The Appellate Advocate

State Bar of Texas Appellate Section Report
Expanded Thirtieth Anniversary Edition!

ARTICLES

Interlocutory Appeals and Rule 91a Dismissals:
A Statistical Analysis
Amanda G. Taylor

Preview of New Jurisdictional Standard
at The Supreme Court of Texas
Lisa Hobbs

SPECIAL FEATURES

Reflections on the Creation of
Standards for Appellate Conduct
Kevin Dubose

Happy Birthday, Appellate Section!
Reflecting on Three Decades of Growth
JoAnn Storey

Interview with the Honorable Jim Moseley
W. Frank Carroll

Volume 29, Number 4    Summer 2017
Editors’ Corner
William J. Chriss & Lisa D. Kinzer .............................................. 464

PART I: THE PAST

A Proposal
Ralph H. Brock & Mike Hatchell .................................................. 469

Reflections on the Creation of Standards for Appellate Conduct
Kevin Dubose ........................................................................ 471

Happy Birthday, Appellate Section! Reflecting on Three Decades of Growth
JoAnn Storey ........................................................................ 474

Interview with the Honorable Jim Moseley
W. Frank Carroll ..................................................................... 491

PART II: THE PRESENT

Chair’s Report
Steven K. Hayes ..................................................................... 501

Interlocutory Appeals and Rule 91a Dismissals: A Statistical Analysis
Amanda G. Taylor .................................................................. 505

United States Supreme Court Update
Cam Barker, Andrew Guthrie, Sean O’Neill, & Ryan Paulsen ........ 542
Fifth Circuit Update  
*Kelli B. Bills, Natasha Breaux, & David Rost*.................................574

Texas Supreme Court Update  
*Patrice Pujol & Jason N. Jordan*..........................................................587

Texas Courts of Appeals Update  
*Jerry D. Bullard & Scott A. Cummings*..............................................648

**PART III: THE FUTURE**

Chair’s Report  
*Michael S. Truesdale*........................................................................659

Preview of New Jurisdictional Standard at  
The Supreme Court of Texas  
*Lisa Hobbs*....................................................................................665

Announcement: Introducing the Winners of the  
Excellence in Appellate Advocacy Award........................................667
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William J. Chriss and Lisa D. Kinzer

Friends,

We’re pleased to present The Appellate Advocate’s thirtieth-anniversary issue, which celebrates the past, present, and future of the Appellate Section of the State Bar of Texas. We feel fortunate to have received contributions and submissions from dozens of Section members, resulting in an issue packed with insightful legal analysis and compelling commentary on how the Section and its members have shaped appellate practice in Texas.

This issue, like Caesar’s Gaul, is divided into three parts. The first part is dedicated to the Section’s history, and features the original 1986 letter—typed on real paper with an actual typewriter!—in which Mike Hatchell replied to Ralph Brock’s proposal to organize a bar section for appellate specialists. The letter is followed by reflections from long-time Section members Kevin Dubose and JoAnn Storey, and an interview with former fifth court Justice Jim Moseley.

The issue’s second section focuses on the present, and features a detailed statistical analysis, penned by Beck Redden’s Amanda Taylor, regarding the courts’ rapidly changing treatment of interlocutory appeals. Among her many notable findings are that the number of interlocutory appeals has increased sixfold in less than two decades! Also in this section are a farewell from outgoing Chair Steve Hayes and our quarterly case summaries.

The issue’s final section focuses on the future, including the plans of incoming Chair Mike Truesdale. In addition, Lisa Hobbs provides a helpful overview of the new jurisdictional standards in effect at the Supreme Court, and we’re pleased to announce the winners of this year’s Appellate Advocacy Award. If these winners are any indication, the next generation of appellate attorneys offers the Section an awful lot to look forward to!
Finally, we note that the present issue is our last as managing editors of *The Appellate Advocate*. It’s hard to believe this journal began as a short newsletter limited to Section-related bulletins. But thanks to the incredible efforts of the editorial teams that have come before us, *The Appellate Advocate* is now a premier source of legal analysis in Texas and represents the gold standard in bar publications. We’ve enjoyed working with so many talented colleagues as we’ve published the last two volumes of the journal, and we welcome Mr. Jody Sanders and Ms. Julia Peebles as the journal’s incoming managing editors.

Happy Reading!
Disclaimer

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

The Past
Mr. Ralph H. Brock  
Attorney at Law  
P. O. Box 959  
Lubbock, TX 79408-0959  

Dear Ralph:

Many thanks for your letter of November 19, 1986, concerning creation of an appellate section.

I can report the following matters:

(i) I was able to gather the necessary number of signatures at the Appellate Advocacy Seminar in San Antonio, so we are over what would otherwise be a tedious hurdle in that respect.

(ii) I have determined from the General Counsel's office of the State Bar of Texas that we can get on the agenda for the February State Bar Directors Meeting, at which time our application could be acted upon. (Ralph, this meeting will be in El Paso. Would it be possible for you to attend on our behalf, if I will take care of getting us on the agenda and contacting the chairman to lay a little ground work?)

This day I have also received information from the General Counsel's office relative to all procedures that we will need to meet and documents we will need to prepare. Frankly, since Ralph has drafted bylaws, the remaining matters should be of relatively minor labor.

Look these materials over at your convenience. I will communicate with you very shortly and, perhaps,
Mr. Ralph H. Brock  
November 21, 1986  
Page 2

if Ralph is going to be in Dallas, we can arrange a short meeting sometime in the near future.

Sincerely yours,

Mike Hatchell

MH:bb

Enclosures

cc: Mr. Marvin S. Sloman

*Editors’ Note: Ralph Brock served as the first Chair of the Appellate Section. He passed away in 2013, leaving a legacy of service to the profession and to the community. Mike Hatchell also served as Chair of the Section, and is now of counsel with Locke Lord LLP, where he has led the firm’s appellate practice for more than a decade.

State Bar of Texas Archives  
SBOT\Sections\Appellate\"Ralph Brock, Appellate Practice & Advocacy Section Founding Records, 1985-1987"
Reflecting on the Creation of the Standards for Appellate Conduct

Kevin Dubose

In 1989, the highest courts of Texas adopted and promulgated a document called The Texas Lawyer’s Creed: A Mandate for Professionalism. This creed was created in response to the proliferation of unprofessional “Rambo” litigation tactics that plagued the trial bar in the 1980s. When the Lawyer’s Creed appeared, and was primarily aimed at a trial court practice, appellate lawyers briefly wondered whether a similar creed should be considered for the appellate practice. We initially thought this was unnecessary because the appellate bar already had developed a culture that was more professional and less contentious than the trial bar.

But in the early 1990s, several CLE articles about ethical issues in appellate practice appeared, exposing some disagreements and uncertainties about what constitutes ethical practices in the appellate arena. Additionally, though appellate specialists had a pretty good understanding of the behavior expected in appellate courts, they realized that published guidelines might be helpful for non-appellate specialists who venture into the appellate courts, and for managing client expectations.

When I became President of the Appellate Section of the State Bar of Texas in 1995, I appointed a committee to study possible ethical guidelines for appellate lawyers. I asked Charles R. “Skip” Watson, then of Amarillo, to chair the committee. The committee members included former Supreme Court Justice Eugene Cook; Justice Ann McClure of the El Paso Court of Appeals; and Jessie Amos, then with the clerk’s office of the Austin Court of Appeals. Practitioners appointed to the

---

1 Dubose is board certified in civil appellate law and a founding partner of Alexander Dubose Jefferson & Townsend LLP. In a career dedicated to appellate advocacy and to professional service, he has served as President of the Appellate Section of the State Bar of Texas and as Chair of the Appellate Section of the Houston Bar Association.
committee included David Gunn and David Hricik of Houston, Shane Sanders of Bryan, and Steve Tatum of Fort Worth. And I appointed myself to the committee.

Justice Cook brought us almost forty sets of professional standards from across the country. All of them targeted trial practices. At that point, we realized we were in uncharted territory when drafting professional standards applicable to an appellate practice.

We began by engaging in a thoughtful analysis of why lawyers sometimes behave unprofessionally. We decided that a prominent reason was an unwarranted elevation of the duty to “zealously represent” the client to the exclusion of other important duties. We decided to address the importance of balancing various duties in the preamble, and then to organize the Standards around four sets of duties: Lawyers’ Duties to Clients, Lawyers’ Duties to the Court, Lawyers’ Duties to Lawyers, and the Court’s Relationship with Counsel.

We divided responsibilities, assigning committee members to draft the preamble and each of the sections just described. We circulated drafts and each person reviewed and edited each of the sections. We met to discuss and reach agreement on the more difficult provisions. After about a year we had a draft that we were pleased with.

We then circulated our draft to every sitting judge in the State, trial and appellate, state and federal, and all the living former chief justices of the Supreme Court of Texas. We received a lot of compliments and enthusiastic support. We received some helpful constructive comments, which resulted in valuable amendments to the original draft. And we received a small amount of overall pushback, but not enough to get discouraged.

We also met some resistance from the State Bar of Texas, which mostly arose from us undertaking this project by ourselves, without asking permission or providing notice to the State Bar. As one of the people responsible for initiating the project, I can attest that our failure to go through proper channels was a function of our ignorance, not an attempt to avoid institutional due process.
Several people played a key role in shepherding the Standards through the three-year process between draft completion and promulgation. Committee Chair Skip Watson continued to gently push the Standards through the process, including several private meetings with judges. Richard Orsinger and Lynne Liberato were the next two Chairs of the Appellate Section following me, and both used their knowledge of the workings of the State Bar and their considerable personal connections to keep pushing the Standards along toward adoption and publication. Justice Deborah Hankinson of the Texas Supreme Court was an invaluable advocate for the Standards inside the Supreme Court. Justice Ann McClure persuaded the El Paso Court of Appeals to set an example by adopting the Standards for that court before the highest two courts did so.

On February 1, 1999, the Supreme Court of Texas and the Court of Criminal Appeals jointly adopted and promulgated the Standards of Appellate Conduct for all Texas appellate courts. Eighteen years later, Texas remains the only jurisdiction in the United States with distinct ethical and professional guidelines for appellate lawyers and courts.

We did not need the Standards for Appellate Conduct because of rampant bad behavior by Texas appellate lawyers and judges. But they are extremely helpful to provide guidance for lawyers who do not regularly practice in appellate courts and thus may not be aware that the practice culture in those courts is different. They also come in very handy when clients want to treat appellate litigation like a blood sport, and need to be persuaded that aggressive, unprofessional behavior is not what appellate judges expect or want to see.

The Standards for Appellate Conduct have been cited at least 18 times in Texas appellate decisions. They undoubtedly have been consulted and relied upon many thousands of times by attorneys who avoided the kind of conduct that required the Standards to be mentioned in published decisions. They both reflect the appellate culture that already existed before they were drafted, and have helped to shape and refine that culture as it develops and perseveres. I think they represent one of the finest examples of what an organized bar section is capable of at its best.
HAPPY BIRTHDAY, APPELLATE SECTION!

JoAnn Storey, JoAnn Storey, P.C., Houston, Texas

Introduction

In October 1986, Mike Hatchell, Marvin S. Sloman, and Ralph H. Brock discussed the need for a State Bar appellate section and constituted themselves an ad hoc committee to get one started. Roger Townsend and Russell “Rusty” McMains soon joined the effort. In February 1987, the Bar’s Board of Directors approved creation of the Appellate Practice & Advocacy Section.

By the fall of 1987, the Section had 700 dues-paying members and, under Lynne Liberato’s capable hands as editor, the first issue of *The Appellate Advocate* had been published. At the conclusion of the section’s first year, outgoing chair Ralph Brock reflected on his goal to lay the foundation for an active, functioning section. The vision of those who made it happen is captured by Ralph’s parting thoughts in his final report as Chair: “No longer do we have to feel like stepchildren of some other area of practice. We have come into our own.” *The Chair Reports*, 1 APP. ADVOC., no. 2, 1988, at 1, 1.

This article summarizes the Section’s history and its important contributions to its members and to the practice of appellate law as reported through the years by the Section’s Chairs and in *The Appellate Advocate*. This summary is by no means an exhaustive account of section activities, as it is impossible to credit all the dedicated and hard-working council members, committee chairs, and members who continued the founders’ vision and contributed to the Section’s growth, vitality, and relevance.

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1 JoAnn was among the handful of attorneys who took the first civil-appellate board-certification exam in 1987. A longtime member of the Section, she served as Chair from 1998-1999. She has also served the Section and the profession in many other capacities, currently serving as co-Chair of the Section’s History Committee.
Creating and Carrying Out the Bylaws

The Section bylaws provide, in part, that the purposes of the Section are to promote the role and enhance the skills of Texas appellate lawyers and to improve the practice of appellate law in Texas. The Section furthers these goals by:

- offering continuing legal education,
- disseminating materials on matters of interest to the membership, and
- creating opportunities for the exchange of ideas among Section members.

The Section has occasionally updated and improved the bylaws. During its Annual Meeting on June 24, 1994, Section members approved amendments to the bylaws that made them gender-neutral and included a change that separated the offices of secretary and treasurer. On June 27, 1997, members approved bylaw amendments that included changing the name of the section from the “Appellate Practice and Advocacy Section” to the “Appellate Section.” During its Annual Meeting in 2000, the membership approved an amendment to the bylaws that allowed the Council to appoint the editor of the Section’s newsletter, to serve at the pleasure of the Council, up to a three-year term.

Sponsoring Continuing Legal Education

Consistent with one of the purposes of the bylaws, Mike Hatchell (Chair, 1988-1989) encouraged “sponsorship of worthy continuing legal education projects in the field of appellate advocacy.” Those many projects and seminars include:

- The now-familiar *Advanced Civil Appellate Practice Course*, during which judges and practitioners have occasionally played games for ethics credit but, more importantly, where some of the most brilliant appellate
practitioners have taught us everything there is to know about appellate practice.  

- The Appellate Practice Institute, conceived under Wayne Scott’s direction (Chair, 1993-1994) as an innovative “nuts and bolts” course. This course has alternatively been known as “Appellate Law 101,” “Nuts and Bolts,” and “Boot Camp.”

- The Appellate Practice for Lawyers and Legal Assistants Seminar (February 1989).

- The Appellate Practice Institute for Lawyers and Legal Assistants (February 1995).

- A “thrilling moot court between Rusty McMains and Mike Hatchell,” conducted at the State Bar Convention in June 1990, during Roger Townsend’s tenure as Chair. The moot problem involved a recent Texas Supreme Court opinion that changed the standard for determining whether the results of a party’s investigation following an incident were discoverable. The arguments were followed by a critique by a three-judge panel of courts of appeals’ justices.

- A program entitled Charge Submission after Tort Reform – A Demonstration, Critique, and Overview (held at the State Bar Convention in June 1991, during Rusty McMain’s tenure).

- A program entitled All-Star Advocacy: A Demonstration of Oral Argument Skills by the Masters (held at the State Bar Convention in June 1995, during Justice (Ret.) Michol O’Connor’s tenure).

2 Little known fact: It was not until September 2002 that the Four Seasons Hotel in Austin became the permanent home for the course. The course celebrates its 30th anniversary this year, along with the Section.
• A program entitled *Appellate Jeopardy* (held at the State Bar Convention in June, 1996, during Kevin Dubose’s tenure). The program was billed as a “game show seminar that accomplishes that most difficult of tasks — combining entertainment with information!”


• A program entitled *Gilligan’s Appeal — An Interactive Legal Adventure* (held at the State Bar Convention in June 1998, during Lynne Liberato’s tenure). The program involved the appeal of a hypothetical $10-million judgment in favor of Thurston Howell, III, and his wife Lovey, against the Skipper, Gilligan, and the S.S. Minnow Corp. The program was reported in the *Wall Street Journal*.

• A program entitled *Appellate Hollywood Squares* debuted at the Section’s annual meeting held in San Antonio in June 2000 (during Wendell Hall’s tenure as Chair). The “celebrities” included then-Justices James Baker, Deborah Hankinson, and Sarah Duncan.

• *The Appellate Roadshow*. During Skip Watson’s tenure as chair, Mara Blatt of El Paso began taking the Section’s appellate education on the road. The Roadshow was the Council’s effort to provide CLE to section members in addition to the advanced course. The Roadshow went to El Paso (2002), Waco (June 2003), Austin (October 2003), Tyler (November 2003), and to Lubbock and Amarillo (2005).
• CLE videos. As the Section entered the twenty-first century, it recorded CLE on video for appellate courts to use for in-house training of new court attorneys. Helen Cassidy (Chair 2001-2002) was the moving force behind this project.

In addition to the programs and seminars, the Section’s current Chair, Steve Hayes, reports that “we have steadily built both the CLE video and the CLE article which are available to the Section members through our website.” Steve describes more than 600 articles—from both the State Bar appellate seminars and from the University of Texas appellate seminars. These CLE-related projects are the culmination of the efforts of a lot of folks over many years.

The Section Newsletter

The Section newsletter, *The Appellate Advocate*, has been a first-rate publication from its inception. Marvin Sloman (Chair, 1992-1993) arranged for the newsletter to be printed without charge to the Section. For ten years, Bowne, Inc., provided those printing services. It was conservatively estimated that Marvin’s efforts saved the Section at least $100,000 over the years.


During Wendell’s service as interim editor, the Council appointed a committee to solicit applicants and to interview candidates to serve as volunteer editors. Following the committee’s recommendation, David Coale (Chair, 2010-2011) became the Section’s new volunteer editor, and Heidi Bloch (Chair, 2012-2013) became the new assistant editor. David and Heidi published their first issue of *The Appellate advocate* in
The first “electronic issue” of *The Appellate Advocate* was created in 1997 by the Electronic Publication Committee, chaired by Doug Alexander (Chair 2007-2008). This special issue was devoted to the new appellate rules and was provided on disk to every member of the Section. Ralph Brock uploaded *The Appellate Advocate* to the Section’s website for the first time with the February 1998, issue.

In her first Chair’s Report, Marcy Hogan Greer (Chair, 2009-2010) announced that the “crown jewel asset of membership, *The Appellate Advocate*, will be transitioning to an electronic format.” The change was prompted by the cost of printing and mailing the newsletter, which comprised more than half of all dues collected. Brandy Wingate and Dylan Drummond (co-Editors, 2010-2012) calculated that, prior to the transition to an online format, some 640,000 pages of material were printed annually at a cost of $30,000.00.

**The Section Website**

On June 29, 1996, then-Chair Richard Orsinger launched the Section’s website. At the time, the website included names and addresses of Section’s officers, Council members, committee chairs and members, a history of the Section, and an invitation to join. By the latter part of 1997, the website included docketing forms and other useful information about some of the courts of appeals.

In 1999, the Section’s new webmaster, Mark Steiner, revamped the website. Mark continued the great work begun by Richard Orsinger.

During Helen Cassidy’s tenure as Chair, the Section unveiled its new and improved website, www.tex-app.org, in 2002. The new website was the result of the efforts of Mark Steiner and Marcy Hogan Greer. That address remains in effect today.

The website was again overhauled in 2008, when Doug Alexander served as Chair. That overhaul resulted from the hard work of current Section Chair Steve Hayes, who was then the
Chair of the Website Committee, and was assisted in the effort by Scott Rothenberg (Chair, 2011-2012) and Mark Steiner. The new website offered important tools for legal research as well as “lawyer lounge” discussion boards for dialogue among Section members.

The current face and content of the website is the product of Kent Rutter, the current Section Treasurer, and his dedicated team.

_The Standards for Appellate Conduct and Texas Appellate Practice Manual_

In 1995, Chair-Elect Kevin Dubose conceived of a “Texas Appellate Lawyer’s Creed” to provide an appellate counterpart to the Texas Lawyer’s Creed. As Chair the following year, Kevin appointed a committee chaired by Skip Watson (Chair, 2002-2003) to consider a code to address ethical concerns directly tailored to an appellate practice. On February 1, 1999, the Texas Supreme Court and the Court of Criminal Appeals adopted the standards. Elsewhere in this issue, Kevin recounts the efforts of the individuals who worked tirelessly to bring about these Standards.


_Promoting Pro Bono Service_

As Chair-Elect in 1995, Kevin Dubose contemplated forming a pro bono committee to provide a voluntary, statewide
network for providing pro bono appellate services. As Chair, Kevin appointed Warren Harris (Chair, 2005-2006) to chair the new statewide committee. Warren continued to chair the committee for several years, laying the foundation for program’s success today.

With Mike Truesdale (current Chair-elect) leading the effort, the Section launched a pilot program with the Third Court of Appeals. The Pro Bono Committee has since helped successfully launch pro bono programs with the Texas Supreme Court and with the First, Second, Third, Fifth, and Fourteenth Courts of Appeals. In addition, the committee presently administers an ad hoc pro bono program for Fifth Circuit appeals.

The Section also employs an ad hoc pro bono program to fill the gap in appellate courts currently without pro bono programs. See Michael S. Truesdale, *Why I Support Appellate Pro Bono Services (and Why You Should Too)*, 79 Tex. B.J. 368, 368 (2016). This program attempts to match pro se litigants who have appeals in nonparticipating appellate courts with attorneys from a statewide pool of volunteers. *Id.*

In 2008, the Section was awarded the Pro Bono Section Award, sponsored by the Supreme Court Task Force to Expand Legal Services Delivers. Two years later, the Texas Access to Justice Commission awarded the Section the 2010 Pro Bono Service Award.

**Sponsoring Scholarships and Awards**

**CLE Scholarships.** For many years, the Section has awarded scholarships to court staff and to other deserving recipients to help make CLE affordable for all. The scholarships are used for attendance at the Advanced Appellate Practice Course.

**Helen Cassidy Award.** At the Section’s Annual Meeting on September 8, 2005, the Section honored Helen Cassidy by presenting to Judge John G. Hyde the first Helen Cassidy Award for excellence in an appellate CLE presentation. The award continues today.
Texas Appellate Hall of Fame. The Texas Appellate Hall of Fame is a joint project of the Section and the Texas Supreme Court Historical Society. The Trustees inducted the Hall of Fame’s inaugural class in 2011.

Excellence in Appellate Advocacy Award. During Macey Reasoner Stokes’s tenure as Chair (2015-2016), the Council established the Excellence in Appellate Advocacy Award. The award is given each Spring to a graduating student selected by each law school’s faculty.

Preserving Our History

During her year as Chair, Lynne Liberato created the Heritage Committee, which had as its mission obtaining the oral histories of the retired chief justices of the courts of appeal. Excerpts of the first interview of retired Chief Justice Frank Evans of the First Court of Appeals appeared in the February 1998 issue of The Appellate Advocate. The scope of the committee’s work was later expanded to include interviews of all retired court of appeals justices.

The Heritage Committee became the Section History Committee during the author’s tenure as Chair. That committee was charged with interviewing founders of the Section in addition to the interviews of the justices. Deborah Race, chair of the committee at the time, interviewed the Section founders and chronicled the Section’s history. See generally Deborah Race, Reflections on the Formation of the Appellate Section, 12 App. Advoc., no. 3, 1999, at 28.

During Jeff Levinger’s year as chair, the committee changed names again, and is now known as the Judiciary and Section History Committee. To date, more than 100 retired and former courts of appeals’ justices have been interviewed. Excerpts of many of those interviews have been published in The Appellate

Editors’ Note: The author is too modest to spend much time on her tenure as Chair and co-Chair of the committee, or on her tireless efforts to preserve our Section’s history and the history of the Texas judiciary. The physical and digital archive JoAnn has assembled rivals the work of full-time, professional archivists, and her work is greatly appreciated.
Advocate. In addition, videos of the interviews, together with short clips from the videos, are available on the Section’s website. Also, eleven former chairs have been interviewed and a tribute to Helen Cassidy has been made. Excerpts of those interviews and of the tribute to Helen have been published in The Appellate Advocate. As with the videos of the judicial interviews, these videos and clips are available on the website.

Establishing (and Moving!) the Section’s Annual Meeting

On September 24, 1998, during the author’s tenure as Chair, the Section bucked convention and, for the first time, held a “Special Meeting” of the Section during the Advanced Civil Appellate Practice Course. At that time, State Bar Board rules required sections to hold their annual meetings in conjunction with the State Bar Convention (which was usually held in June each year). The meeting combined business (an overview of the Section’s finances, projects, and committee work) with pleasure (a reception for the judiciary following the meeting). The special meeting was a huge success; it was attended by about 125 people.

The Section continued with a “Special Meeting” during the advanced course and, in keeping with the State Bar Board rules, an Annual Meeting during the State Bar Convention. After the Bar rules changed, the Section held its Annual Meeting during the Advanced Civil Appellate Practice Course for the first time on September 12, 2002. It was the largest annual membership meeting in the Section’s history.

Today, the Section continues to hold its Annual Meeting during the Advanced Civil Appellate Practice Course.

Calling All Poets (and Songwriters and Tweeters and . . . )

The first annual Appellate Haiku Contest, conceived by Pam Baron (Chair, 2004-2005), was a smashing success. The response was overwhelming; 244 poems were submitted. The winners were announced at the 2004 Advanced Civil Appellate Practice Course and winning entries were printed in The
Appellate Advocate. As Pam observed in her first Chair’s Report, the responses to the contest showed our section members to be “creative, humorous, insightful, and uniformly creative.”

Following the “wildly successful” Appellate Haiku Contest, the Section continued its “exploration of poetic traditions” by offering the 2005 Appellate Limerick Contest. The following year, in honor of Japan winning the World Baseball Classic, the Poetry Competition Division of the Appellate Section reprised the Appellate Haiku Contest.

From 2007 to 2010, contestants were invited to change the lyrics of a well-known song to give it an “appellate” touch. The winning entries were performed live by a “professional” singer at the Section’s Annual Meetings.

The challenge in 2011 was a “Twitter Brief” competition. The competition garnered nearly 100 entries from as far away as Hawaii, and covered by the Texas Bar Journal, the Texas Lawyer’s online blog Tex Parte, and the ABA Journal. The competition even generated its own twitter hashtag: #140brief. The competition was held again in 2012 and in 2013.

The competitions continued with the meme challenge in 2014 and, in 2015, with the challenge to capture the spirit of the Section in a motto.

Debating Citation: The Great Footnote Wars

Mark Steiner threw down the citation gauntlet in his article entitled “Without Precedent: Footnotes in Judicial Opinions,” which appeared in the September 1999 issue of The Appellate Advocate. Mark expressed his skepticism of the relatively new practice of using footnotes for every citation. 12 App. Advoc., no. 4, 1999, at 3, 3-6. Mark was of the view that the “increased use of bibliographic footnotes in Texas judicial opinions appears to be the result of the Rasputin-like influence of Bryan A. Garner.” Id. at 4. He was particularly critical of the footnote as a substitute for the citation sentence. Mark was of the opinion that “[f]ootnotes in judicial opinions marginalize precedent . . . [t]hat’s why judicial activists use footnotes.” Id. at 6.
In the following issue of the journal, Bryan Garner defended his promotion of footnotes and outlined “at least ten good reasons” for their use. The Citational Footnote, 13 App. Advoc., no. 1, 1999, at 2, 3. He saw a “trend emerging nationally,” and predicted that, “within a generation, the citational footnote will be the norm in both judicial opinions and briefs.” Id. at 5.

Other appellate practitioners were quick to take sides on this issue. Scott Stolley wrote a letter in which he embraced the use of footnoting citations in his briefs because “there is so much precedent that any decent lawyer can find a case that says just about anything.” Wendell Hall also weighed in, agreeing “100% with Professor Steiner.” Wendell also provided very interesting anecdotal statistics. The Section decided to settle the matter with a vote: At the 13th Annual Advanced Civil Appellate Practice Course, attendees preferred the traditional method of in-line citations by a vote of 390 to 8.

But the debate over footnotes—and comments about the debate itself—continued appearing for years in letters to the editors of The Appellate Advocate. Amy Hunt feared we were “all dancing on the head of a pin.” David Holman seemed to echo the lament of many appellate practitioners when he said he was “tired of reading court opinions and appellate briefs that make [his] head nod up and down like a bobble-head doll on a pogo stick,” as he would try to find the footnote associated with each assertion. See David Holman, Citational Footnotes: Why Bryan Garner is Wrong, 21 App. Advoc., no.1, 2008, at 15, 15. With his classic humor and persuasive reasoning, David then dismantled Mr. Garner’s ten premises one by one.

Meanwhile, Professor James Paulson, of South Texas College of Law, upon reading the prolonged and “spirited exchange” on the subject, later quipped: “Who says we appellate types can’t be the life of the party?”

More recently, Bryan Garner promoted citational footnotes with a 2014 article in the ABA Journal, leading University of Texas Professors Wayne Schiess and Elana Einohorn to publish a comprehensive review of the ongoing debate, complete with examples and practical recommendations. See generally Wayne

**Reviewing the Review Process: From Writs to Petitions**

In November of 1995, Pam Baron wrote a letter to then-Justice Nathan Hecht expressing her concerns about the proposed rule substituting a ten-page petition for review for the longstanding writ-of-errorpractice. The rule change was intended to eliminate the need for court staff to summarize the lengthy writ briefs in internal memoranda and thus allow the petition for review to be distributed to and reviewed directly by all nine justices. Pam indicated that “practitioners are understandably concerned that, over time, this practice will break down, resulting in the justices reading internal summaries of the petition for review, which is itself a summary.” In its own letter to Justice Hecht, the Council advised that it shared Pam’s concerns and had voted unanimously to endorse Pam’s letter.

Pam’s early concerns have since proven prophetic. Pam believes that currently five justices on the court read summaries prepared by the law clerks. See Pamela Stanton Baron, *Texas Supreme Court Docket Update 2016*, State Bar of Texas, Advanced Civil Appellate Practice Course (Sept. 8-9, 2016).

Pam wasn’t the only Section member to accurately anticipate developments at the appellate courts. Nearly 16 years ago, David Holman predicted a “paperless appellate court in our lifetime.” David Holman, *A Brief History of the Future*, 14 *App. Advoc.*, no. 1, 2008, at 4, 8. David imagined a judge reading a brief, coming to a case citation, clicking on the citation, and then predicted, “[I]nstantly the case appears, turned to the exact page cited.” *Id.* at 4. He further imagined that a judge clicking on a reference to an exhibit would be “instantly transported to that exhibit, right at the very page you want[ ] the judge to see.” *Id.* While David envisioned briefs submitted on CD-ROM, the future David anticipated has arrived via briefs and records filed in PDF format, and by specially designed software used at the Supreme Court, the courts of appeals, and the Fifth Circuit.
The Chair’s Report as Bully Pulpit

Helen Cassidy’s wit was unsurpassed. In her first column as Chair, she complained about mistreatments of the English language and asked readers to help her stamp out the use of the phrase “reason why.” *The Chair Reports*, 14 *App. Advoc.*, no. 3, 2001, at 4, 4. She encouraged assigning that phrase to the “Department of Redundancy Department.” *Id.*

In the following issue of *The Appellate Advocate*, Helen once again used the Chair’s Report to rant (her word, not mine) about a particularly irritating practice (long since abandoned because of electronic records) of district clerks tying “bows and ribbons and slap[ping] seals all over the clerk’s record, making it impossible to disassemble the record for copying.” *The Chair Reports*, 14 *App. Advoc.*, no. 4, 2002, at 3, 3. Helen’s rant prompted a letter to the editor from A. Allise Burris, suggesting that technology would solve the concerns of the bench and bar about document integrity. How right she was.

In the Summer 2002 issue of *The Appellate Advocate*, Helen took to task those persons who make nasty comments about CLE speakers. *The Chair Reports*, 15 *App. Advoc.*, no. 2, 2002, at 4, 4-5. She reminded us that speakers generously give their time and energy to preparing a CLE paper and presentation and that they are our “colleagues doing a tough, thankless job for nothing.” *Id.* at 4. She asked those guilty of making such ugly remarks to please “cut it out,” and for all of us to be courteous and kind in our comments. *Id.* It was primarily because of Helen’s comments in this particular Chair’s Report that the Council approved the annual Helen Cassidy Award, which honors an attorney with an outstanding presentation at the annual advanced course.

“If You Build It . . .”

Nearly 30 years ago, Ralph Brock noted that the Section’s 775 members made up less than two percent of the lawyers in Texas:
Despite having our own rules of practice (state and federal), our own section, our own area of legal specialization, and our own advanced course, I suspect the appellate lawyer is one of the best-kept secrets in the Bar. 

If nothing else has done so, the increasing complexity of law practice has created a raison d’être for appellate practitioners. We know that—perhaps our next task should be to start educating the other 98% of the Bar. The profession as a whole will benefit as our area of practice becomes more well known. That is something we can all work for.


Ten years later, Lynne Liberato reflected on what it was like to be an appellate lawyer: “A mere 10 years ago appellate practice was mostly something trial lawyers did and only when they had to. . . . Now appellate practice is a recognized specialty, [and] not just in the board[-]certified sense. Many trial lawyers won’t leave home without one.” *The Chair Reports*, 10 *App. Advoc.*, no. 4, 1997, at 2, 2. In other words, the 98% of attorneys Brock had wanted to persuade were starting to recognize the value of appellate expertise.

And in 2008, in his final report as Chair, Doug Alexander expressed his sentiment that we are “heirs of an appellate culture in this state forged by pioneering appellate lawyers who viewed courtesy and decency not as signs of weakness, but rather as the environment in which the greatest appellate battles can be waged most effectively, without pointless and distracting bickering.” *The Chairs’ Reports*, 21 *App. Advoc.*, no. 1, 2008, at 2, 2.

As we approach the thirtieth anniversary of this Section’s founding, Ralph, Rusty, Don, Marvin, and Helen likely are looking down bursting with pride and, hopefully, taking a victory lap. Given the undeniable and ongoing success of their
original efforts to create an appellate community in Texas, they
certainly deserve one.

Appendix

Current and Former Presidents, Chairmen, and Chairs of the Appellate Section

2016-2017: Steven K. Hayes
2015-2016: Macey Reasoner Stokes
2014-2015: Cynthia K. Timms
2013-2014: Jeffrey S. Levinger
2012-2013: Elizabeth G. “Heidi” Bloch
2011-2012: Scott Rothenberg
2010-2011: David Coale
2009-2010: Marcy Hogan Greer
2008-2009: Daryl L. Moore
2007-2008: Douglas W. Alexander
2005-2006: Warren W. Harris
2004-2005: Pamela Stanton Baron
2003-2004: Lori M. Gallagher
2001-2002: Helen A. Cassidy*
1999-2000: W. Wendell Hall
1998-1999: JoAnn Storey
1997-1998: Lynne Liberato
1995-1996: Kevin Dubose
1994-1995: Michol O’Connor
1993-1994: L. Wayne Scott
1992-1993: Marvin S. Sloman*
1991-1992: Donald M. (Don) Hunt*
1990-1991: Russell H. (Rusty) McMains*
1989-1990: Roger Townsend
1988-89: Mike A. Hatchell
1987-88: Ralph H. Brock*

* Now deceased.
The following is an excerpt of an interview of Justice Jim Moseley conducted on February 20, 2015, by Frank Carroll. Justice Moseley served on the Dallas Court of Appeals. He was nominated to this bench in 1996 and was re-elected to six-year terms in 2000, 2006, and 2012. Upon his retirement in 2014, he joined Gray Reed & McGraw, where he leads the firm’s appellate practice group.

**FC:** What made you decide you wanted to be a lawyer?

**JM:** I grew up in a little town called Eastland, Texas. My mother worked at the Eastland Court of Appeals. She started off as a stenographer and later became the Clerk of the Court. There weren’t any lawyers in my family, but I was around those people and I saw what they did. I was just fascinated by what went on at the courthouse, and ended up taking that shot.

**FC:** Once you became a lawyer, did you have any mentors, or that you followed to learn how to practice law?

**JM:** I’ve had more than I could possibly name. I’ll name a few for you. The person I hold solely responsible for getting me into law school was Austin McCloud, who was Chief Justice of the Eastland Court of Appeals. Austin was a wonderful lawyer and a great justice on the court of appeals; he had a great reputation. He was an influence on my life in terms of the type of lawyer I wanted to be.

I started practicing law in Odessa, Texas. I was with the Shafer Law Firm in Odessa. The first-name lawyer in that firm was W.O. Shafer, who was the State Bar President years ago. A wonderful lawyer.
He was a great, great trial lawyer. W.O. was the kind of guy to model after. He was a lawyer’s lawyer. He was cordial to everyone he was around. Everybody on both sides loved him.

FC: When you were practicing in west Texas, did you handle appeals?

JM: Yes. I did all the firm’s appellate work. At that time, Ector County was in the El Paso Court of Appeals. When cases were set on Friday mornings, you couldn’t get out there fast enough to make it for a nine o’clock docket, unless you came in the night before (because of the time change). So you would go in the night before, stay at the hotel, have a nice meal, read through your briefs. It was a very genteel practice.

