesboro. Ultimately, however, JNS failed to pay Airways the remaining purchase amount and, as a result, Airways defaulted on its purchase agreement with Dixie. Dixie eventually terminated its contract with Airways and sold the salvage to other buyers, Velez Trucking, Inc. (Velez) and AAR Incorporated (AAR). Airways then terminated its contract with JNS.

The Third Court of Appeals affirmed the dismissal of a cause of action as a death penalty sanction when the sanction was based on the production of false documents in discovery and the producing party lying about the documents in deposition.

Leesboro sued JNS, Dixie, Airways, and others for various claims stemming from the breach of an alleged "performance guarantee" that Leesboro asserted was included, as a condition of its investment, in the two salvage contracts it had allegedly entered into with JNS regarding the Alcoa plant. More specifically, Leesboro asserted claims for breach of a performance guarantee against Dixie, JNS, and Airways; fraud in the inducement and fraudulent concealment against Airways and Dixie; and constructive trust of the salvage materials from the Alcoa plant.

JNS ultimately settled with Leesboro and then joined Leesboro as a plaintiff. In JNS and Leesboro's petition against the remaining defendants, Leesboro asserted claims for breach of the performance guarantee, various fraud claims, and interference with contract—again, all based on breach of the alleged performance guarantee. JNS, in turn, asserted a claim against Airways for breach of its purchase agreement and claims against both Airways and Dixie for breach of the performance guarantee.

In response to discovery requests, Leesboro and JNS produced two contracts along with their attached performance guarantees. Their corporate representatives also testified in deposition about the contracts. And, in response to further discovery requests, a court order compelling the production of certain documents (and a $12,000 sanction for not having done so previously), Leesboro produced its communications with JNS and all Leesboro computers used to create or edit the contracts and performance guarantee. Dixie hired a computer forensics expert to analyze the data. The expert concluded that there was no evidence from the data to show that the contracts and performance guarantee "existed at the time they are dated." Additional discovery revealed evidence to support the expert's conclusion that the contracts and performance guarantee were created after the dates on which they were purportedly signed. Further, a Leesboro representative admitted in deposition that it was "a possibility" that the JNS/Leesboro contracts were created after the lawsuit was filed and then backdated to support Leesboro's claims.

Based on this information, Dixie filed a "Rule 215 Motion to Dismiss with Prejudice and for Monetary Sanction" in which Dixie alleged that JNS and Leesboro "fraudulently fabricated evidence that goes to the heart of their claims against Dixie," and asked the trial court to dismiss both Leesboro and JNS's claims with prejudice and award Dixie its attorney's fees. Essentially, Dixie asserted that JNS and Leesboro fabricated the two contracts in August 2008—after Airways defaulted on its agreement with Dixie and notified JNS that it was terminating its contract—and then backdated them to appear as if they had been created and signed in May and June 2008, respectively. Dixie also alleged that the performance guarantee was forged.

Shortly after Dixie filed its motion for sanctions, AAR and Velez filed a motion to join Dixie's motion. After Dixie set the matter for hearing, the attorney representing both JNS and Leesboro asked to withdraw from the case and sought a continuance of the sanctions hearing to allow JNS and Leesboro to find new counsel. The trial court granted the

continuance and rescheduled the hearing. One day before the rescheduled hearing, Leesboro filed another motion for continuance signed by Leesboro's president,Michael Lee, as a "pro se litigant." Dixie opposed Leesboro's request for continuance, arguing that Leesboro had not diligently sought new counsel. Dixie also noted that a corporation cannot appear pro se.

At the rescheduled hearing, the trial court first considered Leesboro's request for a continuance before addressing the motion for sanctions. Neither JNS nor Leesboro were represented by counsel at the hearing. The trial court denied the request for a continuance on the grounds that there had already been one continuance of the hearing and that JNS and Leesboro had failed to show good cause to grant the continuance. The trial court next considered the motion for sanctions. In addition to argument from Dixie's counsel, the court heard testimony regarding the reasonableness of Dixie's attorney's fees and offered both Daniel Lee, who described himself as fact witness and friend to Michael Lee, and Sonny Nguyen, JNS's president, the opportunity to cross-examine Dixie's counsel regarding those attorney's fees, which both declined. The court granted the motion for sanctions and ordered that JNS's and Leesboro's claims against Dixie, AAR, and Velez be dismissed with prejudice. The trial court's written orders, in addition to denying Leesboro's motion for continuance and dismissing JNS's and Leesboro's claims against Dixie, AAR, and Velez, awarded sanctions of $625,000 in attorney's fees to Dixie and $21,000 in attorney's fees to AAR and Velez.

The trial court subsequently entered a final judgment that incorporated its sanctions order. JNS and Leesboro appealed the judgment on multiple grounds, including the following: (1) the sanctions provisions of Texas Rule of Civil Procedure 215 did not apply to the facts of this case; (2) the death penalty sanctions imposed on JNS were excessive; (3) the district court violated JNS's and Leesboro's due process rights; (4) the monetary sanctions imposed against JNS were unsupported by the evidence; (5) the award of appellate attorney's fees was improper; (6) Dixie's expert-witness

evidence lacked an adequate foundation; (7) the court erred by holding the dismissal hearing without an interpreter for one of the witnesses and by refusing to allow witnesses to testify; (8) it was improper for the court to resolve a factual dispute at a rule 215 hearing; (9) the court should have tried lesser penalties before imposing death-penalty sanctions; and (10) the death-penalty sanction was too severe.

On appeal, JNS alleged that the trial court erred in ordering sanctions under TRCP 215 because that rule requires the existence of an underlying discovery dispute that was not present in this case. Claiming that the court granted death-penalty sanctions solely under TRCP 215, JNS argued that fabricating or falsifying evidence was not discovery-related conduct that TRCP 215 prohibits. However, the court of appeals noted that order imposing death-penalty sanctions did not specify the authority under which the trial court granted Dixie's motion—Dixie's motion, although it principally sought sanctions under TRCP 215, also asked for relief under the court's inherent power to impose sanctions. Further, even if Dixie had not invoked the inherent authority to sanction, the court of appeals held that the trial could have done so on its own motion. In any event, regardless of a trial court's inherent authority to sanction, the court of appeals held that TRCP 215 was properly invoked since the production of false documents in discovery and then lying about those documents in deposition "undoubtedly qualifies as an abuse—flagrant, in fact—of the discovery process."

JNS also suggested that it was improper for the court to sanction JNS and Leesboro under TRCP 215 in the absence of prior motions to compel or prior orders sanctioning JNS's or Leesboro's conduct. The court of appeals disagreed and held that the absence of discovery ordered does not necessarily preclude the imposition of death-penalty sanctions where the objectionable discovery conduct is fabricating evidence and lying about that evidence in deposition.

JNS and Leesboro also alleged that the death-penalty sanctions were excessive and unjust under the circumstances. However, the court of appeals held that the evidence showed that both JNS and Leesboro had committed fraud on the court

by fabricating and submitting back-dated contracts and the performance guarantee to establish a basis for their lawsuits against Dixie, AAR and Velez. JNS's and Leesboro's representatives also gave false deposition testimony about when these documents were created and signed. The fabricated documents would have been the principal evidence that Leesboro and JNS needed to succeed in most of their claims against Dixie, AAR, and Velez. As such, the documents were at the heart of Leesboro's and JNS's claims. Accordingly, the court of appeals held that the punishment dismissing JNS's and Leesboro's claims was directly related to the offensive conduct of fabricating the evidence critical to those claims. And given the court's finding that both JNS and Leesboro participated in the scheme, the punishment was properly directed at the perpetrators of the offensive conduct.

The court of appeals also dismissed the notion that the trial court's death penalty sanctions violated the due process rights of JNS and Leesboro. As the court noted, although the imposition of severe sanctions—such as the death-penalty sanctions here—is limited by constitutional due-process concerns because it adjudicates the merits of a party's claims or defenses, such severe sanctions are appropriate when the offensive conduct justifies a presumption that the party's claims or defenses lack merit, such as fabricating evidence (i.e., one of the most egregious offenses against the integrity of the judicial system).

Finally, JNS challenged the trial court's award of monetary sanctions against JNS—i.e., $625,000 for Dixie's attorney's fees and $21,000 for appellees AAR and Velez's attorney's fees—arguing specifically that it was improper for the court to make JNS jointly and severally liable with Leesboro for all of the monetary sanctions because JNS had no claims against AAR and Velez. However, the court found both JNS and Leesboro complicit in the scheme to fabricate the contracts and performance guarantee and awarded Dixie and the other defendants their attorney's fees. In other words, the court sanctioned JNS's and Leesboro's joint conduct and, therefore, it was not an abuse of discretion for

the district court to make JNS and Leesboro jointly and severally responsible for those fees.

Insurance Coverage/Failure to Provide Independent Counsel in Conflict Situations

***Marquis Acquisitions, Inc. v. Steadfast Ins. Co.*, No. 05-11-01663-CV, 2013 Tex. App. Lexis 2048 (Tex. App.—Dallas, Aug. 14, 2013, no pet. h.)**

This case arises out of a dispute between an insured and its insurance carrier arising out of the legal defense provided by Steadfast Insurance Company (Steadfast) to Marquis Acquisitions, Inc. and related entities (Marquis) in a wrongful death lawsuit brought by the Burks family in January, 2007. The underlying suit was based on a fire at the Colonia Tepeyac Apartments in Dallas, Texas that killed three members of the Burks family and injured several others. The Burks filed suit (Burks Lawsuit) against multiple defendants with ownership or management interests in the apartment complex, including Marquis, Colonia Tepeyac, Ltd., Colonia Tepeyac, G.P., Inc., Marquis Asset Management, Inc., and Hickok Interests, Inc. All of these entities were either owned or controlled by Doug Hickok. The Marquis defendants carried several layers of insurance. The first layer was a $30,000 self-insured retention policy administered by Innovative Risk Management (IRM). IRM agreed to provide a defense in the Burks suit subject to a reservation of rights and hired Joe Michael Russell (Russell) as defense counsel. Evan Lane "Van" Shaw, Hickok's partner in various business interests as well as his attorney in the present suit, had an ownership interest in Colonia Tepeyac, Ltd. On April 4, 2007, Shaw sent a letter to IRM stating that he represented Colonia Tepeyac, Ltd. in connection with the Burks Lawsuit and asked IRM to clarify its reservation of rights as to that company. Shaw stated that, if IRM was reserving its rights, then his client had the right to "select its own defense counsel and require [IRM] to pay for that defense." Shaw also sent proposed motions to IRM to substitute himself for Russell as counsel. IRM agreed to allow Shaw to take over the defense if the defendants consented in writing and Shaw was willing to

work for the lower hourly rate charged by Russell. Shaw declined the offer.

On May 17th, IRM informed Shaw that it was withdrawing its reservation of rights and providing all the insureds (i.e., Marquis entities) with an unqualified defense in the Burks Lawsuit. The letter referenced apparent allegations by Shaw that a conflict of interest existed among the insureds requiring that separate counsel be hired. IRM asked Shaw to provide further information or evidence of the potential conflict so that IRM could evaluate whether one or more of the defendants needed separate counsel. Shortly after sending this letter, however, the self-insured retention amount was exhausted and IRM tendered the defense to Steadfast which provided the second layer of insurance coverage. Steadfast agreed to provide all the insureds with an unqualified defense in the Burks Lawsuit and assigned Clay White (White) as defense counsel.

The Fifth Court of Appeals held that an insurer's failure to appoint separate counsel immediately upon receiving notice of an unspecified conflict of interest from the insured does not constitute a breach of contract and that attorney's fees incurred as a result of efforts to force an insurer to comply with the insurance contract cannot be recovered as the sole damages caused by the breach, but may be awarded in connection with an otherwise successful breach of contract claim.

Following the trial of the Burks Lawsuit, Marquis brought suit against Steadfast and Fry "in an effort to recover the attorney's fees it expended in getting Steadfast to retain separate counsel for the owner group of insureds." Marquis asserted claims for breach of contract, violations of the Texas Insurance Code, breach of the duty of good faith and fair dealing, and "aiding and abetting." Steadfast and Fry moved for summary judgment on all of Marquis's claims contending that they complied with their legal and contractual obligations as a matter of law and, in the alternative, that Marquis suffered no recoverable damages as a result of their allegedly wrongful actions. Following a hearing, the trial court signed a final judgment dismissing Marquis's claims with

prejudice. Marquis filed motions for new trial that were overruled by operation of law.

On appeal, Marquis alleged that Steadfast breached its insurance contract with Marquis when it "fail[ed] to appoint independent counsel for the owner group and the management group in order to avoid the clear conflict that arose between the two groups of insureds." Because it is undisputed that Steadfast appointed separate counsel for the owner and management defendants approximately two (2) months after it assumed control of the defense, the court construed Marquis's argument to be that Steadfast breached the contract by failing to employ separate counsel in a timely manner. In this case, although Marquis generally alleged that Steadfast breached the insurance contract, Marquis failed to point to any provision of the contract that it alleges was breached. Instead, Marquis cited the Fifth Circuit opinion of *In re Segerstrom* to argue that an insurance company's disregard of a notice of conflict among multiple insured defendants may subject it to liability for failing to act with reasonable care in fulfilling its duty to defend under the contract. *See In re Segerstrom*, 247 F. 3d 218, 228 (5th Cir. 2001). As *Segerstrom* noted, however, the claim at issue in that case was a tort claim, not a contract claim, and there was no indication that providing separate counsel for multiple insured parties was a contractual obligation. Even if the duty referred to in *Segerstrom* could support a claim for breach of contract, the court concluded that Marquis would be reading the duty too broadly. The court in *Segerstrom* stated there was no Texas authority imposing a duty on an insurance company to independently identify conflicts among multiple insured defendants when appointing legal counsel. The court then went on to suggest in dicta that an insurer's failure to act when notified of a conflict by the defense counsel engaged to represent the insured may give rise to liability.