Another mentor I’ll mention was Lucius Bunton. Lucius and I practiced together before he went to the federal bench in Midland. When he was in El Paso, I would meet him and his lovely wife, Mary Jane. On Friday afternoons, we’d go out to the race track. Mary Jane thought she knew how to bet horses. (Laughs.) I’m the young guy of the group, so if Mary Jane says put money on horse number four, you did it. She quickly went through my money in a hurry, and so they’d buy me dinner on Friday night. Those were great times.

FC: When did you first start thinking about wanting to become a judge?

JM: I had left West Texas to come to Dallas to work for Reagan in the ‘80s, and did that for four years. I was Regional Director for the Federal Trade Commission. But I felt I didn’t want to be a career person in government. I went back into private
practice with what was then Locke Purnell Rain Harrell. Yet, I’d always thought about those justices on the Eastland Court of Appeals. I appreciated the role of the intermediate appellate courts and how important it is that they get it right, because for 90% or 95% of the cases, they’re the last word.

**FC:** How did you learn to do the various things that appellate judges do?

**JM:** The first thing you’ve got to do when you get to the court is learn to listen. Find those leading lights on your own court that you can talk to, and don’t be afraid to ask them questions. I had a couple of those people. Linda Thomas certainly fits that mold. I’ll also single out Joe Morris and Mark Whittington. They were both excellent justices on the court, and were kind enough to give me help, in terms of letting me just bounce questions off of them.

I also learned from those men and women what was appropriate and what’s over the line in terms of working with fellow justices. When do you go talk to them? When do you dissent? How do you write a dissent that doesn’t create personal problems? I tell this to the younger justices: “Everybody has a right to your very best effort in deciding a case, but no one has a right to your vote. It’s your vote. You’re an elected justice on the court of appeals. You’re here for a reason. You don’t owe anybody your vote, but you do owe them your best effort.”

Another justice I learned a great deal from was Frances Maloney. Frances and Sue Lagarde were both very good about focusing on the standard of review.

**FC:** How did you go about preparing yourself to hear oral argument?
JM: You go through the briefs. While other justices I know have pre-submission memoranda or analyses from their staff attorneys or their briefing attorney, I rarely did that. I tried it once to see how it worked; it was helpful, but my attorneys were spending two-thirds of their time on cases that I wasn’t going to author. So, it made better sense to me to do my own preparation, and not involve them in that process. I got them involved in the drafting process; in terms of the preparation, I wanted to do that work.

FC: After oral argument, what was the practice of the court when you were on it as to deciding the case?

JM: After the last case of the docket, we would all go into the conference room next door to the court and sit down and talk about the case and reach a tentative conclusion as to how it ought to go. We would decide whether we all agreed, or whether there was disagreement. At the end of the votes, the justices would then pick which cases they wanted to write. And the rotation order would change from week to week. So one week I would have the first pick, and I’d get any of the cases I wanted. Next week I might have second pick, and so I’d go to number two. And of course by the third week, you get whatever’s left over.

One of the rules you learn very quickly is, don’t pick cases because you think they’re interesting. Pick cases because they’re easy. There’s enough interesting cases to go around, and you’re going to get your share. That rule was violated by my office twice – once by me because I found this antitrust case I wanted to write on, and once by my attorney, who found this products case he wanted to write on. And both times we regretted it, and we both admitted – “Wish we hadn’t taken that case.” But we did. So you pick the easy case and you go.
FC: What did you find to be the most rewarding thing about being an appellate judge on the Dallas Court?

JM: I loved the people I worked with, both the justices and the attorneys, staff in the Clerk’s office. Being an appellate justice is like solving a six-dimensional puzzle. What’s the law in this situation, at this time, for people situated as these people were? And how do you come up with what the law is in that case, without screwing up what the law might be in some other situation down the road?

FC: Do you have any advice for younger lawyers who are getting ready to do their first oral argument and their first brief for the Dallas Court of Appeals?

JM: The advice I would give you is, find the one way to say it the very best way you can, and say it, and then move on. Because there are other cases waiting. The court’s job isn’t to spend all week looking at your case – that’s your job. Their job is to take what you give them and get a handle on the case.

Another piece of advice on briefing is, don’t assume that the justices are experts in this particular area of law. Remember when writing your brief that people think and remember in stories; we may speak in sentences, but we remember stories. And stories are told generally chronologically for a reason – because that’s how we experience life and how judges experience life, so try to tell the story chronologically, unless there’s a really good reason not to.

FC: Any particular tips you would give a young lawyer for how to prepare for oral argument?

JM: The first advice you always give is, answer the question the minute they ask it. I did have an attorney
one time say “I’ll get to that in a minute, Judge.” And the case blew up. No, you’re going to get to it right now, or you’re done.

The other reason to answer the question is because it’s persuasive. If you don’t answer their question, they’re not listening to you anyway. Why do you think what you’re telling them is more important? They’re not hearing it, because they’re sitting there wondering why you didn’t answer the question. “I wonder how that’s going to bite him on the backside that he didn’t answer that question.”

I also think the person who wrote the brief needs to argue the case. Oral argument is a credibility issue, and what you can’t afford to do is, when the judge asks, “Why did you say such-and-such on page 14?” and you say “Well, Judge, I really didn’t write that.” You’ve just lost credibility.

**FC:** Did you think oral argument is a worthwhile endeavor?

**JM:** Mostly you’ll get it. We have a committee called the NORA Committee, which is “No Oral Argument.” And we’ll go through the cases and make a determination as to whether to take the case off of the oral argument submission and put it on a submission without oral argument docket. And that decision is made by a panel of justices on the Court. It’s not made by staff.

I always found argument helpful. That’s not to say it always changes the outcome. In fact, I think it rarely does. But it’s helpful because it affirms what you’re thinking about a case. Sometimes it makes it easier to write, or faster to write. The purpose of the argument is to help the court. It’s not to be an orator. It’s not a speaking competition.

It’s important to understand your job isn’t to
argue with the judges. And it’s really not even to argue with the other side. So, part of oral argument is “How can I help the Court make sense of what we’ve written about? Here’s the strongest element in our favor. Here’s the weakness in the other side’s argument; here’s their Achilles’ heel.”

It is also so much more appropriate to say “I don’t remember” if you can’t remember something from the record, than to take a guess. There are some lawyers in town who will look you right in the eye and say “Yes, they said such-and-such,” and you go back and look at that record and it’s just not there. And the justices remember who those lawyers are too. Word gets around, reputations get around.

**FC:** Do you have any advice for anybody who would like to be an appellate judge as to what they ought to do to go about securing that position?

**JM:** It helps to be involved in the political process. Texas still elects its justices, its judges. There are a variety of views on that subject. Some people adamantly oppose it. I think it’s the best system we’ve got. I think it’s the best system we can get. All appointments are political. Nothing more political than a political appointment. The question is there, are you going to have indoor politics that people can’t see what’s going on, or you have outdoor politics, where people get elected and they run for office? That’s not to say there’s no weaknesses in the system – there are – and the election process, the fund-raising process, those are all subject to legitimate regulation and legitimate criticism. But moving to a strictly appointed system is not going to be a panacea.

I also think it’s important to make sure that the lawyers in the community need to know who you are. And it’s helpful to be involved in organized bar
associations to get your name out and get the word out.

Austin McCloud taught me “You’re a judge 24 hours a day.” If you’re in the grocery store standing in line, and the clerk does something that you’re tempted to scream about, you’re still a judge, and you need to keep that in mind as you’re dealing in that situation.

FC: I appreciate your time today, Justice Moseley.

JM: I’m grateful you took the time to do this. I’m grateful the Bar’s doing this.

This interview is part of an ongoing effort by the State Bar of Texas and the Appellate Section to preserve and document matters of historical interest to members of the bar. The interview was conducted and recorded in the Dallas offices of Thompson & Knight, LLP, which provides its facilities as a courtesy to the section and in recognition of the importance of its archival work. To watch the video of Justice Moseley’s interview, visit https://vimeopro.com/user45474482/oralhistoryproject/video/157519794.
**Job Announcements!**

Did you know the Appellate Section homepage ([www.tex-app.org](http://www.tex-app.org)) has links to each of the Texas appellate courts’ employment announcement webpages?

Just click on the “Links” tab on the homepage, and select “Job Opportunities.” Then select the court website you’d like to browse.
PART II

THE PRESENT
Chair’s Report
Steve Hayes, Law Office of Steven K. Hayes, Chair, 2016-17

Dearly Beloved:

For The Appellate Advocate’s thirtieth-anniversary issue, the editors asked me to reflect on the Section as it exists today and to predict what the Section’s next thirty years might bring. Based on what the Section has done so far, I predict the Section will continue . . .

. . . to use technological advances to expand services to its members, the Bar, the Bench, and the public. Like we currently provide: electronic distribution of The Appellate Advocate; a 24/7 website; free online CLE video; free CLE articles (over 600); Section e-mail blasts, Twitter, and Facebook; and pro bono and amicus assistance via the internet.

. . . to serve others, and to benefit in the process. Like we now recruit CLE speakers for the annual meetings of the Staff Attorneys and the SBOT; we offer those CLE presentations on the website. We give Appellate Advocacy Awards at each Texas law school—one of our inaugural winners will become one of The Appellate Advocate’s next editors. We supported updating SCOTX’s webcasting facilities; everyone can keep viewing its oral arguments.

. . . to thrive because of its talented, tireless, creative members. Like this year, our members provided:

- free CLE to 130+ government lawyers in four presentations from Lubbock to Corpus;
- seven CLE presentations to over 460 lawyers in local bars at six locations; and
- six Coffees with the Courts, where 400 lawyers visited with justices and staff attorneys from eight courts of appeals.

That’s on top of the history committee’s tireless efforts to
interview former Section Chairs and former appellate judges; Jerry Bullard’s award-winning weekly Legislative Updates; the rules committee’s ongoing input on appellate rules and practice, including encouraging all stakeholders to work together to facilitate statewide e-filing; and our co-sponsorship of up to seven CLE programs annually. I’ve attached a list of the folks who do this work—please tell them how much you appreciate them. They follow in the footsteps of the hundreds of committee chairs and committee members, whose efforts we should all deeply appreciate, as these individuals have done the Section’s work over the years and helped shape and direct the Section as it has grown.

At this year’s Advanced Course, long-time Section members Mike Hatchell, JoAnn Storey, Roger Townsend, and Kevin Dubose will share the well-known successes and the little-known secrets of the Section’s first thirty years. I hope you will attend and stay for the Anniversary party afterward. It will be a fitting and fun way to celebrate our first three decades.

It has been an honor and pleasure to chair this Section. I want to thank the former Chairs—who each labored in the Section’s vineyards for years before assuming the presiding role—for their roles in growing this amazing organization. JoAnn Storey has included a list of these individuals with her reflection on the history of the Section; please give those still living a pat on the back.

I envy future Chairs their opportunity to lead this fine group. I know they would love your help in launching this Section into its next thirty years, which I predict you will do. Have fun doing so, and take good care.

Yours,

*Steve Hayes*

shayes@stevehayeslaw.com
## 2016-2017 Committees of the Appellate Section of the State Bar of Texas

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<tr>
<th>Anniversary</th>
<th>Advanced Course &amp; Appellate 101 CLE</th>
<th>Amicus Brief</th>
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<td>Ben Mesches Audrey Vicknair Brandy Wingate Voss</td>
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<th>Appellate Rules</th>
<th>Bench Bar Liaison</th>
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<td>Hon. Tracy Christopher Amy Hefley</td>
<td>Hon. Rebeca Huddle Hon. Sue Walker, co-Chairs</td>
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<td>Lisa Kinzer, co-managing editors</td>
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<td>Jonathan Cone Lucy Forbes Jeanette Strange Audrey Vicknair</td>
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<td>Steve Knight Jeff Oldham</td>
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<td>Brandon Goodwin Sam Houston Todd Smith</td>
<td>Hon. Gina Benavides Kirsten Castañeda</td>
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1 See masthead for committee members, associate editors, and other contributors.
<table>
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<th>Government Lawyers</th>
<th>Hall of Fame</th>
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<th>Law School Liaison</th>
<th>Legislative Liaison</th>
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<td>Jerry Bullard</td>
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<td>Perry Cockerell</td>
<td>Susannah E. Prucka</td>
<td>Hon. Jeff Rose</td>
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It is no secret to appellate practitioners and the members of our judiciary that the number of appeals from interlocutory orders and other forms of early dismissal rules has steadily increased over the last two decades (1996-2016). But what do the numbers really show, and what does it all mean?

Section I of this paper analyzes the impact of such appeals on our State appellate courts by calculating the number of opinions issued from 1996 to 2016 addressing such issues. The resulting data is presented in the spreadsheet attached as Appendix A. Although there is no feasible way to review every single appellate filing arising from such orders over the last two decades (to determine a scientifically exact impact on our dockets), analyzing the opinions provides an interesting overview of what types of interlocutory appeals are having the greatest impact on our dockets, and why. From this, helpful lessons may be gleaned about practice development, docket management, and legislative action.

Section II considers other consequences that these provisions are having on our practice, including their “tort reform” effect; the increased delays caused by the stay of trial court proceedings pending interlocutory appeal; and changes to the practice of appellate law.

I. DOCKET ANALYSIS

A. Methodology

To quantify the overall impact of various types of appeals on our appellate dockets, I reviewed twenty years of opinions issued under multiple statutory provisions and one procedural rule. Namely, these include express interlocutory appeals
under Civil Practice and Remedies Code ("CPRC") sections 15.003, 51.014(a)(1)-(13), 51.016, 150.002, and 171.098; agreed and permissive interlocutory appeals under CPRC sections 51.014(d), (f); and appeals from expedited dismissals under Texas Rule of Civil Procedure 91a.¹

My calculations include all opinions issued in appeals where appellate jurisdiction existed (or was claimed to exist) based on one of the foregoing statutes, even if the court ultimately concluded that it lacked jurisdiction. This is because the impact on our dockets is the same whether a party pursues such an appeal rightly or wrongly: It still presents another case for the appellate court to consider and decide. I did my best to include opinions only from appeals pursued on the basis of one of these statutes/rules, eliminating opinions that merely cited to them for some other purpose.

I also attempted to eliminate any double counting of opinions in each of the following situations. First, where two opinions were issued in one case, such as an amended opinion on rehearing, I counted it only once. However, I separately counted opinions in the same case issued by an intermediate court and the supreme court, reasoning that each stage of appeal

¹ All interlocutory appeals shall proceed on an “accelerated” schedule. See Tex. R. App. P. 25.1, 28.2, 35.1, 38.6. Several additional statutes and rules—outside the scope of statistical analysis in this paper—also grant express rights to interlocutory appeal and/or otherwise require that certain types of appeals be accelerated. See, e.g., id. 24.4 (order setting supersedeas bond or other order regarding suspension or enforcement of judgment); Tex. R. Civ. P. 76a (sealing court records); Tex. R. Crim. P. art. 4.02 (all criminal appeals receive priority); Tex. Bus. Org. Code § 2.106(b) (denial of summary judgment based on nonprofit’s immunity); Tex. Elec. Code §§ 231.009, 232.014-.015 (election contests); Tex. Fam. Code § 6.507 (appointment of receiver); id. § 33.004 (parental notification of minor’s request for abortion); id. § 56.01(c)(1) (certain juvenile orders); id. § 262.112 (denial of emergency removal of child from home); id. §§ 109.002, 263.404-.405 (appointment of TDFPS as managing conservator / termination of parental rights). When considering the overall docket impact of accelerated appeals on the workloads of our justices and their staffs, it is important to keep these additional rules and statutes in mind.
represents an additional impact on the docket. My statistics are presented globally without separation between intermediate and supreme court opinions. But as you would expect, the number of supreme court opinions is infinitely smaller than intermediate court opinions under every statute. Second, where one opinion cited multiple provisions, I tried my best to include that opinion only once under the provision most relevant to jurisdiction in that case, and eliminate its inclusion from any other provision also cited in the opinion. For some types of interlocutory appeals, the overlap is too significant (such as appeals involving both qualified and sovereign immunity under CPRC sections 51.014(a)(5) and (8), or TAA and FAA arbitration orders under CPRC sections 51.016 and 171.098). In those situations, I separately calculated opinions based on both provisions, versus opinions based on one or the other. Additionally, I collectively counted opinions under subsections (a)(1)-(2) (receivership orders) and under subsections (a)(9)-(10) (orders regarding expert reports in health care liability claims) because so many opinions discuss both subsections.

Beyond the rules and statutes discussed in footnote 1, there are three additional areas outside the scope of this paper. First, I did not consider any federal opinions arising from these statutes. Although a handful of federal opinions are issued each year regarding them, it is such a small number that it does not warrant an analysis of the impact that these statutes have on our federal appellate dockets. Second, I did not consider the impact of related mandamus filings that may be pursued in addition (alternatively to) interlocutory appeals under these provisions. Finally, I did not include appeals from final judgments related to the subject matter of the included interlocutory appeals (i.e., when the dismissal results in a final judgment rather than interlocutory order).

The resulting statistics are not “hard science” because some level of discretion was applied in determining what to include in the final numbers, and some legal research inquiries returned fuzzy results. But overall, the resulting statistics provide an accurate picture of what impact the specified statutes and Rule
91a have had on our state court appellate dockets over the last two decades.

**B. Comprehensive Impact**

As shown by the attached spreadsheet (Appendix A), the number of opinions decided each year on the basis of an interlocutory appeal or other early dismissal has increased approximately six-fold from 1996 (total of 58 opinions) to 2016 (total of 336 opinions).

![Graph showing opinions from interlocutory appeals and early dismissals](image)

The most obvious reason for this vast increase is our Legislature’s continuous amendments to expand the scope of statutes allowing for appeals from interlocutory and early dismissal orders. Beyond this broad conclusion, specific analysis related to the docket impact resulting from each provision is discussed in Sections C-E below.

With each new statutory amendment, not only are the rights to pursue interlocutory appeals expanded, but also new questions arise about the interpretation and application of the relevant provisions. This results in many appeals presenting issues about when the right of interlocutory appeal exists (*i.e.*, when interlocutory appellate jurisdiction is conferred). Moreover, I believe there is a snowball effect: As the types of interlocutory appeals increase, so does our awareness of their availability, resulting in more frequent use of these statutes to
pursue immediate relief. Ten or fifteen years ago, many Texas lawyers might not have even heard of (much less studied) interlocutory appellate practice. Now, it is a frequent CLE topic and important area of daily practice for both litigators and appellate lawyers.

CPRC section 51.014 was first codified in 1985. Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, Tex. Gen. Laws 3242, 3280) (S.B. 797). At that time, it covered only four types of orders (which remain in the current statute, without amendment, as subsections (a)(1)-(4)). By 2003, subsections (a)(5)-(10) had been added.\(^2\) Eight years passed before the addition of subsection (a)(11) in 2011. (H.B. 274, 82\(^{nd}\) R.S.). Three other expansions quickly followed: two separate subsections titled (a)(12) were added in 2013 (H.B. 200/H.B. 2935, 83\(^{rd}\) R.S.), one of which was corrected to be (a)(13) in 2015 (S.B. 1296, 84\(^{th}\) R.S.); and the addition of allowing interlocutory appeals from “statutory probate courts” was made in 2013 (S.B. 1083/H.B. 1874, 83\(^{rd}\) R.S.).

Additionally, the right of interlocutory appeal from orders regarding certain venue/joinder decisions under CPRC section 15.003 was expanded in 2003 (H.B. 4, 78\(^{th}\) R.S.); interlocutory appeals from dismissals based on certificates of merit was added to CPRC section 150.002 in 2005 (H.B. 1573, 79\(^{th}\) R.S.); and an express right to interlocutory orders denying arbitration under the federal statute was added to CPRC section 51.016 in 2009 (S.B. 1650, 81\(^{st}\) R.S.).

In 2013, our supreme court adopted Rule 91a, which allows for expedited dismissal of claims having no basis in fact or law. As with the foregoing statutory amendments, the adoption of this rule has generated a significant increase in appeals.

It is not surprising that the historical progression of legislative amendments to expand the types of appeals allowed under the relevant statutes follows a nearly identical trajectory to the increased number of appeals from interlocutory orders and Rule 91a dismissals on an annual basis:

\(^2\) Subsection (a)(5) was added in 1989; (a)(6) was added in 1993; (a)(7)-(8) were added in 1997; and (a)(9)-(10) were added in 2003.
The increase in number of appeals, 1985 to 2001, with relevant statutory amendments shown.
The increase in number of appeals, 2002 to 2016, with relevant statutory amendments shown.
The increase in number of appeals, 1985 to 2016, with relevant statutory amendments shown.
And more expansion is on the way: Most significantly in this 2017 legislative session (85th RS), H.B. 1761 was passed, amending the Texas Supreme Court’s jurisdiction under Texas Government Code Ch. 22. Previously under section 22.225(d), the supreme court had jurisdiction to review interlocutory appeals only: (1) pursued under CPRC sections 51.014 (a)(3) (class action certification orders), (a)(6) (media free speech summary judgments), (a)(11) (denied dismissals of asbestos/silica claims), and (d) (permissive interlocutory appeals); or (2) pursuant to conflicts jurisdiction. H.B. 1761 eliminated those restrictions (among others) and replaced them with a uniform jurisdictional test: whether the issue presented is sufficiently important to the jurisprudence of the State. This standard applies to all final judgments and interlocutory orders unless another statute otherwise makes the intermediate court’s jurisdiction final. The amendment “applies only to an interlocutory order signed on or after the effective date of this Act [September 1, 2017]. An interlocutory order signed before the effective date of this Act is governed by the law applicable to the order immediately before the effective date of this Act, and that law is continued in effect for that purpose.” H.B. 1761, sec. 5.

Additionally, S.B. 4 was passed, effective September 1, 2017 (subject to a pending constitutional challenge). The law expands law enforcement’s abilities to inquire about one’s immigration status and create enhanced governmental liability (including waivers of sovereign immunity) resulting from the entity’s release of individuals who are subject to an ICE detainer request. Among other things, it enacts Texas Government Code section 752.055(c) to provide for an accelerated appeal from a suit brought by the Attorney General to enforce compliance by governmental entities and other state actors with the state’s immigration policies. According to this new provision, “The appellate court shall render its final order or judgment with the least possible delay.” Such appeals are certain to have an impact on our dockets. Because the statute allows the AG to file all such suits in Travis County (or in the county in which the
principal office of the entity is located, at the AG’s discretion), the most significant impact is likely to be felt by the Third Court of Appeals.

C. Express Interlocutory Appeals

Various Texas statutes grant “express” rights to pursue immediate appeals from certain types of non-final (interlocutory) orders. The primary statute granting such rights is CPRC section 51.014(a), which currently specifies thirteen types of interlocutory orders from which an immediate, accelerated appeal may be pursued prior to entry of a final judgment. Other important statutes granting express rights of interlocutory appeal are: CPRC section 15.003 (venue/joinder orders); CPRC sections 51.016 and 171.098 (arbitration orders); and CPRC section 150.002 (certificate of merit orders). The docket impact of each of these statutes is analyzed individually below, and the data is reflected on Appendix A.

1. CPRC §§ 51.014(a)(1)-(2): Receivership.

Interlocutory appeals are expressly allowed from orders that “appoint[] a receiver or trustee,” or “overrule[] a motion to vacate an order that appoints a receiver or trustee,” including orders appointing receivers in family cases. CPRC §§ 51.014(a) (1)-(2); see also Tex. Fam. Code Ann. § 6.507. Subsections (a)(1)-(2) are analyzed collectively because of the substantial overlap in opinions citing to both when analyzing jurisdiction over the appeal.

Following their enactment in 1985, subsections (a)(1) and (2) were not cited any opinion until 1988; there were two that year. Thereafter, the number increased only slightly. Over the last two decades (1996-2016), the frequency of opinions decided under these subsections has remained consistent at about three to four per year. Hence, the docket impact of interlocutory appeals brought under subsections (a)(1)-(2) is very slight.
2. CPRC § 51.014(a)(3): Class Certification.

Section 51.014(a)(3) authorizes interlocutory appeals from orders that “certify[y] or refuse[] to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure.”

Opinions issued in appeals brought under subsection (a)(3) were very minimal between 1987-1996 (averaging only two per year). There was a notable jump in 1997. During the eight-year span from 1997-2004, there was an average of ten opinions issued each year in appeals brought under subsection (a)(3). Then the numbers tapered off: There was an average of five opinions per year from 2005-2008, and then only three per year from 2009-2016. What explains this? Simply put, tort reform.

During the 1990s, the political climate in Texas was more liberal under a Democratic Governor (Ann Richards, 1990-1994), a Democratic President (Bill Clinton, 1993-2001), and laws enacted under such administrations that remained on the books even after their tenures. Tort claims (including product liability claims that are often the subject of class actions) were more readily pursued under these laws.

This began to change at the start of the 2000s, first with pinnacle supreme court cases restricting class actions. See, e.g., Southwest Refining Co. v. Bernal, 22 S.W.3d 425 (Tex. 2000) (rejecting “certify now and worry later” approach and requiring a “rigorous analysis” for certification); Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675 (Tex. 2002) (reversing nationwide certification based on Bernal analysis).

Next, the Legislature passed sweeping tort reforms in 2003 (H.B. 4, 79th R.S.). Those amendments abolished class action contingency fees, imposed administrative proceedings as a prerequisite to suit for certain class claims, granted the supreme court automatic jurisdiction to review all appeals brought under subsection (a)(3), and imposed major restrictions on tort remedies, among other things. In 2004, amendments to Texas Rule of Civil Procedure 42 were passed incorporating elements of the Bernal analysis and making other changes consistent with Federal Rule of Civil Procedure 23. These amendments had
the intended effect of making it harder for plaintiffs to pursue class actions in Texas. The annual number of appeals pursued under subsection (a)(3) was consistently reduced following these amendments.

Although the overall changes to class action litigation have had significant impacts on Texas court dockets and trial practice, the numbers of interlocutory appeals from certification orders under CPRC section 51.014(a)(3) have not had a significant impact on our appellate courts over the last 10 years (decreasing from an average of seven to three opinions per year).

3. CPRC § 51.014(a)(4): Temporary Injunctions.

Section 51.014(a)(4) permits an interlocutory appeal from an order that “grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65.”

Although subsection (a)(4) was part of the original codification in 1985, it was not cited in an opinion until 1997. Thereafter, its frequency increased to approximately twenty opinions per year through 2005. Over the last decade (2006-2016), there has been a slight increase to an average of twenty-eight opinions per year decided under subsection (a)(4).

The issuance of *Hernandez v. Ebrom*, 289 S.W.3d 316, 318-19 (Tex. 2009) (addressing the “use it or lose it” doctrine) may be responsible for this uptick in recent years. When addressing an appeal brought under subsection (a)(9) (regarding appeals of orders on motions to dismiss in a health care liability claim based the failure to file an expert report), the supreme court interpreted the phrase “may appeal” under subsection (a) as meaning that the right to pursue an interlocutory appeal was discretionary, not mandatory. However, the Court cautioned that if an interlocutory appeal were not timely pursued in response to certain types of interlocutory orders, there was a risk of the order being rendered moot by subsequent orders before a final judgment could issue, thereby absolving the underlying right of appeal. *Id.* at 319. The Court specifically
cited temporary injunction orders subject to interlocutory appeal under subsection (a)(4) as an example. *Id.* at 319, 323 and 325 (Jefferson, C.J., dissenting) (“As the Court notes, the oldest interlocutory appeal, that from an order creating or dissolving a temporary injunction, must either be taken immediately or lost, because a temporary injunction, by its very nature, ceases to exist when the controversy has proceeded to final judgment.”). It seems practitioners noted this concern and pursued such appeals more frequently to avoid the risk of waiver.

4. CPRC §§ 51.014(a)(5) and (a)(8): Governmental Immunity.

Section 51.014(a)(5) allows for an interlocutory appeal from an order that “denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state.” Although the statute expressly refers to an order arising from a “summary judgment,” the procedural vehicle used or title of the motion (such as “plea to the jurisdiction” or “motion to dismiss”) are irrelevant. *Austin State Hosp. v. Graham*, 347 S.W.3d 298, 301 (Tex. 2011) (per curiam) (“[A]n appeal may be taken from orders denying an assertion of immunity, as provided in section 51.014(a)(5), regardless of the procedural vehicle used.”).

Relatively, subsection (a)(8) allows for an interlocutory appeal from an order that “grants or denies a plea to the jurisdiction by a governmental unit as that term is defined in Section 101.001.” Although the plea must be filed by a government unit, an interlocutory appeal of the order “granting or denying” that plea may be brought by both “a non-governmental plaintiff challenging the grant of [a plea] and a governmental defendant challenging the denial of one.” *Tex. A&M Univ. Ret. Sys. v. Koseoglu*, 223 S.W.3d 835, 843 (Tex. 2007).

Since 1998 (shortly after the enactment of subsection (a)(8)), interlocutory appeals under this subsection have been
the most numerous in our court system with an average of 77 opinions per year issued per year over the last decade. Appeals under subsection (a)(5) are also frequently pursued, but the numbers pale in comparison to (a)(8) appeals, with an average of 11 opinions per year issued under this subsection over the last decade. During this time, there have also been an average of four opinions per year decided under both subsections.3

Also, the frequency of (a)(5) appeals decreased following the enactment of (a)(8). Subsection (a)(5) was passed in 1989 and cited for the first time in 1992. Between 1993-1998, there were approximately 23 opinions per year decided under this subsection. Following subsection (a)(8)’s enactment in 1997, that dropped to an average of 20 per year through 2005, and then 11 per year through 2016. During these same periods, appeals decided under subsection (a)(8) increased from an average of 46 per year through 2005, then 77 per year through 2016. This may be because more plaintiffs elected to pursue liability (and a waiver of immunity) against the governmental entity instead of the individual officer, which provides the benefit that a losing plaintiff has a right to interlocutory appeal under (a)(8) but not under (a)(5).

5. CPRC § 51.014(a)(6): Media Free Speech.

Section 51.014(a)(6) allows an interlocutory appeal from an order that “[a] denies a motion for summary judgment [b] that is based in whole or in part upon a claim against or defense by [i] a member of the electronic or print media, acting in such capacity, or [ii] a person whose communication appears in or is

3 This typically occurs when a plaintiff names both a governmental entity and official(s) as defendants. Note, however, that if the plaintiff seeks a waiver of immunity under the Texas Tort Claims Act, the plaintiff must make a critical “election of remedies” about who to sue: the governmental unit/employer or the governmental officer/employee? CPRC § 101.106(f); Molina v. Alvarado, 463 S.W.3d 867, 870 (Tex. 2015) (per curiam). If the plaintiff sues both, section 101.106(e) provides for immediate dismissal of both. See Texas Dep’t of Aging and Disability v. Cannon, 453 S.W.3d 311 (Tex. 2015).
published by the electronic or print media, [c] arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73.” Only a defendant has a right to take an interlocutory appeal from the denial of its summary judgment under this subsection (a)(6); a plaintiff has no such right. Koseoglu, 233 S.W.3d at 844; Franco v. Cronfel, 311 S.W.3d 600, 609-10 (Tex. App.—Austin 2010, no pet.) (“Texas courts have consistently recognized [] that the statute does not permit the plaintiff to bring a similar interlocutory appeal, nor does it confer jurisdiction over cross-points raised on appeal by the plaintiff.”).

There is an obvious overlap between appeals under this section and section 51.014(a)(12) (appeals from denials of motions to dismiss under the “anti-SLAPP” statute, CPRC Ch. 27, Texas Citizens’ Participation Act (“TCPA”)). See infra, Section I(C)(9). Following the enlargement of subsection (a)(12)’s scope in 2013, appeals under (a)(6) have become virtually nonexistent. There were no opinions decided under subsection (a)(6) in 2015, and only one in 2016. See Scripps NP Operating, LLC v. Carter, No. 13-15-00506-CV, 2016 Tex. App. LEXIS 13519 (Tex. App.—Corpus Christi Dec. 21, 2016, pet. filed) (the second appeal from an order originally issued in 2009, prior to the enactment of (a)(12)).

There are several reasons why appellants would prefer to utilize subsection (a)(12) over (a)(6). Primarily, the latter comes with a huge deterrent: If the order denying dismissal is affirmed on appeal, then the court “shall order the appellant [media defendant] to pay all costs and reasonable attorney fees of the appeal; otherwise, each party shall be liable for and taxed its own costs of appeal.” CPRC § 51.015; City of Houston v. Northwood Mun. Utility Dist. No. 1, 74 S.W.3d 183, 185 n.2 (Tex. App.—Houston [1st Dist.] 2002, no pet.). The TCPA, on the other hand, provides for an award of attorney’s fees and possibly sanctions to a defendant who prevails in obtaining a dismissal. CPRC § 27.009.

Additionally, relief under (a)(6) is more limited: it applies to
a narrower set of movants, on a narrower set of claims. See State v. Valerie Saxon, Inc., 450 S.W.3d 602, 610-612 (Tex. App.—Fort Worth 2014, no pet.) (dismissing cross-appeal under (a) (6) based on failure to satisfy both requirements of being the correct type of party and defending against the correct type of claim). In the appeals previously filed under (a)(6), significant fights ensued about whether a defendant/movant satisfied each of the requirement elements, and the primary requirement of being a media defendant remains an unresolved question by the Texas Supreme Court. Moreover, a motion for summary judgment within the scope of (a)(6) does not provide for the same, expedient dismissal as a motion under CPRC Ch. 27 within the scope of (a)(12). Thus, the latter would likely be the first procedural vehicle used by a defendant, therefore resulting in an appeal under (a)(12) rather than (a)(6).

6. CPRC § 51.014(a)(7): Special Appearance.

Section 51.014(a)(7) allows an interlocutory appeal from an order that “grants or denies the special appearance of a defendant under Rule 120a, Texas Rules of Civil Procedure, except in a suit brought under the Family Code.” See In re Knight Corp., 378 S.W.3d 658 (Tex. App.—Houston [14th Dist.] 2012, no pet.); In re J.W.L., 291 S.W.3d 79 (Tex. App.—Fort Worth 2009, no pet.). Because this subsection encompasses orders both “granting” and “denying,” it means either the plaintiff or defendant can pursue an interlocutory appeal under (a)(7).

Subsection (a)(7) was enacted in 1997. Since that time, opinions issued under this provision have consistently remained at an average of eighteen per year. While not an uncommon source of appeal, the docket impact has shown no significant change over the last two decades.


Interlocutory appeals are allowed from two types of orders in a health care liability claim arising from a defendant’s motion
to dismiss on the basis that the plaintiff failed to file an expert report in compliance with the statute. The Texas Medical Liability Act ("TMLA"), Chapter 74 of the CPRC, governs such claims.

If the claimant fails to serve any expert report by the statutory deadline, then trial court must grant the defendant’s motion to dismiss the claim with prejudice and award costs and attorney’s fees to the defendant. CPRC § 74.351(b). If this motion to dismiss is denied in whole or in part, CPRC section 51.014(a)(9) allows the defendant to pursue an interlocutory appeal. The claimant has no right to appeal from a grant of dismissal in this situation. DuBois v. Irfan, No. 14-15-01032-CV, 2016 Tex. App. LEXIS 3851 (Tex. App.—Houston [14th Dist.] Apr. 14, 2016, no pet.).

If the claimant serves a timely report but the defendant considers it to be inadequate or deficient, the defendant can move for dismissal. CPRC § 74.351(l). The statute does not mandate dismissal in this situation. Instead, the trial court can grant the claimant one 30-day extension to cure the defects alleged with its expert report. Id. § 74.351(c). The defendant must wait for the expiration of the extension period and then, if claimant’s report still appears deficient, move to dismiss again. “The trial court should grant the motion to dismiss “only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the [statute’s] definition of an expert report.” Id. § 74.351(l). If the motion is denied, in whole or in part, CPRC section 51.014(a)(9) allows the defendant to pursue an interlocutory appeal. Scoresby v. Santillan, 346 S.W.3d 546, 549 (Tex. 2011); Lewis v. Funderburk, 253 S.W.3d 204 (Tex. 2008). If the motion is granted, CPRC section 51.014(a)(10) allows the claimant to pursue an interlocutory appeal. Am. Transitional Care Ctrs.,

4 CPRC section 51.014(a)(9) expressly prohibits an interlocutory appeal by a defendant from an order granting an extension under section 74.351(c). Moreover, if the extension is granted, the defendant cannot pursue an interlocutory appeal from the initial denial of his motion to dismiss. Ogletree v. Matthews, 262 S.W.3d 316, 321 (Tex. 2007).
Inc. v. Palacios, 46 S.W.3d 873, 875 (Tex. 2001); see also Perry v. Bradley, No. 10-10-00402-CV, 2011 WL 6415135, *2 (Tex. App.—Waco Dec. 21, 2011, no pet.) (defendant can bring interlocutory appeal of order denying motion to dismiss on the basis of “no report” or a “deficient report”; but claimant has a right to pursue interlocutory appeal only from an order granting a motion to dismiss based on filing a deficient report).