Marquis sought to have the court read *Segerstrom* to mean that an insurer's failure to appoint separate counsel immediately upon receiving notice of an unspecified conflict of interest from the insured would constitute a breach of contract. However, the court declined to make such a finding.

Instead, *Segerstrom* stated that an insurer may breach its duty of reasonable care if it "disregards" notice of a conflict from defense counsel. The court found nothing in *Segerstrom* or any other Texas law that would require an insurance company to immediately hire separate counsel for insured defendants based on an insured's unspecified and unsubstantiated allegations of a conflict of interest. Even if Steadfast's actions could be held to constitute a breach of the insurance contract, the summary judgment evidence conclusively showed that Marquis suffered no damages as a result. As part of its summary judgment evidence, Steadfast presented Shaw's own testimony in which he admitted he was unaware of any actions by either Russell or White that affected the outcome of the Burks Lawsuit. All of the damages paid to the Burks were covered by insurance policies and Marquis produced no summary judgment evidence to show that it was harmed in any way by the fact that Steadfast did not hire separate defense counsel to represent it immediately upon Shaw's request. The only "damages" sought by Marquis were the fees it paid Shaw for his efforts to force Steadfast to hire him as Marquis's defense counsel. The court noted that any recovery of attorney's fees must be in addition to the recovery of actual damages caused by the alleged breach of contract, so fees incurred by a plaintiff prior to filing suit over the alleged breach are not an exception to this rule. Accordingly, attorney's fees incurred as a result of efforts to force an insurer to comply with the insurance contract cannot be recovered as the sole "damages" caused by the breach, but may be awarded only in connection with an otherwise successful breach of contract claim. Therefore, trial court properly granted summary judgment ordering that Marquis take nothing by its claim for breach of contract.

Medical Malpractice/Emergency Medical Care/Equal Protection

***Gardner v. Children's Med. Ctr. of Dallas*, 402 S.W.3d 888 (Tex. App.—Dallas 2013, no pet.)**

This is an appeal from a take-nothing judgment in a medical malpractice lawsuit against Children's Medical Center (CMC). At the conclusion of a jury trial, the jury found CMC not liable, and the trial court entered a final judgment in favor of CMC and against the Gardners. On appeal, the Gardners questioned whether the heightened standard of proof in cases involving emergency medical care in certain facilities as set forth in section 74.153 of the Texas Civil Practice and Remedies Code (CPRC) violated the Equal Protection Clauses of the Texas and United States Constitutions.

The Fifth Court of Appeals held that the heightened standard of proof in cases involving emergency medical care in facilities as set forth in section 74.153 of the Texas Civil Practice and Remedies Code does not violate the Equal Protection Clauses of the Texas and United States Constitutions.

On January 12, 2006, ten-month-old A.G. arrived by ambulance in the emergency room at Medical Center of Mesquite (MCM). The child suffered a seizure on the way to the emergency room and was in respiratory distress. Dr. Dana Wingate, the emergency physician, placed an endotracheal tube in the child's airway, administered medication to control the seizure, and determined that the child needed a level of care not available at the MCM. Dr. Wingate called CMC to arrange A.G.'s transport to that facility. CMC dispatched an emergency transport team to MCM to provide emergency care to A.G. and transport her to CMC.

The CMC team discovered that A.G. was not receiving sufficient oxygen and became concerned that her intubation tube was either blocked or improperly placed. The CMC team removed the intubation tube and made three unsuccessful attempts to reintubate her. The child went into respiratory and cardiac arrest. Dr. Wingate and the CMC team successfully administered cardiopulmonary resuscitation

(CPR), and Dr. Wingate reintubated A.G. The child was then transported to CMC where she remained hospitalized for three weeks. As a result of her extended oxygen deprivation, A.G. now suffers from permanent brain damage, cerebral palsy, and cortical blindness.

Amber and Anthony Gardner (Gardners) sued MCM, CMC, and various individuals involved in A.G.'s medical treatment. After settling with or dismissing all other defendants, the Gardners proceeded to a jury trial against CMC. At the close of evidence, the jury was charged with the liability question set forth in section 74.154 of the CPRC, which was the legislatively-mandated instruction for cases involving emergency medical care in certain facilities. The Gardners objected to this jury question and requested an alternate question and instruction, arguing that imposition of the heightened standard of proof set forth in section 74.154 violated the Equal Protection Clauses of the Texas and United States Constitutions. The trial court overruled the Gardners' objection and refused their alternate instruction. The jury found that the emergency medical care rendered by CMC was not performed with willful or wanton negligence. The trial court entered a take-nothing judgment in favor of CMC and granted CMC's motion to sever so that final judgment could be entered without waiting for court approval of the settlements with other parties.

On appeal, the Gardners challenged the constitutionality of section 74.153 of the CPRC, arguing that the heightened standard of proof in cases involving emergency medical care in certain facilities violated the Equal Protection Clauses of the Texas or United States Constitutions. The Gardners alleged that the statute classified potential claimants into two categories: those who receive emergency medical care in certain facilities (i.e., the hospital emergency department) and must meet the heightened standard of proof, and those who receive emergency medical care in non-covered facilities and must only meet the traditional standard of proof. The Gardners argued this classification is arbitrary, unreasonable, and not rationally related to a legitimate state interest.

The court of appeals noted that, under the rational-basis test, a statute enjoys a strong presumption of validity, and the statute must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. The party challenging the rationality of the legislative classification has the burden of negating every conceivable basis that might support it. Section 74.153 classifies health care liability claimants into two categories: (1) those who receive emergency medical care in certain settings and must meet a heightened standard of proof, and (2) those who receive emergency medical care in non-covered settings or receive non-emergency care and must only meet the traditional standard of proof.

Section 74.153 expanded the former Good Samaritan statute to include physicians in (or immediately after transfer from) hospital emergency departments. The legislature acted to encourage physicians and other health care providers to provide emergency medical care. In this case, CMC argued that the state had a legitimate interest in ensuring the provision and availability of emergency medical care to its citizens. CMC suggested the legislature could have concluded that health care institutions were experiencing problems in obtaining physician coverage for certain services, particularly in high-risk areas such as emergency care, due to the high number of health care liability claims and the relative unavailability of affordable malpractice insurance. CMC also suggested that the legislature could have distinguished between emergency medical care provided in a hospital emergency room and emergency medical care provided elsewhere because hospital emergency room physicians and health care providers are required by law to treat anyone who walks into the emergency room.

CMC argued that because there are several scenarios that could provide a rational basis for a heightened burden of proof of negligence for physicians providing emergency care in a hospital emergency room, the Gardners' equal protection challenge failed. The statute bears a rational relationship to the State's legitimate interest in ensuring the provision and availability of emergency medical care to its citizens. Under a

rational-basis review, the court held that it was compelled to accept a legislature's generalizations even where there is an imperfect fit between means and ends.

The court of appeals further held that a classification of health care liability claimants based on whether they receive emergency medical care in a hospital emergency room or whether they receive emergency medical care in a non-covered setting does not fail rational-basis review because, in practice, it results in some inequity. Accordingly, the court concluded that the classification did not violate the equal protection clauses of the United States and Texas Constitutions.

Post Judgment Collection/Turnover Order

D&M Marine, Inc. v. Turner, No. 02-12-00399-CV, 2013 Tex. App. LEXIS 8484 (Tex. App.—Fort Worth, Aug. 15, 2013, no pet.).

D&M Marine, Inc. d/b/a Phipps & Company Homes (D&M) appealed from a trial court turnover order entered to aid execution on a prior final judgment against D&M and in favor of J. Neal Turner and Kerie B. Turner (Turners). The Turners filed a construction-defect action against D&M and others involved in building their home. D&M's insurance company, Mid-Continent Casualty Company (Mid-Continent), defended D&M against the Turners' suit. A jury concluded that D&M solely was liable for the defect. In March 2012, the trial court entered judgment on the jury's verdict and awarded the Turners damages, including attorneys' fees. D&M appealed the trial court's judgment. The court of appeals affirmed the judgment in part but reversed the award of attorneys' fees.

In June 2012, Mid-Continent filed a declaratory-judgment action in federal court against D&M and the Turners, seeking a declaration that it had no duty either (1) to defend or indemnify D&M or (2) to pay the Turners' damages under its policy with D&M. Shortly thereafter, the Turners discovered that D&M was no longer in business and had no assets that readily could be attached to satisfy their judgment. The Turners, therefore, filed an application for turnover relief in

the state trial court on July 31, 2012. The Turners specifically requested rights "to any insurance policies issued to or which may provide coverage" to D&M.

In the federal trial court, D&M did not answer Mid-Continent's complaint, so a default judgment was entered against D&M. On August 31, 2012—two days after the federal trial court granted the default judgment against D&M—the state trial court held a hearing on the Turners' turnover application. At the hearing, D&M did not dispute that it was no longer in business and had no assets that rea dily could be attached in satisfaction of the Turners' judgment. Based on that evidence, the Turners submitted to the state trial court a proposed order that granted their requested turnover relief. D&M responded that "an unasserted claim against an insurance carrier is not subject to turnover relief." The state trial court granted the Turners' application and ordered "that all ownership, rights, privileges, and interests relative to any insurance policies issued to or which may provide coverage of any nature to [D&M] relative to the Judgment issued in this cause are hereby transferred and assigned to [the Turners]."

The Second Court of Appeals held that a judgment debtor's unasserted claim for indemnification against its insurer was the proper subject of a turnover order in favor of the judgment creditor. The judgment debtor waived voidable error in the turnover order, which improperly ordered assets surrendered directly to the judgment creditor instead of to the sheriff, constable, or receiver.

The Turners then moved to set aside the federal trial court's default judgment. The federal trial court concluded that extraordinary circumstances—the fact that the Turners could not appear in Mid-Continent's declaratory-judgment action as to D&M until they obtained the turnover order—warranted vacating the default judgment. D&M appealed the state trial court's turnover order.

On appeal, D&M argued that its unasserted claims against Mid-Continent were not properly subject to a turnover order, rendering the trial court's order an abuse of its discretion.

The judgment-collection statute provides a method for court-ordered collection of judgments, authorizing the trial court to order the judgment debtor to turn over nonexempt property that readily cannot be attached or levied on by ordinary legal process. Generally, causes of action constitute property subject to turnover by a court. Specifically permitted as subjects of a turnover order are "causes of action against third parties to a judgment creditor who [has] the same interest in pursuing them to maximum value as the judgment debtor.

The Turners requested a turnover order regarding D&M's insurance policies that possibly provided coverage for D&M against the Turners' construction-defect suit. The Turners would have the same interest as D&M would to pursue any bad faith or failure-to-indemnify claims against Mid-Continent to maximum recovery. The public-policy and open-courts concerns that have doomed turnover orders in the past are not present in this case. Therefore, the trial court did not abuse its discretion by ordering D&M to transfer its unasserted claims against Mid-Continent that could possibly satisfy the Turners' judgment against D&M.

Texas Courts of Appeals Update—Procedural

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Associational Standing

***Big Rock Investors Ass'n v. Big Rock Petroleum, Inc.*, 409 S.W.3d 845 (Tex. App.—Fort Worth 2013, pet. granted)**

From November 1994 to June 2005, Big Rock Petroleum, Inc. ("Big Rock") offered potential investors the opportunities to invest in approximately 117 different purported oil and gas drilling projects. At least 226 entity investors or individuals invested approximately $26.8 million with Big Rock during that time. After an FBI raid and the appointment of a receiver over Big Rock, those 226 entity investors or individuals formed Big Rock Investors Association ("BRIA") in order to commence and prosecute their claims against Big Rock, alleging that a substantial majority of the purported oil and gas drilling projects never existed or that Big Rock never had any interests in the projects.

Big Rock filed a plea to the jurisdiction, arguing that BRIA could not pursue the individual claims of its members because the claims required the participation of each individual member and, therefore, BRIA could not satisfy the third prong of the associational standing test. The trial court agreed and signed an order granting Big Rock's plea to the jurisdiction, dismissing BRIA's claims. BRIA perfected its appeal.

The third prong of the associational standing test provides that an association has standing only when neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441 (1977). But an association lacks standing—an each individual member must be a party to the suit—when the claim is for monetary damages for individual members' alleged injuries, when the damages have not been assigned to the association, and when the damages are not common to the entire membership and are not shared by all members to an equal degree.

The Second Court of Appeals affirmed the trial court and held that an association did not have standing to pursue claims related to a Ponzi scheme on behalf of its members because determining the financial losses for each member—even if offered only through the testimony of a single expert witness—would still be the type of fact-intensive analysis that the third prong of the associational standing test aims to avoid.

A different analysis, however, accompanies an association's claim for equitable relief. The association has standing if the equitable remedy would inure to each injured member's benefit and prudential concerns would therefore be advanced by the association standing on behalf of its members. To determine whether such prudential concerns would be advanced, courts look to whether the association has established that any individualized evidence required to prosecute the claim would be duplicative and redundant. If the claims can be proven through evidence from representative injured members without a fact-intensive individual inquiry, the need for participation of those individual members will not defeat associational standing.

The BRIA's 226 members did not share a common investment portfolio, invested in over 100 separate projects in varying amounts, and reaped profits or incurred losses in different amounts over the ten-year period at issue. Despite the varying facts applicable to each of its members,

the BRIA claimed it intended to retain a damage expert that would minimize the need for the participation of the individual members. Specifically, the BRIA argued the expert could testify about the financial losses sustained by the individual members with reasonable certainty, and with minimal participation by the individual members. The Second Court of Appeals held that substituting the testimony of one person concerning the individual profits and losses of each of the BRIA's individual members is no less fact-intensive than simply permitting each individual member to provide such testimony concerning his profits and losses. Thus, even if this fact-intensive analysis were performed by one witness, the prudential concerns in favor of associational standing do not exist. Accordingly, the Second Court of Appeals affirmed the trial court's grant of Big Rock's plea to the jurisdiction because the BRIA lacked associational standing.

Default Judgment—Strict Compliance Requirement

***Reliant Capital Solutions, LLC v. Chuma-Okorafor*, No. 03-11-00422-CV, 2013 WL 4487529 (Tex. App.—Austin Aug. 14, 2013, no. pet.) (mem. op.)**

On December 11, 2009, Chimeka Chuma-Okorafor filed an original petition against Reliant Capital Solutions, LLC ("Reliant") asserting claims for deceptive trade practices, invasion of privacy, and wrongful debt collection. Chuma-Okorafor sought to serve Reliant through its registered agent for service, CT Corporation Systems. On December 16, 2009, the citation was issued. On January 19, 2010, the required documents were mailed to "CT Corporation Sys." by certified mail. The appellate record included photocopies of Postal Service Form 3800, titled "Certified Mail Receipt," and Postal Service Form 3811, titled "Domestic Return Receipt."

Notably, Section A of the Domestic Return Receipt, headed "Signature: Addressee or Agent," contained the stamped legend "JAN 21 2010." Section B, headed "Received by (Print Name)," also contained a stamped legend stating, "Received CT CORPORATION." Section C, headed "Date of Delivery," was left blank. There was no handwritten signature on the receipt.

After the U.S. Postal Service's return receipt had been on file with the District Clerk of Travis County for the required period of time, Chuma-Okorafor moved for entry of a default judgment. On January 18, 2011, the trial court granted the default judgment. Reliant perfected this restricted appeal on July 7, 2011. Reliant argued that the trial court erred in entering a no-answer default judgment against it because the service of citation was fatally defective due to the absence of the addressee's signature on the return.

The Third Court of Appeals found error on the face of the record as to whether service of citation was properly effected where the return receipt merely included the stamped name of the defendant and did not indicate service on a person with capacity to accept the same.

When service is accomplished by certified mail, Rule 107 of the Texas Rules of Civil Procedure requires that the return include the addressee's signature. The Third Court of Appeals noted that a stamped signature may be sufficient if shown to be authorized by proof in the record. The return receipt, however, contained no signature at all. Accordingly, the lack of a signature on the receipt and the lack of evidence in the record authorizing a stamp as an alternative to a signature rendered the service on Reliant defective.

The court also found that the default judgment could not stand because a corporation is not a person capable of accepting process. Rather, a corporation must be served through its agents. Since neither the return receipt nor the record indicated that a person with capacity to accept service was actually served, there was error on the face of the record.

The Third Court of Appeals concluded that Chuma-Okorafor had failed to strictly comply with the rules governing the issuance, service, and return of citation and thus, reversed the trial court's judgment.

Jury Shuffle—When Does Voir Dire Officially Begin?

***BNSF Ry. Co. v. Wipff*, 408 S.W.3d 662 (Tex. App.—Fort Worth 2013, no pet.)**

At a Friday pretrial hearing, the trial court informed counsel that the venire members—located in a central jury room—were completing detailed questionnaires under penalty of perjury. BNSF Railway Company's ("BNSF") counsel did not view the venire while it was in the central jury room. Later that day, BNSF's counsel received copies of the completed questionnaires and copies of information cards. The trial court called the case for trial on the following Monday, and BNSF's counsel immediately demanded a shuffle of the venire. BNSF's counsel acknowledged that she had reviewed the questionnaires before demanding the shuffle, but indicated that the demand had been "primarily based" on the information cards rather than the questionnaires. The trial court denied the shuffle demand as untimely because the questionnaires had been reviewed. After exercising all of its peremptory strikes, BNSF's counsel made a record that two objectionable jurors were seated after expending peremptory strikes. The jury ultimately returned a $2,718,653 verdict against BNSF, and the trial court subsequently denied BNSF's motion for new trial. BNSF perfected its appeal.

The procedural rule governing jury shuffles creates mandatory duties for a trial court. The Second Court of Appeals, therefore, employed a de novo review of the denial of BNSF's demand for a jury shuffle, and gave a completely fresh look at the trial court's rulings.

Rule 223 provides that a trial court "upon the demand prior to voir dire examination . . ., shall cause the names of all members of such assigned jury panel in such case to be . . . shuffled." Tex. R. Civ. P. 223. The trial court denied BNSF's demand for a jury shuffle as untimely, having been made after voir dire examination allegedly began. Thus, the Second Court of Appeals noted that the operative issue in the appeal was when voir dire begins.

The Second Court of Appeals first looked to the Texas Supreme Court's guidance on when voir dire examination begins. Through a prior administrative order, the Texas Supreme Court mandated that the Rule 226a instructions "shall be given by the court to the members of the jury panel after they have been sworn in as provided in Rule 226 and *before the voir dire examination*." Supreme Court of Tex. Admin. Order, *Amendments to Texas Rules of Civil Procedure 281 and 284 and to the Jury Instructions under Texas Rule of Civil Procedure 226A*, Misc. Docket No. 11-9047 (Mar. 15, 2011) (emphasis added). Here, the trial court had not yet given the Rule 226a instructions at the time BNSF's counsel demanded a jury shuffle. Thus, assuming compliance with the Texas Supreme Court's mandate, voir dire examination had not begun.

The Second Court of Appeals held the trial court erred in denying a demand for a jury shuffle as untimely because, although counsel had reviewed a detailed questionnaire answered under penalty of perjury, voir dire had not officially begun where the requesting counsel had not actually viewed the venire in their seated order and the trial court had not given the venire the Rule 226a instructions.

The Second Court of Appeals then looked to one of its prior opinions, which the Appellee argued controlled and commanded affirmation of the trial court's decision. In that opinion, the court held that a shuffle demand was untimely where counsel had viewed the venire members in their seated order, counsel had an opportunity to review the case-specific and detailed questionnaires, and the trial court swore in the

jury. *See Carr v. Smith*, 22 S.W.3d 128, 133-34 (Tex. App.—Fort Worth 2000, pet. denied). After considering the facts under a de novo review, the Second Court of Appeals concluded that the facts presented here differed from those in *Carr*. First, BNSF's counsel had not viewed the venire members in their seated order on the Friday before. Second, although BNSF's counsel had an opportunity to review the case-specific and detailed questionnaires, the trial court had not given the venire the prescribed instructions from Rule 226a. Accordingly, voir dire had not begun and BNSF's demand for a jury shuffle was therefore timely. The Second Court of Appeals reversed the trial court's denial and remanded for a new trial.

Post-Judgment Deadline Extensions—No Notice or Knowledge of Judgment

***RK Fin. Group, L.P. v. Allstate Sec. Indus.*, No. 07-12-00063-CV, 2013 WL 2475561 (Tex. App.—Amarillo June 6, 2013, no pet.) (mem. op.)**

Allstate Security Industries ("Allstate") allegedly provided RK Financial Group, L.P. ("RK") a security service that RK had not requested. When RK refused to pay for the service, Allstate filed suit. RK's registered agent, Kay Fischer, received the original petition and filed an answer on behalf of RK. Thereafter, Allstate moved for summary judgment and allegedly served requests of admission upon RK. RK did not respond to Allstate's summary judgment motion, nor did it answer Allstate's requests for admission. RK claimed that it never received the documents. On October 17, 2011, the trial court granted Allstate's motion for summary judgment.

According to an affidavit executed by Fischer, neither she nor anyone else at RK knew of the judgment's entry until November 17, 2011. This lack of notice or knowledge purportedly related to Fischer's absence from the country for a substantial amount of time each month. Additionally, the

court clerk's letter notifying RK of the decree contained an incorrect street address for RK. As such, RK moved for a new trial to extend the deadlines by which it could move for a new trial and perfect an appeal pursuant to Texas Rule of Civil Procedure 306a. The trial court denied RK's motions.

The Seventh Court of Appeals reversed the trial court's order denying an extension of post-judgment deadlines under Texas Rule of Civil Procedure 306a(4) where appellant had no notice or knowledge of the judgment until thirty-one days after the date of execution.

The Seventh Court of Appeals first addressed the trial court's refusal to grant RK's Rule 306a motion. The court found that RK had standing to attack the judgment levied against it even though its status as a Texas limited partnership may have been forfeited. The court then turned to the requirements of Rule 306a(4). Rule 306a(4) provides that if a party adversely affected by a judgment has neither received notice nor acquired actual knowledge of the order within twenty days after the judgment is signed, the time period in which to file post-judgment motions begins on the date the party or his attorney receives the notice or acquires actual knowledge.

Fischer's affidavit confirmed that RK neither received notice nor acquired knowledge of the judgment until thirty-one days after the decree was signed. Accordingly, RK's Rule 306a motion, coupled with Fischer's affidavit, created a prima facie case that RK not only lacked timely notice of the final summary judgment entered below, but also failed to acquire such notice until November 17, 2011. The Seventh Court of Appeals, therefore, held that the trial court erred in denying RK's Rule 306a(4) motion.

The court of appeals also held that the trial court erred in denying RK's motion for new trial. The trial court refused to grant RK's motion for the sole reason that it "was not timely, as required by Texas Rule of Civil Procedure 329b, within thirty days of the rendition of summary judgment on October

17, 2011." Having concluded that the trial court erred in denying RK's Rule 306a motion, the Seventh Court of Appeals also found that the deadlines to file post-judgment motions should have been extended. Thus, the deadline by which RK had to file its motion for new trial was thirty days from November 17, 2011 (i.e., the date RK received notice of the judgment's entry). Since RK had filed its motion for new trial well within the extended deadline, the trial court abused its discretion in denying RK's motion. Accordingly, the Seventh Court of Appeals sustained RK's issues and reversed the trial court's order denying an extension of post-judgment deadlines and a new trial.

Res Judicata—Dismissal Without Prejudice

***Allen v. Union Standard Ins. Co.*, No. 11-12-00233-CV, 2013 WL 4715972 (Tex. App.—Eastland Aug. 30, 2013, no. pet.) (mem. op.)**

In 1981, Jerry Allen was injured in the course and scope of his employment. In 1985, the 161st District Court of Ector County entered judgment in Allen's favor against Union Standard Insurance Company ("Union"). The trial court held Union liable for all of Allen's future medical expenses and benefits as provided by then-existing workers' compensation laws.

In 2010, Allen sued Union when Union failed to pay his continued medical costs. Union alleged diversity jurisdiction and removed the suit to the U.S. District Court for the Western District of Texas. The federal court stayed the suit to allow Allen and Union to conduct an administrative hearing on the compensability issue. Thereafter, the federal court granted Union's motion to dismiss without prejudice and dismissed the suit. The federal court stated that it lacked jurisdiction over Allen's claims because Allen had not exhausted his administrative remedies when he brought the suit.

Following the federal court's dismissal without prejudice, Allen filed the current lawsuit in the 70th District Court in Ector County seeking enforcement of the 1985 order. Union moved for summary judgment, claiming res judicata barred Allen's enforcement claim. The trial court granted Union's motion.

On appeal, Allen argued that res judicata did not operate to bar his enforcement claim. Allen alleged that Union was not entitled to judgment as a matter of law because his enforcement claim was not part of the federal lawsuit. More specifically, Allen argued that the federal court did not have jurisdiction to enforce the original 1985 judgment.

The Eleventh Court of Appeals reversed the trial court's judgment, explaining that a federal district court's dismissal for lack of subject-matter jurisdiction is "without prejudice on the merits" and is open to review in state court.

Under Texas law, whether the doctrine of res judicata operates to bar a claim is determined by three factors: (1) whether a court of competent jurisdiction entered a prior judgment on the merits; (2) whether the prior suit involved the same parties or those in privity with them; and (3) whether the second action was based on the same claims as raised or that could have been raised in the prior suit. The Eleventh Court of Appeals found that the first element of the test was missing. The federal court had entered a dismissal without prejudice; however, a dismissal without prejudice does not have the force of a judgment on the merits. As such, the court held Allen could refile his claim in the original state court without preclusive effect. The Eleventh Court of Appeals reversed the trial court's judgment and remanded the case for further proceedings.

Standing—Virtual Representation Doctrine

***BJVSD Bird Family P'ship v. Star Electricity, L.L.C.*, No. 01-11-00470-CV, 2013 WL 4080723 (Tex. App.—Houston [1st Dist.] Aug. 13, 2013, no pet.)**

Star Electricity, L.L.C. d/b/a Startex Power ("Startex") filed suit against Triton 88, L.P. and its general partner Triton 2000, L.L.C. The trial court ultimately entered judgment in favor of Startex and appointed a receiver over Triton 88. Triton 88 then filed for bankruptcy. The trial court entered a modified order appointing a receiver, enlarging the receiver's authority and authorizing him to take charge of Triton 2000 and act as its sole manager, member and officer and conduct the business of Triton 2000. Triton 2000 filed for bankruptcy soon thereafter. The BJVSD Bird Family Partnership ("BJVSD")—a limited partner of both Triton 88 and Triton 2000—later filed a notice of appeal from the trial court's modified order appointing the receiver. On appeal, Startex argued that BJVSD lacked standing to appeal because it was not a party to the underlying judgment or to the trial court's modified order appointing a receiver. BJVSD argued it had standing under the virtual representation doctrine.

The First Court of Appeals dismissed the appeal for lack of jurisdiction, holding that the appellant lacked standing under the virtual representation doctrine because the appellant—a limited partner of one defendant and a member of the other defendant—would not be bound by the judgment against the defendants.

Under the virtual representation doctrine, "a person or entity who was not a named party in the trial court may pursue an appeal in order to vindicate important rights." *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718, 723 (Tex. 2006). This doctrine affords a litigant the opportunity to be deemed a party if the litigant (1) would be bound by the judgment, (2) has a privity of interest apparent from the record, and (3) has an identity of interest between itself and a named party to the judgment. *Id.* at 722.

The first factor is often considered the most important consideration.

With respect to the first factor, BJVSD argued that it was bound to the judgment against Triton 88 and Triton 2000 because BJVSD was their sole limited partner and sole member, respectively. The First Court of Appeals, however, noted that a limited partner like BJVSD—one that did not also serve as a general partner and one who did not participate in the control of the business—is not liable for Triton 88's obligations. Similarly, BJVSD is not liable for Triton 2000's obligations because nothing in the membership agreement provided that members are liable for company obligations. Because BJVSD made no showing it had an individual legal right relative to the underlying judgment and the complained-of post-judgment orders, it was not a proper party to challenge the trial court's orders. The First Court of Appeals therefore held that BJVSD could not invoke the doctrine of virtual representation and lacked standing to pursue the appeal.