Subsections (a)(9)-(10) were enacted in 2003 as part of Texas’s tort reform bill. (H.B. 4, 79th R.S.). The purpose of these reforms (in connection with the amendments to the TMLA under Chapter 74) was to restrict the number of health care liability claims by making the filing requirements more stringent. Along with the increased requirements, these reforms provided the aforementioned paths to swift dismissal, and broader rights for defendants to pursue an interlocutory appeal from an unsuccessful motion to dismiss than plaintiffs have to pursue interlocutory appeals from a successful motion.

After a consistent increase in the number of annual opinions issued under subsections (a)(9)-(10) between 2004-2007, the frequency of these appeals peaked in 2008 (with seventy-three opinions that year). Since then, the numbers have dwindled annually, resulting in an average of only thirty-two per year between 2014-2016. This appears to reflect the overall decline in medical malpractice claims, exactly as intended by the 2003 tort reforms. This decline has been hastened by additional restrictions on the damages recoverable in such claims and by case law broadly interpreting the scope of “health care liability claims” falling within the scope of these statutes. See, e.g., Randol Mill Pharmacy v. Miller, 465 S.W.3d 612 (Tex. 2015) (claim against pharmacist for negligent compounding of drugs was a HCLC, despite statutory exemption for a pharmacist’s sale of mishandled or defective products); Loaisiga v. Cerda, 379 S.W.3d 248, 252 (Tex. 2012) (patient’s claim of assault during medical examination could be a HCLC); Bioderm Skin Care, LLC v. Sok, 426 S.W.3d 753 (Tex. 2014) (claim based on injuries received during laser hair removal at a facility owned by a physician was a HCLA).

Subsection (a)(11) allows for an interlocutory appeal from an order that “denies a motion to dismiss filed under Section 90.007.” CPRC Ch. 90 applies to “Claims Involving Asbestos and Silica.” Section 90.007 provides that, “in an action filed on or after September 2, 2005, if a claimant fails to serve [an expert report complying with Section 90.003 (asbestos) or 90.004 (silica)],” then “the defendant may file a motion to dismiss” within 30 days of the date that the report was served or due to be served. If the motion is denied, defendant can immediately appeal.

Since its enactment in 2011, only four appellate opinions have been issued in appeals pursued under subsection (a)(11). See, e.g., Union Carbide Corp. v. Synatzske, 438 S.W.3d 39, 45-46 (Tex. 2014). Thus, it has virtually no impact on our appellate dockets.

9. CPRC § 51.014 (a)(12): Anti-SLAPP/TCPA.

CPRC sections 51.014(a)(12) and 27.008 allow for an interlocutory appeal from an order that “denies a motion to dismiss under [CPRC] Section 27.003.” Chapter 27 is the Texas Citizen’s Participation Act (“TCPA”), which was enacted in 2011.

The TCPA is an “anti-SLAPP” statute that permits parties targeted by Strategic Lawsuits Against Public Participation to move for dismissal if the action relates to the party’s exercise of the right of free speech, right to petition, or right of association. In re Lipsky, 460 S.W.3d 579, 586 (Tex. 2015); CPRC § 27.002. As originally enacted in 2011, the TCPA allowed for an interlocutory appeal only from an “overruling by operation of law,” and a split in the courts developed about whether interlocutory appeals were allowed from express rulings. See Paulsen v. Yarrell, 455 S.W.3d 192, 195-96 (Tex. App.—Houston [1st Dist.] 2014, no pet.); Miller Weisbrod, L.L.P. v. Llamas-Soforo, 511 S.W.3d 181 (Tex. App.—El Paso 2014, no pet.) The Legislature clarified this by amending section 51.014(a) in 2013 to add subsection (a)(12), expressly permitting appeal in this
situation. The amendment became effective immediately on May 24, 2013, and applies retroactively to all cases pending at the time of enactment. See Act of May 24, 2013, 83rd Leg., R.S., H.B. 2935, § 6; In re Lipsky, 460 S.W.3d at 585 n.2.

Following the 2013 amendment, the number of interlocutory appeals from express or implied denials of TCPA motions increased to eleven, then twenty, then twenty-five per year in 2014-2016. This is significant on its own. But it is also important to remember the even higher number of regular appeals that are pursued each year under the TCPA from orders granting a swift dismissal (when it results in a final judgment). The appeals under section 51.014(a)(12) tell only part of the story. The overall impact of the TCPA on our appellate dockets has been prolific. More on this is discussed in Section II.

10. CPRC § 51.014(a)(13): Electric Utilities.

Section 51.014(a)(13) allows for an interlocutory appeal from an order that “denies a motion for summary judgment filed by an electric utility regarding liability in a suit subject to [CPRC] Section 75.0022.” Section 75.0022 is a provision that limits the liability of an electric utility located in a county with a population of more than four million when it allows, in certain circumstances, public access onto its property “for recreation, exercise, relaxation, travel, or pleasure.”

Subsection (a)(13) took effect in 2013, with applicability to causes of action accruing on or after May 16, 2013. [Note: This provision was originally enacted as a “duplicate” subsection (a)(12). The Legislature corrected this typographical error in 2015.] To date, there have been no appellate opinions deciding an interlocutory appeal under this subsection. Thus, it has zero impact on our appellate dockets.

11. CPRC § 15.003: Venue/Joinder.

The general rule is that “[n]o interlocutory appeal shall lie from the [trial court’s venue] determination.” CPRC §
section 15.003(b) provides an exception, allowing for an interlocutory appeal, in a multi-plaintiff case, from a trial court’s determination that “(1) a plaintiff did or did not independently establish proper venue; or (2) a plaintiff that did not independently establish proper venue did or did not establish the items prescribed by Subsections [15.003](a) (1)-(4).” Any party affected by the venue or joinder decision under subsection (a) may bring the interlocutory appeal. CPRC § 15.003(c).

This right to interlocutory appeal was expanded in 2003. See Acts 2003, 78th Leg., ch. 204, Sec. 3.03, eff. Sept. 1, 2003. Before the amendment (from 1995-2002), “interlocutory appellate jurisdiction was limited to review of joinder and intervention rulings made in a venue context.” Union Pacific R. Co. v. Stouffer, 420 S.W.3d 233, 237 (Tex. App.—Dallas 2013, pet. dism’d) (citing Act of May 8, 1995, 74th Leg., R.S., ch. 138, 1995 Tex. Gen. Laws 978). “After the 2003 amendment, interlocutory appellate jurisdiction in multiple-plaintiff cases extends to the determination of whether the plaintiffs have independently established proper venue or not.” Id.

However, even following the expanded scope of the statute, there has not been much change in the frequency of interlocutory appeals pursued under section 15.003. From 1997-2006, there have been an average of eight opinions per year issued in such appeals. Thus, the overall docket impact of such appeals is minimal.

An interesting uptick occurred in 1999, when twenty-one opinions were issued in section 15.003 appeals. It may seem that this resulted from Surgitek v. Abel, 997 S.W.2d 598, 601 (Tex. 1999) (rejecting a “formulistic” approach to the statute and confirming interlocutory jurisdiction would exist more broadly over any order that in substance—regardless of title or form— “necessarily determines the propriety of a plaintiff’s joinder under section 15.003(a)”). However, only seven of the 1999 opinions were issued after Surgitek. I could not identify any obvious cause for the 1999 uptick, which may simply be an anomaly.
Orders denying motions to compel arbitration and other specified orders that are “hostile” to arbitration under the Federal Arbitration Act (“FAA”) and the Texas Arbitration Act (“TAA”) are subject to interlocutory appeal under CPRC sections 51.016 and 171.098, respectively. This ability tends to favor defendants who are typically the parties seeking to enforce arbitration agreements and remove a lawsuit from the judicial arena.

Some arbitration provisions expressly state that they are governed by the FAA or the TAA but often they are silent on this point. Thus, many practitioners ask whether it is necessary to determine which Act applies for purposes of appeal. The answer is “usually not” for any case filed after September 1, 2009.

Prior to 2009, mandamus was the proper procedure to complain about a hostile arbitration order under the FAA. Hence, it was important at that time to determine which Act applied to know whether to pursue mandamus (FAA) or interlocutory appeal (TAA); or, if uncertain, to pursue parallel proceedings. See CMH Homes v. Perez, 340 S.W.3d 444, 448 (Tex. 2011).

Section 51.016 was amended in 2009 to expressly allow for an interlocutory appeal from an order denying arbitration under the FAA, making it consistent with the procedure for orders under the TAA, per section 171.098. Now, if a party mistakenly attempts to pursue review of an order denying its motion to compel arbitration under either Act via mandamus, that relief will be denied based on the existence of an adequate remedy at law, and the party will have waived its right to interlocutory appeal by failing to pursue it timely. In re Hart of Tex. Cattle Feeders, Inc., No. 07-16-00194-CV, 2016 Tex. App. LEXIS 5958 (Tex. App.—Amarillo June 2, 2016, no pet.) (orig. proc.).

The statistics demonstrate that appeals from interlocutory orders hostile to arbitration have had a consistent, moderate impact on the docket. Between 1998-2008, there were an average of nineteen opinions per year issued in interlocutory appeals under section 171.098 (TAA). Although outside the
scope of this paper, my general research reflects that there were a similar number of mandamus actions pursued from FAA orders during this time.

Following the 2009 amendment, the number of opinions resulting from interlocutory appeals pursued solely under section 171.098 steadily decreased, while the number of opinions from interlocutory appeals pursued solely under section 51.016 or under both provisions without distinction steadily increased. Presumably the FAA statute is relied on more frequently because its scope is broader and arbitration agreements in certain circumstances are easier to enforce under the FAA than the TAA. *E.g., compare* CPRC § 171.002(b)(2) (under the TAA, an arbitration agreement between individuals for the acquisition of services involving consideration of $50,000 or less is not enforceable unless it is “in writing” and “signed by each party and each party’s attorney”), with 9 U.S.C.A. § 2 (FAA would not require an attorney’s signature in this circumstance); *see also In re Olshan Foundation Repair Co., LLC*, 328 S.W.3d 883, 890 (Tex. 2010) (“FAA is part of the substantive law of Texas” and it controls when an arbitration provision contains general language that the “laws of the state” govern (or similar language) without expressly stating that the TAA controls.”); *Forged Components v. Guzman*, 409 S.W.3d 91, 97-98 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (FAA generally “extends to any contract affecting commerce, as far as the Commerce Clause of the United States Constitution will reach.”).

By 2013, it became common for opinions to simply cite both statutes as a basis for appellate jurisdiction without analyzing whether the TAA or FAA applied. *See, e.g., Watts Water Techs., Inc. v. Tex. Farmers Ins. Co.*, No. 14-13-00241-CV, 2013 Tex. App. LEXIS 6592, at *1 (Tex. App.—Houston [14th Dist.] May 30, 2013, no pet.). The lesson for practitioners seeking to compel arbitration is that, unless the underlying agreement specifies without question that the TAA governs, rely on both the state and federal acts in your motion to expand the scope of possible interlocutory jurisdiction to review the order if denied.
13. CPRC § 150.002: Certificates of Merit.

Section 150.002(f) provides an interlocutory appeal from “an order granting or denying” a motion to dismiss under CPRC Chapter 150. Section 150.002 requires that—in any action or arbitration proceeding for damages arising out of services of a licensed or registered professional architect, engineer, land surveyor, landscape architect, or any firm in which such professional practices—the plaintiff must file with its original complaint a “certificate of merit” prepared by a third-party, competent, licensed professional in the same field as defendant. If plaintiff fails to file a sufficient affidavit (i.e., certificate of merit), then it “shall result in dismissal of the complaint against the defendant.” CPRC § 150.002(e).

As discussed above with medical expert reports, class actions, and others, section 150.002 was originally enacted in 2003 as part of the comprehensive tort reform package. See Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 20.01, 2003 Tex. Gen. Laws 847, 896-97 (H.B. 4, 78th R.S.). The statute did not provide for an interlocutory appeal at that time. In 2005, the statute was amended to enhance its tort-reform strength by (1) expanding the scope of claims to which the certificate of merit requirement applied from only those “alleging professional negligence” to more broadly include “any action or arbitration proceeding for damages arising out of the provision of professional services by a design professional”; but also (2) providing the right of interlocutory appeal to both plaintiffs and defendants. S&P Consulting Eng’rs, PLLC v. Baker, 334 S.W.3d 390, 394-95 (Tex. App.—Austin 2011, no pet.) (citing Act of May 27, 2005, 79th Leg., R.S., ch. 208, § 2, 2005 Tex. Gen. Laws 369, 370). Section 150.002 was amended again in 2009 to (1) increase the qualification requirements for the plaintiff’s expert attesting to the certificate; and (2) require much greater detail be set forth within the certificate. Id. (citing Act of May 29, 2009, 81st Leg., R.S., ch. 789, § 2.).

Following the addition of an express right to interlocutory appeal in 2005, no opinion was issued on that basis for two
years (zero in 2005-2006). Then, there was a modest increase between 2007-2009 (with one, two, and six opinions issued in those years, respectively). The number jumped to an average of twelve opinions per year between 2010-2015. But as of 2016, there were only two opinions issued in appeals pursued under section 150.002.

As seen in the other “tort reform” statutes, it appears that the legislation is having its intended effect. The amendments made to section 150.002 have made it increasingly more difficult for plaintiffs to pursue claims against licensed or registered professionals in the design and construction industry. As those claims become harder to pursue across the board, it is not surprising that the number of interlocutory appeals arising from them has dropped dramatically.

D. Permissive (and Agreed) Interlocutory Appeals

Beginning in 2001 and as amended in 2005, the Legislature provided a mechanism under CPRC § 51.014(d) by which parties could seek appeal of an interlocutory order that was not otherwise expressly appealable “by agreement” of the parties. The statute was amended in 2011 to eliminate the need for party agreement and, instead, require “permission” from the trial court and court of appeals to pursue the interlocutory appeal. See id. § 51.014(f); State v. Ledrec, Inc., 366 S.W.3d 305, 306 n.1 (Tex. App.—Fort Worth 2012, no pet.) (“agreed” procedures continue to apply to cases filed before September 1, 2011). Both “agreed” and “permissive” interlocutory appeals require proof that the issue presented is on a (1) controlling question of law, (2) about which there is a substantial ground for difference of opinion, and (3) the resolution of which may materially advance the termination of the litigation. See Tex. R. App. P. 28.3; Tex. R. Civ. P. 168; CPRC §§ 51.014(d), (f).

Over the last few years, the number of petitions for permissive interlocutory appeal have substantially increased. In a paper presented at the 27th Annual UT Law Conference on State and Federal Appeals (2017) titled “Interlocutory
Appeal Update,” Mike Heidler and Zachary Howe extensively analyzed these statistics.

I have included overview numbers about appeals under section 51.014(d) in my spreadsheet. It is important to note the differences between my statistics and Mr. Heidler’s: My numbers include appeals from 2001-2016 under both the prior version (agreed) and current version (permissive) to provide a historical overview of the impact on our dockets. Mr. Heidler’s analysis is limited to appeals under the current version of the statute, from 2011-2017. I break my numbers down by year, to show a historical progression, whereas he breaks his down by court. Also, I am counting the number opinions ultimately issued in cases where a party relied on section 51.014(d) as a basis for jurisdiction (including opinions that both agreed and disagreed jurisdiction existed on that basis). Mr. Heidler has considered all petitions for permissive appeal that have been filed, and then analyzed their outcomes. Thus, his numbers capture cases where a petition was filed but, for whatever reason, no opinion was ultimately issued.

Based on my overview, there has been a steady climb in the number of appeals pursued under this provision from its enactment in 2001 through 2016, with a notable jump following the 2011 change from agreed to permissive interlocutory appeals. It took two years before any opinions were issued on this basis. Then, from 2003-2011, there were an average of eight opinions per year on a consistent basis. Thereafter (under the permissive statute), that number more than tripled to an average of twenty-seven opinions per year from 2012-2016, with the individual annual numbers climbing each year. These numbers do not reflect that our appellate courts are granting permission and actually deciding “controlling questions of law” in this many interlocutory appeals each year. As Mr. Heidler’s paper demonstrates, they are not. But the numbers do show that practitioners are seeking such permission more and more frequently, which has an undeniable impact on our appellate dockets.
E. Rule 91a Motions to Dismiss

In 2011, the legislature passed statutes that directed the Texas Supreme Court to adopt rules providing for the “dismissal of causes of action that have no basis in law or fact on a motion without evidence,” and making a mandatory award of attorney’s fees to the prevailing party on such a motion (i.e., loser pays). Tex. Gov’t Code § 22.004(g); CPRC § 30.021. In 2013, the Court responded by adopting Texas Rule of Civil Procedure 91a. See Texas Supreme Court, Misc. Docket No. 13-9022.

Rule 91a provides a vehicle for expedited dismissal of allegedly-baseless claims shortly after they have been filed. The motion to dismiss must be filed within 60 days after service of the first pleading containing the objectionable claim, specifically alleging why each challenged cause of action has no basis in fact or law, or both. TRCP 91a.3. Unless the movant withdraws or amends its motion or the non-movant nonsuits its claim, then a ruling on the motion is mandatory 45 days after the motion was filed. Id. 91a.3, a.5.

The ruling must be made as a matter of law, based solely on the pleadings and attachments thereto, without considering any other evidence. Id. 91a.6. This limited review, coupled with the loser-pays fee provision (id. 91a.7), adds additional layers of risk and difficulty for plaintiffs to pursue claims in Texas because they now must marshal proof from Day 1 of their suit to avoid dismissal and fees under Rule 91a, without the opportunity to first conduct discovery. As such, Rule 91a is harsher than either special exceptions or summary judgment. Moreover, while a special appearance or motion to transfer venue must be filed before a Rule 91a motion (due order of pleadings), a defendant can have the Rule 91a motion decided first (and potentially obtain a fee award) without waiving his right to pursue the special appearance or venue transfer as back-up dismissal methods if the Rule 91a motion is unsuccessful. Id. 91a.8. Rule 91a is also expressly cumulative of all other available dismissal procedures. Id. 91a.8. In short, it provides a very powerful tool to defendants (or counter-defendants).
If the ruling (either granting or denying the motion) is interlocutory (meaning it does not dismiss all claims or parties), then the losing party may pursue an interlocutory appeal only if the substance of the motion is within the scope of something for which an interlocutory appeal would otherwise be allowed, such as a plea to the jurisdiction by a governmental defendant. See Koenig v. Blaylock, 497 S.W.3d 595, 598 n.4 (Tex. App.—Austin 2016, pet. denied); Chambers-Liberty Counties Navigation Dist. v. State, No. 03-15-00744-CV, 2016 Tex. App. LEXIS 7242, *6 n.2 (Tex. App.—Austin Jul. 8, 2016, no pet.). Otherwise, such an interlocutory ruling may be pursued only by mandamus or permissive appeal. See, e.g., In re Essex Ins. Co., 450 S.W.3d 524, 525 (Tex. 2014) (per curiam); Jefferson Cty. v. Swain, 452 S.W.3d 881, 882 (Tex. App.—Beaumont 2014, pet. denied). If the ruling is final (meaning it dismisses all claims and parties), then it is subject to a regular appeal. See Crotts v. Cole, 480 S.W.3d 99, 105 (Tex. App.—Houston 2015, no pet.).

To quantify the docket impact of Rule 91a, I counted all appeals pursued from rulings under this rule, without distinction between interlocutory, original, or final/regular proceedings. In the few years since its enactment, our appellate dockets have sustained a significant impact. Although no opinions were issued in Rule 91a appeals in 2013 (the year of enactment), there was a big jump the next year to twenty opinions in 2014. The numbers have markedly increased each year thereafter (thirty-nine in 2015, and fifty-two in 2016).

II. OTHER CONSEQUENCES

Beyond the increased workload of our appellate courts, the interlocutory appeals and early dismissals discussed above have other notable impacts on Texas jurisprudence and legal practice, as discussed below.

A. Tort / Lawsuit Reform

What began as a campaign to limit “tort” claims in the 2000s
has now expanded to a campaign aimed at limiting all forms of “lawsuits” led by Texans for Lawsuit Reform and similar groups. See, e.g., https://www.tortreform.com/; https://www.tlrpac.com/. The connection between these efforts and the interlocutory appeal statutes and Rule 91a cannot be denied. Most notably, the relevant provisions have made it harder for plaintiffs to pursue (and easier for defendants to appeal from the denial of orders seeking to dismiss) class-actions (CPRC § 51.014(a)(3)); health care liability claims (CPRC § 51.014(a)(9)-(10)); asbestos and silica claims (CPRC § 51.014(a)(11)); multi-plaintiff cases (CPRC § 15.003); claims against licensed or registered professionals in design and construction fields (CPRC § 150.002); claims potentially subject to arbitration (CPRC §§ 51.016, 171.098); and claims characterized as baseless without the benefit of discovery or evidence (Rule 91a).

Another interlocutory appeal statute merits special consideration here: CPRC § 51.014(a)(12), allowing immediate appeals from the denial of motions to dismiss under the Texas Citizens Participation Act (“TCPA”). The TCPA allows for swift dismissal (and a mandatory award of attorney’s fees) against any claim that is “based on, relates to, or is in response to a party’s exercise of the right of free speech, right to petition, or right of association.” CPRC § 27.003(a). At the time of enactment in 2011, many perceived this as simply protecting the exercise of free speech and other first amendment rights without the fear of a “SLAPP” suit being filed in retaliation. That seemed like a reasonable purpose.

In application, however, the TCPA has been given an expansive scope, used to shut down all types of claims having nothing to do with the traditional constitutional rights of speech, petition, or association. The supreme court held early on that the TCPA’s scope is not limited to communications made in the public forum but also applies to private communications about a topic of public concern. Lippincott v. Whisenhunt, 462 S.W.3d 507, 508 (Tex. 2015). Regarding the right to petition, the Third Court held that counterclaims filed in a neighborhood boundary dispute in response to the underlying claim being
filed improperly impinged one’s “right to petition,” and were therefore subject to dismissal under the TCPA. *Serafine v. Blunt*, 466 S.W.3d 352, 359-60 (Tex. App.—Austin 2015, no pet.).

Justice Pemberton expressed sincere concern with this outcome in *Serafine*, characterizing the TCPA, as broadly interpreted by the courts, to be an “across-the-board game-changer in Texas civil litigation,” which may be available “as a tactical weapon…in nearly every case” to seek not only dismissal but also loser-pays attorney’s fees. *Id.* at 474-95 (Pemberton, J., concurring). He urged our Legislature to amend the statute or the Texas Supreme Court to consider his concerns regarding further interpretation of the statute. *Id.* at 495.

Nevertheless, the supreme court recently decided *ExxonMobil Pipeline Company v. Coleman*, 512 S.W.3d 895 (Tex. 2017) (per curiam), further broadening the scope of the TCPA’s applicability. There, internal company statements were made claiming that employee Coleman falsely reported he performed a regular gauge check on an oil tank when he had not. *Id.* at 897. Coleman sued for defamation, and Exxon filed a TCPA motion to dismiss. The supreme court agreed Coleman’s claims fell within the scope of the TCPA because, as in *Lippincott*, the speech can be made in a private forum. *Id.* at 899-900. As far as the connection required between the speech and a matter of public concern, the court rejected Coleman’s argument that “more than a tenuous or remote relationship” is required, and concluded the statements about Coleman’s work on an oil tank were sufficiently connected to “potential environmental, health, safety, and economic risks associated with noxious and flammable chemicals overfilling and spilling onto the ground.” *Id.* at 901.

Thereafter, the Third Court—with Justice Pemberton writing for the unanimous panel—followed Coleman’s reasoning to conclude that the TCPA can be invoked to dismiss a suit to enjoin defendant from misappropriating a business’s trade secrets or confidential/proprietary information because the underlying “communication” need not be the type protected by the constitution to be protected by the TCPA. *Elite Auto Body LLC v. Autocraft Bodywerks, Inc.*, -- S.W.3d --, No. 03-15-
00064-CV, 2017 Tex. App. LEXIS 4108, *1 (Tex. App.—Austin May 5, 2017, no pet. h.) (holding Coleman “extinguished” any “remaining doubts to the contrary”). “Coleman’s analysis makes clear that this Court is to adhere to a plain-meaning, dictionary-definition analysis of the text within the TCPA’s definitions of protected expression, not the broader resort to constitutional context that some of us have urged previously.” Id. at *20.

As shown by holdings like this, the extremely broad interpretation of the TCPA’s scope has had substantial “lawsuit reform” consequences, even if that was not the original intent of the statute. Now, any reversal of course must come from our Legislature. One bill filed in 2017 sought amendments to limit the TCPA to only public speech and the exercise of constitutional rights, and expressly exclude its application from statements made in discovery, certain dispositive motions, and other procedural actions taken during the course of a lawsuit. (H.B. 3811, 85th R.S.). This was a non-starter. H.B. 3811 never even made it to committee.

Unless future amendments are made to the scope of the TCPA, all practitioners need to be familiar with its procedures and cases interpreting it. Based on the body of case law that is quickly developing, astute counsel will continue to find ways to use the TCPA as a tool on behalf of their clients to dismiss a wide variety of claims and recover attorney’s fees for doing so. Thus, in every case, counsel must consider how the TCPA may apply, in both favorable and unfavorable ways.

B. Increased Stays (i.e., Delays)

Many interlocutory appeal statutes expressly provide for an automatic stay of trial or, even more, all trial court proceedings, pending the appeal. See CPRC §§ 15.003, 51.014(b)-(c). If the stay is not automatically imposed, a party can move for a stay of the proceedings either in the trial court or the court of appeals. See Tex. R. App. P. 29.5; see also id. 28.2(f) (allowing stay of agreed interlocutory appeal with agreement of parties and the trial or appellate court); CPRC § 51.014(e) (allowing
stay of permissive interlocutory appeal upon agreement of the parties or an order from the trial or appellate court); \textit{RSL Funding, LLC v. Pippins}, 499 S.W.3d 423, 429-30 (Tex. 2016) ("The FAA generally requires courts to stay lawsuits involving arbitrable issues if a party with the right to arbitration seeks a stay," and "state courts have almost unanimously recognized that the stay provision of § 3 applies to suits in state as well as federal courts").

When there were fewer forms of interlocutory and other accelerated appeals, they moved through our appellate system on a truly "accelerated" basis. Now that our dockets have been crowded with such matters (see footnote 1 and Appendix A)—and priority must be given to certain types of family appeals and other matters pursuant to statutory mandates—general interlocutory matters are not proceeding as expediently.

As discussed above, many of the express rights of interlocutory appeal are pursued by defendants from the denial of a motion to dismiss (or other dispositive motion against) a plaintiff’s claim. In this posture, the defendant/appellant is generally happy to delay the underlying case as long as possible. Knowing that an automatic stay will be imposed (or may be readily sought) encourages the use of such appeals to delay the case. While no party or court wants to expend limited judicial resources to litigate an issue that may be subject to reversal or modification pending the appeal, a defendant’s strategic use of an interlocutory appeal to stay (delay) a plaintiff’s case is frustrating to judicial economy. Because the current docket makes it impossible to push all of these appeals through on an accelerated basis, this impact should be considered carefully by practitioners pursuing and defending such appeals, by courts in ruling on the underlying motions and motions to stay, and by legislators in passing new interlocutory appeal statutes.

\textbf{C. Impact on Practitioners}

The increased frequency of appeals being pursued from interlocutory orders and early dismissals means that all civil
practitioners—both litigators and appellate specialists—must be well informed of the underlying statutes/rules—both procedurally and substantively—and prepared to proceed expeditiously. These provisions and interpretative cases must be considered in determining and advising clients about litigation strategies, budgets, and timelines; in crafting the language of pleadings, motions, and resulting orders (to fall within or outside the scope of an express interlocutory appeal statute, for instance); and in advocating to the court about what the impact of certain rulings will be.

The statistics analyzed herein also provide guidance for business development. Certain types of orders present prolific opportunities for appeal, while others are infrequently pursued. Appellate practitioners may seek to develop a niche area of practice based on this data. Litigators should develop good relationships with appellate counsel so that they know who to call when one of these situations arises suddenly while otherwise preparing a case for trial.
### APPENDIX

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United States Supreme Court Update

Cam Barker, Deputy Solicitor General,
Office of the Solicitor General of Texas
Andrew Guthrie, Associate, Haynes and Boone, LLP, Dallas
Sean O’Neill, Assistant Attorney General,
Office of the Attorney General of Texas
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Bankruptcy & Debt Collection

Midland Funding, LLC v. Johnson, 137 S. Ct. 1407 (2017)

The Supreme Court held that the filing of a time-barred claim in a bankruptcy proceeding does not constitute a “false, deceptive, or misleading representation” or an “unfair or unconscionable means” to collect a debt under the Fair Debt Collection Practices Act.

The respondent Aleida Johnson filed for bankruptcy in 2014. In her bankruptcy case, petitioner Midland Funding, LLC filed a “proof of claim” asserting that Johnson owed a credit card debt of roughly $1800. The statement added that the last time any charge appeared on Johnson’s account was May 2003. (The relevant statute of limitations is six years.) The bankruptcy court disallowed the claim, but Johnson later filed suit seeking actual damages under the FDCPA. The district court found that the Act did not apply and dismissed the action. The Eleventh Circuit disagreed and reversed.

The Supreme Court reversed in an opinion authored by Justice Breyer and joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. Like the majority of appellate courts to have considered this question, the Court held that the filing of a claim in bankruptcy court that is facially barred by limitations does not fall within the scope of any of the five relevant prohibitions in the FDCPA. The Court found it reasonably clear that such a claim is not “false, deceptive, or misleading” because a creditor typically has some right to
payment even after limitations has expired. Though this was a closer question, the Court also found that the assertion of an obviously time-barred claim in bankruptcy court is not “unfair” or “unconscionable” under the FDCPA because the bankruptcy system provides existing protections for weeding out such claims.

Justice Sotomayor dissented, joined by Justices Ginsberg and Kagan. The dissenters emphasized that professional debt collectors have built a business out of buying stale debt, filing claims in bankruptcy, and hoping no one notices. The dissenters would hold this practice is both “unfair” and “unconscionable.”

**Civil Procedure**


The Supreme Court held that the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters does not prohibit service by mail.

Water Splash, Inc., sued its former employee, Tara Menon, for various tort claims associated with its contention that Menon had worked for a competitor during her employment with Water Splash. Because Menon lived in Canada, Water Splash obtained permission to effect service by mail. When Menon failed to answer, Water Splash obtained a default judgment. Menon moved to set aside the judgment, arguing that service by mail was improper, but the trial court denied the motion. The state court of appeals reversed, however, holding that the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the “Convention”) prohibits service by mail. The Supreme Court of Texas denied discretionary review.

The Supreme Court, in an opinion by Justice Alito, reversed and remanded the case. The Convention, by its own terms and as previously interpreted by the Court, is limited to service of
judicial documents. Article 10(a) provides that the Convention does not interfere with “the freedom to send judicial documents, by postal channels, directly to persons abroad.” Articles 10(b) and 10(c) address permissible methods of “effect[ing] service of judicial documents.” Menon emphasized the difference between the language used in these subprovisions of Article 10, but the Court held that the language, context, and history of the Convention run counter to Menon’s proposed interpretation. Specifically, the reference to sending judicial documents in Article 10(a) is broad enough to encompass service, which is the focus of the Convention itself. Moreover, the French language version of the Convention, which is equally authentic as the English version, uses a term that means service or notice. To the extent Menon’s interpretation signals an ambiguity, the drafting history of the Convention, taken together with the consistent understanding of the executive branch of the United States and of other signatory countries, resolves the ambiguity in favor of permitting service by mail. The Court remanded for consideration of whether service by mail was proper under Texas law.

Constitutional Law - Due Process

Beckles v. United States, 137 S. Ct. 886 (2017)

The Supreme Court held that the federal advisory Sentencing Guidelines are not subject to vagueness challenges under the Fifth Amendment Due Process Clause.

Petitioner Beckles, a previously-convicted felon, was convicted in 2007 of possessing a sawed-off shotgun. The district court found that Beckles was eligible for a sentencing enhancement as a “career offender” under the Sentencing Guidelines. To meet that standard, the Sentencing Guidelines require proof that the instant conviction was a “crime of violence,” defined to include offenses that involve “conduct that presents a serious potential risk of physical injury to
another.” In 2015, the Supreme Court held in Johnson v. United States, 135 S. Ct. 2551 (2015), that an identically worded clause in another statute was unconstitutionally vague. The Eleventh Circuit nevertheless affirmed Beckles’ conviction over a vagueness challenge to the Sentencing Guidelines.

The Supreme Court affirmed in an opinion authored by Justice Thomas and joined by Chief Justice Roberts and Justices Kennedy, Breyer, and Alito. The Court held that the Sentencing Guidelines are not subject to vagueness challenges under the due process clause because those guidelines merely guide the district court’s discretion—they do not fix permissible sentences. Key to the Court’s reasoning was the fact that the system of purely discretionary sentencing that predated the guidelines was constitutionally permissible. “If a system of unfettered discretion is not unconstitutionally vague, then it is difficult to see how the present system of guided discretion could be.”

Justice Ginsberg concurred in the judgment, writing separately to stress that the Court’s broad holding was unnecessary in light of the fact that the official commentary to the Sentencing Guidelines expressly designated Beckles’ offense (possessing a sawed-off shotgun as a felon) a crime of violence. Justice Sotomayor concurred in the judgment for the same reason, but wrote separately to explain why the Court’s holding was not only unnecessary, but also “deeply unsound.”


The Supreme Court held that a Colorado statute violated due process by requiring criminal defendants whose convictions have been overturned to initiate court proceedings and establish innocence by clear and convincing evidence in order to recover money paid as fines and restitution.

Shannon Nelson and Louis Madden were each ordered to pay restitution and fees as part of their separate criminal convictions in Colorado state courts. Nelson’s conviction was reversed on appeal and she was acquitted on retrial. Madden’s
convictions were reversed and vacated, and the state did not appeal or retry the case. Both Nelson and Madden moved for a refund of the money they paid pursuant to their convictions. Nelson’s motion was denied; Madden’s was granted as to the amount of costs and fees paid, but not the restitution amounts. On appeal, the court of appeals reversed both rulings, holding that Nelson and Madden were each entitled to a full refund. The Colorado Supreme Court reversed, holding that the failure by both Nelson and Madden to file a claim under the state’s Compensation for Certain Exonerated Persons statute (the “Act”) barred them from recovery. The court also held that the Act did not violate due process.

The Supreme Court reversed in an opinion by Justice Ginsburg, holding that the Act did not provide due process to defendants whose convictions are reversed. Because the Act applies to those who are no longer subject to the criminal justice system, the Court applied traditional due process analysis. The Court held that each of the three factors weighed against the Act. First, Nelson and Madden have an interest in regaining the money they paid due to convictions that were later reversed. The fact that the convictions were in place at the time the money was taken has no bearing on this factor because the reversal of the convictions also restored the presumption of innocence. Second, the Act creates an unacceptable risk of wrongfully depriving individuals of their property. This is because the Act requires a movant to show innocence by clear and convincing evidence, even though a criminal defendant whose conviction has been overturned enjoys a presumption of innocence. The Act also has no mechanism for the recovery of funds paid to an overturned misdemeanor conviction, and it sets up a costly mechanism for recovery, especially where the funds in question are minimal. The procedures designed to protect against wrongful conviction do not address the risk of improperly depriving exonerated defendants of their property. Third, the state has no interest in retaining money to which it has no claim of right.

Justice Alito concurred in the judgment. Justice Alito agreed
with the Court that Colorado failed to provide due process. But he disagreed with the analytical framework used by the Court to reach that result. Instead of applying traditional due process analysis, Justice Alito would have applied the standard used to assess state procedural rules dealing with the criminal process. Under that standard, the focus is whether the process at issue offends a fundamental and deeply rooted principle of justice. Justice Alito concluded that the right to recoup fines and penalties upon reversal of a criminal conviction is long established. By contrast, Colorado’s scheme prevents most defendants with reversed convictions from obtaining refunds. As such, it violates due process.

Justice Thomas dissented. In his view, the Court and the concurrence failed to address the essential initial question of due process cases: whether there is a recognized property interest for which due process is available. Applying this question to the facts of these cases, Justice Thomas concluded that under Colorado law, defendants whose convictions are overturned do not have a substantive right to recover money paid pursuant to criminal convictions. Under Court precedent, a substantive right must be based on an independent legal source such as state or federal law. The only basis for such a right was Colorado’s Exoneration Act, and in Justice Thomas’ view, plaintiffs failed to show that they satisfied the requirements of the Act.


The Supreme Court held that the Due Process Clause did not require a showing of actual bias by a judge to trigger its recusal requirement.

Michael Damon Rippo was convicted of murder and sentenced to death. During Rippo’s trial, Rippo discovered that the judge was the target of a federal bribery probe, and sought the judge’s recusal. Rippo believed that the prosecutor in his case was also involved in the investigation of the judge and argued that the judge could not be impartial where one of the parties was criminally investigating him. The judge denied
Rippo’s request and, after the judge was indicted on federal charges, a second judge denied Rippo’s motion for new trial. The Nevada Supreme Court affirmed, noting that Rippo had not introduced evidence that the district attorney had been involved in the federal investigation. After Rippo secured documents showing that the district attorney was involved in the judge’s investigation, he applied for post-conviction relief in state court. The court denied relief and the Nevada Supreme Court affirmed holding that Rippo was not entitled to pursue relief because his allegations did not show “that the trial judge was actually biased in this case.”

In a brief per curiam opinion, the Supreme Court vacated the Nevada Supreme Court’s judgment. The Supreme Court noted that its prior opinions did not require a finding of actual bias to trigger recusal under the Due Process Clause. Instead recusal is required where, as an objective test, the risk of bias was too high to be constitutionally tolerable. The Supreme Court remanded for further proceedings consistent with its opinion.

**Constitutional Law - First Amendment**


The Supreme Court held that a New York law prohibiting the imposition of a surcharge for the use of a credit card regulates speech and remanded for a determination regarding the constitutionality of that regulation.

Five New York businesses (“Merchants”) wanted to impose surcharges on customers who use credit cards. New York law expressly prohibits imposing a surcharge on credit card purchases, but does not prohibit discounts for cash purchases. The Merchants brought suit in federal district court against the New York Attorney General, arguing that the no-surcharge law violated the First Amendment as an unconstitutional regulation of how they communicated their prices and was unconstitutionally vague with regard to the distinction between
a surcharge and a discount. The district court agreed and held the statute unconstitutional on both bases. The Second Circuit reversed, holding that, as to certain pricing schemes the statute regulated conduct, not speech. The Second Circuit abstained from considering whether the statute applied other pricing schemes proposed by the Merchants. The Supreme Court granted certiorari on the limited issue of whether the statute was unconstitutional as applied to a pricing scheme where the price was identified and a surcharge for credit card users also separately identified.

Chief Justice Roberts, writing for the court, began by considering whether the alleged pricing scheme actually violated the statute. The Court held that it should defer to the Second Circuit’s determination that the scheme violated the statute, because it was a determination of state law and was not clearly wrong. The Court then analyzed the Second Circuit’s holding that the statute was a price regulation and therefore regulated conduct, not speech. The Supreme Court rejected that argument, noting that the statute did not regulate any particular price, it merely regulated whether the difference in prices was relayed to the customer as a discount or a surcharge. In regulating the communication of prices, rather than the prices themselves, the Court held that the statute regulated speech. Because the Second Circuit did not reach the issue of whether the statute would be constitutional as a regulation of speech, the Court remanded for determination whether that regulation would survive constitutional scrutiny. With regard to the vagueness claim, because the limited as-applied issue presented to the Court did not present a situation where application of the law was unclear, the law was not vague as-applied.

Justice Breyer concurred, writing to argue that, because most regulations of human activity regulate speech, determining the proper standard of scrutiny is more important than “trying to distinguish ‘speech’ from ‘conduct.’” Justice Sotomayor concurred in the judgment only, joined by Justice Alito, arguing that the better course would be to vacate and order the case to be certified to state courts because resolving the constitutional
issue requires an “accurate picture” of how the statute applies to the various pricing schemes proposed by the Merchants.

Constitutional Law - Fourth Amendment

Manuel v. City of Joliet, 137 S. Ct. 911 (2017)

The Supreme Court held that a claim for improper pretrial confinement can give rise to a Fourth Amendment violation (not simply a due process violation), even where the confinement follows the start of the legal process in a criminal case.

Petitioner Manuel was arrested and detained for 48 days after a judge relied on allegedly fabricated evidence to find probable cause. Manuel’s detention was therefore pursuant to the initiation of a “legal process.” After the fabrication was revealed and Manuel was released, he filed suit under Section 1983, alleging a Fourth Amendment violation only. The district court dismissed Manuel’s claim and the Seventh Circuit affirmed. Both found that Manuel’s complaint rested on the wrong part of the Constitution because, once a person is detained pursuant to legal process, the Fourth Amendment falls away and the person must allege a due process violation.

The Supreme Court reversed in an opinion authored by Justice Kagan and joined by Chief Justice Roberts and Justices Kennedy, Ginsberg, Breyer, and Sotomayor. The Court joined the overwhelming majority of circuits to hold that a pretrial detention can violate the Fourth Amendment—and thus give rise to a claim thereunder—even when it follows the start of legal process. Simply put, the start of a legal process did not expunge Manuel’s Fourth Amendment claim because the process he received failed to establish what that Amendment makes essential for pretrial detention—probable cause to believe he committed a crime.

Justice Alito dissented, joined by Justice Thomas. The dissenters agreed with the majority to a point—that the Fourth Amendment can apply beyond the start of legal process—but
found that the Court’s approach stretches the amendment too by suggesting that every moment of pretrial confinement without probable cause constitutes a violation of the Fourth Amendment.

*County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017)

The Supreme Court rejected the Ninth Circuit’s “provocation rule,” which held that an officer’s otherwise reasonable use of force can be a Fourth Amendment violation if the officer provoked a violent response through an independent constitutional violation.

In October 2010, deputies from the Los Angeles County Sheriff’s Department shot Respondent Mendez after a warrantless entry to his home. Because the deputies failed to “knock and announce” their presence, Mendez was holding a BB gun and pointing it “somewhat” toward the deputies when they entered—prompting their use of force. After a bench trial, the district court held the deputies liable for excessive force, even though it found their use of force would have otherwise been reasonable because of their belief that Mendez was pointing a gun at them. The court relied on the Ninth Circuit’s provocation rule, finding that the deputies’ other Fourth Amendment violations (for the warrantless entry and the failure to knock and announce) rendered their use of force unreasonable. The Ninth Circuit largely affirmed.

The Supreme Court reversed in a unanimous opinion authored by Justice Alito. The Court held that the Fourth Amendment provides no basis for the Ninth Circuit’s provocation rule. The fundamental flaw with that rule is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist. This approach mistakenly conflates distinct Fourth Amendment claims, which must be conducted separately. To the extent that a plaintiff has other Fourth Amendment claims, he or she can recover for those claims under existing law. But, the Court determined, there is no need (and no basis) to dress up every Fourth Amendment claim as an excessive force claim.
Constitutional Law - Sixth Amendment

*Buck v. Davis*, 137 S. Ct. 759 (2017)

The Supreme Court held that a man convicted of capital murder established ineffective assistance of counsel by showing that his trial counsel had introduced expert testimony that race was a statistically significant factor in establishing the likelihood of violent behavior.

Duane Buck was convicted of capital murder for killing his former girlfriend and her friend. The sentencing phase focused on whether Buck was likely to commit violent acts in the future. Buck’s counsel called an expert, Dr. Walter Quijano, who testified that race was a factor that could predict “future dangerousness.” Quijano’s expert report, which was admitted into evidence, stated that Buck was statistically more likely to act violently because of his race. The prosecution cross-examined Quijano on his theories and relied on his testimony in its summation. The jury voted in favor of the death penalty, and the conviction and sentence were upheld on direct appeal.

Buck then filed a series of habeas petitions in both state and federal courts. During the course of those filings, the Texas Attorney General confessed error and consented to resentencing in five other cases in which Quijano had given similar, race-focused testimony. But Buck was not granted resentencing. He continued his effort to overturn the sentence, most recently by filing a Rule 60(b) motion to reopen his earlier federal habeas proceeding. Buck argued that two intervening cases by the Supreme Court enabled him to raise an ineffective assistance of counsel claim that had not been heard before due to waiver. The district court denied his motion to reopen the case, and the Fifth Circuit denied his application for a certificate of appealability.

The Supreme Court reversed in an opinion by Chief Justice Roberts. First, the Court held that the Fifth Circuit improperly addressed the merits of Buck’s Rule 60 arguments in denying the certificate of appealability. Under the governing statute, the Fifth Circuit’s only responsibility was to assess whether
reasonable jurists could debate the district court’s ruling. The Court then turned to the two issues raised in Buck’s application: the ineffective assistance and Rule 60 issues. On ineffective assistance, the Court held that Buck met both requirements: that his counsel performed deficiently by eliciting Quijano’s testimony on race and that there was a reasonable probability that the result would have been different without Quijano’s participation. As for the Rule 60 motion, the Court held that it should have been granted because Quijano met the required standard of extraordinary circumstances, including the real danger that race played a role in his sentencing and the unusual steps taken by the Texas Attorney General in other cases involving Quijano.

Justice Thomas dissented in an opinion joined by Justice Alito. The dissent disagreed with the Court’s application of the standards governing each of the questions posed by the case. According to the dissent, the Fifth Circuit had to assess the merits to conclude that the certificate of appealability raised no debatable issues. The dissent further recited Buck’s actions and lack of remorse to conclude that Buck was not prejudiced by Quijano’s testimony. Finally, the dissent called into question the Court’s failure to give deference to the district court’s decision on the Rule 60 motion, its reliance on issues unrelated to Rule 60 analysis, and its failure to respect finality. But the dissent also emphasized that the Court’s ruling was limited to the extraordinary facts at issue in the case and did not announce any new standards to be applied in future cases.


The Supreme Court held that the Sixth Amendment required an exception to the rule barring impeachment of a jury verdict based on juror testimony of racial bias where the evidence showed a substantial likelihood that a juror’s vote was motivated by racial animus.

Miguel Angel Pena-Rodriguez was convicted of unlawful sexual contact and harassment. After the trial, two jurors told Pena-Rodriguez’s counsel that another juror expressed anti-
Hispanic bias during deliberations. Pena-Rodriguez filed a new trial motion based on this information, but the trial court denied the motion. The Colorado state appellate courts affirmed.

The Supreme Court reversed in an opinion by Justice Kennedy. The Court acknowledged that the trial court’s no-impeachment ruling was based on state and federal evidentiary rules that in turn were rooted in centuries of common law. In fact, the Court itself had twice refused to find a constitutional exception to the rule in earlier opinions addressing allegations of pro-defendant bias and juror intoxication. But the Court also left the door open in those cases for exceptions to address extreme juror bias. In light of the long precedent going back to the Civil War Amendments aimed at eradicating racial bias in legal proceedings, the Court held that the Sixth Amendment required an exception to the no-impeachment rule to address allegations of racial bias. While refusing to require specific procedures, the Court held that the no-impeachment bar could be set aside only on a threshold showing that a juror made one or more statements that both demonstrate overt racial bias and call into question the fairness of the jury’s deliberations and verdict. Such a statement must show that racial animus was a significant motivating factor behind the juror’s vote to convict.

Justice Thomas filed a dissenting opinion to express his view that, because the common law did not provide a right to impeach a jury verdict through juror testimony of jury misconduct at the time the Sixth and Fourteenth Amendments were passed, the Court should not have overturned Colorado’s no-impeachment rule.

Justice Alito also dissented in an opinion joined by Chief Justice Roberts and Justice Thomas. The dissent reasoned that there was no basis in the Sixth Amendment, which protects the right to an “impartial” jury, for overturning the no-impeachment rule. Contrary to the Court’s analysis, nothing in the text or history of the Sixth Amendment suggests that the extent of this protection depends on the nature of the bias asserted. According to the dissent, the Court also failed to explain why the factors it had relied on in its earlier no-
impeachment cases—voir dire, judicial observation, pre-verdict reports by jurors, and non-juror evidence—would not be enough to protect a defendant’s Sixth Amendment rights here. Finally, the dissent warned of the consequences of the Court’s holding: consequences that the centuries-old common law was specifically designed to protect against.

**Constitutional Law – Eighth Amendment**


The Supreme Court held that, in assessing whether a criminal defendant is intellectually disabled—and thus exempt from the death penalty—states are not free to disregard modern medical standards on intellectual disabilities in favor of outdated standards.

After being convicted of capital murder and sentenced to death, Petitioner Moore challenged his punishment on the ground that he was intellectually disabled and therefore exempt from execution under the Eight Amendment. A state habeas court made detailed fact findings determining that Moore qualified as intellectually disabled and recommended that he be granted relief. The Texas Court of Criminal Appeals (“CCA”) disagreed, finding that the habeas court erroneously employed intellectual-disability guides currently used in the medical community rather than the 1992 guides adopted by the CCA in a prior opinion (Ex Parte Briseno).

The Supreme Court reversed in an opinion authored by Justice Ginsberg and joined by Justices Kennedy, Breyer, Sotomayor, and Kagan. The Court first held that Moore’s IQ scores placed him within the range of intellectual disability and that, as a result, the CCA had an obligation to consider his adaptive functioning. On that score, the Court found that the CCA ignored the medical community’s current standards for assessing intellectual disability and clung to the outdated standards laid out in Briseno, along with other nonclinical
factors. Although the Court’s precedent allows some discretion in enforcing the Eighth Amendment’s proscription on the death penalty for intellectually disabled persons, that discretion is not unfettered and the medical community’s current standards must be considered.

Chief Justice Roberts dissented in an opinion joined by Justices Thomas and Alito. The dissenters believed that the Court’s opinion ignores the usual mode of analysis in Eighth Amendment cases and instead crafts a constitutional holding based solely on what it deems to be medical consensus—but judges, not clinicians, should determine the content and scope of the Eighth Amendment.

**Disability Law**

*Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017)

The Supreme Court held that a plaintiff is not required to exhaust administrative remedies under the Individuals with Disabilities Education Act (“IDEA”) where the substance of a plaintiff’s complaint seeks relief not available under IDEA.

Stacy and Brent Fry’s daughter has cerebral palsy. The Frys, on the recommendation of their daughter’s doctor, obtained a service dog, Wonder, to mitigate their daughter’s mobility and motor control issues. When the Frys sought to have Wonder accompany their daughter to kindergarten, the school refused, asserting that a human aide provided by the school was sufficient for their daughter’s needs. The Frys then filed a complaint with the U.S. Department of Education’s Office for Civil Rights (“OCR”), asserting that the school’s refusal violated their daughter’s rights under the Americans with Disabilities Act (“ADA”) and § 504 of the Rehabilitation Act. OCR decided in favor of the Frys, and the school agreed to allow Wonder to attend. Due to their belief that the school would resent their daughter, they instead enrolled her in another school that welcomed Wonder. The Frys then brought suit against the school
and certain regional school districts (collectively, the “School Districts”) seeking monetary damages for discrimination suffered by their daughter due to the prior refusal to allow Wonder to attend school with their daughter. The School Districts sought dismissal, asserting that the Fry’s had failed to exhaust their remedies under IDEA. The district court granted the motion and a divided panel of the Sixth Circuit affirmed.

In an opinion by Justice Kagan, the Supreme Court vacated the judgment of the Sixth Circuit. Section 1415(l) of IDEA requires exhaustion of administrative remedies only when a suit seeks “relief that is also available” under IDEA. The court began by noting that the parties had come to a consensus that a suit must seek relief for the denial of a free appropriate public education (“FAPE”) to a child to require exhaustion. The Court agreed with this consensus due to the primacy of FAPE within IDEA’s statutory scheme and administrative procedures. In determining whether a party seeks relief for denial of a FAPE, the Court held that what mattered was the gravamen or substance of the complaint “setting aside any attempts at artful pleading.” The Court noted that an important consideration in determining the substance of the claim was whether the same complaint could be brought had the conduct occurred at a public facility that was not a school or to an adult at the school. Because the Sixth Circuit has not used this test, the Court remanded for further proceedings consistent with its opinion.

Justice Alito, joined by Justice Thomas, concurred with all but the Court’s guidance regarding the considerations to be used in determining the substance of a claim.

**Election Law**


The Supreme Court held that a district court applied the wrong legal standard when it upheld 12 state legislative districts against a claim of racial gerrymandering and ordered the district
court to reexamine 11 of those 12 districts.

The Virginia State Legislature in 2010 drew the boundaries of 12 legislative districts with a goal of ensuring that each would have a black voting-age population of at least 55%. Plaintiffs challenged those new districts as violating the Fourteenth Amendment’s Equal Protection Clause. A three-judge district court rejected the challenges, holding that, as to 11 of the 12 districts, it could confine its analysis to the portions of the new lines that appeared to deviate from traditional redistricting criteria. Under that test, it held that race did not predominate. As to the twelfth district, the district court found that race did predominate but held that this use of race was narrowly tailored to achieve a compelling state interest in avoiding diminution of the ability of black candidates to elect their preferred candidates.

The Supreme Court affirmed in part and vacated in part by a 7-1 vote. In an opinion by Justice Kennedy, the Court held that the district court applied the wrong standard because race may predominate even when a plan respects traditional redistricting principles. Inconsistency with traditional principles is circumstantial evidence of actual justifications, but plaintiffs need not present such evidence in a given case to show that race was the overriding reason for the lines drawn. The Court remanded for the district court to apply the standard the Court announced. The Court then affirmed the district court’s analysis of the twelfth district, finding that the record supported the State’s view that this district was an instance where a 55% black voting-age population was necessary for black voters to have a functional working majority.

Justice Alito filed a separate opinion joining the Court’s opinion upholding the twelfth district and concurring in the Court’s judgment vacating and remanding as to the other districts. Unlike the Court, however, Justice Alito would have vacated and remanded because the intentional creation of majority-minority districts necessarily relies on race as the predominant factor and therefore must satisfy strict scrutiny.

Justice Thomas filed a separate opinion concurring in the Court’s judgment vacating the district court’s decision
upholding 11 of the 12 districts, but dissenting as to the final district, as to which Justice Thomas would have also vacated the district court’s decision. Justice Thomas argued that strict scrutiny should apply to all 12 districts because they used race predominantly as intentional majority-minority districts. And Justice Thomas argued that the Court wrongly held that the twelfth district survived strict scrutiny because Justice Thomas did not view compliance with the Voting Rights Act as a compelling interest where the Act was ultimately held to use an unconstitutional formula for its application.

Cooper v. Harris, 137 S. Ct. 1455 (2017)

The Supreme Court affirmed the district court’s fact findings that North Carolina officials improperly relied on race in redistricting two congressional districts.

This case concerns North Carolina’s most recent redrawing of two congressional districts, both of which have been the subject of previous redistricting lawsuits. Following the State’s adoption of new district lines for District 1 and District 12, registered voters in those districts filed suit complaining of impermissible racial gerrymandering. A three-judge district court held both districts unconstitutional.

The Court affirmed in an opinion authored by Justice Kagan and joined by Justices Thomas, Ginsberg, Breyer, and Sotomayor. It applied the familiar two-part test to establish a claim of racial gerrymandering in violation of the Equal Protection Clause. First, the plaintiff must prove that race was the predominant factor motivating the reconfiguration. Second, if so, the design of the district must withstand strict scrutiny. For District 1, the Court found that there was clear evidence that race was the predominant factor in drawing the new lines because the mapmakers had purposefully established a racial target. And it held that design did not pass strict scrutiny because the race-based lines were not necessary to avoid improper vote dilution under the Voting Rights Act. For District 12, the question turned solely on whether racial (as opposed to political) reasons
motivated the reconfiguration. The Court upheld the district court’s fact finding that racial reasons predominated under a deferential clear error standard of review. The Court rejected the State’s argument that plaintiffs were required to submit an alternative map that would have achieved the legislature’s political objectives while improving racial balance.

Justice Thomas concurred, writing briefly to emphasize that the opinion represents a welcome course correction to the Court’s application of the clear-error standard.

Justice Alito concurred in part and dissented in part, joined by Chief Justice Roberts and Justice Kennedy. In contrast to Justice Thomas, the dissenters believed that the Court’s decision regarding District 12—and specifically, that plaintiffs were not required to produce an alternative map—contradicted a rule adopted by the Court in a prior, remarkably similar challenge to the same district.

EMPLOYMENT LAW


The Supreme Court held that district court decisions on motions to quash EEOC investigative subpoenas are subject to abuse of discretion review.

Damiana Ochoa worked for McClane Company (“McClane”) in a physically demanding job that required employees to pass a physical evaluation any time they took medical leave. After Ochoa took three months of maternity leave, she returned to work but was dismissed by McClane after failing the evaluation three times. Ochoa filed a sex discrimination charge with the EEOC, which opened an investigation. In the course of the investigation, the EEOC requested “pedigree information,” such as names and identifying information, of employees asked to take the evaluation. When McClane refused to provide the information, the EEOC issued subpoenas and later sued
to enforce the subpoenas. The district court quashed the subpoenas, ruling that the pedigree information was irrelevant to and not necessary for the discrimination charges at issue. The Ninth Circuit reversed on de novo review, holding that the lower court erred in finding the information to be irrelevant.

The Supreme Court reversed in an opinion by Justice Sotomayor. The Court held that the Ninth Circuit erred by reviewing the district court decision de novo. Looking to the two factors the Court assesses when determining the appropriate standard of review, the Court held that both pointed toward abuse of discretion review. First, appellate courts have a longstanding practice of applying abuse of discretion review to decisions regarding administrative subpoenas. Second, the analysis required in these decisions focuses on areas such as relevance and burden that involve fact intensive assessment best left to district courts. In reaching this conclusion, the Court rejected arguments that deferential review of district court decisions would conflict with Fourth Amendment standards applicable to subpoenas or prior precedent granting the EEOC broad investigative powers. The Court remanded the case to allow the Ninth Circuit to apply the appropriate standard to the district court ruling.

Justice Ginsburg concurred in part and dissented in part from the Court’s opinion. Justice Ginsburg agreed with the Court on the appropriate standard of review but nonetheless would have affirmed the Ninth Circuit based on her conclusion that the district court erred as a matter of law in ruling that the EEOC had to show necessity to obtain enforcement of the subpoena.

**ERISA**


The Supreme Court held that ERISA’s exemption for “church plans” includes plans maintained by church-affiliated nonprofits, whether or not the plan was originally established by a church.

Petitioners identify themselves as three church-affiliated
non-profits that run hospitals and other healthcare facilities. They offer defined-benefit pension plans to their employees. Those plans were established by the hospitals themselves—not by a church—and are managed by internal employee-benefits committees. ERISA generally obligates employers providing pension plans to comply with an array of administrative rules. But ERISA exempts “church plans” from its requirements. The dispute here is whether the Petitioners fit under that definition. The district court and three courts of appeals found that they do not (and that they must comply with ERISA).

The Supreme Court reversed in a unanimous decision authored by Justice Kagan. The central issue was whether the statutory definition of “church plan” is broad enough to encompass the Petitioners, and the Supreme Court held that it is. The statute defines “church plan” to include a plan “established and maintained . . . by a church.” But it also states that “a plan established and maintained . . . by a church . . . includes a plan maintained” by an organization whose principal purpose was to provide benefits to a particular kind of church-associated entity. The parties differed on whether a plan maintained by that kind of organization must still have been established by a church to qualify, and the Supreme Court found that the answer is “no.” In short, because of the second clause, a plan “maintained” by a principal-purpose organization qualifies as a “church plan” regardless of who established it.

Justice Sotomayor concurred in the result because of the plain text of the statute, but wrote separately to note that Congress might wish to reconsider that language in light of significant changes to the health care market since its adoption.

**JURISDICTION**

*BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017)

The Supreme Court held that neither the Federal Employers‘ Liability Act nor due process permitted an exercise
of general jurisdiction in Montana over claims against a railroad operator arising outside of Montana.

Robert Nelson, a resident of North Dakota, sued BNSF Railway Company ("BNSF") in Montana state court to obtain damages for injuries suffered during his employment with BNSF. Kelli Tyrrell, a resident of South Dakota, sued BNSF in her role as administrator for the estate of her husband, alleging that her husband developed a fatal cancer due to chemical exposure that occurred during his employment with BNSF. BNSF moved to dismiss both cases for lack of general or specific personal jurisdiction. The motion was granted as to Nelson, but denied as to Tyrrell. On appeal to the Montana Supreme Court, the cases were consolidated. The Montana Supreme Court held that Montana courts could exercise general jurisdiction over BNSF under a provision of the Federal Employers’ Liability Act ("FELA") and under the state long-arm statute. The court also concluded that due process concerns did not apply.

The Supreme Court reversed in an opinion by Justice Ginsburg. The Court first determined that FELA does not provide a basis for extending personal jurisdiction. The relevant provision addresses where an action "may be brought" and provides for concurrent federal- and state-court jurisdiction. But the first phrase has long been interpreted to deal with venue, and the second addresses subject matter, not personal jurisdiction. Turning to due process, the Court held that exercise of personal jurisdiction under the circumstances of the case violated due process. Specifically, state courts have general jurisdiction over only those corporate actors whose affiliations are so continuous and systematic as to render them at home in the forum state. BNSF is neither incorporated or headquartered in Montana, and its dealings in Montana represents a small fraction of its total business. Accordingly, the Court concluded that BNSF was not sufficiently involved in Montana to justify an exercise of general jurisdiction.

Justice Sotomayor concurred in part and dissented in part. She agreed with the Court’s holdings that FELA does
not confer jurisdiction on state courts and that the nature of the claim alone is not enough to trigger personal jurisdiction. She continues to disagree, however, with the Court’s general jurisdiction analysis. In her view, the Court’s recent focus on whether a corporation is “at home” in a given jurisdiction is unduly restrictive. She further emphasized that even under that standard, the Court should have remanded to allow the lower courts to conduct the proper analysis in the first instance rather than deciding the case.


The Supreme Court held that tribal immunity is not implicated when a tribal employee is sued in his individual (rather than official) capacity, even where the tribe had agreed to indemnify him for any damages.

This case arose from a car accident involving a limousine driven by an employee of the Mohegan Tribal Gaming Authority (the “Gaming Authority”). The Gaming Authority is an arm of the Mohegan Tribe of Indians of Connecticut, and is therefore protected by the tribe’s sovereign immunity. After the plaintiffs filed suit against the employee in his individual capacity, he moved to dismiss for lack of subject matter jurisdiction on the basis of sovereign immunity. The trial court denied his motion, finding that the tribe’s immunity was not implicated. The Supreme Court of Connecticut reversed, finding it significant that the employee was acting within the scope of his employment at the time of the accident.

The Supreme Court reversed in an opinion authored by Justice Sotomayor and joined by Chief Justice Roberts and Justices Kennedy, Breyer, Alito, and Kagan. The Court noted first that tribal immunity—like sovereign immunity in general—is not implicated when the suit is brought against the employee in his individual capacity, rather than his official capacity. The more novel issue was whether an indemnification clause from the tribe was sufficient to extend immunity in such a suit. The Court held that it was not because, regardless
of whether the funds might come from, the indemnification provision did not convert the suit into one against the tribe.

Justice Thomas concurred in the judgment but wrote separately to emphasize his view that tribal immunity should not extend to suits arising out of a tribe’s commercial activity conducted beyond its territory.

Justice Ginsberg concurred and wrote separately to note a similar point and to state her agreement that a voluntary indemnity undertaking does not convert a suit against an employee into a suit against the tribe.

**Lightfoot v. Cendant Mortgage Corp.,** 137 S. Ct. 553 (2017)

The Supreme Court held that the charter enacted by Congress for the Federal National Mortgage Association (“Fannie Mae”), which authorizes Fannie Mae to “sue and be sued,” does not include language sufficient to grant federal jurisdiction over cases involving Fannie Mae, as to allow all Fannie Mae cases to be removed to federal court.

Petitioners filed suit in state court alleging deficiencies in the refinancing, foreclosure, and sale of their home. Fannie Mae removed the case to federal court, relying on the sue-and-be-sued clause as a basis for federal jurisdiction. The district court denied a motion to remand to state court, and the Ninth Circuit affirmed.

The Supreme Court, in a unanimous opinion authored by Justice Sotomayor, held that Fannie Mae’s sue-and-be-sued clause does not create federal-court jurisdiction. The Court reviewed its five past decisions addressing sue-and-be-sued clauses in federal charters. The Court read narrowly the aspect of Fannie Mae’s charter authorizing suit in “any court of competent jurisdiction” as allowing suit only in courts with a pre-existing source of subject matter jurisdiction, and thus not creating new federal jurisdiction over any suit including Fannie Mae.


**PATENT LAW**


The Supreme Court held that a statute prohibiting the supply from the United States of a “substantial portion” of a patented invention for combination abroad cannot be satisfied where a party merely supplies a single component of a multicomponent invention. 35 U.S.C. § 271(f)(1).

The patent in dispute covers a toolkit for genetic testing. Petitioner Life Technologies Corporation had a license to manufacture testing kits covered by this patent under strict limitations from Respondent Promega Corporation. When Life Technologies exceeded those limitations, Promega filed suit for patent infringement under Section 271(f)(1). The parties agreed that Life Technologies’ testing kits contained five components. Only one component was manufactured in the United States, after which Life Technologies shipped that component to its facility in the United Kingdom, where it was combined with the other four components of the kit. After a jury returned a verdict of infringement, the district court granted judgment as a matter of law for Life Technologies, finding that § 271(f)(1)’s reference to a “substantial portion of the components” does not embrace the supply of a single component—and therefore, Life Technologies did not infringe. The Federal Circuit reversed, finding that a single component can be so “important” or “essential” to an invention that it qualifies as “substantial.”

The Supreme Court reversed in an opinion authored by Justice Sotomayor and joined in full by Justices Kennedy, Ginsberg, Breyer, and Kagan, and in part by Justices Thomas and Alito. The Court held first that the “substantial portion” requirement in § 271(f)(1) refers to a quantitative measurement, not a qualitative one, based on the context in which the text appears. The Court then determined that a single component of a multicomponent invention can never constitute a “substantial portion” because, at a minimum, the statutory text requires more than one component. The Court did not define how many
components are required to meet the substantiality test; it held only that one component does not.

Justice Alito concurred in part, but wrote separately—in an opinion joined by Justice Thomas—to emphasize that the Court’s opinion does not establish how many components (more than one) would be necessary to satisfy this test.

**SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC, 137 S. Ct. 954 (2017)**

The Supreme Court held that laches does not apply to bar claims asserted during the limitations period provided by the Patent Act.


The Supreme Court reversed in an opinion by Justice Alito. The Court held that the same principles supporting its decision in Petrella apply to the Patent Act. Specifically, the limitations period in the Patent Act reflects a Congressional decision on timeliness for a patent lawsuit and courts cannot override that determination by applying the laches defense. In reaching this decision, the Court rejected First Quality’s argument that the Patent Act’s
backward-counting limitation period changed the analysis. The Court acknowledged the possibility that the Patent Act may have codified a laches defense, but rejected as “unprecedented” in federal statutory law the idea that it applies to claims falling within the limitations period. Finally, the Court held that pre-enactment cases do not demonstrate a broad consensus in favor of applying laches in the patent context. The Court held that only such a consensus could override the well-established rule at the time the Patent Act was signed that laches did not operate to bar claims filed within a statutory limitations period.

Justice Breyer dissented. In his view, laches plays an important role within the statutory scheme to prevent a patent plaintiff from intentionally waiting until favorable circumstances to bring an infringement claim. This is because, unlike most statutes of limitations, limitations on patent actions run backward from the time of filing, excluding evidence more than six years before suit is filed. In support of his view, Justice Breyer pointed to case law prior to the current patent statute that he concluded supported laches claims coexistent with statutory limitations. He reasoned that this understanding was codified in the current statute, which contains an exception for unenforceability, which has been understood to include laches.

**Preemption**


The Supreme Court held that the Federal Employees Health Benefits Act (“FEHBA”) preempts state law prohibiting reimbursement and subrogation in insurance agreements.

FEHBA authorizes the Office of Personnel Management (“OPM”) to contract with private carriers for federal employees’ health insurance, and contains a provision expressly preempting state law. OPM has negotiated insurance agreements that provide for reimbursement and subrogation,
but several states, Missouri included, bar the enforcement of such provisions. After reimbursing her insurer pursuant to such an agreement, Respondent Nevils filed a class action alleging that the insurer had unlawfully obtained reimbursement. The trial court granted summary judgment for the insurer, finding that FEHBA preempted Missouri law. The Missouri Supreme Court reversed, holding that the preemption provision was not intended to cover subrogation and reimbursement.

The Supreme Court reversed in a unanimous opinion authored by Justice Ginsberg. The Court determined that contractual provisions for subrogation and reimbursement “relate to . . . payments with respect to benefits” under the text, context, and purpose of FEHBA. The Court rejected Nevils’s argument that this interpretation violates the Supremacy Clause by assigning preemptive effect to the terms of a contract. The Court found it was the statute (not the contract) that stripped the state law of its force, even though the contracts define the context-specific scope of that preemption.

Justice Thomas concurred to note that a statute that confers power on an executive agency to enter contracts that pre-empt state law might unlawfully delegate legislative power to the President insofar as it fails to sufficiently constrain the President’s contracting discretion.


The Supreme Court held that a federal statute precluding states from treating the portion of a veteran’s retirement pay waived to obtain disability benefits as community property preempted the ability of state courts to include such funds in the determination of divorce decrees.

John and Sandra Howell obtained a divorce decree in Arizona providing Sandra with 50% of John’s Air Force retirement pay because it qualified as community property. Nearly 13 years after the decree, the Department of Veteran Affairs determined that John was partially disabled due to an earlier service-related incident. As a result, John qualified for
disability pay in exchange for giving up an equivalent amount of his retirement pay. After John made that election, Sandra’s share of his retirement pay was reduced, leading her to seek modification of the decree to restore her share of retirement payments to the full amount of the original decree. The trial court ordered John to adjust his payment to ensure that Sandra retained the full share provided for in the original decree. The Arizona Supreme Court affirmed the order, holding that the state court order was not preempted by federal law governing John’s retirement and disability pay.

The Supreme Court reversed in an opinion by Justice Breyer. Federal law permits states to treat veterans’ retirement pay as community property. But the statute expressly excludes amounts waived to obtain disability pay from the operative definition of retirement pay. As a result, the Court has previously held that states were preempted from treating waived disability pay as community property. The Arizona courts distinguished that opinion based on the fact that John obtained the right to disability payments after, rather than before, the divorce decree, and that Sandra’s portion of his pay had vested. The Court rejected this view, concluding that the timing of the waiver had no bearing on preemption analysis. Instead, the Court upheld its earlier decision, holding that the lower court decisions displaced the express meaning of the federal statute and impeded the purposes and objectives of the statute.

Justice Thomas concurred in the judgment and joined the opinion except for the discussion of “purposes and objectives” preemption, which he believes is an illegitimate basis for preempting state law.

**Section 1983 Claims**

*White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam)

The Supreme Court held that, with regard to a claim of official immunity, a determination of whether an officer violated
clearly established law must be particularized to the facts of the case.

Daniel Pauly, allegedly driving erratically at night, was reported to the police by two observers in a following car. After a brief non-violent confrontation with the observers on an off-ramp, Daniel drove to a house he shared with his brother Samuel Pauly. Officer Truesdale was dispatched to the scene of the confrontation, where he was informed that Daniel was driving recklessly and was given a license plate number, which was connected to Daniel’s address. Truesdale was met by two other officers, White and Mariscal. They agreed they did not have cause to arrest Daniel, but still wanted to talk to him. Truesdale and Mariscal headed to Daniel’s house, White remained at the off-ramp. At Daniel’s house, Mariscal and Truesdale identified Daniel’s truck and noticed lights in the house; they radioed White, who left the off-ramp to join them. Mariscal and Truesdale approached the house covertly, but were detected by the Pauly brothers. The brothers yelled out, asking who was approaching. The officers responded that they had the Pauly’s surrounded and Truesdale identified the officers as police; however, the Pauly brothers did not hear Truesdale identify them as police. As White arrived, he heard shouting and heard the Pauly brothers announce they had guns. A few seconds later, Daniel opened the back door, screamed, and fired two warning shots from his shotgun. When White subsequently noticed Samuel pointing a handgun from a window, he shot and killed Samuel.