Uniform Interstate Family Support Act—Subject-Matter Jurisdiction

***In re J.R.S.*, No. 10-12-00142-CV, 2013 WL 3846352 (Tex. App.—Waco July 25, 2013, no. pet.) (mem. op.)**

In 2000, Adrian was ordered to pay child support for J.R.S. to Barbara, the child's mother, in the state of Colorado. The child support order was registered and enforced in Texas in 2003, and again in 2007. In 2008, Adrian filed a petition to modify the support order in Johnson County, Texas. At a temporary orders hearing, the trial court learned that Barbara had moved to Colorado and left the child with her father. The Attorney General had been notified of the proceedings but did not appear. On August 31, 2009, the court entered a final judgment, which terminated Adrian's child support obligation and determined that he owed no arrearages.

In 2011, the Attorney General filed a "Motion to Determine Controlling Order and Confirm Arrearages." At the hearing, the evidence showed Adrian's arrearages to be $6,290.17 as of September 12, 2011. Still, the trial court denied the Attorney General's motion on February 3, 2012.

On appeal, the Attorney General argued that the trial court erred by not granting its motion that would set aside the prior judgment for lack of subject-matter jurisdiction pursuant to the Uniform Interstate Family Support Act ("UIFSA"). Specifically, the Attorney General alleged that Texas did not have subject-matter jurisdiction to modify the 2000 support order from Colorado.

The Tenth Court of Appeals reversed the trial court's order denying the Attorney General's motion to determine the controlling child support order and to confirm arrearages, finding the Texas court lacked subject-matter jurisdiction to modify the Colorado support order.

The Tenth Court of Appeals explained that a party seeking to modify a support order from another state must establish jurisdiction pursuant to the UIFSA. Once a court having jurisdiction enters a support decree, that tribunal is the only one entitled to modify the decree so long as that tribunal retains continuing, exclusive jurisdiction under the UIFSA. While another state may be required to enforce the existing support decree, it has no authority under the UIFSA to modify the decree so long as one of the parties remains in the issuing state.

Here, Colorado acquired and retained jurisdiction over matters regarding the child support obligation for J.R.S. by the 2000 child support order. Texas acquired jurisdiction solely for the purpose of enforcing that order in 2003. Thus, Texas could only go beyond mere enforcement and assume jurisdiction to modify the 2000 Colorado order if Colorado had lost its jurisdiction to modify.

The records from the 2009 modification hearings revealed that Barbara and J.R.S. still resided in Colorado. As such, Texas did not acquire continuing, exclusive jurisdiction to modify the Colorado order. Although Texas could acquire jurisdiction if all of the parties had filed consents in the issuing tribunal agreeing to Texas assuming jurisdiction to modify, there was nothing in the record showing that such consents were filed. Therefore, Texas did not have jurisdiction to modify the 2000 order; the trial court's August 31, 2009 order was void.

Accordingly, the Tenth Court of Appeals found that the trial court erred in denying the Attorney General's motion to determine the controlling order and to confirm arrears and reversed and remanded the case to the trial court for further proceedings.

Will Contest—Discharged Independent Executor is Not a Proper Party

In re Estate of Whittington, 409 S.W.3d 666 (Tex. App.—Eastland 2013, no. pet.)

On October 3, 2008, James Bailey Whittington died leaving behind a will naming Appellee, Lonnie Jones, as independent executor and Nora Ann Carpenter as the sole beneficiary. On March 29, 2010, Appellee filed an application for judicial discharge pursuant to Section 149E of the Texas Probate Code. The probate court entered its "Order Granting Final Distribution of the Estate and Discharge of Executor" on May 10, 2010. In its order, the court found that the estate had been fully administered and that Jones had fulfilled all duties required of him under the Texas Probate Code. Thus, the independent administration of Jones was closed.

On November 8, 2010, Appellant, Paul Whittington, filed an application to contest the will and a motion to transfer the case to the district court. Whittington alleged that he was the son and only child of the decedent; that the decedent lacked

testamentary capacity when he executed the will; and that Carpenter, as decedent's caregiver, procured the will through undue influence. Whittington's initial application named Jones individually; however, in his amended application to set aside the will, filed on March 1, 2011, Whittington stated that Jones was named as a party only in his capacity as independent executor.

Between the time that Whittington filed his original contest in 2010 and his amended application in 2011, Jones filed a motion to dismiss on the ground that he was not a proper party because he had been discharged by the court. Jones also filed a motion for sanctions against Whittington under Chapters 9 and 10 of the Texas Civil Practice and Remedies Code. Jones claimed the erroneous naming of him as a party was both groundless and frivolous.

As a matter of first impression, the Eleventh Court of Appeals held that a former independent executor who has been judicially discharged is not a proper party to a subsequently filed will contest, and thus, the court of appeals reversed the trial court's order imposing sanctions.

The probate court transferred the case to the district court, and on June 9, 2011, the trial court entered an order granting Jones' motions and dismissed Jones as a party to the will contest. The trial court also imposed sanctions against Whittington in the amount of $3,000.00 on the ground that naming a discharged independent executor as a party was not supported by any existing law and was a frivolous argument for the establishment of a new law.

In his first issue on appeal, Whittington argued that Jones was a proper party to the will contest and that the trial court erred in dismissing him from the case. Section 149E of the Texas Probate Code permits an independent executor to file an action for declaratory judgment seeking discharge after the estate has been administered and there is no further need for independent administration of the estate. The Eleventh Court of Appeals found that the purpose of Section 149E is

two-fold—that being, to allow an independent executor (1) to obtain a discharge from fiduciary service and (2) to obtain a shield from liability involving matters relating to the past administration of the estate that have been fully and fairly disclosed. The court noted that "past administration" includes the independent executor's defense of a will contest in his or her fiduciary capacity during the administration of the estate.

The judicial discharge of Jones on May 10, 2010 confirmed that he no longer possessed the assets of the estate and had no further responsibilities. Therefore, when Whittington filed his will contest on November 8, 2010, there was no acting executor to serve as a virtual representative. The Eleventh Court of Appeals held that in cases where there is no duly appointed executor, the proper parties to a will contest are the heirs or beneficiaries of the estate, not the former independent executor. Accordingly, the trial court had correctly determined that Jones was not a proper party to Whittington's will contest.

In his second issue, Whittington argued that the trial court abused its discretion in imposing sanctions. The court sided with Whittington after noting that no case had previously addressed the issue of whether a former independent executor who has been judicially discharged under Section 149E is a proper party to a subsequently filed will contest. Thus, the Eleventh Court of Appeals held that sanctions were not appropriate in this case dealing with a matter of first impression and reversed the trial court's June 9, 2011 order insofar as it imposed sanctions against Whittington.

Fifth Circuit Civil Appellate Update

Kelli B. Bills, Haynes and Boone, LLP, Dallas

Anti-Kickback Act

***United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*, 727 F.3d 343 (5th Cir. 2013)**

In 2001, Kellogg Brown & Root, Inc. ("KBR") secured a contract to provide global logistical services to the United States Army, an agreement known as the Logistics Civil Augmentation Program III ("LOGCAP III"). LOGCAP III was structured as an indefinite delivery/indefinite quantity contract, under which the Army issued KBR discrete task orders that KBR could fulfill on its own or by retaining subcontractors. Employees in KBR's transportation department accepted kickbacks from two subcontractors, EGL, Inc. ("EGL") and Panalpina, Inc. ("Panalpina"), engaged by KBR to assist in carrying out LOGCAP III task orders to transport military equipment and supplies between 2002 and 2006. Two individuals brought a qui tam suit against KBR and others for the kickback scheme. The government intervened and filed its own complaint, which KBR moved to dismiss. KBR argued that the government failed to state a claim for civil liability under the Anti-Kickback Act ("AKA") because 41 U.S.C. § 55(a)(1) does not permit vicarious liability. The district court granted the motion to dismiss.

The Anti-Kickback Act's civil suit provision can make an employer vicariously liable for the acts of its employees.

The civil liability provisions of the AKA were amended to strengthen the prohibition against kickbacks. The 1986 amendments permitted recovery of double damages and per-occurrence penalties from knowing violators of the Act. The amendments also added recovery of the cost of the kickback

from the prime contractors and higher tier subcontractors for kickback activity on the part of their employees or subcontractors. Both of § 55(a)'s subsections allow the government to recover from a "person," and "person" is defined broadly to include corporations and other business entities. Thus, the Fifth Circuit noted, § 55(a)'s plain terms provide that a corporate person, and not solely its individual employees, can be held liable. The Fifth Circuit reasoned that because corporations are liable for kickback activity, the AKA requires attributing liability to corporate entities for activities of its employees under a rule of vicarious liability. Also, under § 55(a)(1), the government must prove a knowing violation before it may obtain double damages and per-occurrence recoveries. But section 55(a)(2) requires no proof of "knowing" misconduct before allowing recovery of a civil penalty equal to the amount of the kickback.

The government argued that KBR officials acted within their apparent authority when they accepted bribes. The Fifth Circuit found no persuasive evidence of congressional intent in § 55(a) to retreat from the common law permitting vicarious liability for employee actions taken under apparent authority. The per-occurrence penalty is not obligatory upon finding the defendant liable; rather, courts retain discretion to tailor the size of the penalty they award under § 55(a)(1). The Fifth Circuit also rejected the argument that it should apply "heightened proof" requirements prescribed in the law of vicarious liability applicable to punitive damages statutes. KBR cited no case in which a court had applied punitive-damages vicarious-liability principles to a statute that, by its terms, did not expressly provide for punitive damages. Nor did §55(a)(1), which had a cap on recoverable damages, bear the hallmarks of a punitive damages provision. The Fifth Circuit thus declined to alter the generally applicable common-law rules for a non-punitive damages law like the AKA. Ultimately, the Fifth Circuit found that neither the act-to-benefit pleading standard adopted in prior precedent nor the standards for punitive damages statutes governed when alleging a violation of §55(a)(1). Thus, the Fifth Circuit reversed the dismissal and remanded for further proceedings.

Judge Jolly concurred, joining in the outcome, but not the majority's analysis.

Attorney's Fees

Batton v. I.R.S., 718 F.3d 522 (5th Cir. 2013)

After being audited, Mark Barton filed a Freedom of Information Act ("FOIA") request with the Internal Revenue Service. In response, the IRS began sending near-monthly letters notifying Batton that the agency needed more time to process his request. Almost a year later, Batton filed suit under the FOIA after receiving no responsive documents. The United States Attorney was not properly served until early 2008. In January 2008, the IRS released documents to Batton for the first time and then moved for summary judgment alleging that certain exemptions in the FOIA entitled it to withhold the remaining responsive documents. Batton moved to compel production of an index identifying those remaining documents so that he could contest the claimed exemptions. The district court denied Batton's motion and granted summary judgment for the IRS. On appeal, the Fifth Circuit reversed and remanded with instructions to order production of the index. The district court did so and the IRS released thousands of previously withheld pages. Batton then moved for attorney's fees as the prevailing party, but the district court denied the motion.

The definition of "substantially prevailed" in the Open Government Act applied to determine whether a taxpayer is entitled to attorney's fees in a suit under the Freedom of Information Act.

To obtain attorneys' fees under the FOIA, a party must show that it has substantially prevailed (the eligibility prong) and that it should receive fees based on a variety of factors (the entitlement prong). A party substantially prevails by obtaining a court order in his favor or through a catalyst theory, codified in the FOIA by the Open Government Act ("OGA"), which defines "substantially prevails" as obtaining relief through a voluntary or unilateral change in position by the agency. The Fifth Circuit rejected the IRS's argument that applying the OGA would give it retroactive

effect, as most of the relevant events took place after the effective date of the Act (December 31, 2007). Applying the OGA led to the conclusion that Batton substantially prevailed, because only after he filed and served suit did the IRS first begin to produce responsive documents. The Fifth Circuit then remanded for the district court to assess Batton's entitlement to fees under the four factors of the entitlement prong analysis: (1) the benefit to the public deriving from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding of the records had a reasonable basis in law.

Judge Garza dissented, agreeing that the OGA applied and that the Fifth Circuit should vacate the district court's order, but stating that the Fifth Circuit should remand to allow the district court to assess eligibility for fees in the first instance. Because the district court determined that the OGA did not apply, it did not consider Batton's eligibility for fees under the OGA.

Class Actions

Hall v. Variable Annuity Life Ins. Co., 727 F.3d 372 (5th Cir. 2013)

John and Brenda Hall purchased a deferred variable annuity from Variable Annuity Life Insurance Company ("VALIC") in 2000. In April 2001, two individuals filed a class action complaint against VALIC alleging securities fraud. The Halls were members of the nationwide class certified by the district court. After class certification, class counsel filed expert and fact witness lists six months after the disclosure deadline. VALIC moved to strike the witness list, and the district court granted the motion. The district court then vacated its prior order granting class certification. When the Halls attempted to re-file the class-action claims in 2009, VALIC moved to dismiss the complaint, alleging that the five-year statute of repose

Vacatur of a class-certification order ceased tolling of the statute of limitations.

applicable to securities fraud actions had expired. The district court agreed and dismissed the case.

The Fifth Circuit affirmed, finding that the statute of repose ceased to be tolled when the class certification order was vacated. In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the U.S. Supreme Court created a rule to "freeze the clock" for putative class members once a class action lawsuit was filed. However, that tolling does not continue indefinitely; rather, the limitations period resumes running when class certification is denied or a certified class is decertified. The unsuccessful appeal of either decertification or denial of certification does not extend the tolling period. Although the district court vacated certification, the Fifth Circuit found no reason to distinguish such a vacatur from a decertification order. Recognizing that a vacatur of class certification ceased tolling was most consistent with the Fifth Circuit's reasoning in similar cases and prevented the potential for indefinite litigation exposure if a vacatur implicitly reactivated a pending motion for certification. The resumption of the statute of repose after a vacatur put the burden to file individual claims on those class members who had officially lost their status as a class, instead of allowing them to sit on their rights while awaiting appellate review of a decision that did not legally apply to them.

CONTRACTS/FORECLOSURE

Reinagel v. Deutsche Bank Nat'l Trust Co., 722 F.3d 700 (5th Cir.)

Dia and Joseph Reinagel refinanced their home loan in 2006 and obtained a home-equity loan from Argent Mortgage Company, LLC ("Argent") in exchange for a promissory note and a deed of trust securing the note. Argent sold the loan to Deutsche Bank National Trust Company ("Deutsche Bank"), at which point Deutsche Bank pooled it with other loans and sold the resulting securities to investors. The Pooling and Service Agreement ("PSA") that governed the trust in which Deutsche Bank, as trustee, held the mortgage loans provided that no loans could be transferred into the trust after October 1, 2006. Neither Argent nor Deutsche

Bank documented the sale of the Reinagels' loan until January 2008. At that time, a person (Ms. Reynolds) purporting to act as the "authorized agent" of a company that was allegedly the attorney-in-fact of Argent executed an instrument assigning the deed to Deutsche Bank. More than a year after the initial assignment, another individual (Mr. Bly) executed a second instrument assigning the deed of trust to Deutsche Bank, purporting to act as "Vice President" of the attorney-in-fact for Argent. The Reinagels eventually defaulted on the note, and a state court granted Deutsche Bank a judicial order authorizing foreclosure.

The district court properly dismissed suit seeking injunction against a bank to prevent foreclosure based in part on an allegation of "robo-signed" documents.

The Reinagels then filed suit in Texas state court to temporarily enjoin the foreclosure and obtain a declaratory judgment that Deutsche Bank lacked standing to foreclose. The Reinagels claimed that the 2008 and 2009 assignments were "robo-signed" and therefore void. The state court granted their request for a temporary injunction, and Deutsche Bank removed the suit to federal court on diversity grounds. The Reinagels contended that the first assignment was void because Ms. Reynolds was not an employee of Argent, and the second assignment was void because Mr. Bly worked for a third-party contractor, not Argent. The Reinagels also asserted that the second assignment was void as a forgery because deposition testimony taken in another case indicated that Bly's signature was scanned onto documents and then notarized as an original and recorded. Deutsche Bank moved to dismiss the complaint, and the district court granted the motion.

After first finding that the Reinagels had standing to bring the suit, the Fifth Circuit turned to whether Deutsche Bank lacked authority to foreclose under the deed of trust. The Third Restatement of Property states that a transfer of a mortgage presumptively includes the note secured by the mortgage, even if the assignment instrument did not refer to the note. Thus, the first assignment gave Deutsche Bank

authority to foreclose, and the validity of the second assignment was irrelevant. The Fifth Circuit found no basis to conclude that Ms. Reynolds misrepresented the scope of her authority, so the challenge to the first assignment failed. As to the second assignment, the Texas Supreme Court had held that a contract executed on a corporation's behalf by a person fraudulently purporting to be a corporate officer is merely voidable at the election of the defrauded principal. Thus, Bly's alleged lack of authority, even if true, provided no basis to challenge the second assignment.

The Fifth Circuit also found the Reinagels' argument that the second assignment was void because it was scanned onto documents was a red herring. Texas recognizes typed or stamped signatures, and also presumably scanned signatures, as long as they are made by or at the signer's direction. The Reinagels did not contend that Bly's signature was scanned onto the document without authorization. Further, there is no dispositive law that says an assignment of a deed of trust has to be notarized. While mortgage assignments must be acknowledged to be recorded, Texas's recording statute protects only subsequent purchasers for value and without notice. That statute did not affect Deutsche Bank's rights. Finally, the Reinagels conceded that they were not a party to the PSA and therefore had no right to enforce it. Although the Fifth Circuit did not condone "robo-signing," it reaffirmed that under Texas law, only the defrauded assignor can challenge facially valid assignments for want of authority.

Judge Graves concurred in the judgment only, agreeing that the second assignment was valid, but disagreeing that the first assignment was valid or that the Reinagels' forgery argument was a red herring.

Martins v. BAC Home Loans Servicing, L.P., 722 F.3d 249 (5th Cir. 2013)

Ashley Martins refinanced a mortgage on his home through BSM Financial ("BSM") in 2003. To do so, he executed a security instrument naming Mortgage Electronic Registration System ("MERS") as the beneficiary and nominee for BSM. Martins became delinquent on the

mortgage and stopped paying on it in June 2010. A few months later, MERS assigned the mortgage to BAC Home Loans Servicing, L.P. ("BAC"). In February 2011, Martins was notified of his default and of a looming foreclosure. Martins did not respond. After the note's trustee provided notice, the home was sold to the Federal National Mortgage Association ("Fannie Mae") in April 2011. Martins then sued in state court, challenging the foreclosure. BAC removed to federal court and moved for summary judgment. Martins failed to respond and BAC filed a notice of no response. Martins then filed a motion for continuance, which the district court denied, and an untimely reply to BAC's summary judgment motion. The district court granted summary judgment for BAC.

An assignment of a mortgage was valid under Texas law without production of an original, signed note.

After first rejecting Martins's standing argument, the Fifth Circuit addressed Martins's argument that BAC could not foreclose because it was only assigned the mortgage, not the note. The Fifth Circuit acknowledged disagreement among the district courts on this issue. The "show-me-the-note" theory posits that a party must produce the original note bearing a "wet ink signature" to foreclose. The Fifth Circuit concluded that Texas law recognizes assignment of mortgages through MERS as valid and enforceable without production of the original, signed note. The "split-the-note" theory posits that a transfer of a deed of trust by way of MERS "splits" the note from the deed of trust, rending it null. To foreclose, a party must have both the note and the deed of trust. The Fifth Circuit found that the "split-the-note" theory is inapplicable under Texas law where the foreclosing party is a mortgage servicer and the mortgage was properly assigned. Thus, MERS and BAC did not need to possess the note, as the mortgage was assigned to MERS and then by MERS to BAC. The assignment included the power to foreclose by the deed of trust. The Fifth Circuit rejected the other issues Martins raised on appeal and affirmed the grant of summary judgment.

Employment Law

***Ransom v. M. Patel Enters., Inc.*, --- F.3d ---, 2013 WL 4402983 (5th Cir. Aug. 16, 2013)**

After the plaintiff and fifteen other executive managers employed by M. Patel Enterprises, Incorporated ("Party City") were found by a jury to have been misclassified by their employer as exempt from the Fair Labor Standards Act, the plaintiffs became eligible for an award of overtime damages. The plaintiffs were paid a weekly salary, so the trial court had to calculate their hourly rate of pay to award damages. The district court disregarded the "fluctuating workweek" method and instead determined damages by using an unorthodox methodology. The judge interpreted the parties' mutual understanding to be that the plaintiffs' salary compensated for 55 hours per week. He then divided the weekly salary by the hours to get the plaintiffs' wages.

The "fluctuating workweek" method should have been used to determine damages for violation of the Fair Labor Standards Act.

The Fifth Circuit reversed and remanded for recalculation of damages. The district court's expressed findings did not support a view that the parties agreed that the salary covered 55 hours per week. Rather, much of the testimony suggested fluctuating hours and that the minimum was 50 to 55 hours per week, but that the employees would sometimes work more. Thus, the magistrate judge clearly erred in finding as a fact that there was a mutual understanding that the workweek was for specifically and only 55 hours. The magistrate judge's methodology was error and on remand, the court was to apply the fluctuating workweek method.

Jurisdiction/Procedure

***Morgan v. Plano Indep. Sch. Dist.*, 724 F.3d 579 (5th Cir. 2013)**

The parents of four elementary school students in the Plano Independent School District ("PISD") sued the district over an alleged violation of the students' First Amendment

rights. The parents complained that the Morgans' third-grade son was prevented from distributing a "candy cane ink pen" with a laminated card containing a religious message about the legend of the candy cane and its Christian origins at a winter break party in 2003. Prior to the winter party, the Morgans met with principal Lynn Swanson, who told the Morgans that it was PISD's practice, custom, and policy not to allow religious materials to be distributed while on school property. A few weeks later, Morgan again emailed a PISD official and expressed a "strong desire" that his son be allowed to distribute the candy canes. Swanson's interpretation of PISD's policies was confirmed by that official. Later, the Morgans, through their attorney, sent a demand letter entitled "Unconstitutional Violation of Right to Seasonal Religious Expression" to Swanson, two other school officials, and all members of the PISD Board of Trustees. The letter was delivered by fax and U.S. mail to Swanson and emailed to the others. It was undisputed that the letter was not sent by certified mail, return receipt requested. PISD's attorney responded and informed the Morgans and their attorney that candy canes could not be distributed in the classroom or hallways in conjunction with the holiday party.

The pre-suit notice requirement in the Texas Religious Freedom Restoration Act is jurisdictional.

The families filed suit against PISD prior to the next scheduled winter break party. The district court granted a request for a temporary restraining order and enjoined the school district and officials from interfering with or prohibiting the Morgans and other students from distributing religious viewpoint gifts at the winter break party. After six years of litigation, PISD filed a motion for partial summary judgment on the Morgans' Texas Constitution claims and their Texas Religious Freedom Restoration Act ("TRFRA") claims. The district court denied partial summary judgment as to the Morgans, finding that the Morgans' notice was sufficient and their TRFRA suit was not barred. PISD appealed only the TRFRA claims, alleging that the Morgans' written notice was not sufficient to waive governmental

immunity because the manner of delivery was not by certified mail, return receipt requested.

After first finding the trial court's order appealable, the Fifth Circuit turned to the requirements of TRFRA. Section 110.006 of the Act provides that a person cannot bring suit unless, "60 days before bringing the action, the person gives written notice to the government agency by certified mail, return receipt requested . . . ." And section 311.034 of the Texas Government Code provided that "[s]tatutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity." Thus, the pre-suit notice requirement in section 110.006 was jurisdictional. Because the language in section 311.034 was not added until 2005—after the Morgans filed suit—the Morgans argued that section 311.034's language did not apply. However, in *University of Texas Southwestern Medical Center at Dallas v. Estate of Arancibia*, 324 S.W.3d 544 (Tex. 2010), the Texas Supreme Court held that the prohibition against retroactive application of laws did not apply to procedural, remedial, or jurisdictional statutes like section 311.034. The Fifth Circuit also rejected the Morgans' argument that substantial compliance sufficed when the government agency had actual notice of the issue. Texas lawmakers could have easily included in the Act that actual notice sufficed, as they did in the Texas Tort Claims Act. Because the Morgans' demand letter did not comply with the jurisdictional pre-suit notice requirements, PISD's governmental immunity was not waived.

Judge Elrod dissented, believing that certification of the case to the Texas Supreme Court was appropriate based on prior precedent from that court that seemed to cut against the majority's conclusion.

Yesh Music v. Lakewood Church, 727 F.3d 356 (5th Cir. 2013)

Yesh Music granted Lakewood Church a limited license to use a song in connection with various marketing media. When Lakewood used the song in a televised broadcast, Yesh Music asserted that the license did not permit use on television and

that the term of the license had expired. Yesh Music eventually filed a copyright infringement suit in Texas, but then voluntarily dismissed that suit under Federal Rule of Civil Procedure 41(a)(1)(A)(i). The next day, Yesh Music re-filed the same suit in New York federal court. Lakewood asked the New York court to stay the action so that Lakewood could seek reimbursement of expenses incurred in the Texas action. During a hearing on the motion for costs in the Texas court, the parties agreed on the record that the case would proceed in Texas. Yesh Music then voluntarily dismissed its New York suit. Under Rule 41(a)(1)(B), the two successive voluntary dismissals rendered the second dismissal as a dismissal with prejudice. So, to reinstate its claim in Texas, Yesh Music filed a motion for relief from a final judgment under Rule 60(b). Lakewood contested the motion, arguing that Rule 60(b) only provided relief from final judgments and an initial voluntary dismissal under Rule 41(a) did not qualify as a final judgment. The district court rejected Lakewood's arguments.

A voluntary dismissal without prejudice is a "final proceeding" subject to vacatur under Rule 60(b).

The Fifth Circuit affirmed. A Rule 41(a)(1)(A) voluntary dismissal could be considered "final" because it terminates, closes and ends a cause of action. Further, the weight of case law from other circuits supported the conclusion that a dismissal without prejudice could be considered a final proceeding. Thus, a Rule 41(a)(1)(A) voluntary dismissal without prejudice qualifies as a "final proceeding" and is therefore subject to vacatur under Rule 60(b). The district court did not abuse its discretion in granting the Rule 60(b) motion in this case. The district court's primary reason for granting the motion was that the parties reached an agreement in open court, on the record, that the New York action would be dismissed and reinstated in Texas. The district court did not abuse its discretion in concluding that it would have been unfair to permit Lakewood to agree to reinstate the case in Texas and then allow it to renege on its agreement because of the procedural path taken by the plaintiffs.

Judge Jolly dissented, finding that the first voluntary notice of dismissal satisfied none of the jurisdictional bases for relief under Rule 60(b) and that Yesh Music engaged in forum manipulation.