Daniel brought a § 1983 action on behalf of his brother’s estate, alleging that the officers used excessive force. The officers moved for summary judgment on the basis of qualified immunity. The trial court denied qualified immunity, and a divided Tenth Circuit panel affirmed. As to White, the panel held that a reasonable officer in White’s position would know, based on clearly established law, that he was required to issue a warning prior to firing on Samuel Pauly.

In a per curiam opinion, the Supreme Court vacated the Tenth Circuit’s judgment as to White. The Court noted
that qualified immunity was available to “all but the plainly incompetent or those who knowingly violate the law.” The Court held that a determination of what is clearly established law for qualified immunity purposes should not be made on a general level, but must be particularized to the facts. According to the Court, the Tenth Circuit failed to identify a case where an officer acting under similar circumstances was found to have violated the Fourth Amendment. Because White’s actions were not an obvious violation of the caselaw relied on by the Tenth Circuit, White’s conduct did not violate clearly established law. The Supreme Court remanded for further proceedings consistent with its opinion.

Justice Ginsburg concurred, stating that she understood that the Court’s opinion did not foreclose affirming the denial of summary judgment on factual disputes not addressed in the Tenth Circuit’s prior opinion.

**Securities Law**

*Kokesh v. SEC*, 137 S. Ct. 1635 (2017)

The Supreme Court held that disgorgement judgments issued in response to securities law violations qualify as penalties subject to a five-year statute of limitations.

The SEC brought an enforcement action against Charles Kokesh for violation of the securities laws during a period from 1995 to 2009. The jury found against Kokesh, and the district court assessed civil penalties of $2.4 million and ordered disgorgement of $34.9 million, which covered amounts obtained by Kokesh throughout the 14-year span of the SEC’s charges. On appeal, Kokesh sought a $29.9 million reduction in the disgorgement judgment based on the five-year limitations period for actions seeking “any civil fine, penalty, or forfeiture.” The court of appeals affirmed, holding that disgorgement does not qualify as a penalty and thus falls outside the scope of the limitations statute.
The Supreme Court reversed in an opinion by Justice Sotomayor. The Court relied on two principles from prior precedent to determine whether the disgorgement order qualified as a penalty. First, a penalty is imposed to redress a wrong to the public rather than an individual. Second, a penalty is sought to punish the offender and deter others from wrongdoing. Applying these principles, the Court held that disgorgement operates as a penalty subject to the five-year statute of limitations: it remedies public harm and is imposed for punitive rather than compensatory purposes. In reaching this conclusion, the Court rejected the SEC’s argument that disgorgement is remedial, pointing out that disgorgement often encompasses the earnings of third parties and, as in this case, fails to account for the expenses incurred by the penalized to obtain the income subject to disgorgement.
FIFTH CIRCUIT UPDATE
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ARBITRATION

Lower Colo. R. Auth. v. Papalote Creek II, L.L.C., No. 16-50317, 858 F.3d 916, (5th Cir. 2017)

The Lower Colorado River Authority (“LCRA”) is a conservation and reclamation district based in Austin, Texas and a political subdivision of the State of Texas. It sells wholesale electric power to municipal-owned utilities and electric cooperatives. In late 2009, LCRA entered into a Power Purchase Agreement (“PPA”) with Papalote Creek, which built and operated wind farms.

Under the PPA, LCRA agreed to purchase all energy generated by Papalote’s wind farm for 18 years at a contractually set price. The PPA contained a liquidated damages clause providing a formula for how to calculate damages LCRA would owe if it did not take all of the wind farm’s energy. There was also a limitation on damages for certain types of failures, referring to Papalote’s “liability” and LCRA’s “damages.”

Papalote completed the wind farm in 2010, and LCRA fulfilled its obligations under the PPA for several years. In June 2015, LCRA sent a letter to Papalote attempting to initiate the arbitration process to resolve a purported dispute about LCRA’s limitation of liability under the PPA. Papalote rejected LCRA’s request for arbitration based on the theory that what damages LCRA might owe for a hypothetical breach was not a “dispute” subject to arbitration. LCRA then filed a petition to compel arbitration in Texas state court, and Papalote removed the case to

Before a court can compel arbitration, the underlying dispute must be ripe, and subsequent events will not cure a void order compelling arbitration.
federal court. The district court ultimately granted LCRA’s petition to compel, and Papalote appealed. While the appeal was pending, the parties proceeded with arbitration and, after the arbitrator found that LCRA’s liability would be capped, LCRA stopped taking energy from Papalote.

The Fifth Circuit reversed the district court’s order compelling arbitration, finding that the underlying dispute was not ripe. Following the U.S. Supreme Court’s decision in Vaden v. Discover Bank, 556 U.S. 49 (2009), the Fifth Circuit “looked through” the petition to compel arbitration in order to determine whether the underlying dispute presented a sufficiently ripe controversy to establish federal jurisdiction. The Fifth Circuit likened the present dispute to one for a declaratory judgment that LCRA’s interpretation of the liquidated damages provision was correct. The Fifth Circuit noted that the differing interpretations of that provision would not need to be resolved unless LCRA first decided to stop taking energy from the wind farm. LCRA was fully performing under the PPA at the time the district court compelled arbitration, and there was no evidence that LCRA threatened to stop taking energy or that such a decision was likely. Because the suit was not ripe when the district court ordered arbitration, LRCA’s later refusal to take energy from Papalote did not matter—the district court lacked jurisdiction to compel arbitration in the first place, and, as the Fifth Circuit concluded, these subsequent developments could not retroactively bestow jurisdiction on the district court’s order compelling arbitration.

Evidence

EEOC v. BDO USA, L.L.P., 856 F.3d 356 (5th Cir. 2017)

BDO USA, L.L.P. is a financial and consulting firm. Its former chief human resources officer communicated with both in-house and outside counsel. The officer resigned and filed a gender-discrimination charge against BDO with the Equal Employment Opportunity Commission. As part of the EEOC’s discrimination investigation, it issued a subpoena to
BDO for documents. In response, BDO provided a privilege log that catalogued 278 documents withheld pursuant to attorney-client privilege. The EEOC then sought to enforce its subpoena in court. The district court ultimately refused and issued a protective order for BDO, and the EEOC appealed.

The Fifth Circuit reversed, holding the district court erred in accepting BDO’s claim of attorney-client privilege based on BDO’s privilege log. The log had three types of deficiencies that prevented a determination of whether the attorney-client privilege applied: (1) entries were vague or incomplete, (2) entries did not distinguish between legal and business advice, and (3) entries did not establish that the communications were made and kept in confidence. The Court explained each deficiency in turn.

First, a privilege log must contain a description of each document and its contents that is sufficient to allow courts and other parties to test the merits of the privilege claim—generalized descriptions and conclusory statements do not suffice. Some of BDO’s log entries lacked sufficient detail to allow courts and other parties to determine whether the entire document or portions thereof were protected. Some of BDO’s entries failed this specificity requirement: for example, many log entries failed to identify the sender, recipient, date, and substantive subject matter. Likewise, log entries of emails failed to indicate whether the entry referenced one email or a string of emails.

Second, the Court observed, a document is protected by the attorney-client privilege only if it is generated for the purpose of obtaining or providing legal assistance. As the Fifth Circuit noted, counsel attorneys often provide other kinds of advice—thus, for example, business advice is not protected. Where legal and others kinds of advice are intertwined, the
Fifth Circuit continued, the protection attaches only where legal advice predominates. The Court rejected a presumption that a company’s communications with counsel are privileged. BDO’s log entries did not provide sufficient detail to allow a determination of whether the documents contained legal advice. For example, log entries described as “legal advice” did not suffice, nor did documents that merely included or copied counsel.

Third, the Court recognized, communications must be made confidentially and kept in confidence in order to be protected by the privilege. BDO’s log entries were too vague to determine which persons were included in the sphere of confidentiality. BDO’s log critically failed to resolve whether emails were confidential when third-parties were copied, whether matters were communicated to counsel with confidential intent, and whether non-attorneys were included in the sphere of confidentiality.

Because of these deficiencies, BDO did not prove its prima facie case of attorney-client privilege regarding the purportedly privileged materials—and so the district court erred in requiring the EEOC to show that the documents were not privileged, and the district court therefore also erred in issuing BDO a protective order. Accordingly, the Fifth Circuit reversed and remanded the case for a re-determination of the applicability of the attorney-client privilege and propriety of a protective order, suggesting that in camera review would likely be required on remand.

**JURISDICTION**

*Air Evac EMS, Inc. v. State of Texas*, 851 F.3d 507 (5th Cir. 2017)

Air Evac EMS is an emergency-transportation service required by law to accept patients regardless of ability to pay or source of payment. Air Evac often sought payment for services through the Texas Workers’ Compensation Act (“TWCA”). The TWCA established a state-regulated workers-
An air-ambulance company was permitted to pursue declaratory relief against the Texas Workers’ Compensation Committee premised on federal preemption of a state rule, sovereign immunity notwithstanding.

compensation insurance market, where licensed private insurers sell policies to employers. The Act included both a maximum-reimbursement system and a prohibition on “balance billing,” an insurance practice where a health-care provider first bills an insurer for a service, and, after the insurer has paid its maximum amount, the provider then seeks the remainder from the patient. The TWCA authorizes health-care providers to seek payment directly from workers’-compensation insurers for services provided, and the insurer reimburses the health-care provider according to rate guidelines. An insurer is not allowed to pay more than the maximum-reimbursement rate set by the Texas Workers’ Compensation Commission. If the health-care provider believes it was underpaid or the Commission has not yet set a specific rate, the provider may dispute the fee with the Texas Department of Insurance, Division of Workers’ Compensation, ultimately appealable to the Travis County district court. In 2002, DWC adopted a rule setting the general reimbursement rate of 125% of the Medicare rate.

Ten years later, several air-ambulance companies, including Air Evac, challenged the 125% rate as preempted by federal law. An ALJ ruled that TWCA’s scheme was not preempted and found the proper reimbursement rate to be 149% of the Medicare rate. The lead entity in the administrative proceeding, PHI Air Medical, LLC, appealed the ALJ’s ruling to the Travis County district court, which ruled that the TWCA was not preempted and the reimbursement rate of 125% was adequate. PHI then filed a further appeal.

A year later, with the state proceeding ongoing, Air Evac sued the Texas Commissioner of Insurance and the Texas Commissioner of Workers’ Compensation, seeking declaratory judgment that the Airline Deregulation Act preempts the TWCA with respect to air-ambulance companies, injunctive
relief against enforcement of the maximum-reimbursement-rate system, or alternatively, declaratory and injunctive relief against the balance-billing prohibition. Air Evac argued that because the Airline Deregulation Act preempts all state laws related to the prices charged or routes served by air carriers, Texas may not use state laws to regulate air-ambulance services. The district court granted the defendants’ motions to dismiss on sovereign-immunity grounds, concluding that Air Evac could not avail itself of the *Ex Parte Young* exception to the Eleventh Amendment, which grants equitable jurisdiction to enjoin state officials.

The Fifth Circuit reversed. First, the Court rejected the defendants’ arguments that Air Evac lacked Article III standing because the reimbursement cap is not directly enforced against Air Evac, but instead against insurers. The Fifth Circuit determined that the prohibition on collecting amounts beyond maximum reimbursement rate was a pecuniary injury-in-fact. Likewise, the Fifth Circuit determined, defendants’ conduct of rate-setting, fee-dispute resolution and the balance-billing prohibition are all fairly traceable to the alleged injury. Finally, injunctive or declaratory relief related to that conduct would redress the alleged injury.

The Fifth Circuit also rejected the State’s arguments against federal-question jurisdiction based on language in *Armstrong v. Exceptional Child Care, Inc.*, 135 S. Ct. 1378 (2015). In *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), the Supreme Court stated that a plaintiff seeking injunctive relief against state regulation on preemption grounds presents a federal question. The Fifth Circuit rejected the State’s argument that *Armstrong*, in which the Supreme Court held that the Supremacy Clause does not create a right to challenge state laws on preemption grounds, modified *Shaw*, and reaffirmed that Air Evac must proceed under *Ex parte Young*.

Finally, the Fifth Circuit found that Air Evac satisfied the requirements of *Ex parte Young*, which permits a plaintiff to sue an otherwise-immune state official in his official capacity to enjoin enforcement of a state law that conflicts with federal law.
The Fifth Circuit conducted a “straightforward inquiry” into the complaint’s claims, concluding that the state defendants had a sufficient connection to the enforcement of the TWCA to be proper subjects of an *Ex parte Young* action. The state defendants constrained Air Evac’s ability to collect more than the maximum-reimbursement rate and, given their rate-setting authority and role in arbitrating disputes, those officials effectively ensured the state scheme’s enforcement from start to finish. Finally, the Court rejected the defendants’ request that the Court abstain under the *Colorado River* doctrine because of PHI’s pending proceedings in Texas state court, as that doctrine—which withholds federal adjudication at times due to parallel state proceedings—did not apply to another action with different parties and claims at issue.

**Patent Law**

*BWP Media USA, Inc. v. T&S Software Assoc., Inc.*, 852 F.3d 436 (5th Cir. 2017)

T&S Software Associates, an internet service provider, hosted an internet forum called “HairTalk” on which users could post content, share comments, and ask questions on a range of topics. Every time a user logged on to the forum, the user had to agree to terms of service providing that any photo containing a celebrity or any copyrighted image not owned by the user was prohibited.

Plaintiffs BWP Media USA and National Photo Group own various celebrity photographs. Three photos owned by BWP were posted by third-party users on HairTalk without BWP’s permission. BWP and National Photo Group sued T&S for direct and secondary copyright infringement, alleging that T&S was liable for its users’ infringement because T&S did not designate a registered agent to receive notices of content that should be removed as required to qualify for a statutory safe harbor under the Digital
Millennium Copyright Act ("DCMA"). T&S learned of the photos from the suit and promptly removed them. The district court granted summary judgment for T&S on both direct and secondary infringement. BWP appealed only as to direct-infringement liability.

The Fifth Circuit affirmed. The key question was whether “volitional conduct” was necessary for direct infringement. To establish infringement, a plaintiff must show both “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). In direct-infringement cases, courts trended toward requiring volitional conduct. See, e.g., *Fox Broadcasting Co. v. Dish Network LLC*, 747 F.3d 1060, 1066-68 (9th Cir. 2014); *Cartoon Network, LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 130-31 (2d Cir. 2008); *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004). The Fifth Circuit rejected BWP’s argument that the Supreme Court’s 2014 decision in *American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), precluded the volitional-conduct requirement, distinguishing *Aereo* both legally and factually. Here, T&S merely hosted the forum on which infringing content was posted. Third-party users posted the content, but T&S did not provide access to that content. The Fifth Circuit also agreed with the Fourth Circuit’s reasoning in *LoopNet* that the DMCA did not alter the requirements for infringement liability, instead simply providing that once infringement is found, courts must analyze whether the plaintiff falls within the DMCA’s safe harbor.

*Streamline Prod. Sys., Inc. v. Streamline Manuf., Inc.*, 851 F.3d 440 (5th Cir. 2017)

Streamline Production Systems, Inc. ("SPSI") was established in 1993 in Beaumont, Texas. It produces fabricated natural gas processing equipment. Its logo consists of the word “Streamline” on a ring encircling an image of natural gas processing equipment. Its website, streamlinetexas.com, is blue and white. Streamline Manufacturing, Inc. ("SMI")
was established in 2009 in Houston, Texas. It also produced fabricated natural gas processing equipment. Its logo consisted of the acronym “SMI” on a photo of natural gas processing equipment and the outline of Texas. Its website, steamlinetx.com, was also blue and white. When SMI’s founders chose the name and website of their company, they did not know SPSI existed. It was not until 2013 that SPSI applied for and obtained trademark registration of the mark “Streamline Production Systems.” SPSI never considered licensing its mark to SMI or any other company.

SPSI sued SMI for trademark infringement under the Lanham Act and Texas common law. SMI consented to a preliminary injunction, whereby it changed its name and website. The case proceeded to a jury trial. The jury found that SMI infringed on SPSI’s valid trademark but that SMI did not profit from its infringing use. Nonetheless, the jury awarded $230,000 as royalty damages, $230,000 attributed to unjust enrichment, and $230,000 as exemplary damages, for a total award of $690,000. The district court denied SMI’s motions for judgment as a matter of law and entered judgment in accordance with the jury’s findings. SMI appealed.

The Fifth Circuit affirmed the finding of trademark infringement but vacated each of the damages awards. The Fifth Circuit agreed that SPSI showed two irreducible elements of a trademark-infringement claim—that it possessed a legally protectable mark and that SMI’s mark created a likelihood of confusion with its similar mark. The Court further agreed that there was sufficient evidence that SPSI’s mark was inherently distinctive and thus legally protectable. And likewise, the Court agreed that there was sufficient evidence of likelihood of

In a trademark infringement suit, a royalty-based damages award must be rationally related to the scope of the defendant’s infringement. For an unjust enrichment remedy, important considerations in fashioning a proper award include whether the defendant attempted to “palm off” its goods for those of the plaintiff and whether the plaintiff lost profits.
confusion because at least some of the digits of confusion weighed in favor of finding confusion (type of mark, mark similarity, product similarity, advertising media identity, and actual confusion), even though some of the digits of confusion weighed against finding confusion (intent and degree of care exercised by potential purchasers).

But the Court disagreed as to the damages awards. The Court first held that a royalty-based measure of damages for trademark infringement must bear some rational relationship to the defendant’s infringement. In this case, the royalty damages were not rationally related to the scope of SMI’s infringement because there was no evidence that SMI’s profits were attributable to its infringing use, and because there was no discussion about SMI’s infringing use relative to the rights it would have received via a license. In contrast, there was evidence that the majority of SMI’s customers came from its founders’ preexisting relationships, and SMI’s infringing use likely was not as extensive as it would have been if SMI had received a license. Accordingly, there was insufficient evidence to support the royalty damages.

Nor could SPSI’s unjust-enrichment award stand. For an unjust-enrichment remedy under Texas law, a defendant must obtain a benefit from the plaintiff by fraud, duress, or undue advantage. In trademark infringement suits, the Fifth Circuit noted, important considerations are whether the defendant attempted to “palm off” (i.e. misrepresent) its goods for those of the plaintiff and, conversely, whether the plaintiff lost sales or profits. SMI’s purported benefits of easier market entry and undue referral business did not suffice because SMI did not misrepresent its goods’ nature or origin and SMI did not profit from its infringing mark. Moreover, there was no evidence of fraud, duress, or undue advantage because SMI chose its mark without knowing about SPSI and did not modify its conduct after learning about SPSI. Accordingly, there was insufficient evidence to support the unjust enrichment damages. Because neither of the damages awards survived review, the Fifth Circuit concluded, the exemplary damages fell as well.
Texas Law

*Welsh v. Fort Bend Indep. Sch. Dist.*, No. 16-20538, 860 F.3d 762, (5th Cir. 2017)

Guadalupe Welsh, a teacher at Fort Bend Independent School District, filed an EEOC charge against the school alleging several theories of discrimination and retaliation on August 15, 2012; she amended her charge on June 19, 2014. The EEOC issued a right-to-sue letter on June 30, 2014. On September 26, 2014, Welsh sued the FBISD in Texas state court, alleging that she was passed over for jobs because of her sex, age and national origin. She further alleged retaliation for filing the 2012 EEOC charge. FBISD filed a plea to the jurisdiction in Welsh’s state-court action, arguing that Welsh’s claims were barred by a two-year statute of limitations. The Texas court agreed, dismissing Welsh’s claims in January 2015.

Later that same month, Welsh filed another EEOC charge alleging discrimination and retaliation based on incidents in April and December 2014. She received another right-to-sue letter, this time suing FBISD in the Southern District of Texas in May 2015, alleging discrimination under Title VII and the ADEA. FBISD moved for summary judgment, arguing that all of the claims in this second lawsuit were barred by res judicata. The district court granted the motion and subsequently denied Welsh’s motion for reconsideration. Welsh appealed.

The Fifth Circuit vacated and remanded the district court’s summary judgment order. The Fifth Circuit relied on a bedrock principle of *res judicata* under Texas law: a claim in a second action is only barred if it was or could have been raised in the first action. Here, the Fifth Circuit determined that Welsh was not required to include in her first lawsuit claims that were not yet mature at the time of the filing of that lawsuit—and thus her claims were not barred.

While FBISD argued that Welsh should have amended
her petition in the first lawsuit to include claims that were not mature at the time of filing, the Fifth Circuit rejected FBISD’s argument on largely pragmatic grounds. It reasoned that FBISD’s proposed rule would require a plaintiff to repeatedly amend her petition and then stay the lawsuit to file charges with the EEOC for conduct arising during the lawsuit. Thus, res judicata only barred those claims that were mature at the time Welsh filed her original petition. Because the parties had not briefed the issues under that framework and at least some facts supporting Welsh’s alleged claims did not exist at the time she filed her original petition, the Fifth Circuit remanded to the district court to determine which claims survived and which were barred.

TORTS

**Koch v. United States, 857 F.3d 267 (5th Cir. 2017)**

Ricky Koch was injured while aboard a public vessel owned by the United States. He was aboard the vessel in order to inspect it and then submit a repair bid for his employer. He fell while descending down a dimly lit stairwell. Prior to this accident, Koch had osteoarthritis in both his knees, degenerative disc disease in his cervical spine, and carpal tunnel syndrome—which his employer knew about. These conditions worsened after the accident, requiring multiple surgeries and significantly impairing Koch’s mobility.

Koch and his wife sued the United States for negligence under the third-party liability provision of the Longshore and Harborworkers’ Compensation Act. After a bench trial, the district court concluded that the United States was negligent in failing to provide adequate lighting of the stairwell and that this negligence was the cause of Koch’s fall, his injuries, the exacerbation of his preexisting conditions, and his disability. The district court awarded $2.83 million in damages, which included recovery for all of Koch’s injuries without a corresponding reduction for Koch’s preexisting conditions. When awarding these damages, the district court relied on the rule set forth
in Maurer v. United States, 668 F.3d 98 (2d Cir. 1981), known colloquially as the “eggshell skull”. Under the eggshell skull rule, a plaintiff’s damages cannot be reduced because of a preexisting weakness or susceptibility to injury, unless one of two exceptions applies: (1) the plaintiff is incapacitated or disabled prior to the accident, or (2) the plaintiff’s preexisting condition would inevitably worsen. The district court held that neither of these exceptions applied to Koch. Therefore, the United States was fully liable for Koch’s injuries, even though his preexisting conditions made the consequences of negligence more severe than normal.

The United States appealed, chiefly contending that the rule only applies when a plaintiff’s preexisting condition was completely latent and had not manifested itself prior to an accident. But the Fifth Circuit affirmed, holding that the “eggshell skull” rule is not limited to cases involving latent or otherwise unapparent preexisting conditions. Likewise, the Court held the district court did not error in finding Koch was not disabled prior to the accident and in excluding certain expert testimony.

The federal common-law “eggshell skull” rule, which provides that a plaintiff’s damages cannot be reduced because of preexisting conditions, is not limited to latent or unmanifested preexisting conditions.

Cadena Comercial USA Corp. (“Cadena”) is a Texas corporation and wholly owned subsidiary of Fomento Economico Mexicano, S.A.B. de C.V. (“FEMSA”), which is a Mexican entity that holds a 20% interest in Heineken Group. Heineken Group, in turn, owns three breweries through a series of intermediary companies. Under the agreement that governs FEMSA’s interest in Heineken Group, FEMSA is entitled to appoint certain directors in Heineken, but it does not have “any right or control or influence or consultation right or other form of cooperation” relating to the Heineken Group. FEMSA owns approximately 10,000 convenience stores in Mexico and Columbia that operate under the name OXXO, and FEMSA formed Cadena to extend its convenience store business into Texas. Cadena wanted to sell beer and wine in its stores, so it applied for the necessary permits from the Texas Alcoholic Beverage Commission (“TABC”). When TABC discovered that Cadena’s owner had an ownership interest in Heineken Group, which owns breweries, it protested Cadena’s application based on the Texas “tied house” statutes. The tied house statutes are designed to prevent certain overlapping relationships between those engaged in the alcoholic beverage industry, and a “tied house” is defined as “any overlapping ownership” between different levels, such as “between a manufacturer and a wholesaler or retailer.” In an evidentiary hearing before a county judge, the parties stipulated to the corporate relationships between Cadena, FEMSA, and the Heineken Group, but Cadena argued its application should be
granted because FEMSA has no ability to manage or control Heineken entities and that imputing interests in Heineken to Cadena would violate corporate separateness principles.

The county judge denied Cadena’s application, and a district court and the court of appeals affirmed. Cadena sought review in the Texas Supreme Court, advancing three primary arguments: First, a plain reading of the tied house statutes shows that a “control-based test” should apply to determining which interests come under the statutes. Second, under a proper application of corporate separateness and veil-piercing principles, FEMSA’s interest in both Cadena and the Heineken brewers does not violate the tied house statutes. Finally, TABC’s selective application of the statute to Cadena’s permit application violates equal protection principles. In making these arguments, Cadena expressed concern that TABC should not have authority to reject a permit application based on a person’s ownership of a single share of stock in two separate tiers of the alcoholic beverage industry.

The Texas Supreme Court rejected Cadena’s arguments and affirmed the court of appeals’ judgment in an opinion written by Justice Johnson, in which Justices Green, Guzman, Lehrmann, Devine, and Brown joined. The majority first concluded that the plain text of the tied house statutes encompasses any commercial or economic interest that provides a stake in the financial performance of an entity engaged in the manufacture of alcoholic beverages. Here, by its stock ownership in the Heineken Group, FEMSA has a commercial or economic interest that provides a stake in the financial performance of brewers, and when combined with FEMSA’s interest in Cadena, which would be a retailer of alcoholic beverages, the tied house statutes would be violated by granting Cadena’s permit application. The majority further concluded that “corporate

“Tied house” statutes that prohibit overlapping ownership within the alcoholic beverage industry apply at the stockholder level such that TABC could disregard corporate separateness when determining whether the statutes were violated.
separateness principles are different in the regulatory context,” and regulatory agencies may sometimes “look beyond the corporate veil” to prevent corporations from circumventing statutes by use of the corporate form. In this situation, the Court concluded that TABC could disregard the corporate separateness of entities in determining compliance with the tied house statutes. Finally, the Court rejected Cadena’s equal protection argument. Although Cadena provided evidence that some entities with cross-tier holdings received permits, it could not show that any of those involved a sufficiently similar situation.

Justice Willett, joined by Chief Justice Hecht, filed a dissenting opinion. Justice Willett would have held that FEMSA does not have an “interest” in the business of a brewer within the meaning of the tied house statutes because the “most textually plausible interpretation is that ‘interest’ connotes the ability to control, coerce, or influence business operations in another tier.” To conclude that such an interest exists here would require that “corporate structures are discounted, company agreements are disbelieved, and contextual statutes are disregarded.”

**Civil Procedure – Findings of Fact**


AD Villarai LLC and others (collectively “Villarai”) sued Chan Il Pak for breach of fiduciary duty and related claims. After entering an interlocutory permanent injunction against Pak, the trial judge, Judge Martin Lowy, lost the primary election to Judge Staci Williams. Judge Lowy conducted a bench trial on the remaining claims in October 2014 and entered a final judgment in November. But despite Pak’s timely notice of past due findings on December 31st, Judge Lowy did not file findings of fact and conclusions of law before leaving the bench. On January 12, 2015, Judge Williams timely filed her findings of fact and conclusions of law. Pak appealed the trial court’s
judgment, arguing in part that Judge Williams’s findings were invalid because she lacked authority to file them. The Dallas Court of Appeals agreed, further held that Judge Lowy could not file the findings, and remanded the case to the trial court. Villarai then appealed.

The Supreme Court reversed the court of appeals’ judgment, holding that Judge Williams lacked authority to file findings and negating each alleged basis for this authority as follows:

- Rule of Civil Procedure 18 allows a successor judge to dispose of all motions in the event the former judge “dies, resigns, or becomes unable to hold court.” However, a judge displaced by an election does not fit any of these criteria.

- Civil Practice and Remedies Code section 30.002(a) grants a former judge authority to file findings after his term of office expires. However, it is silent as to the successor’s authority to file findings on the former judge’s behalf: “The statute’s grant of authority to the former judge does not imply a similar grant of authority to his successor.”

- Rules of Civil Procedure 296 and 297 require “the court” to “state in writing its findings of fact and conclusions of law.” “Court” here is confined by the authority granted by Rule 18 and section 30.002(a); to read this otherwise would render both Rule 18 and section 30.002 superfluous.

- A successor judge does not have “inherent power” to file findings; rather, the rules and statutes grant judges power and do not merely recognize inherent power.

In addition, the Supreme Court reversed the court of appeals’ holding that Judge Lowy lacked authority to file the findings. Because Judge Lowy’s term of office
expired on December 31, 2014, which was within the period for filing the findings Pak requested, section 30.002(a) authorized him to file the findings even after his term expired. Indeed, Judge Lowy was the only judge with the power to file findings and the trial court should have afforded him an opportunity to do so. Accordingly, the Supreme Court reversed and remanded the case to the court of appeals with instructions that it abate the appeal and direct the trial court to correct the error by requesting that Judge Lowy file findings. If the former judge fails or refuses to file findings as requested, the court of appeals may then reverse the trial court’s judgment and remand for a new trial.

CIVIL PROCEDURE – STATUTORY NOTICE


In May 2008, Plasma Fab, LLC (“Plasma Fab”) obtained a general liability insurance policy, which it financed through an agreement with BankDirect Capital Finance, LLC (“BankDirect”). The agreement included a power-of-attorney clause that gave BankDirect authority, upon Plasma Fab’s default, to cancel the insurance policy, collect the unearned premiums, and apply them to the loan balance. Importantly, however, BankDirect could exercise the cancel-and-collect authority only “after proper notice has been mailed as required by law.” One such legal requirement appears in section 651.161 of the Texas Premium Finance Act. Under that statute, a premium finance company must mail to the defaulting insured a notice of intent to cancel that states a time by which default must be cured, and “[t]he stated time may not be earlier than the 10th day after the date the notice is mailed.” When Plasma Fab missed its November 2008 payment, BankDirect sent a notice of intent to cancel the policy effective December 4. Although the notice was dated November 24 (i.e., ten days before the cancellation date), it was not mailed until November
A finance company did not provide timely notice under the Texas Premium Finance Act and the notice requirement does not have a substantial-compliance exception.

Plasma Fab did not pay the past-due premium by December 4, and BankDirect sent a notice of cancellation to the insurer. Four days later, a fire destroyed an apartment complex where Plasma Fab’s employees worked. Plasma Fab then tendered the overdue amount, and BankDirect requested that the insurer reinstate the policy. The insurer refused, and a judgment for almost $6 million was eventually rendered against Plasma Fab in connection with the fire. Plasma Fab sued BankDirect and the insurer, asserting that the defendants had no right to cancel the policy because BankDirect failed to comply with the ten-day notice requirement. The trial court disagreed and granted summary judgment to BankDirect and the insurer. The court of appeals reversed the trial court’s judgment, concluding that BankDirect lacked authority to cancel the policy because it mailed the notice one day late.

Justice Willett, joined by Justices Green, Lehrmann, Boyd, Devine, and Brown, affirmed the court of appeals’ judgment. BankDirect urged the Court to adopt a “substantial compliance” approach to interpreting section 651.161, but the Court refused to do so. It acknowledged that a substantial compliance approach was rational, workable, and logical, but it had no support in the statute’s express text. The Court explained that “absent statutory language to the contrary, a statutorily imposed time period does not allow for substantial compliance.” Simply put, “when it comes to statutorily required time periods, substantial compliance is insufficient.” Here, the parties contractually made notice “as required by law” a precondition to cancellation, and because BankDirect failed to meet the law’s requirements, BankDirect could not cancel the policy.

Justice Guzman authored a concurring opinion. She did not agree with the Court’s
conclusion that “failing to ‘state’ a ten-day post-mailing cure deadline is, in and of itself, insufficient compliance.” But she concurred in the judgment because, in her view, BankDirect did not comply with section 651.161—substantially or otherwise—as it not only stated a shortened cure deadline, but also prematurely cancelled the insurance policy.

Justice Johnson, joined by Chief Justice Hecht, issued a dissenting opinion. He faulted the majority for stopping its analysis “without considering the statute’s lack of consequences for noncompliance” with the ten-day requirement in section 651.161. He urged that the Court is “required to look at the factors and language in the Code Construction Act and our decisions regarding statutory language for assistance in determining the effect of noncompliance with the ‘10th day’ language.” After considering these factors and prior cases, Justice Johnson concluded that section 651.161’s ten-day requirement should be measured by substantial compliance, and when measured by that standard, he would have held that BankDirect complied with the statute.

**Constitutional Law - Dormant Commerce Clause**


ETC Marketing, Ltd. ("ETC") buys and sells natural gas. Between sales, ETC stores its gas at Houston Pipe Line Company's ("HPL") Bammel reservoir in Harris County, Texas. The gas is stored seasonally from late spring into winter until it is sold to mostly out-of-state consumers. HPL's pipeline is solely within Texas's borders, but connects to other interstate pipelines. HPL also stores "cushion gas" in its facility, which is necessary to pump other gas out of the reservoir. HPL pays an ad valorem tax on the cushion gas, but does not pay taxes on other gas stored in its facility. In September 2009, the Harris County Appraisal District ("HCAD") found that
ETC occupied roughly thirty-three billion cubic feet in HPL’s Bammel reservoir. HCAD issued a tax based on this amount, which ETC contested, arguing that it is immune from state issued taxes because its product is in the stream of interstate commerce. HCAD’s review board denied ETC’s challenge, and ETC promptly appealed to the district court. The district court granted summary judgment for HCAD and the court of appeals affirmed, finding that the tax satisfied the test for constitutionality of state taxation of interstate commerce under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

The Supreme Court, in an opinion written by Justice Devine, affirmed the court of appeals’ judgment. At the outset of analyzing this issue, the Court reconciled the *Complete Auto* test with the “in transit” test. The *Complete Auto* test requires a tax that implicates interstate commerce to (1) apply to an activity with a “substantial nexus” to the taxing state, (2) be fairly apportioned, (3) be nondiscriminatory, and (4) be related to services provided by the taxing state. The Court utilized the “in transit” test—if property is *in transit*, then it is in interstate commerce—to inform its analysis of the substantial nexus and relation prongs. The Court noted that ETC’s gas is in interstate commerce because it is eventually pumped through interstate pipelines to out-of-state customers.

In determining whether a sufficient nexus existed, the Court explained that the only relevant consideration for an ad valorem tax is the link between the property and the taxing state. Applying the “in transit” test to color this analysis, the Court determined that ETC’s gas was not in transit because ETC can delay transportation and dispose of the gas at its discretion. Therefore, because the gas is stored in Texas, a substantial nexus with Texas existed. Secondly, under the Texas Tax Code, the ad valorem tax is only placed on property physically located in Texas on a specified day each year (January 1). The Court determined that the tax is fairly apportioned because property can only be in one place at a single

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**A nondiscriminatory state tax on surplus gas stored for future resale does not violate the Commerce Clause.**
time, meaning ETC could not suffer multiple taxation across various jurisdictions. The Court then considered whether the ad valorem tax discriminates against interstate commerce, finding that it does not because it targets all property in Harris County regardless of its ultimate destination. Finally, the Court determined that ETC’s gas storage arrangement provides it with the “opportunities and protections” of the State of Texas, thus satisfying the Complete Auto test. According to the Court, a nondiscriminatory tax on surplus gas stored without a pre-determined destination for resale does not violate the Commerce Clause.

Although joining the majority’s decision, Justice Brown filed a concurring opinion, joined by Justice Willet, criticizing the majority’s application of a judicially-made, multi-factor analysis, referring to it as “‘interpretative jiggery-pokery.’”

Chief Justice Hecht filed a dissenting opinion. In his view, the Court’s conclusion that the storage of gas to facilitate its interstate shipment is nothing more than a shipper’s business choice directly contradicts U.S. Supreme Court precedent, the Federal Energy Regulatory Commission, and the laws of physics.

CONSTITUTIONAL LAW – SEPARATION OF POWERS


In 2014, a dispute arose between the Galveston County Commissioners Court (“GCCC”) and a group of Galveston County judges regarding the firing of then Director of Justice Administration (“DJA”) Bonita Quiroga. The GCCC created the DJA position, which included both court-related and non-court-related responsibilities. After County Judge Mark Henry fired Quiroga for job performance reasons, District Judge Lonnie Cox issued a sua sponte order requiring Judge Henry to reinstate Quiroga.