***F.D.I.C. v. SLE, Inc.*, 722 F.3d 264 (5th Cir. 2013) (per curiam)**

The FDIC filed a complaint against S.L.E., Inc., Future Revenues, Inc., and Roger LeBlanc (collectively, "Appellants") for sums due under some promissory notes. The Appellants entered into a stipulated judgment in favor of the FDIC, which recognized the FDIC was a holder in due course of five promissory notes and recognized Appellants' liability for various amounts. Ten years later, CadleRock Joint Venture II, L.P., as successor to the FDIC, moved ex parte to re-open the case to allow CadleRock to file the necessary pleadings to revive the stipulated judgment. After the district court granted the motion, CadleRock then filed an ex parte motion to revive the judgment. CadleRock argued that it was the successor-in-interest and assignee from the CadleCompany, which was successor-in-interest and assignee from the FDIC, and that the judgment was unsatisfied. The district court granted the motion and revived the judgment. Five years later, CadleRock commenced collection and served Appellants with pleadings. Appellants moved to vacate and annul the revived judgment, arguing that CadleRock did not have standing to file the motion because it did not substitute as a party-plaintiff under Federal Rule of Civil Procedure 25(c) and (a)(3) before filing the motion. Appellants also argued that they were never served with the revival motion and were thus denied an opportunity to assess standing or the amount CadleRock claimed was due. In response to the district court's order that the parties submit lists of legal and factual issues to discuss at the status conference, Appellants framed the standing issue narrowly—that CadleRock did not have standing to obtain the

Successor in interest is not required to substitute as a party-plaintiff before seeking to revive a judgment.

revived judgment because it failed to substitute as a party-plaintiff. The district court denied the motion to vacate after the conference and Appellants appealed.

The Fifth Circuit first concluded that Rules 25(c) and (a)(3) do not impose a substitution requirement. Rule 25(c) includes permissive language and does not require transferees to substitute in an action. Thus, the revived judgment was not void under Rule 60(b)(4). The Court also rejected Appellants' argument that CadleRock's failure to substitute as a party violated their due process rights. Appellants admitted at oral argument that there was no due process requirement to a hearing under Rule 25(c). Appellants also conceded before the district court that had CadleRock properly moved to substitute as plaintiff before filing the revival motion, it would have had standing to do so. A motion to substitute was not a prerequisite to CadleRock's standing. Further, Appellants conceded that they had several avenues to secure any relief that they are due from the revived judgment.

Fontenot v. Watson Pharm., **718 F.3d 518 (5th Cir. 2013)**

Joseph Fontenot died in a Louisiana hospital after being administered a transdermal pain patch. His wife and children filed suit in Louisiana state court asserting tort claims against the hospital and various entities involved in the manufacture and sale of pain patches. Over a year later, one of the defendants removed the case on the basis of diversity jurisdiction. At that point, the parties were not actually diverse, but the defendant asserted that the non-diverse providers were improperly named under Louisiana law. The district court agreed and dismissed the non-diverse defendants without prejudice. Appellees later amended their complaint to add additional defendants, who turned out to be the only defendants remaining after two voluntary dismissals. After a medical review panel completed its work, the Appellees requested leave to file an amended

28 U.S.C. § 1447(d) precludes appellate review of a remand order issued pursuant to § 1447(e).

complaint joining non-diverse defendants and the previously dismissed claims against them. The Appellees also sought an order remanding the case to state court. The district court adopted the magistrate judge's recommended joinder and remand.

The removal statute expressly provides that an order remanding a case to the state court from which it was removed is not reviewable on appeal with few exceptions. But the Supreme Court has held that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d). One such ground is lack of subject matter jurisdiction. The appellants argued that a remand order is immune from review only if it was issued under § 1447(d) and concerned jurisdictional defects at the time of the removal. Because the remand order was based on § 1447(e) and the jurisdictional defect arose post-removal, the appellants maintained that § 1447(d) did not prevent review. The Fifth Circuit held that the appellants' argument was foreclosed by the Supreme Court's reasoning in *Powerex Corp. v. Reliant Energy Services, Inc.*, 127 S. Ct. 2411, 2417 (2007), in which the Court held that "when a district court remands a properly removed case because it nonetheless lacks subject-matter jurisdiction, the remand is covered by § 1447(c) and thus shielded from review by § 1447(d)." The Fifth Circuit joined five other circuits in expressly holding that § 1447(d) precludes appellate review of a remand order issued pursuant to § 1447(e). Appellate review of the district court's joinder ruling was also barred.

Mumfrey v. CVS Pharmacy, Inc., 719 F.3d 392 (5th Cir. 2013)

Tony Mumfrey appealed the district court's denial of his motion to remand his retaliation suit against his former employer, CVS Pharmacy, Inc. ("CVS"), and the district court's conclusion that Mumfrey did not prove retaliatory termination. After Mumfrey was terminated, he filed a state court suit against CVS on various Texas Labor Code claims and against three individual defendants claiming various torts. Mumfrey's original petition did not specify an amount in controversy and pleaded only general categories of damages.

The state court granted CVS's motion to require Mumfrey to specify the amount of damages he sought. In response, Mumfrey filed an amended petition claiming over $3.5 million as the amount in controversy. CVS then removed to federal court, asserting that removal was proper because the individual Texas defendants were improperly joined and without them, complete diversity existed. Mumfrey filed a motion to remand, arguing that the removal was untimely and the individual defendants were not improperly joined. The district court rejected Mumfrey's motion to remand, finding that CVS's removal was timely and that the individual defendants' joinder was improper. Mumfrey filed a motion to reconsider, which the district court denied.

The time to seek removal was not triggered until the defendant received an amended complaint specifically seeking damages in excess of the jurisdictional threshold.

The Fifth Circuit first addressed the timeliness of the removal motion. At the time Mumfrey initiated his suit, Texas prohibited plaintiffs from pleading a specific amount of unliquidated damages. Mumfrey argued that his initial pleadings were removable because his list of damages was so extensive it was clear his claims satisfied the jurisdictional amount. Specifically, he pleaded for lost wages and CVS knew his salary. The Fifth Circuit had previously held that the thirty-day removal period can be triggered where the initial pleading affirmatively reveals on its face that the plaintiff is seeking damages in excess of the minimum jurisdictional amount. But Mumfrey's initial petition without a specific amount of damages did not do that. Thus, the removal clock was not triggered until CVS received a copy of Mumfrey's amended petition.

Turning to improper joinder, the Fifth Circuit first noted that the district court erred in placing the burden on Mumfrey. But that error was harmless because CVS demonstrated that Mumfrey had no possibility of recovering against the individual defendants. The district court also committed harmless error by analyzing the wrong claim.

Mumfrey's pleadings did not allege that the individual defendants were acting to serve their own personal interests and admitted that the individual defendants were acting in the scope of their employment at the time of the retaliatory acts. Because Mumfrey could not satisfy the second element of a tortious interference claim, the individual defendants were improperly joined, and complete diversity existed.

On the merits, the Fifth Circuit found that Mumfrey did not establish by a preponderance of the evidence that CVS retaliated against him.

***Ernewayn v. Home Depot U.S.A., Inc.*, 727 F.3d 369 (5th Cir. 2013)**

Mary Ernewayn sued her employer, Home Depot U.S.A., Inc., claiming that Home Depot's negligence caused her on-the-job injury. She filed a nonsubscriber action as provided in Texas Labor Code § 406.033 because Home Depot did not subscribe to the Texas Worker's Compensation Fund. Home Depot removed to federal court on the basis of diversity jurisdiction. Ernewayn moved to remand, arguing that the suit arose under the Texas Worker's Compensation Act ("TWCA") and therefore was not removable under 28 U.S.C § 1445(c). The district court found that it had subject-matter jurisdiction based on diversity and then considered whether removal should be denied under section 1445(c). The district court found an ambiguity as to whether the suit was removable and remanded. Home Depot appealed.

The Fifth Circuit had no jurisdiction to review a remand order based on 28 U.S.C. § 1445(c).

The Fifth Circuit found that it had no jurisdiction and dismissed the appeal. Reading section 1447(c) and 1447(d) together, the US Supreme Court has held that an appellate court lacks jurisdiction over remand orders only when the remand order is based on a lack of subject-matter jurisdiction or a timely raised defect in removal procedure. Because the district court found that it had subject matter jurisdiction, the Fifth Circuit had to dismiss the appeal only if the district court remanded based on a timely raised defect in removal

procedure. Fifth Circuit precedent established that a statutory restriction against removal like the one in § 1445(c) was a defect in removal procedure. The remand was based on § 1445(c), so the Fifth Circuit had no jurisdiction to review such orders.

***U.S. ex rel. Steury v. Cardinal Health, Inc.*, ___ F.3d ___, 2013 WL 4436264 (Aug. 20, 2013) (per curiam)**

Leslie Steury filed a claim under the False Claims Act ("FCA") based on an implied false certification of "merchantability" by Cardinal Health, Inc. and other related entities (collectively, "Cardinal Health") to the United States Department of Veteran Affairs ("VA") in connection with the sales of a certain pump device. Steury marketed the device to various hospitals, including VA hospitals, until her termination in 2001. Steury alleged a design flaw in the device that allowed air bubbles to accumulate and then release into a patient's intravenous line, potentially causing death. After Steury discussed the defect with an area manager in early 2001, Cardinal Health suspended shipment of the device for three months while it reviewed the defect. Steury continued to market the device during that period. Cardinal Health then fired Steury at the end of the three-month review period. Steury sued Cardinal Health in 2007 for alleged violations of the FCA and several state statutes. The district court dismissed Steury's complaint for failure to satisfy the heightened pleading standards of Federal Rule of Civil Procedure 9(b). The Fifth Circuit affirmed, but remanded to give Steury the opportunity to amend her complaint. Steury filed a second amended complaint, which the district court dismissed. Steury then filed a third amended complaint, and Cardinal moved to dismiss under Rules 12(b)(6) and 9(b). The district court adopted the magistrate judge's recommendation to dismiss, and Steury appealed.

False Claims Act claim failed to meet the particularity requirements of Federal Rule of Civil Procedure 9.

The Fifth Circuit first noted that its initial opinion in the case did not reject the implied false certification theory of

FCA liability. But the Fifth Circuit still found that Steury's allegations were insufficient under Rule 9(b) to assert a claim of implied false certification. Claims brought under the FCA must comply with the particularity requirements of Rule 9(b) for claims of fraud. A claim under the FCA requires presentation of a knowingly false claim to the government for payment. Thus, Steury had to plead the particularities of the falsity. Steury's amended complaint based her FCA claim solely on an implied false certification theory, as she alleged that Cardinal expressly warranted the devices as merchantable, that the contract with the VA specifically required that the devices be merchantable, and that the requirement that the devices be merchantable was a material requirement. Steury's allegations that merchantability was a standard condition of the VA contracts or that the VA would not have paid for the devices had it known of the defect were deficient under Rule 9(b). Steury did not identify contractual provisions regarding merchantability. And if Steury relied on an implied warranty of merchantability, she had to articulate a court opinion or regulation that would imply such a warranty into the VA contract. Steury failed to allege with particularity that, without the contractual merchantability provision, the VA would not have paid Cardinal. The Fifth Circuit did not reach the question of whether an FCA claim could be viable under a worthless goods theory because of the deficiencies in Steury's complaint.

Judge Higginson concurred, emphasizing a need to return to the plain language of the FCA to distinguish between FCA liability and ordinary breach of contract actions.

SECURITIES

Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620 (5th Cir. 2013)

Khaled Asadi filed a complaint alleging that G.E. Energy (USA), L.L.C. ("GE Energy") violated the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") by terminating him after he made an internal report of a possible securities law violation. While Asadi was serving as GE Energy's Iraq Country Executive, Iraqi officials

informed Asadi of their concern that GE Energy hired a woman closely associated with a senior Iraqi official to curry favor with that official in negotiating a lucrative joint venture agreement. Asadi reported the issue to his supervisor and to the GE Energy ombudsman for the region. Shortly thereafter, Asadi received a negative performance review and was fired approximately one year later. The district court dismissed the case for failure to state a claim.

An individual did not meet the definition of a "whistleblower" under the Dodd-Frank Act because that individual did not provide information to the Securities Exchange Commission.

The Fifth Circuit affirmed, finding that Asadi was not a "whistleblower" under Dodd-Frank. Section 922 of Dodd-Frank encourages individuals to provide information regarding a violation of securities laws to the Securities and Exchange Commission ("SEC"). The Court held that the plain language of the Dodd-Frank whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC. The relevant statute defined a "whistleblower" as any individual who provides information relating to a violation of securities laws to the SEC, and Asadi conceded that he did not meet that definition because he did not provide information to the SEC.

VENUE

In re Radmax Ltd., 720 F.3d 285 (5th Cir. 2013) (per curiam)

Radmax, Ltd. petitioned for a writ of mandamus directing the district court to transfer the underlying case from the Marshall division of the Eastern District of Texas to the Tyler Division. The Fifth Circuit first considered the district court's analysis of the eight factors established in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), for determining whether the movant demonstrated that the transferee venue is clearly more convenient. Five factors were neutral, two were in favor of transfer, and one was solidly in favor of transfer. Reweighing those factors, the Fifth Circuit concluded that

Radmax discharged its burden of showing that the Tyler Division was clearly more convenient than the Marshall Division and that transfer was therefore warranted. After determining that the district court's ruling was incorrect, the Fifth Circuit also concluded that it was a clear abuse of discretion based on extraordinary errors leading to a patently erroneous result and, therefore, mandamus was warranted.

Judge Higginson dissented, agreeing that the *Gilbert* factors, when weighed properly, favored transfer of the case, but disagreeing that the district court's contrary ruling was a clear abuse of discretion warranting mandamus relief.

District court abused its discretion in refusing to transfer a case from the Marshall Division of the Eastern District of Texas to the Tyler Division.

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Texas Criminal Appellate Update

Alan Curry, Harris County District Attorney's Office, Houston

Ability to Appeal—Challenging Court Costs for the First Time on Appeal

***Landers v. State,* 402 S.W.3d 252 (Tex. Crim. App. 2013)**

The defendant was indicted for tampering with a witness. The elected district attorney recused himself and his office from her case because he had previously represented the defendant, and an attorney pro tem was appointed to prosecute the defendant. The defendant was convicted and sentenced to two years in prison and a $10,000 fine. At sentencing, the judge made no mention of imposing court costs. The written judgment (which was otherwise typed) included $4,562.50 in costs that were handwritten. The record did not indicate whether the handwriting was added before or after the defendant signed the judgment. There was no itemization or explanation of the costs. The clerk's record included a "Bill of Costs" that was issued six days after judgment was imposed. This bill itemized the court costs and included fees of $3,718.50 for the attorney pro tem and $440.00 for investigative costs of the prosecutor. This document was not provided to the defendant or her counsel. The defendant challenged the imposition of these fees for the first time on appeal.