Distilled to its essence, this was a war-of-wills dispute pitting the legislative powers of the GCCC, which alone sets the
salaries of county employees like Quiroga, against the inherent supervisory power of the judicial branch, which may direct the GCCC to set a new salary range, but cannot dictate a specific salary outside that range. After Judge Cox issued his sua sponte order, both sides of the dispute began talks to resolve the issues. Ultimately, the GCCC created a new position, Director of Court Administration (“DCA”), involving only court-related responsibilities. However, the salary range was roughly half of Quiroga’s salary when she was fired. Dissatisfied, Judge Cox filed suit—in his own district court, but before a visiting judge—against Judge Henry, arguing the salary range for the new position was unreasonable. The trial court issued a temporary restraining order and a temporary injunction requiring Judge Henry to: (1) reinstate Quiroga to her old job title of DJA; (2) carve out any non-court-related duties and ensure Quiroga was doing the work of the DCA position; and (3) pay Quiroga her old salary of $113,000 for the new position with fewer duties. A divided First Court of Appeals affirmed, holding the evidence presented at the hearing on the temporary injunction supported the trial court’s findings.

The Supreme Court reversed, holding that if the trial court found the proposed salary range to be unreasonable, the only appropriate option was for the trial court to order the GCCC to reevaluate and set a new, reasonable salary range. The county’s judicial branch encroached on the county’s legislative branch, the GCCC, which was performing a constitutionally and statutorily authorized function. Personnel is policy, and fiscal-policy decisions, including staffing, are a quintessentially legislative prerogative. Neither the Constitution nor the Government Code allowed the judiciary to usurp a county’s budgeting discretion by, for example, dictating specific salaries for county employees other than within the designated range, as section 75.401 of the Government Code allows. County budgets are set by county
budgeters. And while section 75.401(d) authorizes the “judges served” to determine ultimately what qualifies as “reasonable compensation,” step one in the process, the salary range, is “set by the commissioners court.” Ultimately, the trial court lacked the authority to bind the GCCC in the first place, because Judge Cox failed to name anyone but Judge Henry in the request for injunctive relief. The trial court, therefore, erred in issuing the temporary injunction. For these reasons, the Supreme Court reversed the court of appeals’ judgment and remanded the case to the trial court for further proceedings consistent with this opinion.

Contracts – Bilateral Breach


Food-product manufacturer Bartush–Schnitzius Foods Co. (“Bartush”) expanded its line of food products to include seafood dips, and manufacturing the dips required Bartush’s production facilities to maintain a constant temperature no higher than 38 degrees, which is lower than Bartush’s existing refrigeration system could sustain. Therefore, Bartush contracted with Cimco Refrigeration, Inc. (“Cimco”) to install a new system. Cimco sent Bartush an offer letter that included three quoted options but did not reference a particular temperature range. Bartush orally selected the most expensive of the three options, and began paying Cimco in installments. After installation, Bartush discovered that the system’s defrost unit was not designed to support operation at the low temperature setting Bartush needed. By this time, Bartush had paid Cimco more than $300,000 but still owed more than $100,000. The parties discussed a repair, but when they could not reach an agreement, Bartush hired another company to install a warm-glycol defrost unit at a cost of nearly $170,000. After this modification, the system was able to maintain the target temperature.
Cimco sued Bartush to recover the balance owed on the contract, and Bartush counterclaimed for breach of contract, seeking damages for the costs associated with installing the warm-glycol defrost unit. A jury determined that (1) Bartush failed to comply with the parties’ contract, (2) Cimco also failed to comply with the contract, (3) Cimco failed to comply first, and (4) Bartush’s failure to comply was not excused. The jury awarded Bartush damages equal to the cost of installing the warm-glycol defrost unit plus $215,000 in trial and conditional appellate attorney’s fees. The jury also awarded Cimco the balance due on the contract (i.e., $113,400). Despite the jury’s findings that both parties failed to comply and Bartush’s failure to comply was not excused, the trial court rendered judgment in Bartush’s favor for the cost of installing the warm-glycol defrost unit plus interest, costs, and attorney’s fees. The judgment awarded nothing to Cimco, and Cimco appealed.

The court of appeals reversed and remanded for entry of judgment that Bartush take nothing and Cimco recover $113,400 in damages plus interest and costs. It concluded that the jury impliedly found that Cimco’s prior breach was not material because it found that Bartush’s failure to comply was not excused. The court further held that Bartush’s failure to pay the balance was a material breach as a matter of law, which rendered irrelevant the jury’s finding that Cimco breached first. Finally, the court of appeals held that Cimco waived its challenge to the jury’s failure to award attorney’s fees.

In a per curiam opinion, the Texas Supreme Court reversed the court of appeals’ judgment and remanded the case. The Court agreed with the court of appeals’ conclusion that the jury must have concluded Cimco’s prior breach was not material, and it rejected Bartush’s argument that Cimco’s breach was material as a matter of law. The Court agreed with Bartush, however, that the court of appeals should have given

**A prior material breach by one party will not excuse overdue performance by another contracting party.**
effect to the jury’s damages awards to both parties. A material breach excuses future performance, not past performance, but the court of appeals effectively turned this principle on its head by holding that Bartush’s nonpayment retroactively excused Cimco’s prior breach. Under the jury’s findings, Bartush remained liable for its subsequent failure to comply, but Bartush’s claim for damages caused by Cimco’s breach remained viable. Because the court of appeals did not reach Cimco’s alternative argument that no evidence supports the jury’s finding that Cimco breached, the Court remanded for the court of appeals to address that issue as well as the issue of whether Cimco preserved error on its complaint about the jury’s failure to award it attorneys’ fees.

**Contracts – Forum Selection**


Jeffrey Sheldon and Andras Konya were both shareholders of IDev Technologies, Inc. ("IDEV"), a company that manufactures medical devices. Sheldon founded IDEV in 1999 and served as its Chief Executive Officer until 2008. Konya worked as a consultant at IDEV and co-invented vascular-stent technology for the company. IDEV’s shareholders agreement included a forum-selection clause, which required disputes to be brought in Texas. In 2010, however, IDEV amended the clause, agreeing to resolve “any dispute arising out of [the] Agreement” in Delaware. Sheldon signed the 2010 Amended Shareholders Agreement, but Konya did not. At that time, Sheldon owned both preferred and common stock equating to approximately 5% of IDEV’s outstanding shares. Konya held common stock and owned roughly 2.4% of the outstanding shares. In late 2010, IDEV went through multiple rounds of necessary financing, which altered Sheldon and Konya’s proportional interests in the company. Consequently, they sued IDEV’s venture-capital majority shareholders in Texas alleging numerous claims, asserting that these transactions cost
them significant payouts and wrongfully diluted their interests to a fraction of 1%. The defendants included IDEV’s CEO and Chief Financial Officer, as well as IDEV directors. The defendants moved to dismiss the suit based on the forum-selection clause.

The trial court granted the motion to dismiss with prejudice, and agreed that Sheldon and Konya’s claims must be brought in Delaware pursuant to the 2010 Amended Shareholders Agreement. The court of appeals reversed, holding that the forum-selection clause did not control because Sheldon and Konya had not alleged noncompliance or interference with any rights or obligations deriving from the shareholders agreement and therefore the claims did not “arise out of” that agreement.

The Supreme Court, in an opinion written by Justice Guzman, reversed the court of appeals and held that Sheldon and Konya’s claims arose out of the shareholders agreement, thus subjecting them to the forum-selection clause. The Court focused on the contract’s language, and explained that the existence and terms of the shareholders agreement are operative facts in the litigation and “but for” the agreement Sheldon and Konya would not have any claims. In so ruling, the Court sought to prevent litigants from avoiding forum-selection clauses by artfully crafting pleadings. Although Konya did not sign the 2010 Amended Shareholders Agreement, he had consented to a provision in a prior shareholders agreement allowing written alterations so long as they were signed by the corporation and at least a majority of the shareholders. Therefore, the Court found that he was bound by the amended forum-selection clause. The Court also determined that the forum-selection clause could not be enforced by the CEO and CFO as they were not parties to the shareholders agreement, and remanded the case for further proceedings.
CONTRACTS – SETTLEMENT AGREEMENTS


After 28 years of marriage, Miguel Angel Loya and Leticia B. Loya began divorce proceedings that lasted two years. They eventually entered into a mediated settlement agreement (“MSA”) that partitioned the couple’s numerous assets. The MSA also partitioned the couple’s future income and earnings as follows: “All future income of a party and/or from any property herein awarded to a party is partitioned to the person to whom the property is awarded. * * * All future earnings from each party are partitioned to the person providing the services giving rise to the earnings.” A dispute later arose about this provision and the language that would be used in the parties’ the divorce decree and the agreement incident to divorce (“AID”). The arbitrator assigned to resolve the dispute ruled that the MSA language would be placed into the AID, which would read, “All future income and earnings are partitioned as of June 13, 2010….”

In March 2011, Miguel received a $4.5 million bonus from his employer. Leticia then filed an original petition for post-divorce division of property, alleging that the decree failed to divide the parties’ marital interest in Miguel’s 2011 bonus relating to his services between January 1 and June 13, 2010. Miguel moved for partial summary judgment on several grounds including that the MSA awarded it to him as future earnings. The trial court granted Miguel’s motion and signed a final take-nothing judgment. But a divided Fourteenth Court of Appeals reversed and remanded, concluding “that the bonus was not considered, disposed of, or partitioned in the divorce decree, and that Leticia raised a fact issue concerning the characterization of the bonus.”

The Supreme Court reversed, holding that the MSA partitioned the bonus to Miguel under the provision addressing future income. As noted, the MSA provision addressing future income stated: “All future income of a party and/or from any
property herein awarded to a party is partitioned to the person to whom the property is awarded.” To the extent this provision was unclear, the arbitrator resolved this issue when he stated that “[a]ll future income and earnings are partitioned as of June 13, 2010.” Although the MSA did not define “future income,” the plain meaning of “income” included all forms of payment received and “future income” means payment received at a later time—terms that clearly encompassed the 2011 bonus. Moreover, regardless of whether part of the bonus compensated work done during marriage, the MSA partitioned all future income, which includes future payments for work done in the past. Indeed, the inclusion of the June 13, 2010 date indicated that all money Miguel received after that date was partitioned to him, regardless of when the underlying work was done. Therefore, whether “future earnings” referred only to money received for work done in the future or included money to be received in the future for work done during the marriage was irrelevant to this analysis because of the broad definition of “future income.” Based on this determination, the Supreme Court reversed the court of appeals’ judgment and rendered judgment for Miguel.

**Contracts – Third-Party Benefits**


Southway Systems, Inc. (“Southway”) was an information-technology company owned Richard Brumitt. He agreed to his stock in Southway to another information-technology company, DTSG, Ltd., which was owned by Don Oprea. To make the purchase, Oprea met with Tim Duffy, president of First Bank’s division that handled federal Small Business Administration loans. Their first meeting was in September 2007, and although Oprea told to Duffy that “a sense of urgency” existed and he needed to close on the loan by year’s
end, multiple delays ensued over the following 14 months. In the meantime, delays with the ownership transition at Southway created uncertainty with the employees who began leaving the company. Eventually, Southway lost its employees and had essentially failed. Oprea and DTSG sued First Bank in October 2009, and Brumitt intervened as an additional plaintiff, alleging that he was a third-party-creditor beneficiary of the three “loan commitment letters executed by DTSG and First Bank.” The jury found First Bank liable to both DTSG and Brumitt for breach of contract and for negligent and grossly negligent misrepresentations. The trial court entered judgment based on the jury’s verdict, awarding Brumitt $1,006,000 as breach-of-contract damages, $250,000 as damages for negligent misrepresentation, and $250,000 as exemplary damages for gross negligence. Including attorney’s fees and pre-judgment interest, Brumitt’s award totaled $1,815,460 plus court costs, post-judgment interest, and attorney’s fees on appeal. The Fourteenth Court of Appeals affirmed the judgment on the breach of contract claim, expressly concluding that Brumitt was entitled to recover as a third-party beneficiary of the agreement between First Bank and DTSG. But the court reversed the judgment on the negligent and grossly negligent misrepresentation claims, concluding that Brumitt failed to establish any injury independent from the economic loss he sustained as a result of First Bank’s contractual breach.

The Supreme Court reversed the court of appeals’ judgment. First, the Court held that the contract is unambiguous and did not make Brumitt plaintiff a third-party beneficiary. A person seeking to establish third-party-beneficiary status must demonstrate that the contracting parties “intended to secure a benefit to that third party” and “entered into the contract directly for the third party’s benefit.” Here, Brumitt alleged that he was a third-party beneficiary of three “loan commitment letters executed by DTSG and First Bank.” But upon reviewing these documents, the Court determined that they were unambiguous and did not clearly express the parties’ intent to make Brumitt a third-party beneficiary. None of the three
letters ever mentioned Brumitt or Southway or referred in any way to the seller from whom DTSG intended to purchase the “existing business.” Nothing in the letters “clearly,” “fully,” and “unequivocally” expressed the parties’ intent to “contract directly for [Brumitt’s] benefit” and thus to confer on Brumitt the right to be a “claimant” in the event of a breach.

The Court further held that the trial court erred by (1) submitting the issue of whether Brumitt was a third-party beneficiary to the jury and (2) instructing the jury that it could consider extrinsic evidence to add a third-party-beneficiary term to the unambiguous written agreement. When a contract is unambiguous, courts must construe it as a matter of law. Here, the trial court should have decided whether the commitment letters were ambiguous and whether they clearly, fully, and unequivocally expressed the parties’ mutual intent to make Brumitt a third-party beneficiary. Because the trial court submitted this issue to the jury, it erred and the court of appeals should have so held. As for the consideration of extrinsic evidence, such evidence was irrelevant and inadmissible because the contract was unambiguous. Referring to the circumstances surrounding a contract recognizes that evidence of the circumstances may assist courts in construing the language the parties used, but they do not authorize courts to rely on such evidence to add to or alter the terms contained within the agreement itself. When parties have a valid, integrated written agreement, the parol-evidence rule precludes enforcement of prior or contemporaneous agreements. Because the contract’s language was unambiguous, the court—not a jury—should have determined the parties’ intent as a matter of law, and it could not do so by relying on extrinsic evidence to create an intent that the contract itself does not express.

Finally, the Court held that Brumitt could not rely on any alleged oral agreement

If a contract’s language leaves any doubt about the parties’ intent to directly benefit a third party, those doubts must be resolved against conferring third-party beneficiary status.
between First Bank and DTSG as a basis for claiming third-party-beneficiary status. As an initial matter, Brumitt did not plead any claim based on an alleged oral agreement, and instead pleaded only that he was a third-party beneficiary of the three loan letters. Second, the trial court’s charge expressly defined the parties’ agreements in terms of the loan letters, not any oral agreement; thus, Brumitt failed to obtain a jury finding on the issue of an oral agreement. Next, the alleged oral agreement on which Brumitt relied occurred before the parties’ agreement as finally expressed in the third loan letter. Permitting Brumitt to rely on an alleged prior oral agreement to add to the terms of the parties’ subsequent written agreement would violate the well-established rule that the parties’ intent to create a third-party beneficiary must be clearly and fully spelled out in the agreement itself. Finally, even the evidence regarding the alleged oral agreement did not “clearly and fully” establish an intent to make Brumitt a third-party beneficiary. Thus, the Supreme Court reversed the court of appeals’ judgment, rendered judgment for First Bank on Brumitt’s breach-of-contract claim, and remanded the case to the court of appeals for further consideration of Brumitt’s claims alleging negligent and grossly negligent misrepresentations.

**Discovery**


In this case of first impression, residential homeowners sued their insurer and others alleging underpayment of insured hail-damage claims. The lawsuits asserted statutory, contractual, and extra-contractual claims against the same insurer, State Farm Lloyds, in separate proceedings. At issue in this mandamus proceeding was trial-court orders adopting a proposed protocol for the exchange of electronic discovery. The homeowners requested and the trial court ordered all ESI to be produced in its native or near-native forms—which contained the metadata—rather than in the searchable,
static, and non-metadata-containing format that State Farm proposed. After a hearing on the benefit, feasibility, expense, and related considerations of the competing protocols, the trial court order required State Farm to produce ESI in native form regardless of whether a more convenient, less expensive, and “reasonably usable” format was readily available. State Farm sought mandamus relief from the Corpus Christi Court of Appeals, arguing that Rule of Civil Procedure 196.4 allows for production of ESI in reasonably usable forms and, considering the proportionality concerns delineated in discovery Rule 192.4, the trial court abused its discretion in requiring native production in lieu of the reasonably usable form State Farm offered. The court of appeals denied mandamus relief.

The Supreme Court denied the petitions for writ of mandamus without prejudice to reurge the discovery objections to the trial court in light of this opinion. Whether production of metadata-accessible forms is required on demand engages the interplay between the discovery limits in Rule of Civil Procedure 192.4 and production of electronic discovery under Rule 196.4. Simply because the requested information is discoverable does not mean that discovery must be had. So while metadata may generally be discoverable if it is relevant and unprivileged, that does not mean production in a metadata-friendly format is necessarily required. At its core, the homeowners’ argument claim that native-form production was required presumed the requesting party could unilaterally determine the form of production. But Rule 196.4 cannot be construed so narrowly given its focus on “reasonable” efforts and “reasonableness” availability. Thus, if the responding party objects that electronic data cannot be retrieved in the form requested through “reasonable efforts” and asserts that the information is readily

**Discovery involving electronically stored information (“ESI”) when electronic data in a reasonably usable form is readily available, a trial court must balance the burdens with the benefits in ordering production in a different form, particularly when metadata is contained within the ESI.**
“obtainable from some other source that is more convenient, less burdensome, or less expensive,” the trial court is obliged to consider whether production in the form requested should be denied in favor of a “reasonably usable” alternative form. And in line with Rule 192.4, the trial court must consider whether differences in utility and usability of the form requested are significant enough—in the context of the particular case—to override any enhanced burden, cost, or convenience. If the burden or cost is unreasonable compared to the countervailing factors, the trial court may order production in (1) the form the responding party proffers, (2) another form that is proportionally appropriate, or (3) the form requested if (i) there is a particularized need for otherwise unreasonable production efforts and (ii) the court orders the requesting party to “pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.” Because neither the trial court nor the parties had the benefit of the Court’s opinion here, it denied the petitions for writ of mandamus without prejudice to reurge the discovery objections to the trial court in light of this opinion.

**Employment Law**


Exxon Mobil Corporation (“Exxon”) contracted with WHM Custom Services, Inc. (“WHM”) to employ Gilberto Rincones as a refinery technician at its Baytown refinery. Exxon requires its contractors to sign a written drug policy, agreeing to participate in random drug screenings. According to the policy, if an employee tests positive for drugs, he or she is suspended from work and must complete a rehabilitation program to become reinstated. In April 2008, DISA, Inc. (“DISA”), a drug screening administrator hired by WHM, randomly selected Rincones to submit to a drug test. Rincones tested positive for marijuana. Rincones asserted that he did not use illegal substances, and claimed DISA engaged in “questionable
testing procedures.” He obtained a private drug test, which did not show drugs in his system, and offered these results to WHM. However, Rincones never completed the required rehabilitation program and did not return to work. In September 2008, the Texas Workforce Commission determined that he had been officially discharged and could obtain unemployment benefits.

In September 2010, Rincones filed a discrimination suit against WHM, Exxon, and DISA, asserting sixteen claims against the three defendants, including multiple pattern-or-practice discrimination claims. He maintained that other non-Hispanic employees received different treatment in regards to Exxon’s drug policies and were allowed to retest in cases of false positives. The trial court granted summary judgment for the defendants and entered a take-nothing judgment. The court of appeals reversed, reinstating nine of Rincones’ claims.

The Supreme Court, in an opinion by Justice Brown, addressed each claim individually, and reinstated the trial court’s take-nothing judgment against Rincones. The claims against WHM included compelled self-defamation, individual discrimination, retaliation, and pattern-or-practice discrimination. The Supreme Court rejected a theory of compelled self-defamation, finding that it failed to meet the required publication element of a defamation claim. The Court explained that compelled self-defamation is incompatible with Texas’s at-will employment system and inappropriately censors employers. As to the individual discrimination claim, the Court held for WHM stating that Rincones did not establish a prima facie case of discrimination because he did not provide evidence of a similarly situated employee being treated differently based on race. The Court also rendered judgment for WHM on the retaliation claim, explaining that Rincones did not offer any evidence that he was engaged in a protected activity. Because

The Court rejected discrimination and defamation claims asserted by a former employee and declared that Texas does not recognize a claim for compelled self-defamation.
Rincones abandoned his pattern-or-practice discrimination claim, it was rendered moot.

The claims against Exxon included a claim of pattern-or-practice discrimination—which was rendered moot—tortious interference with an employment contract, and negligence. The Court held for Exxon on the latter two claims. Rincones did not present sufficient evidence to show Exxon interfered with his employment contract. The only evidence he presented was a letter between Exxon and WHM directing WHM to report any disqualified individuals to Exxon. Similarly, as to the negligence claim, Rincones did not present any evidence that Exxon had an agency relationship with DISA, which was necessary to establish that Exxon owed Rincones a duty. Therefore, the Court held Rincones could not successfully establish a negligence claim.

Finally, Rincones claims against DISA included tortious interference with an employment contract and negligence, both of which have a two year statute of limitation requirement. The Court rendered judgment for DISA on both claims, holding that the statute of limitations had run. The Court rejected all of Rincones counter arguments that the statute of limitations did not apply under the continuing-tort doctrine, equitable estoppel, and misnomer. The accrual period began in April 2008, when he first tested positive for marijuana, and he filed suit over two years later in September 2010.


Certified registered nurse anesthetist, Laura Murphy, sued El Paso Healthcare System for statutory retaliation and tortious interference with her employment contract. Murphy’s suit stemmed from an incident involving Dr. Frederick Harlass, a high-risk-delivery specialist at Las Palmas Medical Center (“Las Palmas”), where Murphy regularly worked as a contract nurse in the labor-and-delivery unit. After Harlass advised an expectant mother to deliver her baby by Cesarean section, he confronted Murphy about her prior discussion with the patient
that he felt discouraged her from consenting to the C-section. Although the patient consented to the C-section and delivered her baby without complications, both Harlass and Murphy submitted complaints about each other the following morning. Later that day, Murphy’s employer, West Texas OB, told her not to return to work at Las Palmas until further notice. The next day, Murphy sent letters to West Texas OB and Las Palmas’s ethics coordinator memorializing her recollection of the incident.

At trial, the court submitted jury questions on Murphy’s claims against El Paso Healthcare for statutory retaliation and tortious interference with “the continuation of the business relationship between” Murphy and West Texas OB. The jury found in Murphy’s favor on both claims and awarded her $631,000 in damages. The trial court entered judgment on the jury’s verdict, and the El Paso Court of Appeals affirmed.

The Supreme Court reversed and rendered judgment that Murphy take nothing, holding that she failed to establish that El Paso Healthcare illegally retaliated against her or tortuously interfered with her contract with West Texas OB. Regarding the retaliation claim, the Court determined Health and Safety Code sections 161.134 and 161.135 did not require Murphy to prove that the reported conduct—that Harlass did not obtain the patient’s informed consent—in fact violated the law. Instead, she could sue for retaliation if she reported a violation of law in good faith. On this latter point, however, Murphy did not prove “good faith” because her belief that Harlass did not obtain informed consent was not objectively reasonable. She admitted that she did not witness or hear Harlass’s conversation with the patient. She also admitted that her belief was based on Harlass’s statements and demeanor after he left the patient’s room. Thus, Murphy’s belief was based on mere

Statutes prohibiting a hospital from retaliating against “a person who is not an employee for reporting a violation of law” do not require the plaintiff to prove that the reported conduct in fact violated the law, but instead permits her to sue for retaliation if she reported a violation of law in good faith.
conjecture and surmise. As such, her retaliation claim failed as a matter of law.

Regarding the tortious interference claim, no evidence supported the jury’s finding that El Paso Healthcare interfered with the terms of Murphy’s contract with West Texas OB. To prevail on this claim, Murphy had to present evidence that El Paso Healthcare caused West Texas OB to remove her from the schedule at Las Palmas and stop assigning her to shifts there. But she admitted that her contract with West Texas OB contained no obligation to provide employment at Las Palmas or any hospital. Because no evidence supported the jury’s finding that El Paso Healthcare interfered with Murphy’s legal rights under her contract with West Texas OB, this claim also failed as a matter of law.


The Harris County Appraisal District (“HCAD”) is statutorily tasked with appraising property in Harris County. Taxpayers may contest HCAD’s valuation decisions before the Harris County Appraisal Review Board (“Board”), which is an administrative entity with statutory authority to modify property appraisal valuations. Fifteen Board members (“claimants”) filed for unemployment compensation with the Texas Workforce Commission (“TWC”), alleging that they were last employed by HCAD. In response, HCAD argued the claimants were members of the judiciary and that certain Tax Code provisions forbade Board members from being employed by HCAD. Ultimately, the TWC determined that each of the claims was valid and the claimants were entitled to compensation. The appeal tribunal upheld the TWC’s determinations. HCAD then filed suit in the district court challenging the administrative determinations and asserting that there was not and never had been an employment relationship between the claimants and HCAD under the Texas Unemployment Compensation Act’s (“TUCA”) definition of
employment. Both sides moved for summary judgment. The district court denied the TWC’s motion, granted HCAD’s, and set aside the TWC’s decisions awarding compensation. The Fourteenth Court of Appeals reversed and reinstated the TWC’s determinations.

The Supreme Court affirmed. TUCA grants certain benefits to individuals who become either totally or partially unemployed. The key focus under TUCA is whether a claimant can establish that he or she was in an employment relationship with an employer. TUCA’s definition of “employment” in Labor Code section 201.041 creates a presumption of employment upon a showing that an individual is paid for performing services; this presumption is rebutted only if the alleged employer carries its burden of showing that the individual’s service is “free from control or direction under the contract and in fact.” HCAD argued that it did not and could not control the content or result of any decision the Board made. But the Court held that controlling the outcome of a Board member’s decisions was not the test. Rather, the test the TWC adopted looked at twenty different factors to determine whether, on balance, the purchaser of the worker’s service “has the right to direct or control the worker, both as to the final results and as to the details of when, where, and how the work is done.” Thus, the Court held that Board members were not precluded from meeting the definition of “employment” under TUCA simply because they exercised independent judgment, or the content and result of their decisions were not under the direct control of HCAD.

In addition, the Court rejected HCAD’s arguments that Tax Code sections 6.412(c) and 6.413(a) supported its argument that a Board member could not be an employee of HCAD. The purpose of these Tax Code provisions is to prevent a conflict of interest by determining who may serve on an appraisal review board in order to maintain equal and uniform taxation. In contrast, the primary purpose of TUCA is to “provide compensation for workers who are unemployed through no fault of their own.” Therefore, these statutes serve
two separate and distinct purposes, and the cited Tax Code sections were irrelevant to the claimants’ status as HCAD employees under TUCA. Indeed, the Tax Code neither defined nor used the term “employment.” Accordingly, the Tax Code’s references to the term “employee” did not control TUCA’s determination of employment status and did not prohibit or prevent a Board member from being an employee of HCAD for TUCA purposes.

As for the evidence supporting the TWC’s determination, the claimants presented undisputed evidence to the TWC that HCAD paid them for their services. Therefore, the presumption of employment arose under section 201.041, and it became HCAD’s burden to show “to the satisfaction of the commission that the individual’s performance of the service has been and will continue to be free from control or direction under the contract and in fact.” After reviewing the evidence, the Court concluded that although no evidence supported the TWC’s finding of employment under some of the factors and some factors did not apply under the circumstances, there was substantial evidence—that is, more than a scintilla—to support the TWC’s determination that HCAD did not overcome the presumption of employment under several parts of the twenty-factor test.

Finally, the Court rejected HCAD’s argument that the claimants fell under an exemption in TUCA for members of the judiciary, specifically Labor Code section 201.063(a)(1)(C). This provision did not define “judiciary,” but applying the ordinary meaning of this term and reading it in the context of the entire statute, the plain meaning of section 201.063’s member of the judiciary exemption only applied to members of the judicial branch of government. Also, the Board was akin
to a quasi-judicial body: even though it conducted hearings, determined findings of fact, and issued conclusions of law, these were executive measures designed to efficiently and effectively administer the Tax Code without placing the entire burden on the court system. This delegation of authority did not place the Board members in the judicial branch of government. For these reasons, the Supreme Court agreed with the court of appeals’ determination that Board members were not members of the judiciary within TUCA’s exemption and affirmed the judgment of the court of appeals.


Paul Green worked as a bus monitor for Dallas County Schools (“DCS”). When he was hired, Green told his supervisor he had congestive heart failure and was taking Lasix, a diuretic drug. He later began taking Coreg, a drug he believed had the same urinary side effects. A few years later, DCS assigned Green to a new bus driven by Carlos Barcena. One day in August 2011, after the bus dropped off the only student, Green asked Barcena to stop at a gas station so Green could use the bathroom. Barcena agreed but then turned into a residential area instead of towards the gas station. Green repeated his request, ultimately begging Barcena to stop, but Barcena asked him to wait until the next stop. Green could not wait and involuntarily urinated in his pants. When Barcena finally stopped, Green concealed himself behind the bus doors and finished urinating into an empty water bottle. At the next stop, Green helped a wheelchair-bound student board the bus, secured the wheelchair’s straps, and later released the straps when the bus reached its destination. Green denied that he ever touched the student. Barcena reported the incident and Green was later fired. The termination letter stated that Green was fired because he “engaged in unprofessional conduct,” admitted to “urinating on [himself] and in a water bottle while

1 The resulting final judgment was subsequently vacated by agreement; the Supreme Court’s opinion was not withdrawn.
onboard the school bus,” and “failed to protect the health and safety of the students boarding at [the] next scheduled stop from exposure to bodily fluids.” Green unsuccessfully appealed his termination through DCS’s grievance process and then initiated this lawsuit, alleging DCS terminated his employment because he was disabled.

At trial, the parties agreed that the only issue for the jury to decide was whether DCS terminated Green “because of” his disability. In that regard, the jury heard testimony about the termination process, the reasons for DCS’s decision, congestive heart failure, the drug Green was taking, and urinary incontinence. The jury then found that Green’s disability was a motivating factor in his termination, that DCS would not have made the same decision even if it had not considered Green’s disability, and that Green should recover $41,292 in back pay and $125,000 in compensatory damages. The trial court rendered judgment on the verdict, but the court of appeals reversed and rendered a take-nothing judgment for DCS. It reasoned that Green’s only disability was congestive heart failure, so even if DCS fired Green because of urinary incontinence, Green could not show that he was terminated “because of” his disability.

In a per curiam opinion, the Texas Supreme Court reversed the court of appeals’ judgment and remanded the case back to that court for consideration of other issues it did not reach. The Court agreed with Green that the court of appeals erred by concluding that the only disability the jury could have found was Green’s heart condition. The parties agreed—and the trial court instructed the jury—that Green had a disability, but they left it to the jury to decide what the disability was. Indeed, the jury charge did not forbid the jury from finding that Green’s urinary incontinence was a disability, and the charge referred to “disabilities” (in the plural). Moreover, even if Green did not expressly “argue” that

The court of appeals viewed an employee’s disability too narrowly, and when viewed in light of the jury charge, the evidence supported a finding the employee was terminated because of his disability.
his incontinence was itself a “disability,” the Court refused to hold that Green waived that argument. Courts will not consider issues that were not raised, but parties are free to advance new arguments in support of previously raised issues. Finally, the Court concluded that the record contained legally sufficient evidence that the bus drivers who were DCS employees knew of Green’s urinary incontinence, and this was sufficient under the jury charge to impute knowledge to DCS.

Environmental Law


James A. McAllen controls the 27,000-plus-acre McAllen Ranch (the “Ranch”), and Forest Oil Corporation (“Forest”) has produced natural gas on the Ranch for over 30 years. In the 1990s, McAllen sued Forest for underpayment of royalties, and the parties resolved the dispute with a “Settlement Agreement” and “Surface Agreement.” The Surface Agreement stated that Forest would not store or dispose of hazardous materials on the Ranch and would remove any hazardous materials placed or released on the Ranch, including through remediation. The Surface Agreement also included an arbitration clause. In 2004, McAllen learned from a former Forest employee that Forest had contaminated parts of the Ranch, and McAllen was told that used oilfield tubing donated to him by Forest was contaminated with naturally occurring radioactive material. McAllen then sued Forest for environmental contamination, improper disposal of hazardous materials on the Ranch, and maliciously donating the contaminated pipe. Forest moved to compel arbitration, and while the parties litigated arbitrability, McAllen asked the Railroad Commission to investigate contamination.

The Railroad Commission does not have exclusive or primary jurisdiction over claims for environmental contamination and an arbitration award concerning contaminated property was enforceable.
at the Ranch. The Railroad Commission referred Forest to its voluntary Operator Cleanup Program to propose and implement plans to remediate soil and groundwater conditions at the Ranch. Forest proposed a plan that was partially approved by the Railroad Commission, but was not yet complete.

The dispute was ultimately compelled to arbitration as a result of a prior Texas Supreme Court opinion, and the arbitration proceeded before a three-lawyer panel. Forest chose B. Daryl Bristow of Houston, and McAllen chose Donato Ramos of Laredo. When Bristow and Ramos could not agree on a third arbitrator, Forest asked District Judge Dion Ramos of Houston (no relation to Donato) to name a third arbitrator. Judge Ramos chose Clayton Hoover of Austin, whom McAllen had proposed. A divided arbitration panel denied Forest’s request to abate the arbitration pending final rulings by the Railroad Commission and ultimately awarded McAllen $15 million for actual damages, $500,000 for exemplary damages, and nearly $7 million in attorneys’ fees. The arbitration panel also made certain declarations regarding Forest’s remediation obligations and ordered Forest to provide McAllen with a $10 million bond to assure performance of these obligations.

Forest moved to vacate the award on several grounds. First, Forest argued that the Railroad Commission had exclusive or primary jurisdiction over McAllen’s claims. Forest also asserted that arbitrator Ramos’ evident partiality required vacatur of the award. This argument was based on evidence that McAllen had previously objected to using Ramos as a mediator in another case and that neither McAllen nor Ramos had disclosed this to Forest. Finally, Forest argued that the damage awards were in manifest disregard of Texas law, and the parties agreed to expanded judicial review of the arbitration award. The trial court vacated the award’s $10 million bond requirement but otherwise denied Forest’s motion. The court of appeals affirmed.

A unanimous Supreme Court affirmed the court of appeals’ judgment in an opinion written by Chief Justice Hecht. The Court concluded that none of the statutes Forest relied on
give the Railroad Commission authority that is exclusive of common-law actions. The Court further concluded that Forest’s arguments about the potential for a landowner to recover twice for the same injury if the Railroad Commission does not have exclusive jurisdiction were policy arguments for the Texas Legislature to resolve, not the Court. As to Forest’s primary jurisdiction argument, the Court concluded that the doctrine of primary jurisdiction did not apply because McAllen’s claims were “inherently judicial.” Turning to the enforceability of the arbitration award, the Court held that Forest’s evident partiality argument failed because, among other things, there was no direct evidence that Ramos knew McAllen had objected to Ramos serving as an arbitrator in the other case. Because the arbitration agreement provided that all “disputes relating to his Agreement or disputes over the scope of this arbitration clause [ ] will be resolved by arbitration,” the Court also concluded that the arbitrators had broad authority to determine both the amount and the types of damages to be awarded. Finally, in the absence of a clear agreement to limit the panel’s authority and expand the scope of judicial review, the Court refused to exercise expanded judicial review of the exemplary damages award.

**Exemplary Damages**


The saga underlying this malicious prosecution case began when 13 cattle belonging to rancher Randy Reynolds strayed onto land owned by neighboring rancher, Thomas O. Bennett. Instead of returning the cattle to Reynolds, Bennett told his ranch hand, Larry Grant, to round them up and sell them. Unsure of the legality of this task, Grant took photographs of the cattle as they were sold. One month later, Grant gave the photos to the police and Bennett was indicted for cattle theft. Although he was acquitted of theft, Bennett lost a civil suit brought by Reynolds for the converted cattle.
Bennett then began a campaign of revenge on Grant. Two years after the photos were turned over to police, Bennett alleged that Grant tried to extort money from him for the photos. Over the next several months, Bennett attempted to bring blackmail charges against Grant in four counties, but none of the district attorneys pursued the case because the charges were barred by the statute of limitations. After that, Bennett succeeded in getting his neighbor, Robert Dunn, appointed as a special prosecutor, but the two felony indictments were later quashed because of limitations.

In addition to the criminal charges, Bennett sued Grant for slander, based on allegations that Grant told Reynolds and others that the cattle belonged to Reynolds. After Grant was cleared of criminal charges, he counterclaimed in the civil suit for malicious prosecution. Ultimately, the jury found Bennett and his company, James B. Bonham Corporation, liable to Grant for malicious prosecution. The trial court awarded Grant $10,703 in actual damages ($5,000 for mental anguish and $5,703 in attorney fees), $1 million each against Bennett and Bonham Corp. in exemplary damages, and assessed sanctions of $269,644.50 against Bennett for filing a frivolous slander claim. The Austin Court of Appeals affirmed the actual-damage awards, but remitted the amount of exemplary damages to $512,109 each against Bennett and Bonham Corp. based on constitutional grounds.

Addressing four issues, the Supreme Court affirmed in part and reversed in part. First, the Court affirmed the jury’s award of mental-anguish damages, holding that it was supported by legally sufficient evidence. However, the Court reversed the exemplary-damages award as unconstitutionally excessive and in violation of federal due process. Three criteria govern the review of an exemplary-damages award: (1) the degree of reprehensibility of the misconduct; (2) the disparity between the exemplary-damages award and the actual harm suffered by the plaintiff or the harm likely to result; and (3) the difference between the exemplary damages awarded and the civil or criminal penalties that could be imposed for comparable
conduct. Here, the Court agreed with the court of appeals’
determination as to the first and third criteria, but not the
second. While there is no bright-line rule for the ratio, the
U.S. Supreme Court has indicated that few awards exceeding
a single-digit ratio satisfy due process standards. Here, the
ratio of nearly 48:1 was troublesome. Moreover, in examining
the “harm likely to result”—in order words, “the harm to
the victim that would have ensued if the tortious plan had
succeeded”—the Supreme Court faulted the court of appeals’
consideration of Grant’s possible prison
sentence. The court of appeals considered
the compensation that the State provides
to those wrongfully convicted, concluding
“the potential damages in this case can
be prudently and rationally valued at a
minimum of $160,000.” Thus, the reduced
exemplary-damages award of $512,109
against each defendant resulted in roughly a
3:1 ratio, which was constitutionally sound.
But the Supreme Court noted there was
essentially zero likelihood of imprisonment
because the statute of limitations barred
the claim against Grant. Therefore, the
potential harm analysis should have only
focused on the probable damages resulting
from the malicious prosecution, not the consequences of
wrongful imprisonment. Thus, it was appropriate to consider
attorney fees Grant would incur in defending himself against
criminal charges, as well as the time taken away from his job
by having to participate in criminal proceedings. Because
Grant failed to show imprisonment was likely to result from
Bennett’s conduct, the court of appeals was wrong to consider
imprisonment-related damages.

As to the two remaining peripheral issues, the Supreme
Court held the trial court did not abuse its discretion in allowing
Grant to join Bonham Corp. as a defendant. Although joinder
under Rule 38(a) would have been improper, the joinder was

In reviewing an exemplary-damages
award for a malicious prosecution claim,
the potential harm analysis should focus
on the probable damages from likely
harm, not harm from consequences that
have zero likelihood of happening.
permissible under Rules 37, 39, and 40. Finally, the Court upheld the sanctions awarded against Bennett. Evaluating whether the litigation was frivolous required a factfinder to determine whether Bennett lied and the suit was brought in bad faith. In fact, the jury answered this very question in the affirmative in the charge. Thus, the Supreme Court affirmed in part and reversed in part, remanding the exemplary-damages issue to the court of appeals for remittitur in light of this opinion.


Horizon Health Corporation ("Horizon"), a contract management services provider specializing in managing hospital psychiatric and behavioral health programs, sued a competitor, Acadia Healthcare Company ("Acadia") and its subsidiary Psychiatric Resource Partners ("PRP"), asserting a variety of business-related claims seeking lost profits and exemplary damages. Months earlier, five former members of Horizon’s upper management (the individual defendants) abruptly left the company, joined the newly formed PRP, and began competing directly with their former employer. In addition to the claims against Acadia and PRP, Horizon also sued the individual defendants asserting breach of fiduciary duty, misappropriation of trade secrets, and conversion, among others. At the ensuing trial, the jury entered a unanimous verdict in Horizon’s favor on several of its claims. At issue in this appeal were the following awards: $898,000 in future lost profits from “the Westlake contract”; $3.3 million in future lost profits from the future sales production of John Piechocki, one of the five individual defendants; and $1,750,000 in exemplary damages.

The Fort Worth Court of Appeals reversed and rendered a take-nothing judgment in part and remanded in part. The court of appeals held that (1) Horizon was not entitled to any award of future lost profits damages because its expert testimony was impermissibly speculative and legally insufficient; (2) because only $55,049.24 in compensatory damages remained
(comprised of $50,000 for the theft of property and trade secrets and $5,049.24 for fraudulent expense reports), the jury’s $1,750,000 exemplary damages award was unconstitutionally excessive and therefore remitted to $220,196.96 for each individual defendant, totaling $1,100,984.80; and (3) Acadia and PRP were not jointly and severally liable for the exemplary damages assessed against the individual defendants.

The Supreme Court reversed in part and affirmed in part. Addressing future lost profits, the Court affirmed the court of appeals’ judgment that the evidence was legally insufficient to support either award. To recover lost profits from the contract with Westlake as damages, Horizon needed to present evidence showing that Westlake would have entered into a contract with it. But there was no evidence that Westlake would have entered into a contract with Horizon, as opposed to some other company, had it not signed a contract with PRP, and no evidence supported the conclusion that Westlake would have accepted Horizon’s bid had it not accepted PRP’s. Moreover, Horizon’s damages expert, Jeff Balcombe, simply assumed that Horizon would have won the Westlake contract if not for the defendants’ wrongful conduct, and he specifically stated that he had no opinion as to whether Horizon would have retained Westlake. As for the lost profits award stemming from Piechocki’s future sales, the record supported the court of appeals’ conclusion that Balcombe’s testimony regarding the length of Piechocki’s future employment at Horizon and the success he would have had during that time was based on improper assumptions and thus conclusory. Indeed, Balcombe based his estimates regarding the profitability of Piechocki’s future sales on the average profit generated by contracts sold by Horizon generally, rather than the profit generated by the contracts Piechocki sold. Thus, the evidence was legally insufficient to support the jury’s finding that Horizon sustained lost profits.

The Court next held that the court of appeals’ remitted exemplary damages award was unconstitutionally excessive. As an initial matter, the Court agreed with the court of appeals’ holding that legally sufficient evidence supported the jury’s
finding that all of the individual defendants acted with malice. But the appellate court’s suggested remittitur was excessive given the $55,049.24 in actual damages that remained. Whether an award comports with due process is measured by three guideposts: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. As to the first guidepost, courts determine the reprehensibility of a defendant’s conduct by considering whether: (1) the harm caused was physical as opposed to economic; (2) the tortious conduct demonstrated an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident. Here, the Court determined that only the fifth reprehensibility factor was present, thus concluding that the exemplary damages award remained excessive despite the court of appeals’ suggested remittitur. Regarding the disparity between the compensatory and exemplary damages awards, the alleged excessiveness of exemplary damages must be evaluated on a per-defendant basis (as opposed to a per-judgment basis) because the exemplary damages themselves are assessed by the jury on a per-defendant basis. Moreover, in determining the basis for a constitutionally permissible amount of exemplary damages, courts must consider the harm each defendant actually caused and assess the punishment based on that harm because this approach most closely matches the punishment to each defendant’s misconduct. Because the ratios of compensatory to exemplary damages against each individual defendant remained excessive,
the Court remanded the case to the court of appeals to re-examine this issue, analyzing the reprehensibility of each individual defendant’s conduct and comparing the ratio of compensatory to exemplary damages on a per-defendant basis, calculated based on the harm that the jury found each defendant caused Horizon to suffer.

As to the remaining issues, the Court affirmed the court of appeals’ reversal of the trial court’s judgment assessing exemplary damages against Acadia and PRP on a joint and several basis. This result is supported by Civil Practice and Remedies Code section 41.006, which states that “an award of exemplary damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant.” The Court further held that remanding the issue of the attorney’s fees awarded to Horizon was proper, given the insufficient evidence supporting any award of future lost profits. Finally, the trial court did not err in imposing discovery sanctions against one of the individual defendants. Thus, the Supreme Court affirmed in part, reversed in part, and remanded the case to the court of appeals so that it could reconsider its suggested remittitur of exemplary damages in light of this decision.

**Governmental Immunity**


Pregnant with twins, Shana Lenoir received prenatal care at the University of Texas Physicians Clinic in Houston. Her doctor was Leah Anne Gonski, a second-year medical resident. After she received first prescribed progesterone injection, Shana experienced breathing problems, and she and her unborn children died. Shana’s mother and the father of Shana’s living child brought a medical malpractice suit against Gonski and other defendants. In response to the suit, Gonski filed a motion to dismiss under the election-of-remedies provision of the Tort Claims Act, specifically section 101.106(f). She claimed this
provision entitled her to dismissal because she was an employee of a governmental unit, namely the University of Texas System Medical Foundation (“Foundation”). The trial court granted Gonski’s motion, but the First Court of Appeals reversed and remanded, concluding that she did not establish she was an employee of the Foundation.

The Supreme Court affirmed, holding that Gonski was not an employee of the Foundation because it had no control over the details of her tasks as a medical resident. The definition of “employee” under section 101.106(f) of the Tort Claims Act expressly excludes “a person who performs tasks the details of which the governmental unit does not have the legal right to control.” Here, the evidence at the trial court showed that Gonski was in a residency program offered by the University of Texas Health Science Center at Houston (“UTHSCH”). Although the Foundation was involved in administering this residency program, including issuing Gonski’s paychecks, providing malpractice insurance to her, and maintaining her records, the Foundation did not control her tasks as a resident physician. Citing Murk v. Scheele, 120 S.W.3d 865 (Tex. 2003) (per curiam) and St. Joseph Hospital v. Wolff, 94 S.W.3d 513 (Tex. 2002), the Court determined the details of Gonski’s tasks as a resident physician were, under the relevant contract and other documents and in actual practice, controlled by UTHSCH and its physicians, not the Foundation. Through its Program Director and clinic medical staff, UTHSCH controlled the daily rotations, duties, and responsibilities of residents in its residency program. In contrast, the Foundation’s administrative functions did not rise to the level of controlling Gonski’s daily tasks as a physician, her chosen occupation. In addition, the Foundation’s own bylaws expressly and emphatically disavowed any right to control a physician working at any hospital not
owned by the Foundation. And although the Foundation may have, as Gonski argued, a “legal” or formal right to control her, the Court refused to adopt two definitions of control when the statute’s express focus on the “details” of the employee’s tasks suggested a focus on the real or practical, as opposed to theoretical. For these reasons, the Supreme Court affirmed the court of appeals’ judgment and remanded the case to the trial court for further proceedings.


University of the Incarnate Word (“UIW”) is a private university that maintains and operates a state-authorized police department for its campus. This case arises from a UIW officer’s use of deadly force following a traffic stop. The incident resulted in the death of UIW student, Cameron Redus. Redus’s parents sued UIW and the officer for their son’s death. In its answer to the suit, UIW raised governmental immunity as a defense and moved to dismiss the suit in a plea to the jurisdiction. After the trial court denied the plea, UIW appealed this decision under Civil Practice and Remedies Code section 51.014(a)(8), which authorizes an interlocutory appeal from an order granting or denying a governmental unit’s plea to the jurisdiction. Although UIW did not claim to be a governmental unit generally, it argued it was a governmental unit when defending the actions of its police department. The San Antonio Court of Appeals disagreed and dismissed the appeal.

Concluding that UIW was a governmental unit for purposes of this interlocutory appeal, the Supreme Court reversed and remanded. As noted, section 51.014(a)(8) allows an interlocutory appeal from an order that “grants or denies a plea to the jurisdiction by a governmental unit.” The term “governmental unit” has the same meaning here that it does in the Tort Claims Act (“Act”). To be a governmental unit under the Act, UIW must (1) be an “institution, agency, or organ of government” and (2) derive its “status and authority” as such from “laws passed by the Legislature.” As to the latter prong,
UIW derived its status and authority to commission and employ peace officers and operate a police department from laws passed by the Legislature, including Education Code section 51.212(b), which authorized UIW to enforce state and local law using the same resource municipalities and the State use to enforce law. As to the first and more difficult prong to decide, the Court held UIW was a governmental unit as to its law enforcement function. Thus, the Court concluded that UIW was entitled to pursue an interlocutory appeal under section 51.014(a)(8). The Court, however, emphasized that whether an entity is entitled to an interlocutory appeal and whether an entity has sovereign immunity are separate questions with separate analytical frameworks. The Court’s conclusion that UIW was a governmental unit was not a comment on the merits of UIW’s plea to the jurisdiction, an issue that was not before the Court and will instead be decided by the court of appeals. Accordingly, the Supreme Court reversed the court of appeals’ judgment and remanded for it to resolve UIW’s interlocutory appeal.

**Insurance**


After Hurricane Ike struck Galveston Island in September 2008, Gail Menchaca contacted her homeowner’s insurance company, USAA Texas Lloyds, and reported that the storm had damaged her home. USAA sent an adjuster to investigate Menchaca’s claim, and the adjuster found only minimal damage. Based on the adjuster’s findings, USAA determined that its policy covered some of the damage but declined to pay Menchaca any benefits because the estimated repair costs did not exceed the policy’s deductible. At Menchaca’s request,
USAA later sent another adjuster to re-inspect the property. This adjuster generally confirmed the first adjuster’s findings, and USAA again refused to pay any policy benefits. Menchaca sued USAA for breach of the insurance policy and for unfair settlement practices in violation of the Texas Insurance Code. As damages for both claims, she sought insurance benefits under the policy.

The case was tried to a jury, which was asked three questions. Question 1 asked whether USAA failed to comply with the terms of the insurance policy; the jury answered “no.” Question 2 asked whether USAA violated the Insurance Code by, among other things, failing to pay a claim without conducting a reasonable investigation; the jury answered “yes.” Finally, Question 3 asked the jury to determine Menchaca’s damages; the jury answered $11,350, which is the amount of policy benefits Menchaca was seeking.

Both parties moved for judgment in their favor. USAA argued that because the jury failed to find that USAA breached the policy’s terms, Menchaca could not recover. Menchaca, however, argued that she was entitled to judgment based on the jury’s answers to Questions 2 and 3. The trial court ultimately disregarded the jury’s answer to Question 1 and entered final judgment in Menchaca’s favor. The court of appeals affirmed.

In a unanimous opinion written by Justice Boyd, the Texas Supreme Court reversed the court of appeals’ judgment and remanded the case for a new trial in the interest of justice. The Court used this case to clarify its precedent by announcing five rules that address the relationship between contract claims under an insurance policy and tort claims under the Insurance Code. First, an insured generally cannot recover policy benefits as damages for an insurer’s statutory violation if the policy does not provide the insured a right to receive those benefits. Second, an insured who establishes a right to receive benefits...
under an insurance policy can recover those benefits as actual damages under the Insurance Code if the insurer’s statutory violation causes the loss of the benefits. Third, even if the insured cannot establish a present contractual right to policy benefits, the insured can recover benefits as actual damages under the Insurance Code if the insurer’s statutory violation caused the insured to lose the contractual right. Fourth, if an insurer’s statutory violation causes an injury independent from the loss of policy benefits, then the insured may recover damages for that injury. Finally, an insured cannot recover any damages based on an insurer’s statutory violation if the insured has no right to receive benefits under the policy and sustained no injury independent from the policy benefits.

After discussing these guiding rules, the Court concluded that it was proper to remand the case for a new trial. The Court agreed with USAA that the trial court erred by disregarding the jury’s answer to Question 1 because the jury’s answers to Questions 2 and 3 did not render the answer to Question 1 immaterial. Nevertheless, the Court concluded that the confusing nature of its precedent precluded it from faulting either party for the arguments they made in the trial court. Thus, a remand in the interest of justice was appropriate.

**LANDLORD-TENANT LAW**


Shields Limited Partnership ("Shields") owns commercial property housing the San Francisco Rose restaurant in Dallas. Boo Nathaniel Bradberry and 40/40 Enterprises, Inc. (collectively "Bradberry") were the long-term tenants. Per the lease agreements, Bradberry had the option to extend the lease term for three successive five-year periods. Although he timely and properly exercised this option, Bradberry failed to begin paying the increased rent amount under the option; he also continued to pay his rent untimely and irregularly in violation of the lease. Believing that Bradberry was under a month-to-
month tenancy, Shields sent him a new lease that tripled the monthly rent, but Bradberry rejected it. Shields then told Bradberry to vacate the premises in 30 days. When Bradberry refused to leave, Shields filed eviction proceedings.

Both the justice court and the county court ruled in Bradberry’s favor. The Dallas Court of Appeals affirmed, holding that Shields’s continued acceptance of late rent payments without imposing late fees or declaring the lease in default was inconsistent with its assumption that Bradberry failed to fulfill the obligations of the lease and was therefore precluded from exercising the option. Moreover, because Bradberry previously gave Shields timely notice of his intent to exercise the option, the extension took effect. The court of appeals also summarily rejected Shields’s alternative argument that, even if Bradberry had successfully exercised the extension option, he was in default under the lease based on his failure to pay the increased rent amount.

The Supreme Court reversed the court of appeals’ judgment, rendered judgment in Shields’s favor, and remanded to the trial court to award attorney’s fees in accordance with the parties’ contract. Disposition of whether Bradberry’s right of possession terminated ultimately turned on the force and effect of the parties’ nonwaiver agreement, which unequivocally precluded a defense of waiver premised on Shields’s acceptance of late rental payments. The agreement provided that the landlord’s “acceptance of late installment of Rent shall not be a waiver and shall not estop Landlord from enforcing that provision or any other provision of [the] lease in the future”; “all waivers” must be “in writing and signed by the waiving party”; and any forbearance of enforcement shall not be construed to constitute a waiver.

Agreeing with Shields, the Court held that, as a matter of law, accepting late rental payments did not waive the nonwaiver provision in the underlying lease or, correspondingly, the contractual requirement that rent was due on the first of the month, without prior demand, and no later than the tenth day of the month. The question here was not whether the
nonwaiver clause in the parties’ agreement was enforceable, but whether that clause was waivable and, if so, the circumstances under which waiver might occur. Under the fact of this case, accepting late rental payments could not waive the parties’ agreement that contractual rights, remedies, and obligations would not be waived on that basis, especially when the lease provided a specific method for obtaining a waiver. Thus, the Court held that engaging in the very conduct disclaimed as a basis for waiver was insufficient as a matter of law to nullify the nonwaiver provision in the parties’ lease agreement.

In addition, the Court held that Shields did not act inconsistently with its right to accept untimely rent without waiving the nonwaiver provision. The lease did not obligate Shields to affirmatively reject Bradberry’s rental payment, and its failure to do so reflected no inconsistency. Furthermore, Shields’s continued acceptance of Bradberry’s rental payments of $3,000 per month was consistent—not inconsistent—with its claim that Bradberry became a month-to-month tenant.

Finally, the Court rejected Bradberry’s alternative basis for affirming the judgment in his favor that Shields was estopped from claiming Bradberry failed to extend the lease. To succeed, Bradberry needed to show he detrimentally relied on Shields’s false representations or an undisclosed material fact, but he provided no such evidence. Bradberry made renovations to the property without input or approval from Shields. And Shields’s knowledge of these improvements after their completion did not constitute a misrepresentation on which Bradberry detrimentally relied. Accordingly, the Supreme Court reversed the court of appeals’ judgment, rendered judgment that Shields had a superior right to immediate possession of the leased premises, and remanded to the trial court to award attorney’s fees in accordance with the parties’ contract.

**Waiver of a nonwaiver provision cannot be anchored in the same conduct the parties specifically agreed would not give rise to a waiver of contract rights.**
The Texas Supreme Court reversed the court of appeals’ judgment and reinstated the trial court’s judgment dismissing Pedernal’s petition without prejudice in an opinion written by Justice Johnson and joined by all the Court’s members except Justice Devine. The Court reasoned that although the Certificate of Merit statute requires dismissal if the plaintiff fails to file an affidavit with the complaint, it does not require dismissal with prejudice. Thus, Pedernal’s failure to file an expert affidavit with its original petition was not, by itself, evidence that the allegations in its petition lacked merit or deserved the
sanction of dismissal with prejudice. Looking to the record at the time of dismissal, the Court further concluded that the trial court’s decision to dismiss the case without prejudice was not so arbitrary and unreasonable that it constituted an abuse of its discretion. Going further than the court of appeals and reaching Bruington’s alternative argument in the interest of judicial economy, the Court held that alleged deficiencies in the expert affidavit Pedernal filed were not so glaring that the trial court abused its discretion by not dismissing Pedernal’s claims with prejudice.

Justice Devine authored a concurring opinion. He agreed the Certificate of Merit statute does not require a trial court to dismiss a complaint with prejudice merely because it was filed without an expert affidavit, and he agreed that a deficient affidavit, without more, does not require dismissal with prejudice. But Justice Devine would not have merely reinstated the trial court’s judgment. Rather, he would have remanded for the trial court to consider Bruington’s motion to dismiss “unburdened” by what Justice Devine perceived as an erroneous, intervening mandate from the court of appeals, which resulted from Bruington’s first appeal.


James Rogers sued his former attorneys, Victor Zanetti, Charles Perry, and the firm of Andrews Kurth, for legal malpractice stemming from their work on an investment agreement and a subsequent lawsuit against him by his investment partners. Rogers hired Zanetti to draft an investment agreement for his partial ownership in a home-healthcare company called Accent Home Health (“Accent”). The agreement required Rogers to provide his services and a financial commitment of $250,000. But after executing the

Certificate of Merit statute did not preclude dismissal without prejudice, and the order dismissing the case without prejudice was not an abuse of discretion.
deal, Rogers failed to provide the money and began drawing on Accent’s accounts, transferring money into other accounts that only he could access. Accent’s founding members then sued Rogers, his accountant, and two of his companies for fraud, conversion and other claims. Rogers then hired Perry and Andrews Kurth to defend him in the lawsuit, but on the recommendation of Andrews Kurth, Rogers procured new counsel some time before trial. Eventually, the jury found Rogers had defrauded Accent’s founders and awarded damages to them. The trial court also declared the investment agreement void because it was procured by fraud, was unconscionable, and lacked consideration. The court of appeals thereafter affirmed the trial court’s judgment.

Rogers then sued Zanetti, Perry, and Andrews Kurth for legal malpractice. Rogers alleged that Perry should not have accepted employment as his defense counsel because Perry’s existing relationship with Zanetti and Andrews Kurth created a conflict of interest. Rogers further alleged that the conflict caused Perry not to designate Zanetti and Andrews Kurth as responsible third parties (“RTPs”), demonstrating that Perry was more interested in protecting Zanetti from the consequences of the negligently drafted investment agreement than he was in defending Rogers. And although Perry withdrew from the defense before the case was tried, Rogers complained that Perry’s negligence had already compromised his defense by that time because (1) he failed to advise Rogers of a settlement offer that might have ended the litigation, and (2) Perry failed to designate a rebuttal expert on Accent’s value that led to an excessive damages award. Zanetti, Perry, and Andrews Kurth moved for summary judgment on all claims, primarily on causation grounds among others. The trial court granted the motions and the Dallas Court of Appeals affirmed.

Specifically addressing whether Rogers’ summary-judgment evidence raised a material fact issue as to causation, the Supreme Court found no such evidence and affirmed. First, the Court held that neither any negligence in drafting the investment agreement nor the failure to raise a proportionate-responsibility
defense caused Rogers’ harm. Causation in a legal malpractice claim encompasses the traditional cause-in-fact standard, which requires that the act or omission be a substantial factor and that it be a but-for cause of the injury or occurrence. Here, the alleged drafting error was not a cause of Rogers’ harm because before Zanetti’s alleged drafting errors, Rogers had already committed fraud sufficient to render the agreement unenforceable regardless of its language. Moreover, Perry’s failure to join Zanetti and Andrews Kurth as RTPs was causally irrelevant because Rogers’ antecedent fraud supported his liability in the underlying case.

Next, the Court held that the failure to designate a damages expert to rebut the plaintiffs’ valuation of Accent did not cause Rogers’ harm. Whether a negligent lawyer’s conduct is the cause in fact of the client’s claimed injury requires an examination of the hypothetical alternative: What should have happened if the lawyer had not been negligent? Rogers’ burden then was to show that (1) alternative expert valuation testimony was available and (2) the testimony would have probably altered the verdict. However, none of the four experts he offered could satisfy both prongs of this test.

Finally, the Court held that the failure to communicate a settlement offer to Rogers did not cause his harm. Evidence showed that Accent’s founders offered to settle their case against Rogers and transfer full ownership of the business to him for $450,000. Asserting that he never received this offer, Rogers argued that had he known of it, he might have settled the case and avoided the adverse judgment. However, he presented no evidence that the case would have settled on those terms or any others, or that he could have paid either the $450,000 actually demanded or any lesser sum that Accent’s founders would have accepted. Because Rogers’ summary-judgment evidence failed to raise a material fact issue as to the causation element of he claims, the Supreme Court affirmed the court of appeals’ judgment.

But-for causation standard applies to legal malpractice claims based on litigation or transactional negligence.
Oil and Gas


BP America Production Company (“BP”) owns the Vera Murray oil and gas lease. The lease, which originated in 1962, has a five-year primary term and lasts “as long thereafter as oil, gas or other minerals is produced.” In 1986, the lessee drilled three wells—the Vera Murray #9, #10, and #11—but by June 12, 2012, the #11 well was the only well that could have sustained the lease. Over time, the #11 well had been a marginal well. Its production had steadily declined from averaging 200 Mcf per day in the 1990s to 100Mcf per day in 2000 and just 10Mcf per day by 2009. Red Deer Resources, LLC (“Red Deer”) discovered the low production from the Vera Murray lease and obtained top leases in June 2011, which give Red Deer the right to file suit to terminate BP’s lease. The #11 well experienced a seven day period with no production in May 2012, followed by a general pattern of producing every other day. On June 12, 2012, BP turned off the well valve, and the next day, BP sent notice to the lessors that it was invoking the shut-in royalty clause and enclosing checks for the shut-in royalty owed.

Because BP did not commence any operations that could have sustained the lease under the cessation-of-production clause, BP had to properly invoke the shut-in royalty clause to maintain the lease. The shut-in royalty clause stated as follows:

Where gas from any well or wells capable of producing gas . . . is not sold or used during or after the primary term and this lease is not otherwise maintained in effect, lessee may pay or tender as shut-in royalty . . . payable annually on or before the end of each twelve month period during which such gas is not sold or used and this lease is not otherwise maintained in force, and if such shut-in royalty is so paid or tendered and while lessee’s right to pay or tender same is accruing, it shall be considered that gas is being produced in
paying quantities, and this lease shall remain in force during each twelve-month period for which shut-in royalty is so paid or tendered….

Red Deer sued BP in August 2012—more than sixty days after BP shut in the #11 well—and asked the trial court to declare that BP’s lease had terminated. Red Deer asserted that BP’s lease terminated because either (1) the lease had not produced in paying quantities, based on a period ending on June 12, 2012, or (2) the #11 well was incapable of producing in paying quantities on June 13, 2012, so the shut-in clause did not save it. Based on a jury’s verdict, the trial court rendered judgment consistent with Red Deer’s second theory, declaring that BP’s lease had “lapsed and terminated for the lease being incapable of producing in paying quantities when the Vera Murray Well #11 was shut-in on June 13, 2012 and that a reasonably prudent operator would not continue to operate the well.” The court of appeals affirmed this judgment.

Justice Green authored a unanimous opinion for the Texas Supreme Court, reversing the court of appeals’ judgment and rendering judgment in favor of BP. The Court explained that Red Deer had the burden to prove that BP failed to properly invoke the shut-in rights under its lease, and it reasoned that Red Deer failed to satisfy this burden. The Court concluded that the parties improperly focused on the date the #11 well was shut in rather than the date specified in the lease. The shut-in clause in BP’s lease uses the date gas was last “sold or used,” not the date the shut-in royalty was paid or the date the valve was closed, as the operative date for determining a well’s capability to produce gas in paying quantities over a reasonable period of time. Thus, tender of the shut-in royalty at any time “before the end of the twelve-month period during which such gas is not sold or used” preserves the lease from the last day on which gas was sold or used, so long as

Producer’s lease remained valid because top-leaseholder did not obtain a finding that the well was incapable of production in paying quantities on the material date under the lease.
the shut-in well was capable of production in paying quantities on the day the last gas was sold or used. Here, the last gas was sold or used on June 4, 2012, so Red Deer bore the burden of proving and obtaining a finding that the #11 well was incapable of production in paying quantities over a reasonable period of time as of June 4, 2012. Red Deer failed to do so, meaning Red Deer failed to carry its burden to prove and obtain a finding that BP’s exercise of its shut-in right was improper under the terms of the lease. Although Red Deer argued that BP waived this issue by failing to object at the charge conference, the Court concluded otherwise. It held that BP did not need to object because the jury questions were immaterial due to the focus on a date different from the date required by the lease’s shut-in clause.


In 1991, Virginia Cope and James Mills separately conveyed all of their respective minerals interests in vaguely described tracts in Harrison County, Texas to JD Minerals (“Davis”). Each conveyance contained a two-sentence Mother Hubbard clause, as well as general granting clause stating that “all of the mineral, royalty, and overriding royalty interest owned by Grantor in Harrison County, whether or not same is herein above correctly described.”

Twenty years later, Cope and Mills separately deeded the same interests to Mark J. Mueller. Mueller then sued Davis to quiet title to the mineral interests, arguing the property descriptions and general granting clause in the 1991 deeds were insufficient to satisfy the requirement of the Statute of Frauds that conveyed property be identified with reasonable certainty. Mueller also sued for conversion of the royalties and payments obtained from the mineral interests, adverse possession, fraud, and failure of consideration. Davis raised various affirmative defenses and argued that the general granting clause was sufficient to pass title of all the grantors’ mineral interests in Harrison County. Both sides moved for summary judgment
on the title issue. The trial court denied Mueller’s motion and granted Davis’s without stating the grounds, and rendered a take-nothing judgment against Mueller. The Texarkana Court of Appeals reversed and remanded, holding that the general granting clause was ambiguous and concluding that the parties’ intent was a fact issue to be decided by a jury. The appellate court also reversed summary judgment on Mueller’s statutory fraud, conversion, and adverse possession claims, even though he did not appeal that portion of the trial court’s decision.

The Supreme Court reversed and rendered for Davis, holding that the 1991 deeds were unambiguous. Distinguishing the general granting clause in this case from the ambiguous one in *J. Hiram Moore, Ltd. v. Greer*, 172 S.W.3d 609 (Tex. 2005), the Court rejected Mueller’s argument that the deficiencies of the specific descriptions could not be cured by the general granting clause, noting that “that is precisely the purpose of the general grant when included with specific grants.” The Court determined that the general granting clause in the 1991 deeds resolved any ambiguity by conveying “all of the mineral, royalty, and overriding royalty interest owned by Grantor in Harrison County, whether or not same is herein above correctly described.” According to the Court, this language “could not be clearer. All means all.” Concluding that the general grants in the 1991 deeds were valid and unambiguous, and that they conveyed title of Cope’s and Mills’s Harrison County mineral interests to Davis before the conveyances to Mueller, the Court determined that Davis had superior title.

As for the court of appeals remand of Mueller’s claims for statutory fraud, conversion, and adverse possession, the Supreme Court agreed with Davis that these claims had no merit. Davis could not have fraudulently claimed or converted
royalties from property he owned. Moreover, Mueller had no standing to prosecute any claim for adverse possession that non-parties Cope and Mills would have. Therefore, the court of appeals erred in remanding Mueller’s these claims. For these reasons, the Court reversed the court of appeals’ judgment and rendered judgment that Mueller take nothing.


Anadarko E&P Onshore, LLC (“Anadarko”), entered into an oil and gas lease covering the minerals beneath the Chaparral Wildlife Management Area, which the Texas Parks and Wildlife Department controls. The lease restricted Anadarko’s use of the surface and required it to drill from off-site locations “when prudent and feasible.” As a result, Anadarko planned to locate well sites on the surface of adjacent tracts and use horizontal drilling to produce minerals from its lease. Briscoe Ranch, Inc. (the “Ranch”), owned an adjacent surface estate and agreed that Anadarko could drill from the surface of the Ranch using wellbores that would start vertically and then “kick-off” horizontally to reach Anadarko’s mineral estate. Lightning Oil Company (“Lightning”), is the lessee of the minerals underlying the Ranch and was not a party to the agreement between the Ranch and Anadarko. Lightning sought to enjoin Anadarko from drilling on the Ranch, claiming that Lightning’s consent was necessary before Anadarko could drill through the Ranch’s subsurface covered by Lightning’s mineral lease.

Both Lightning and Anadarko filed traditional and no-evidence summary judgment motions. In their traditional motions, each party sought partial summary judgment as to Lightning’s claims for trespass and injunctive relief and on the issue of whether the Ranch could authorize Anadarko’s subsurface activities absent Lightning’s consent. Anadarko also challenged Lightning’s tortious interference claim. In Lightning’s no-evidence motion, it asserted Anadarko had no evidence to prove its affirmative defense of justification in
response to Lightning’s claim for tortious interference with its lease. The trial court granted Anadarko’s motion for partial summary judgment, denied Lightning’s motions, and pursuant to a Rule 11 agreement, severed those rulings so they could be appealed. The court of appeals affirmed, concluding that the surface estate owner controls the earth beneath the surface estate and may grant another permission to site a well, drill down through the earth, and directionally alter the wellbore into adjacent mineral estate.

Justice Johnson, writing for a unanimous Texas Supreme Court, affirmed the court of appeals’ judgment. The Court noted that it had not yet addressed the question of whether a lessee’s rights in a mineral estate include the right to preclude the surface owner or an adjacent lessee’s activities that are not intended to capture the lessee’s minerals, but rather to merely traverse through formations in which the lessee’s minerals are located. After observing that horizontal drilling activities such as Anadarko’s would likely result in the extraction of at least some (though minimal) amounts of minerals in Lightning’s mineral estate, the Court squarely confronted the question of whether Lightning had the right to prevent that outcome by reason of its status as the mineral estate owner. The Court concluded Lightning did not.

The Court explained that the rights conveyed by a mineral lease “do not include the right to possess the specific place or space where the minerals are located. Thus, an unauthorized interference with the place where the minerals are located constitutes a trespass as to the mineral estate only if the interference infringes on the mineral lessee’s ability to exercise its rights.” The Court went on to reason that whether the small amount of minerals lost through the drilling process that Anadarko intended to deploy

A lessee’s rights to a mineral estate do not include a blanket right to preclude the surface owner from permitting another to bore through formations in which the lessee’s minerals are located for the purpose of capturing minerals from an adjacent mineral estate.
would support a trespass claim depended on balancing the interests of the parties, the oil and gas industry, and society. After considering these interests, the Court concluded that the interests of the industry and society in maximizing oil and gas recovery outweighed Lightning’s individual interest. Accordingly, the loss of minerals Lightning would suffer by a well being drilled through its mineral estate was not a sufficient injury to support a claim for trespass, nor could it support a request for injunctive relief. Finally, the Court held that the agreement between the Ranch and Anadarko does not tortiously interfere with Lightning’s contractual lease rights.

**Summary Judgment – Movant’s Burden**


Luz Chavez sued Kansas City Southern Railway and its engineer (collectively “KCS”) for the wrongful death of her husband and son. The case was tried to a defense verdict, but the trial court granted Chavez’s motion for new trial, and counsel for both sides began settlement negotiations. They reached a letter agreement, signed by counsel. At the hearing to approve the settlement, Chavez asked the court to give her three months to find new counsel. In response, KCS moved to enforce the settlement agreement. The trial court granted KCS’s motion and rendered judgment on the settlement agreement, awarding Chavez $531,000, of which $325,000 went to her law firm for expenses.

After an initial appeal and remand on an unrelated issue, KCS filed the settlement agreement, sued Chavez for breach of contract, and moved for summary judgment. KCS’s evidence established that Chavez was represented during settlement negotiations by the same law firm that had represented her at trial, including the lawyer who signed the settlement agreement on her behalf. However, KCS’s motion and evidence did not otherwise address Chavez’s law firm’s authority to agree to the settlement. Chavez responded by affidavit that she had never
consented to the settlement. The trial court granted KCS’s motion. The San Antonio Court of Appeals affirmed, relying in part on the presumption that because Chavez hired the lawyer that signed the settlement agreement, that lawyer had actual authority to bind her to the agreement.