A defendant may challenge the imposition of court costs for the first time on appeal if those court costs were imposed by a Bill of Costs issued after the judgment and sentence had been imposed. Such a defendant has had no prior opportunity to make an objection.

The general rule is that a party must first complain in the trial court in order to preserve a complaint for appellate review. This rule protects important policy interests. But, as

recently made clear by the Texas Court of Criminal Appeals in *Burt v. State,* 396 S.W.3d 574 (Tex. Crim. App. 2013), that rule's operation may depend on the party's having an opportunity to comply with the rule. In this case, the defendant was not given an opportunity to object to the imposition of the court costs. Since she was not given the opportunity, the absence of an objection was not fatal to her appeal.

Even if the defendant could have raised the issue of court costs in a motion for new trial, she was not required to. A motion for new trial is required to preserve error only when it is necessary to adduce facts not in the record. In this case, the defendant's complaint was one of law and not facts.

The defendant may not be faulted for failing to object when she was not given the opportunity. Since the fees were not imposed in open court and she was not required to file a motion for new trial, she has not forfeited the complaint on appeal.

Ability to Appeal—Challenging Court Costs After Revocation of Probation

***Wiley v. State,* No. PD-1728-12, 2013 WL 5337093 (Tex. Crim. App. Sept. 25, 2013)**

The defendant pleaded guilty to the offense of hindering apprehension pursuant to a negotiated plea bargain with the State. The trial court admonished the defendant that, should it follow the plea bargain, the defendant would not be allowed to appeal without the trial court's permission. A few weeks later, the trial court sentenced the defendant to eight years in prison and a $1,000 fine; however, the trial court suspended the sentence and placed the defendant on probation for eight years. On that same date, the written judgment was entered, which included a sub-heading titled "Court Costs." While most of the text of the judgment was computer-generated, the amount of court costs, $898.00, was handwritten.

The judgment also incorporated the defendant's conditions of probation, and those conditions expressly included a requirement that the defendant pay, as court costs, all attorney fees as provided by a bill of costs that was attached to the judgment. On its face, the computer-generated bill of costs indicated that it was printed out on the same day that the defendant was sentenced. It itemized the particulars of the court costs, which included a $400.00 cost for the defendant's court-appointed attorney during the plea proceedings. In a declaration signed by the defendant that appeared on the last page of the judgment next to his thumbprint, the defendant acknowledged that "[t]he terms and conditions set forth in this probation order have been read and explained to me . . . and I understand them." On that same day, the defendant also executed an express written waiver of appeal, and he did not pursue an appeal at that time.

If a defendant wishes to challenge court costs assessed at the time that he entered his plea of guilty and was placed on probation, he should do so in an appeal from that judgment, and he should not wait until an appeal from a subsequent judgment in which his probation has been revoked.

Several weeks later, the State filed a motion to revoke the defendant's probation; after a hearing, the trial court revoked the defendant's probation and sentenced him to eight years in prison. The written judgment was entered the same day. A new bill of costs, printed out the day after the revocation judgment, itemized the defendant's total court costs. The attorney fees were listed at $800.00—the unpaid $400.00 balance for the attorney who represented the defendant when the trial court initially placed him on probation, plus an additional $400.00 for the attorney who represented him during the revocation proceeding. The defendant appealed from this judgment.

In cases involving a trial, a defendant may challenge the sufficiency of the evidence to support an assessment of attorney fees in the written judgment for the first time on appeal, and such a claim need not be preserved by trial

objection. But a defendant may not accept a condition of probation as part of a plea agreement and later challenge that condition for the first time on appeal; instead, he must complain at trial to conditions he finds objectionable. Moreover, a defendant will also not be permitted to raise on appeal from the revocation of his probation any claim that he could have brought on an appeal from the original imposition of that probation.

In this case, the defendant could have raised his sufficiency claim in a direct appeal from the initial judgment imposing probation. Instead of doing so, he waived his right to appeal, though not required to do so by the terms of any negotiation with the State. That he chose to forego that appeal had to work as a forfeiture of the claim, and he could not attempt to resuscitate it in a later appeal from the revocation of his probation.

Ability to Appeal—Motion to Reduce Bail

***Ex parte Ragston,* 402 S.W.3d 472 (Tex. App.—Houston [14th Dist.] 2013, pet. granted)**

The defendant was arrested and indicted on charges of capital murder, murder, and aggravated robbery. Although the defendant was charged in three separate counts, all of the charges arose from a single incident in which the defendant allegedly robbed and murdered the owner of a liquor store. The defendant was jailed and held on no bond for the capital-murder charge, and his bond was set at $500,000 each for the murder and aggravated-robbery charges. The defendant filed motion for bond reduction, and the trial court held a hearing. The trial court denied bond on the capital-murder and murder charges, but reduced the bond to $250,000 on the aggravated-robbery charge. The defendant brought an appeal from that ruling.

In Texas, appeals in criminal cases are permitted only when they are specifically authorized by statute. Generally, a criminal defendant may only appeal from a final judgment. The courts of appeals do not have jurisdiction to review interlocutory orders in a criminal appeal absent express statutory authority.

A number of appellate courts have concluded that no constitutional or statutory provision exists authorizing an interlocutory appeal from a trial court's order on a motion for bond reduction. *See, e.g., Sanchez v. State,* 340 S.W.3d 848, 849 (Tex. App.—San Antonio 2011, no pet.); *Keaton v. State,* 294 S.W.3d 870, 873 (Tex. App.—Beaumont 2009, no pet.); *McCarver v. State,* 257 S.W.3d 512, 514–15 (Tex. App.—Texarkana 2008, no pet.); *Vargas v. State,* 109 S.W.3d 26, 29 (Tex. App.—Amarillo 2003, no pet.). Accordingly, these courts have dismissed appeals involving pretrial rulings on motions for bond reduction for lack of jurisdiction.

A defendant cannot bring an interlocutory appeal from a trial court's ruling on the defendant's motion to reduce his bail. He must pursue relief by way of an application for a writ of habeas corpus and then appeal from that, if necessary.

Other courts, however, have held that a defendant may take an interlocutory appeal from a pretrial motion for bond reduction. *See Ramos v. State,* 89 S.W.3d 122, 125–26 (Tex. App.—Corpus Christi 2002, no pet.); *Clark v. Barr,* 827 S.W.2d 556, 557 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). These courts primarily rely on two sources of authority: Texas Rule of Appellate Procedure 31 and *Primrose v. State,* 725 S.W.2d 254, 256 n.3 (Tex. Crim. App. 1987).

The court of appeals was persuaded by the reasoning of those courts that have concluded that no interlocutory appeal lies from the trial court's order on a pretrial motion for bond reduction. Absent a grant of constitutional or statutory authority, Rule 31 of the Rules of Appellate Procedure cannot create jurisdiction where none exists. And, because the *Primrose* court relied on an earlier version of the appellate rule, it is not dispositive of this issue.

The court of appeals also refused to consider the defendant's motion the equivalent of an application for writ of habeas corpus. The defendant's motion did not contain the requisites of an application for habeas corpus relief, and it did not appear that the parties or the trial judge treated it as such. Therefore, the court of appeals had no jurisdiction to decide

the defendant's interlocutory appeal of the trial court's order on his motion for bond reduction. The court of appeals granted the State's motion to dismiss the defendant's appeal without prejudice to the defendant's application for appropriate habeas corpus relief in the trial court.

Effect of Issuance of Mandate—Reversal of Conviction

***Hartfield v. Thaler,* 403 S.W.3d 234 (Tex. Crim. App. 2013)**

A jury convicted the defendant of capital murder and sentenced him to death. On appeal, he complained that a member of the venire panel was improperly excluded from the jury. The Court of Criminal Appeals agreed and reversed the conviction and death sentence and remanded the case to the trial court for a new trial. The State filed a motion for rehearing, arguing that the defendant failed to properly preserve error, but the court overruled the State's motion for rehearing. The court handed down its opinion on rehearing on January 26, 1983, also stating that the court denied the State's request that the court vacate the death sentence and reform the sentence to life imprisonment. The court stated that the fifteen-day period between the rendition of its decision and the date that the mandate issued was a reasonable time to seek commutation of the defendant's sentence from the Governor. Instead of pursuing that remedy, the State filed a motion for leave to file a second motion for rehearing, which the court also denied. On March 4, 1983, the court issued its mandate reversing the conviction and remanding the cause for a new trial. Five days after mandate issued, the trial court acknowledged receipt of the court's mandate and, on March 23, 1983, the trial court returned a postcard to the Court of Criminal Appeals saying that the execution of the mandate had been carried out. The card said "Executed on March 16, 1983 by

When an appellate court issues its mandate reversing a defendant's conviction, no further action can be taken on the case, except perhaps providing the defendant with a new trial. Therefore, an attempt at commuting the defendant's sentence would be ineffective if it occurred after the mandate had already issued.

Governor Mark White" and "Death Sentence commuted to Life by Governor." There was no further action by the trial court or the Court of Criminal Appeals. Acting in accordance with the governor's commutation of the sentence to life in prison, the Department of Criminal Justice maintained custody of the defendant.

More than 20 years later, the defendant filed an application for writ of habeas corpus with a federal district court, and that application was dismissed. The defendant appealed that decision in the United States Court of Appeals for the Fifth Circuit. Acting on its own motion, the Fifth Circuit submitted a certified question of law to the Court of Criminal Appeals, asking that court to determine the status of the judgment of conviction.

When the Court of Criminal Appeals concluded on appeal that the exclusion of one of the members of the venire violated the defendant's Sixth and Fourteenth Amendment rights and that the death penalty could not be imposed, the defendant was entitled to an entirely new trial. The Governor's commutation of the defendant's sentence was signed after the Court of Criminal Appeals had issued its mandate reversing the defendant's conviction and sentence.

In addition to seeking commutation of the defendant's sentence during the 15–day period between the court's ruling on the motion for rehearing and the date mandate issued, and in addition to filing a motion to stay the court's mandate, the State could have filed a motion to withdraw the court's mandate. The State did not exercise any of these options, and the court's denial of the State's motion for leave to file a second motion for rehearing did not re-start the clock on the 15–day window. The court issued its mandate, and the judgment was final 15 days after the court's ruling on the motion for rehearing. As soon as mandate issued, the defendant's conviction and sentence were vacated, the court's order for a new trial became final, and the case was returned to the point it would have been had there never been a trial. Therefore, at that time, there was no conviction, and no sentence to reduce. Because there was no longer a death sentence to commute, the governor's order had no effect.

Preservation of Error—Affirmative Assertion of "No Objection"

Thomas v. State, 408 **S.W.3d 877 (Tex. Crim. App. 2013)**

At trial, the defendant claimed that she was improperly detained and that the trial court should suppress more than 200 pounds of marijuana recovered from her vehicle, but the trial judge denied her motion to suppress. The next day, the defendant pleaded guilty and signed a judicial confession without a sentencing recommendation. The defendant signed a general plea-admonishment form that included boilerplate language that stated that she was waiving her right to appeal. There was also a separate form that was specifically dedicated to waiver of the right to appeal, but the defendant did not sign that form. The defendant did sign the trial court's certification of her right of appeal indicating that, because her plea of guilty was not pursuant to a plea bargain, the defendant retained the right to appeal. The defendant pleaded guilty, and the trial court found the evidence sufficient to support her guilty plea before adjourning for a lunch break.

If error has been properly preserved by a trial court's prior ruling on a defendant's motion to suppress evidence, defense counsel's subsequent statement during trial that he has "no objections" to the admissibility of that evidence will not waive the previously preserved error, unless the record is unclear as to whether defense counsel may have in fact intended an abandonment of the previously preserved error.

During the punishment stage that commenced after the break, the State offered into evidence State's Exhibits 1 through 9, which was the evidence challenged in the prior suppression hearing. The defendant's trial counsel stated: "I don't have any objection to that, Your Honor. [The State] has been kind enough to let me see them before this afternoon and we have no objections." The trial court admitted the exhibits and sentenced the defendant to six and a half years in prison and a fine of $2,500. Immediately after sentencing the defendant, the trial court informed her of her right to appeal the ruling on her motion to suppress. At

that time, the defendant gave oral notice of appeal, and the trial court recognized that the defendant would be appealing the trial court's ruling on the motion to suppress.

An adverse ruling on a pretrial motion to suppress evidence will ordinarily suffice to preserve error on appeal, and a defendant need not specifically object to the evidence when it is later offered at trial. But he must also take care not to affirmatively indicate that he has "no objection" to the evidence that he challenged in his pretrial motion to suppress when it is later offered at trial. Such an affirmative statement constitutes a "waiver" of the right to raise on appeal the error that was previously preserved. But the "no objection" waiver rule should be applied with flexibility. Particularly when a defendant has taken pains to file a pretrial motion to suppress, develop testimony at a hearing, and secure an appealable adverse ruling, it is unrealistic to presume that he would lightly forego the opportunity to vindicate his interests on appeal. No purpose is served by insisting that earlier-preserved error is abandoned by a later statement of "no objection" when the record otherwise establishes that no waiver was either intended or understood.

An appellate court should not focus exclusively on a statement of "no objection" itself in isolation, but should consider it in the context of the entirety of the record. If the record as a whole plainly demonstrates that the defendant did not intend, nor did the trial court construe, his "no objection" statement to constitute an abandonment of a claim of error that he had earlier preserved for appeal, then the appellate court should not regard the claim as "waived," but should resolve it on the merits. On the other hand, if from the record as a whole the appellate court simply cannot tell whether an abandonment was intended or understood, then it should regard the "no objection" statement to be a waiver of the earlier-preserved error.

Preservation of Error—Speedy Trial

Henson v. State, 407 S.W.3d 764 (Tex. Crim. App. 2013)

On April 11, 2008, the defendant was involved in a violent altercation with a friend in which he stabbed the friend 11

times. The defendant was arrested, and, on May 9, 2008, the State charged him with aggravated assault. The defendant's case was reset several times because the defendant had difficulty getting and keeping counsel. Finally, on January 30, 2009, the trial court appointed counsel. After that, the case was reset for pretrial hearings and conferences. On January 2, 2010, the State filed an agreed motion for continuance because a witness was sick. The next day, the judge granted the State's motion and added the notation, "Def. ready. " The case was reset seven more times before the trial began on March 4, 2011. In total, the case was reset 25 times over three years.

A defendant may not raise a speedy trial claim for the first time on appeal. Such a claim must first be raised at trial.

The defendant agreed to every reset in this case. Each reset form stated, "The undersigned Counsel hereby agrees this case is reset for [type of hearing] to [date]." The State, the defendant, and (when the defendant had one) his trial counsel signed each form. At no point throughout this process did the defendant object to these delays or file a speedy-trial motion. The first time the defendant raised the issue of a speedy-trial violation was on appeal.

The Sixth Amendment to the United States Constitution guarantees an accused the right to a speedy trial. This ensures that the defendant is protected from oppressive pretrial incarceration, mitigates the anxiety and concern accompanying public accusations, and ensures that the defendant can mount a defense. However, the speedy-trial right is different from other constitutional rights because the deprivation of the right can benefit the defendant. Delay can cause witnesses to become unavailable or can cause their memories to fade, making it more difficult for the prosecution to meet its burden of proof.

A defendant bears some responsibility for asserting his right to a speedy trial. While a defendant does not necessarily waive his right to a speedy trial as to any period before he demanded that his right be honored, preservation requirements do apply to speedy-trial claims. Without a

requirement of preservation, a defendant would have great incentive not to insist upon a speedy trial and then to argue for the first time on appeal that the prosecution should be dismissed because of delay. The requirement of preservation forces the defendant to pick one strategy. He can either fail to insist upon a speedy trial and possibly reap benefits caused by delay, or he can insist on a prompt trial, and if it is not granted, argue for a dismissal. He may not do both. Further, a requirement that the defendant assert his complaint at the trial level enables the court to hold a hearing and develop the record, so that the appellate courts may more accurately assess the claim.

Supplementation of Appellate Record—Bill of Costs

Johnson v. State, **405 S.W.3d 350 (Tex. App.—Tyler 2013, no pet.)**

Ballinger v. State, **405 S.W.3d 346 (Tex. App.—Tyler 2013, no pet.)**

Houston v. State, **No. 02-12-00514-CR, 2013 WL 4473763 (Tex. App.—Fort Worth, Aug. 22, 2013, no pet.)**

In these cases, the defendants were convicted of various criminal offenses and sentenced. The judgments reflecting these convictions and sentences also included a reference to court costs being assessed against the defendants. At the time that the judgments were prepared, no bill of costs had been prepared. On appeal, each defendant challenged the sufficiency of the evidence supporting the assessment of court costs. In response, the State supplemented the record in each case with a bill of costs provided by the district clerk. The defendants claimed that the appellate records could not be supplemented with bills of costs that had not been prepared at the time that the judgments had been prepared.

If a criminal action is appealed, "an officer of the court shall certify and sign a bill of costs stating the costs that have accrued and send the bill of costs to the court to which the action or proceeding is transferred or appealed." TEX. CODE CRIM. PROC. ANN. art. 103.006 (West 2006). "A cost is not

payable by the person charged with the cost until a written bill is produced or is ready to be produced, containing the items of cost, signed by the officer who charged the cost or the officer who is entitled to receive payment for the cost." TEX. CODE CRIM. PROC. ANN. art. 103.001 (West 2006). The rules of appellate procedure permit supplementation of the clerk's record "[i]f a relevant item has been omitted. . . ." *See* TEX. R. APP. P. 34.5(c)(1).

An appellate court can consider a supplementation of the appellate record with a bill of costs to review the defendant's challenge to the sufficiency of the evidence to support the court costs assessed against him.

In their analysis of the issue, the courts of appeals noted that the issue had been considered by several of their sister courts. Three courts of appeals had already (1) allowed supplementation of the clerk's record with bills of costs prepared and filed after the defendant appealed and (2) considered such bills of costs to support for the trial court's earlier assessment of a specific amount of court costs. *See Coronel v. State,* No. 05-12-00493-CR, 2013 WL 3874446, at *4, *5 (Tex. App.—Dallas, July 29, 2013, no pet.); *Allen v. State,* No. 06-12-00166-CR, 2013 WL 1316965, at *2, *4 (Tex. App.—Texarkana, Apr. 3, 2013, no pet.); *Cardenas v. State*, 403 S.W.3d 377, 383–84 (Tex. App.—Houston [1st Dist.] 2013, pet. granted). On the other hand, the Fourteenth Court of Appeals has repeatedly refused to consider a "computer screen printout" from the Justice Information Management System (JIMS) as an "actual bill of costs" supporting a trial court's order of a specific dollar amount of court costs when no evidence in the record shows that the printout was presented to the trial court before it included the specific dollar amount of court costs in the judgment. *See, e.g., Romero v. State*, 406 S.W.3d 695, 698 (Tex. App.—Houston [14th Dist.] 2013, pet. filed); *Johnson v. State,* 389 S.W.3d 513, 515 n.1 (Tex. App.—Houston [14th Dist.] 2012, pet. granted).

These courts of appeals held that they could consider bills of costs that were included in supplemental records on appeal.

Upholding Trial Court's Ruling on Appeal—Alternative Argument

Alford v. State, **400 S.W.3d 924 (Tex. Crim. App. 2013)**

Two police officers observed two individuals sitting in a parked car on a dead-end street. The car was in a dark area illuminated only by a streetlight near a restaurant where disturbances frequently occur. One of the individuals—later identified as the defendant—opened the passenger door, put her legs outside of the car, and leaned her head over her knees. After watching the car for more than five minutes and hearing loud voices coming from it, the officers approached the car due to a concern that the defendant was sick or needed assistance. During the officers' approach, the two occupants switched seats, so that the defendant, who was previously the passenger, became the driver. The defendant put the car in gear, took her foot off the brake, and drove the car about six to eight feet. Through the open driver's side window, one officer asked the defendant to stop the car, so that he could see if everyone in the car was okay. The defendant then stopped the car. One of the officers asked the defendant if anyone was sick or if there was a verbal altercation between her and the other occupant of the car. The defendant responded that no one was sick and that there was not any altercation. As the defendant spoke, the officer immediately noticed an odor of alcohol coming from the defendant and began investigating whether she was driving while intoxicated (DWI). That investigation led to the defendant's arrest for DWI. After she was charged with DWI, the defendant filed a motion to suppress, which was denied by the trial court. The trial court made a conclusion of law limited to the theory that the officers were justified in approaching the defendant's

A reviewing court should uphold a trial court's ruling on appeal, even if the ruling can be upheld on a basis upon which the trial court did not rely. In this case, the court of appeals in fact addressed the merits of the alternative basis for upholding the trial court's ruling on a defendant's motion to suppress.

vehicle under the community-caretaking exception to the warrant requirement.

On appeal, the State defended the trial court's ruling by presenting two theories. First, the State relied on the trial court's conclusion that the police officers' contact with the defendant was justified under the community-caretaking exception to the warrant requirement. Second, the State alternatively contended that the contact was a consensual encounter. The State, however, had argued only the first theory to the trial court, and the trial court's conclusions of law had addressed only that theory. The court of appeals issued an opinion holding that: (1) the officer's exercise of his community-caretaking function was not reasonable, and (2) the State's alternate theory on consensual encounter was (a) procedurally defaulted, or, alternatively, (b) unmeritorious. After ruling that the State's consensual-encounter theory had been procedurally defaulted, the court of appeals went on to reject that theory on the merits.

In support of its holding that the State had procedurally defaulted its consensual-encounter argument, the court of appeals cited Rule 33.1(a) of the Texas Rules of Appellate Procedure for the proposition that the failure to present an argument to the trial court in the form of a timely request, objection, or motion waives the complaint on appeal. Application of that rule to the State in this case was, however, erroneous because the State, as the appellee, was not subject to normal procedural-default rules. Rule 33.1(a) is inapplicable to the appellee, which in this case was the State. Therefore, although the trial court made a conclusion of law denying the defendant's motion to suppress under the community-caretaking exception to the warrant requirement, the appellate court was not limited to consideration of that legal theory and could uphold the trial court's ruling under any legal theory supported by the facts.

A remand of this case back to the court of appeals was not necessary because the court of appeals did go on to address and reject the merits of the State's consensual-encounter argument and the State did not challenge that analysis in the Court of Criminal Appeals.

Federal White-Collar Crime Update

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Falsification of Records and False Statements

Sec. and Exch. Comm'n v. Das, 723 F.3d 943 (8th Cir. 2013)

Vinod Gupta served as CEO for infoUSA, a publicly traded organization, and was often reimbursed by the company for his lavish trips and other luxuries. The SEC filed a civil enforcement action against the company's two chief financial officers Das and Dean, alleging violations of the Securities Exchange Act of 1934. CFO Dean filed this appeal after being found guilty of violating various securities laws.

When pursuing a securities violation against a company's chief financial officer, the SEC is only required to show negligence and not actual knowledge in the falsification of records and in the making false statements to accountants.

The four arguments raised on appeal by Dean were (1) sufficiency of the evidence, (2) expert witness testimony, (3) instruction to the jury, and (4) the finding of bad faith toward infoUSA's shareholders. The court dismissed the first two arguments, finding that Dean waived a sufficiency of the evidence argument by not filing the correct motion and that the expert witness' testimony about prerequisite compensation was reliable. The finding of bad faith was vacated because it was not an issue for the jury.

The court upheld the first set of jury instructions because it employed the correct standard, negligence, when considering an officer's making of a misleading statement. The second jury instruction in issue was also correct, which

stated that Dean violated the law if he did not act reasonably in the falsification of records. This issue was a matter of first impression. The court followed its sister courts in holding that negligence should be the standard when determining liability for the falsification of records and rejected Dean's argument that he must have acted knowingly. As another matter of first impression, the court held that the standard regarding a CFO's making of false statements to accountants is also negligence and scienter is not required. Therefore, the third jury instruction in question was correct and the court refused to extend its holding in *Shanahan* to chief financial officers. A fourth set of instructions was vacated, for it used both the incorrect standard of knowledge and the correct standard of negligence when trying to determine the CFO's duty to set up internal accounting controls.

Sentencing Guidelines

United States v. Stinson, No. 12-2012, 2013 WL 4437222 (3d Cir. Aug. 21, 2013)

Robert Stinson operated a fraud scheme from 2006 to 2010 which purported to invest individual's IRAs in a mortgage fund. In reality, Stinson funneled the investment money into Stinson's other personal businesses. He consulted with Brentwood Financial and Total Wealth Management, two financial institutions that agreed to refer clients to Stinson's investment business. The SEC filed suit and Stinson plead guilty to a 26-count indictment.

The district court sentenced Stinson according to the United States Sentencing Guidelines, and included an increase of two offense levels because he "derived more than $1,000,000 in gross receipts from one or

For a two-level sentencing enhancement to apply when a defendant "derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense," the evidence must show that the financial institution was the source of at least $1,000,000 in gross receipts.

more financial institutions as a result of the offense." Stinson challenged this increase, saying that the money came from individual investors and not the financial institutions, Brentwood Financial and Total Wealth Management. The appellate court agreed with Stinson's argument, holding as a matter of first impression that the financial institution must be proven to be the source of the $1,000,000 in gross receipts under the post-2001 amendments to the Guidelines.

Substitute Asset Forfeiture

***United States v. Rothstein (In re Rothstein, Rosenfeldt, Alder, P.A.)*, 717 F.3d 1205 (11th Cir. 2013)**

Four creditors of the law firm Rothstein, Rosenfeldt, and Adler P.A. ("RAA") petitioned the court to recognize the firm under Chapter 11 of the United States Bankruptcy Code. The government charged Rothstein, the shareholder, chairman, and CEO of RRA, with conspiring to violate the Racketeer Influenced and Corrupt Organizations Act by running a Ponzi scheme under RAA and fraudulently inducing investors through the use of false statements, documents, and records. The government sought forfeiture of Rothstein's assets, including RAA's bank accounts, because these accounts held the proceeds or property gained through the proceeds of Rothstein's Ponzi scheme. After Rothstein pleaded guilty, the trial court ordered him to turn over RAA's bank accounts and property to the government. The Trustee of the bankruptcy estate petitioned the government for ancillary proceedings, saying that the bankruptcy estate of the law firm held interest in these properties. Some of the accounts and properties were turned over to the bankruptcy estate, while others were handed to the government. On

Funds from investors in Ponzi scheme deposited in firm's bank accounts and commingled with legitimate income firm received were not "traceable to" attorney's scheme so as to be subject to forfeiture.

appeal, the trustee argued that 1) the accounts did not constitute funds of Rothstein's Ponzi scheme, and 2) these funds and properties purchased by the funds were comingled and thus not subject to forfeiture.

Any proceeds of Rothstein's criminal activity, or any property that can be traced to the proceeds, are subject to forfeiture. The government must show a requisite nexus between the property and the offense for the property to be forfeitable. Alternatively, the court may order forfeiture of property that, as a result of the defendant's actions, has been so comingled with other property that it can't be divided without difficulty. This is called the substitute asset statutory provision under which the government may seek forfeiture up to the value of the comingled property.

The appellate court concluded that the comingled proceeds could not be divided without great difficulty. The RAA bank accounts contained money from the Ponzi scheme as well as legitimate billings from the seventy lawyers working at RAA. Although the government did present schedules and some evidence attempting to pinpoint the Ponzi scheme income, their method (the lowest intermediate balance rule) was not adequate. Therefore, the trial court erred in ordering the accounts to be turned over the government as proceeds, and the case was remanded. The government can still attempt to seize Rothstein's individual assets, such as shares in the firm. The forfeiture action could be amended to reflect the funds that were forfeitable as a substitute asset. Lastly, the question of whether the account funds were used to acquire the other properties was a question of fact and must be proven by the government.