The Supreme Court reversed, holding that KCS failed to establish affirmatively that Chavez’s law firm was authorized to execute the settlement agreement on her behalf. Citing Missouri-Kansas-Texas Railroad Co. v. City of Dallas, 623 S.W.2d 296 (Tex. 1981), the Court reiterated that “[t]he presumptions and burden of proof for an ordinary trial are immaterial to the burden that a movant for summary judgment must bear.” Here, KCS never provided evidence that Chavez actually authorized her counsel to enter into a settlement agreement on her behalf. Relying on a presumption, KCS only produced evidence that Chavez hired counsel to represent her in this litigation and that those lawyers agreed to the settlement. Because KCS failed to conclusively establish each element of its claim, the Supreme Court reversed the judgment of the court of appeals and remanded the case to the trial court for further proceedings.

TRESPASS


The energy companies in this case own four natural-gas compressor stations adjacent to one another outside the Town of DISH and within a half-mile of residential properties. Enbridge Gathering’s compressor station came online in February 2005; Atmos Energy’s in June 2006; Energy Transfer’s in February 2007; and Texas Midstream’s in May 2008. Together, these compressor stations are referred to as the Ponder station. Enterprise Products completed a nearby metering station in

At trial, a presumption operates to establish a fact until rebutted, but not in summary judgment proceedings.
June 2009. The Town of DISH and eighteen of its residents sued the energy companies on February 28, 2011, alleging trespass and nuisance injuries. The energy companies moved for summary judgment on various grounds, including limitations. The residents responded that their claims did not accrue until the Ponder station was “completely finished” in the summer of 2009, maintaining that Enterprise’s metering station is part of the Ponder station. Although the residents began asserting vociferous complaints as far back as 2006, they asserted their claims did not accrue until the summer of 2009 when the full force and cumulative effect of all of the parts of the completed Ponder station came to bear. The trial court granted summary judgment to the energy companies, but the court of appeals reversed the trial court on limitations. The court of appeals held that the energy companies failed to establish as a matter of law that the residents’ claims accrued before February 2009.

In a unanimous opinion written by Justice Brown, the Texas Supreme Court reversed the court of appeals’ judgment and reinstated the trial court’s take-nothing judgment in favor of the energy companies. The Court began its analysis by considering Enterprise’s argument that its metering facility does not contribute to the Ponder station’s alleged noise and odor. Upon reviewing the record, the Court found no evidence to rebut Enterprises contention. Indeed, the evidence showed that the metering station was a “closed-in system” that neither vents gas nor creates noise that is audible offsite, and even if gas were to be emitted from the facility, it would not have an odor because the facility services only “sweet gas.” After reaching this conclusion, the Court turned to the energy companies’ limitations argument. The relevant limitations period is two years, and the evidence established that residents began making the same complaints that they raised in this case as early as 2006. Moreover, the last compressor was

Energy companies established as a matter of law that claims related to noise and odor emanating from a gas compressor station accrued more than two years before plaintiffs sued and were therefore time barred.
undisputedly brought online by May 2008, and it is logical to conclude that the residents would have known of unreasonable discomfort or annoyance promptly thereafter. In attempting to refute the limitations defense, the residents relied on subjective statements contained in their affidavits and a report. But the Court concluded that the report confirmed the residents’ were aware of the basis for their claims before the report was issued, and although plaintiff’s subjective beliefs matter, “an accrual date must be based on objective evidence, not bare, subjective attestations.”

WILLS AND ESTATES


Lesey Kinsel owned 60% of a family-owned ranch, and her step-children and step-grandchildren owned various shares of the other 40%. Lesey deeded her share of the ranch to her intervivos trust in 1996. Under the trust’s terms, her 60% interest in the surface and minerals would pass to certain of her step-children and step-grandchildren, some of whom already owned interests in the ranch, but Lesey’s inheritance allocation changed over time. Under a third amendment to her trust executed in 2004, her 60% share would be split between J. Frank Kinsel, Jeff Kinsel, Carole Edwards, and Cathy Collins. Because her estate-planning documents were silent about what would happen if the ranch were sold during her lifetime, any ranch-sale proceeds would pass to the trust’s residual beneficiary—Lesey’s only niece, Jane Lindsey.

In 2005, at the age of 92 and losing her eyesight, Lesey moved from her longtime home of Beaumont to an assisted living facility in Fort Worth where Jane and Lesey’s nephew Bob Oliver lived. Jane was Lesey’s primary caretaker outside of the 24-hour home care she received beginning in 2006, and Jane and Bob began helping Lesey with her finances. In January 2007, Jane and Bob arranged for Lesey to meet with Fort Worth attorney Keith Branyon to execute a fourth amendment
to the trust. Keith met with Lesey alone for an hour and a half and concluded that she was competent and desired to execute the fourth amendment. Meanwhile, others with a stake in the ranch began to consider selling it. Jane was asked to run the idea by Lesey, and Lesey agreed to sell. But some family members were reluctant, particularly without knowledge of where the proceeds from Lesey’s 60% stake would wind up. Even so, the sale eventually occurred and the trust received more than $3 million from Lesey’s share. Shortly after the sale, Lesey met with Keith again, and Keith presented Lesey with a fifth amendment that would have devised the ranch proceeds to the Kinsels in proportion to the trust’s ranch-interest bequests. Lesey rejected the draft and opted to leave Jeff and Carole $25,000 in cash, and she made no bequest to Cathy. Keith prepared an amendment as Lesey instructed, she executed it, and she passed away ten days later.

The Kinsels sued Jane, Bob, Keith, and Keith’s law firm arguing that they unduly influenced Lesey and that Lesey lacked capacity to execute the fourth and fifth amendments to the trust or to sell her share of the ranch. They sought damages for tortious interference with their inheritances and fraud as well as a constructive trust on Lesey’s share of the ranch-sale proceeds. A jury eventually found for the Kinsels on every claim, awarding them the amount of Lesey’s proceeds from the sale. The trial court entered judgment on the jury’s verdict and imposed a constructive trust on Jane’s interest in Lesey’s trust. The court also awarded the Kinsels $800,000 in attorneys’ fees but no appellate fees. The court of appeals reversed the award of damages for tortious interference with inheritance on the basis that it was not a cognizable claim in Texas. It also reversed the award of fraud damages, holding that the trial court presented the jury with an incorrect measure of damages. But the court of appeals affirmed the judgment that Lesey was mentally incapacitated and the trial court’s imposition of a constructive trust. The court of appeals also remanded for a new trial on attorney’s’ fees due to the Kinsels’ failure to segregate recoverable from unrecoverable fees, and it
concluded the jury could have concluded that no appellate fees were warranted because it had an insufficient basis upon which to calculate those fees.

The Texas Supreme Court affirmed the court of appeals’ judgment in a unanimous opinion authored by Justice Brown. The Court began its analysis by reviewing the issue of Lesey’s mental capacity, and it agreed with the court of appeals that some evidence supported the jury’s finding that Lesey lacked sufficient mind and memory to understand the nature and effect of her acts when she executed the trust and sales instruments. The Court then turned to the Kinsels’ fraud claim, and here too it agreed with the court of appeals that the claim failed because an incorrect “out-of-pocket” measure of damages was submitted. This measure was improper because the Kinsels had no present or certain future ownership interest in the ranch when it was sold and no evidence showed the ranch’s present value at the time of trial. Turning to the issue of whether to recognize a claim for tortious interference with inheritance rights, the Court observed that the claim’s “viability is an open question,” and it left the question open because it concluded that the constructive trust was an adequate remedy in this case. Finally, the Court upheld the court of appeals’ conclusions regarding attorneys’ fees.
Transferred Cases – Precedential Value of Resulting Decisions

In re Reardon, 514 S.W.3d 919 (Tex. App.—Fort Worth 2017, orig. proceeding)

The Second Court of Appeals held that (1) transferee-court precedent does not bind a transferor court and (2) a trial court has continuing, exclusive jurisdiction over a petition for modification pending appellate review of a prior final order in a suit affecting the parent-child relationship.

A father and mother filed competing motions to modify the parent-child relationship that culminated in a trial in May 2015. The trial judge issued a final order on August 31, 2015. The judge subsequently set aside that order on November 11, 2015, and signed a reformed order on May 19, 2016.

On June 6, 2016, the father filed a new petition to modify the parent-child relationship, requesting modification of the May 19th order, alleging that the circumstances of the child, a conservator, or other party affected by the order had materially and substantially changed. Among other relief, the father’s petition sought to restrict the mother’s access to the child and to have additional periods of possession of the child for himself.

The trial court conducted hearings over a two-month period. On November 14, 2016, the father filed a motion asking the trial court to deny the mother’s request for relief and to award him attorney’s fees and costs. Rather than grant the father’s motion, the following day the trial court signed a temporary injunction prohibiting the father from engaging in certain activities related to the child’s mental and physical health. Several days later, the father’s motion to deny the mother’s request for relief was denied. On December 5, 2016, the father filed a petition for writ of prohibition in the court of appeals.
On appeal, the father argued that a writ of prohibition should issue because the trial court does not have jurisdiction to hear pending motions to modify in a suit affecting the parent-child relationship (SAPCR) when an appeal is pending from the last final order. The father based his argument primarily on an Eighth Court of Appeals decision in a case of first impression that had been transferred from the Second Court of Appeals to the Eighth Court of Appeals pursuant to a docket-equalization order. The mother argued that a trial court having continuing, exclusive jurisdiction in a SAPCR continued to have jurisdiction to modify a final order even while an appeal of the same order is pending. To support her position, the mother relied on authority from the First and Fifth courts.

Both sides acknowledged the split in authority between the First and Fifth courts and the Eighth court. The father contended that the Second court was required to follow the decision of the Eighth court as precedent because the Eighth court was a transferee court. The father argued that, until the Eighth court’s decision was overruled by an en banc decision of the Second court, the Second court was bound by it.

The Second court held that while it may be guided by the analysis of the Eighth court in reaching its decision, it was not bound by the precedent set by the transferee court when determining cases of first impression. Having determined that it was not bound by the Eighth court’s holding, the Second court had to decide whether it agreed with the Eighth court’s analysis or whether it would instead follow the reasoning in the only other two Texas cases addressing the issue of whether a trial court has continuing, exclusive jurisdiction in SAPCR proceedings.

The father argued that allowing a modification order to proceed during the pendency of a prior SAPCR order would render meaningless section 109.001 of the Family Code—which provides a limited opportunity for a trial court to enter temporary orders during the pendency of a SAPCR appeal. He also argued that because appeals of final SAPCR orders under the Family Code “shall be as in civil cases generally,” and that
an appeal from a final order does not suspend the order unless suspension is ordered by the trial court, a trial court should not have authority to modify a final order pending appeal. However, the Second court saw no compelling reason, whether based in law or on broader policy considerations, why a trial court should lose jurisdiction of a lawsuit due to the taking of an appeal in a separate, yet closely-related, lawsuit. Therefore, the Second court held that under the circumstances presented in this case, the trial court had continuing, exclusive jurisdiction over a petition for modification pending appellate review of a prior final SAPCR order. The father’s writ of prohibition was denied.

Civil Procedure – Final Orders

In re M & O Homebuilders, Inc., 516 S.W.3d 101 (Tex. App.—Houston [1st Dist.] 2017, orig. proceeding [mand. pending])

The First Court of Appeals conditionally granted mandamus relief and directed the trial court to vacate an amended order that removed finality language from the original order signed more than sixty days before the amended order.

Paul Elizondo (“Elizondo”) sued M & O Homebuilders, Inc. (“M & O”) for damages in connection with the construction of a home. Elizondo placed a lien on the property and M & O filed a summary judgment motion to remove the lien. M & O obtained an order to remove the lien on March 11, 2016 (“March 11 Order”). However, the March 11 Order also contained language that disposed of all parties and claims and stated it was final and appealable. The trial court amended its March 11 Order on May 9, 2017 (“Amended Order”) to remove the finality language. M & O sought a writ of mandamus to require the trial court to set aside its Amended Order on the grounds that the Amended Order was signed outside the trial court’s plenary power and, therefore, was void.

The majority held that judgments which clearly and
unequivocally dispose of all claims and parties are final judgments and that the March 11 Order clearly stated that “this judgment is final, disposes of all claims and all parties, and is appealable.” Elizondo argued (and the dissenting opinion agreed) that the motion to remove the lien did not seek judgment and, therefore, the March 11 Order could not be a judgment since it granted a motion that did not seek partial summary judgment. However, the majority held that the summary judgment motion to remove a lien sought summary adjudication of that claim and, in effect, operated as a motion for partial summary judgment. Applying finality rules established by precedent, the majority held that since the trial court’s power was not limited to the relief requested and since the March 11 Order was a partial summary judgment, the March 11 Order was a final order.

The majority conceded that the trial court’s adjudication of the lien and the language regarding all other claims and parties may have been erroneous. Nevertheless, the majority held that the finality rules applied and the trial court order rendering judgment that Elizondo take nothing on all claims was a final, even if erroneous, judgment.

Next, the majority discussed whether the Amended Order corrected a clerical error or a judicial error and held that a determination of whether an error in a judgment is judicial or clerical is a question of law that is reviewed de novo. In performing its review, the majority noted that an appellate court must look to the judgment actually rendered by the trial court, rather than the one it might have rendered, when deciding if a nunc pro tunc order corrects a judicial or a clerical error. Examining the Amended Order, the majority found that judgment was rendered, whether properly or not; therefore, the error was judicial and not clerical in nature.

Having found that the March 11 Order was final and that the Amended Order corrected a judicial error, the majority held that the trial court had no power to sign the Amended Order after its plenary power had expired. Therefore, the Amended Order was void.

The dissent argued that the motion to remove the lien was
not a summary judgment motion and the finality language mistakenly included in the March 11 Order did not convert that order into a final judgment. As such, according to the dissent, the trial court properly amended the March 11 Order to remove the finality language and did not abuse its discretion.

**HEALTHCARE LIABILITY CLAIMS**
- **EXPERT REPORTS**


The Fifth Court of Appeals held that the trial court abused its discretion in denying a motion to dismiss a claimant’s case when an expert’s report and curriculum vitae failed to illustrate the expert’s qualifications to offer standard-of-care opinions and failed to provide non-conclusory opinions regarding the causal link between the alleged breach of the standard of care and the claimant’s damages.

On March 10, 2014, a minor (“H.H.”) was admitted to Hickory Trail Hospital. H.H.’s parents alleged that a mental-health technician employed by Hickory Trail entered H.H.’s room and sexually assaulted her. H.H.’s parents subsequently filed a healthcare-liability lawsuit alleging negligence and served Hickory Trail with the expert report of Richard Bays, a nurse. Hickory Trail objected to the report as inadequate and filed a motion to dismiss due to a failure to provide an adequate expert report as required by the Texas Medical Liability Act (“TMLA”). H.H.’s parents responded to Hickory Trail’s objections and simultaneously filed a motion for a thirty-day extension to cure any deficiencies in the expert report. The trial court sustained Hickory Trail’s objections, but denied its motion to dismiss and granted a thirty-day extension to cure the deficiencies in the expert report.

H.H.’s parents provided Hickory Trail with a supplemental expert report prepared by Dr. Mitchell Dunn, along with Dr.
Dunn’s curriculum vitae (“CV”). Thereafter, Hickory Trail filed a motion to dismiss and amended objections to Dr. Dunn’s report and CV, arguing that the CV and report were inadequate. Hickory Trail contended that Dr. Dunn’s report and CV were inadequate in two ways: (1) Dr. Dunn’s report and CV failed to illustrate his qualifications to offer the opinions in his report regarding the standard of care for a hospital’s policies and procedures; and (2) Dr. Dunn’s report failed to provide, in a non-conclusory fashion, an opinion that provided a causal link between the alleged breach of the standard of care and the damages claimed. The trial court overruled Hickory Trail’s objections and denied its motion to dismiss.

On appeal, Hickory Trail asserted that the expert report was inadequate for the same reasons argued in the trial court. More specifically, Hickory Trail argued that Dr. Dunn failed to show how he was qualified to opine as to what policies and procedures the psychiatric hospital should have implemented and that he offered no information to show he was qualified to opine as to what the standard of care for the hospital was. In response, H.H.’s parents alleged that Dr. Dunn was qualified to opine as to what policies and procedures should have been implemented at Hickory Trail based on statements in his report that he was aware of written policies regarding the monitoring of female patients and was familiar with general policies and training that mental-health technicians should receive about entering the rooms of female patients. The court disagreed and held that there was no evidence that Dr. Dunn was knowledgeable or experienced in the formulation and implementation of policies and procedures in a psychiatric hospital so as to establish his qualifications to render an opinion about Hickory Trail’s standard of care.

Further, Hickory Trail contended that the trial court erroneously denied its motion to dismiss because Dr. Dunn’s causation opinion was “entirely conclusory” and his report did not explain how the existence of a policy or procedure would have prevented H.H.’s alleged injuries. H.H.’s parents argued that Dr. Dunn stated in his report that Hickory Trail’s lack of
proper training and lack of policies and procedures created an environment that allowed the mental-health technician to remain in H.H.’s room for an extended amount of time. The parents also argued that, under proper supervision and with appropriate training and policies regarding entry into bedrooms or bathrooms of opposite-sex patients, Hickory Trail would have prevented the assault. Again, the court disagreed and held that Dr. Dunn failed to explain how and why the absence of the suggested policies would have kept the assault from happening or how their absence caused H.H.’s injuries. Therefore, the court deemed Dr. Dunn’s opinion to be conclusory.

The court also noted that, although Dr. Dunn stated that proper supervision of the mental-health technician would have prevented the incident, he failed to describe “proper supervision” or how Hickory Trail’s failure to supervise the technician caused H.H.’s injuries. As such, the court determined that Dr. Dunn’s opinion that the lack of supervision caused H.H.’s injuries was conclusory.

For these reasons, the court of appeals held that the trial court abused its discretion in denying Hickory Trail’s motion to dismiss. The court reversed the trial court’s order denying the motion to dismiss and rendered judgment dismissing the claims against Hickory Trail and remanded the case to the trial court to determine any reasonable attorney’s fees and costs to be awarded to Hickory Trail under the TMLA.

**SUMMARY JUDGMENT – EVIDENCE**


The First Court of Appeals held that a trial court erroneously granted summary judgment based on deemed admissions when the appellate record failed to show that the admitting party did not act in bad faith or with callous disregard for the discovery rules when responding to discovery.
In August 2013, after Marilyn Pickaree-Champagne boarded a light-rail train owned and operated by Metropolitan Transit Authority of Harris County (METRO), she slipped and fell on liquid on the train floor and suffered a concussion, broken foot, and fractured ankle. Pickaree-Champagne subsequently filed suit against METRO and alleged that the liquid on the train’s floor was noticeable to the METRO employee who was at the train’s door and that METRO should have inspected the area.

METRO served Pickaree-Champagne with requests for admissions in March 2015. Pickaree-Champagne responded to METRO’s requests, but her responses directed METRO to refer to her original petition for elaboration. METRO filed a motion to deem admitted certain requests in which Pickaree-Champagne admitted the invalidity of material elements of her claim on the basis that Pickaree-Champagne’s responses were inadequate. In April 2015, before the trial court ruled on METRO’s motion, Pickaree-Champagne filed amended responses to METRO’s requests for admissions. The amended responses included lengthy narratives, but some amended responses contained outright denials.

In May 2015, the trial court granted METRO’s motion to deem facts admitted. Two days later, Pickaree-Champagne filed second amended responses to the requests for admissions with the trial court. The record did not reflect whether the trial court considered the substance of any of Pickaree-Champagne’s amended responses.

In December 2015, METRO moved for summary judgment. It argued that, given the facts deemed admitted, summary judgment was appropriate because Pickaree-Champagne could not establish certain elements of her premises-liability claim. Pickaree-Champagne responded by filing a motion to strike/dismiss METRO’s motion and a separate response addressing each numbered paragraph of the summary judgment motion. The trial court granted METRO’s motion for summary judgment without specifying its reasons, and Pickaree-Champagne appealed.

On appeal, Pickaree-Champagne challenged the entry of
summary judgment on her premises-liability claim, which was based on her deemed admissions. METRO argued that the trial court properly granted its traditional summary judgment on Pickaree-Champagne’s premises-liability claim because Pickaree-Champagne’s deemed admissions conclusively established Pickaree-Champagne’s knowledge of the wet floor and METRO’s lack of actual knowledge of the condition.

The court noted that METRO’s requests for admissions to Pickaree-Champagne sought admission of the invalidity of material elements of her claim. Thus, when the responses were deemed admitted, they had a merits-preclusive effect on Pickaree-Champagne’s case. Accordingly, the court held that METRO was required to prove that Pickaree-Champagne acted with bad faith or callous disregard in order to carry its burden to establish that it was entitled to judgment as a matter of law. The court concluded that METRO did not meet its summary judgment burden.

The court further held that METRO’s motion for summary judgment, which METRO acknowledged was a traditional motion, was not supported by any evidence. Although the motion referenced an exhibit, the version of the motion included in the appellate record contained no such exhibit. Accordingly, there was no evidence in the appellate record to support a finding that METRO adduced summary judgment evidence from which the trial court could have concluded that Pickaree-Champagne acted with bad faith or callous disregard.

Instead, the summary judgment record reflected that Pickaree-Champagne attempted to correct the deficiencies in her amended responses to METRO’s requests for admissions. Her initial responses to METRO’s requests for admissions, though substantively deficient, were timely. METRO subsequently filed a motion to deem facts admitted, pointing out the problems with Pickaree-Champagne’s responses. Pickaree-Champagne then filed her amended responses with the trial court. After the trial court deemed the facts admitted, Pickaree-Champagne filed amended responses in which she expressly denied or disagreed with the requests for admissions.
that asked her to concede an element of her claim. Pickaree-Champagne referenced these amended responses in her response to METRO’s summary judgment motion, and she argued on appeal that these responses cured the defects in her previous responses.

The court held that, because the appellate record did not reflect that METRO adduced summary judgment evidence to support a finding of Pickaree-Champagne’s bad faith or callous disregard, and, on the contrary, reflected that she timely responded to METRO’s requests for admissions and made subsequent attempts to correct the defects in her responses, METRO failed to establish that Pickaree-Champagne acted with flagrant bad faith or callous disregard for the discovery rules. Because this was a necessary element of METRO’s traditional summary judgment motion, which was based on deemed admissions, the court concluded the trial court erred in rendering summary judgment.
PART III

THE FUTURE
I am humbled to assume the role as Chair of the Appellate Section for its thirtieth year. I knew, after my second week of law school, that I would eventually become an appellate lawyer after watching a moot court demonstration led by former Section chair, and my law school appellate mentor, Don Hunt. Several years later, after attending my first “Advanced Appellate Course,” sitting next to Pam Baron, I knew I wanted to participate in the Appellate Section. And since attending my first meeting of the Appellate Section as a member of a committee, I knew I had found my home. But I never anticipated assuming the role as Chair, or as Steve Hayes, my predecessor to the office, would call it, the “Head Enchilada.”

I have huge shoes to fill as the incoming Chair—not only left by Steve and my other recent predecessors, but by those who have served in leadership roles since the Section’s inception, both at the chair and committee chair levels. The Section has done so much for me personally over the years, giving me the opportunity to meet some of my dearest friends and colleagues and instilling in me the sense of professionalism one expects from members of the appellate bar. Accordingly, I assume leadership of the Section recognizing the great honor and responsibility that comes with the role.

The big shoes that have come before me, left by former Section members and its various committee chairs and members, present the Section with outstanding opportunities to continue to expand the services it provides to the bar and the state’s appellate courts, as well as to members of the public who rely upon the appellate system to address their problems.

I have long had as a priority finding ways to improve and expand the provision of pro bono services to litigants in Texas appellate courts. A number of years ago, members of the Section, in coordination with justices and staff members at various courts of appeals and with local bar groups, created
the Section’s first appellate pro bono programs that paired appellate lawyer volunteers (for the most part usually Section members) with pro se litigants needing representation before appellate courts. As a result of those programs, litigants have received the benefit of counsel in a wide number of contexts—foreclosures, child custody cases, employment benefits and other categories of cases in which low-income Texans could not otherwise afford appellate representation in defending or prosecuting appeals.

Over the years, those early programs have been adapted, tweaked, and expanded into formal programs used by some appellate courts and, by the efforts of the Section, into informal programs accessible to pro se litigants before all courts of appeals that want to participate. The Section now works with the Supreme Court’s Pro Bono Program to match volunteer appellate lawyers with parties in cases before the Court in which briefing on the merits has been requested, and has worked closely with the Court and its staff to make access easier for pro se litigants to seek review or defend judgments in their favor. Looking forward, the Section faces great opportunities to continue to improve and expand access to pro bono services to pro se litigants. Our Section has made Texas the go-to state for others across the nation seeking to establish and improve appellate pro bono programs, and representatives of our Section are contacted frequently by groups across the nation for advice on creating appellate programs and appear regularly at national conferences to share ideas with colleagues from other states about the successes we have had in creating and administering our pro bono programs.

But much remains to be done here at home to make our programs even more successful. The Section faces opportunities to further expand pro bono efforts across the state to ensure that no pro se appellate litigant lacks access to a pro bono lawyer due merely to geography, and addressing that goal will be a priority during this coming year. The efforts of our Section’s members years ago in creating a workable pro bono program have provided the foundation for refining programs that, going
forward, will help thousands of Texas and serve as the model to help litigants across the country.

The ongoing success of the pro bono programs depends not only on the Section’s dedicated pro bono committee members (and the cooperation of the participating courts, their staffs and the local bars), but on the willingness of the hundreds of appellate lawyers who volunteer to serve and the commitment of so many Texas firms to support their lawyers’ efforts to do so, all of whom make the program as successful as it has been and which will allow the program to flourish in the future. As an example, several years ago, after a conversation with Blake Hawthorne about an inquiry he received, the Section promptly matched a pro se divorce litigant in far northwest Texas with a volunteer lawyer from a large Houston law firm to serve as counsel in an appeal before the Amarillo Court of Appeals, to the ultimate benefit of the litigant, the court of appeals (and its staff), and to the lawyer. While not all cases placed with pro bono lawyers result in victories for the otherwise pro se litigants, those parties, and the system itself is better served when parties have the benefit of competent appellate representation. I am so proud of the Section’s past pro bono efforts and I know only greater things will come in the future, in large part because of the great minds who came well before me who took an idea and acted upon it, and laid the groundwork for programs that can and will be expanded.

Over the years the Section has and will continue to find new and better ways to serve its members. Through efforts of those who served earlier, we have a cutting-edge web presence, and based in the efforts of those who now lead or work on our committees, we continue to present valuable services to our members. From a top-notch compendium of appellate-related CLE articles in a user-friendly research library, to an ever-growing collection of online CLE presentations available to our members, to a nationally recognized social media presence, our Section’s committees continue to find new and more relevant ways to work together to better serve our members.
As one additional example, many have worked tirelessly over the years to preserve the history of the Section. Under the recent leadership of JoAnn Storey, the Section’s History Committee has undertaken countless interviews not only with former Section chairs but from retired Supreme Court and appellate court justices. These interviews are being preserved and made available on the section’s website (and in *The Appellate Advocate*) and, we are now continuing to post video excerpts from interviews on the website. The work of the History Committee, in coordination with the Website Committee, continues to expand a fascinating archive that tells a story about the evolution of appellate law in Texas as a specialty area of practice.

Of course, the work of these committees provides just several examples of the outstanding work done by the Section. The editorial staff of *The Appellate Advocate* continually produces a journal with intriguing lead articles from practitioners across the state (and nation) on areas of interest to appellate practitioners, updates on recent cases of importance from courts across the state, and items of miscellaneous interest to members of the bar, archived and available on the Section’s website. My bookcase contains every print issue since I joined the section (with pages of many articles dog-eared), and, like many others, I frequently turn to the electronic editions of *The Appellate Advocate* to stay current and to learn about new matters of interest. The Section is particularly proud of *The Appellate Advocate* and its long history of outstanding editors who have turned out volume after volume of top-quality publications. Great thanks go to Bill Chriss and Lisa Kinzer, the journal’s outgoing managing editors, for their two years of service, and great words of encouragement go to the incoming members of the editorial board.

Other committees have worked, and continue to work, to generate opportunities across the state for those interested in the appellate practice to interact— from hosting state-wide coffees with appellate courts, to presenting regional CLE programs undertaken in coordination with local bar
associations, to hosting programs with other state and local bar groups, to encouraging diversity within the section, and to providing opportunities for appellate practitioners to interact with corporate counsel across the state at presentations specially tailored for their interests and to highlight the importance of the appellate practice. Those programs are uniformly received positively, and I look forward to their expansion this coming year and in years to come.

While this issue celebrates the history of the Section, the Section is actively undertaking steps to prepare for its future. Over the past several years, we have been working with every law school in the state to identify talented students interested in the appellate practice (i.e., our Section’s future leaders), and are working with the law schools to encourage students to participate in pro bono cases and to become members of the Section as they become members of the bar. Having met some of these students, I am sure they will soon be worthy adversaries we will all face and respect in the courtroom, and will be trusted colleagues on Section committees as they take on leadership roles befitting their skills and interests. I look forward to watching the next generations develop as lawyers and take over roles on committees and the Appellate Council.

I remember well being taken under the wing by earlier leaders of this Section. I remember how honored I was when Skip Watson asked me to join his table at an appellate lunch, and when Helen Cassidy cornered me in the foyer of an Advanced Appellate Course to encourage me to serve on a Section committee. After attending my first meeting, I was hooked. As Chair for this thirtieth-anniversary year, I will look for opportunities to follow their examples, and identify and work to involve the next generation of leaders who I anticipate will draw upon the outstanding efforts of those who came before me and make the Section even more valuable to its members, the courts, the bar, and the public at large.

Finally, this report would not be complete without recognizing what a task indeed it will be to follow Steve Hayes as chair, and for that matter every chair who came before me.
The shoes Steve leaves me to fill are special. Steve has done an outstanding job leading the Section, encouraging committee members to work together and making suggestions as to how they could coordinate to the ultimate benefit of all, and advancing new initiatives that will carry on for years to come. I thank Steve for his service and fear I will wear out my welcome calling him to draw upon his wisdom and experience to help me during the next year.

I am humbled by the honor of assuming leadership for this milestone thirtieth year, I look forward to working with committee leaders and member, and I invite Section members to actively participate in the Section. It is my hope that I can pass the leadership torch to Justice Busby in 2018 with it burning just as brightly as when it was passed to me. I look forward to working with each of you during this upcoming year.

- Mike Truesdale
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\[1\] Granted, when he is not in court, his shoes are typically some kind of rugged outdoor footwear perfectly suited for any unexpected cross-training or hill-climbing emergency. I, of all people, certainly do not begrudge him his fashion statement, and given his successes, perhaps we should all adopt such sensible soles.
The 85th Texas Legislature expanded the Texas Supreme Court’s jurisdiction over interlocutory orders. Under the new law, effective September 1, 2017, the Court has discretion to review any interlocutory order that raises legal issues that are important to the jurisprudence of the state.

The Court already has broad jurisdiction over legal issues that arise in appeals from final judgments and the discretion to hear any appeal that raises an issue that is important to the jurisprudence of the state. The Court’s jurisdiction to review interlocutory orders, however, has been more limited. The Legislature has granted the Court authority to hear interlocutory appeals “described by Section 51.014(a)(3), (6), or (11), or (d), Civil Practice and Remedies Code.” Tex. Gov’t Code § 22.225(d). These include class certification orders, summary judgment orders in defamation cases, orders denying a motion to dismiss an asbestos/silica case, and what is commonly referred to as “permissive appeals.”

Beyond these limited categories of interlocutory orders, the Texas Supreme Court had jurisdiction only hear an interlocutory appeal if (1) “the justices of a court of appeals disagree on a question of law material to the decision;” or (2) “a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case.” Tex. Gov’t Code §§ 22.001(a), 22.225(c).

The jurisdiction in the latter category is commonly referred to as “conflicts jurisdiction.” Before 2003, a conflict was only established if two rulings were “so far upon the same state of facts that the decision of one case [was]
necessarily conclusive of the decision in the other.” Coastal Corp. v. Garza, 979 S.W.2d 318, 319 (Tex. 1998). This standard was difficult to meet, briefed extensively, and carefully analyzed by the Court’s staff in internal memoranda.

In 2003, however, “the Legislature redefined and broadened” the Court’s conflicts jurisdiction. City of San Antonio v. Ytuarte, 229 S.W.3d 318, 319 (Tex. 2007) (per curiam). Under the more relaxed standard, one court “holds differently” from another “when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants.” Tex. Gov’t Code § 22.001(e).

The “new” standard for “conflicts jurisdiction” became even more meaningless through judicial decision. For example, in Lubbock Co. Water Control & Improvement Dist. v. Church & Akin, L.L.C., the Court found a conflict based on courts of appeals’ decisions defining the word “services” under two different and unrelated statutes. 442 S.W.3d 297, 300 n.3 (Tex. 2014).

Despite the relatively low threshold for establishing conflicts jurisdiction after 2003, parties still researched and briefed the issue in interlocutory appeals presented to the Texas Supreme Court over which jurisdiction is not expressly granted. This additional work resulted in increased costs to litigants in the form of attorneys’ fees. In certain cases, it also forced parties to present a jurisdictional argument at the expense of valuable and limited space for briefing the merits of their appeal. Yet, as the standard developed, the Court seemed relatively unrestrained to review the interlocutory appeals it desired to decide.

H.B. 1761 removed this costly hurdle. The bill, filed by Rep. John Smithee (R-Amarillo) and sponsored in the Senate by Senator Bryan Hughes (R-Mineola), was supported by the Texas Trial Lawyers Association, the Texas Civil Justice League, and Texans for Lawsuit Reform. The new standard applies to interlocutory orders signed on or after September 1, 2017.
A Bright Future Ahead! Introducing the Winners of the 2017 Excellence in Appellate Advocacy Award

Justice Douglas Lang¹ and Susannah E. Prucka²
Co-Chairs, Law School Liaison Committee

As we consider the future of the Section, it seems only fitting to announce the winners of this year’s Excellence in Appellate Advocacy Award. For the second consecutive year, the law school liaison committee has worked alongside the state’s ten law schools to identify and recognize an outstanding student from each school’s graduating class. Each of these students, in addition to establishing a superior academic record in general, has demonstrated uncommon interest, excellence, and promise in appellate briefing and oral advocacy.

This year’s winners are:

Ms. Megan Altobelli
The University of North Texas Dallas College of Law

Mr. Barret Armbruster
Southern Methodist University Dedman School of Law

Mr. Andrew Bell
Texas A&M University School of Law

¹ Justice Lang has served on the Dallas Court of Appeals since 2002. He was previously a partner with Gardere Wynne Sewell L.L.P., where he maintained an active litigation practice while volunteering extensively within the profession and the community.

² After more than a decade as an appellate prosecutor, Susannah Prucka is enjoying the transition to private practice. She previously held positions with the Maryland Attorney General’s Office, the Brazos County District Attorney’s Office, and the United States Department of Justice, and she frequently speaks and writes on current issues in criminal justice.
Mr. Robert Brown  
Texas Southern University Thurgood Marshall School of Law  

Mr. William “Billy” Calve  
St. Mary’s University School of Law  

Ms. Kelly Depew  
Baylor Law School  

Mr. Brad Franklin  
South Texas College of Law  

Ms. Ashleigh Hammer  
Texas Tech University School of Law  

Ms. Lisa Newman  
The University of Texas at Austin School of Law  

Ms. Julia M. Peebles  
The University of Houston Law Center  

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Congratulations to each of our winners. With talented legal minds like these joining the appellate fold, the Section’s future—like the future of each of these young professionals—looks very bright, indeed!

•   Advocacy winners photos, next 4 pages   •
A: Kelly Depew, Baylor Law School, with Dean Brad Toben.
B: Lisa Newman, The University of Texas School of Law, with Dean Ward Farnsworth. *Photo by Brian Birzer/Birzer Photo, Inc.*

C: Megan Altobelli, University of North Texas Dallas College of Law, with the Honorable Royal Furgeson. *Photo by Scott Peek Photography.*

D: Ashleigh Hammer, Texas Tech University School of Law, with Professor Robert T. Sherwin.

E: Julia M. Peebles, University of Houston Law Center, with Professor Amy Hawk.
F: Andrew Bell, Texas A&M University School of Law, with Professor Jennifer Ellis.
G: William “Billy” Calve, St. Mary’s University School of Law, with Professor Dave Schlueter. H: Robert Brown, Texas Southern University Thurgood Marshall School of Law. I: Brad Eric Franklin, South Texas College of Law, with Professor Elaine Carlson. J: Barret Armbruster, Southern Methodist University Dedman School of Law, with Dean Jennifer M. Collins.