



STATE BAR LITIGATION SECTION NEWS for the BAR

Winter 2010



CHAIR'S MESSAGE: Not an "Alternative"

by Fred Bowers

Some of us know what it's like to see our losing efforts in print. This online newsletter contains a summary of *In re Golden Peanut* in Susan Nassar's Alternative Dispute Resolution Update. The case was also originally in Kirsten Castañeda's article about State Appellate Courts. I was on the losing side of that Texas Supreme Court decision after being on the winning side in the trial court and in the Eastland Court of Appeals. I hate losing, but what concerns me most is that binding arbitration is becoming more and more entrenched in our civil justice system.

Fifteen or twenty years ago arbitration was an example of ADR – Alternative Dispute Resolution. More and more there's no "alternative" about it; it is too often the only method of resolution. In my opinion the notion that binding arbitration does not take away any rights but simply provides the specific forum would have our Founders shaking their heads in disbelief. These are my beliefs, and I could be wrong.

I point this out to show that your Litigation Section has members who think for example that pre-injury binding arbitration is the best thing since sliced bread. Others think that the oath we took to get our Bar license requires us to challenge this anti-right-to-jury-trial mechanism at each opportunity. Most Section members are somewhere in the middle. It starts with a better understanding of the developing law on this issue and the many issues coming to the forefront of our practices. *News for the Bar* is one of our efforts to make your Section membership more relevant and more useful. Thank you to Geoff Gannaway and the Editorial Board for putting together another great product. I also encourage you to visit our Section's website, www.litigationsection.com. And I want to hear from you at fbowers@nts-online.net. I'll do my best to respond to every message right away because I've gotten back on that horse. ■



ADR UPDATE

by Susan Nassar

Equitable claims expressly excluded in arbitration provision may still be subject to arbitration.

Texas Petrochemicals LP v. ISP Water Mgmt. Servs. LLC, No. 09-09-00168-CV, --- S.W.3d ---, 2009 WL 4669938 (Tex. App.--Beaumont Dec. 10, 2009, no pet. h.).

In this case, the Beaumont Court of Appeals was asked to determine whether the trial court erred in refusing to compel arbitration of certain equitable claims. Texas Petrochemicals LP ("TPC") and ISP Water Management Services LLC ("ISP") jointly own a dock that TPC operates under the terms of a written agreement. ISP sued TPC seeking to partition the dock on the grounds that TPC had breached the terms of the written agreement by asserting exclusive control over the dock and then utilizing that control to preclude ISP from using the dock. TPC moved to compel arbitration of ISP's claims, and ISP resisted, contending that claims for equitable relief were not arbitrable under the parties' agreement. The arbitration provision at issue provided that:

9.2 All controversies or claims among the parties hereto (other than those involving claims for equitable relief) arising out of [the] interpretation of this Agreement or performance thereof shall be settled by one or more arbitrators under the rules of the American Arbitration Association in effect at the time.

The trial court denied TPC's motion to compel arbitration. On appeal, the court of appeals held that ISP's claims fell within the scope of the parties' arbitration agreement, because ISP's claim for partition was factually intertwined with the breach of

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contract dispute and could not be decided without reference to the contract. For support, the court relied on *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 271 (Tex. 1992) for the proposition that claims not otherwise arbitrable can become arbitrable when factually intertwined with arbitrable claims. In addition, the court noted that the arbitration agreement at issue did not specify the types of claims the parties intended to exempt from arbitration. Thus, although the arbitration provision in the parties' contract expressly excluded equitable claims, they were held to be arbitrable.

Section 406.033(e) of the Texas Labor Code, which prohibits pre-injury waivers of personal injury or wrongful death claims, does not make an arbitration agreement void or unenforceable.

In re Golden Peanut Co., LLC, --- S.W.3d ----, 2009 WL 3969428, 53 Tex. Sup. Ct. J. 149 (Tex. Nov. 20, 2009) (orig. proceeding) (per curiam).

This case arose after Grant Drennan ("Drennan"), an employee of Golden Peanut Company, LLC ("Golden Peanut"), was killed on the job. Instead of subscribing to worker's compensation insurance, Golden Peanut provided its employees with an Employee Injury Benefit Plan under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461. Attached to the benefit plan was an arbitration agreement, requiring arbitration of any and all claims or controversies concerning or relating to Drennan's employment, including claims for personal injury and wrongful death.

After Drennan's death, his estate applied for and received plan benefits. Drennan's widow subsequently sued Golden Peanut under Texas's survival and wrongful death statutes on behalf of herself, their children, Drennan's parents and Drennan's estate (collectively, "the Drennans"). After Golden Peanut moved to compel arbitration, the Drennans dropped the Drennan estate as a party, leaving only the wrongful death claims. The trial court denied Golden Peanut's motion to compel arbitration.

Golden Peanut petitioned the court of appeals for mandamus relief. On appeal, the Drennans argued that their claims were not subject to arbitration, because they did not sign the arbitration agreement. They also argued that the arbitration agreement was unenforceable because it violated section 406.033(e) of the Texas Labor Code. The court of appeals held that the agreement to arbitrate did not violate Texas Labor Code § 406.033(e), which prohibits pre-injury waivers of personal injury or wrongful death claims. Without the benefit of the Texas Supreme Court's decision in *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640 (Tex. 2009) (orig. proceeding), the court of appeals also concluded the arbitration agreement was valid but the Drennans were not bound it, because they were not signatories.

In *Labatt*, the Texas Supreme Court held that a decedent's pre-death arbitration agreement is binding on the decedent's wrongful death beneficiaries although they were not signatories to the arbitration agreement, because a wrongful death claim is entirely derivative of the decedent's rights. *Id.* at 646. Relying on its holding in *Labatt*, the Court held that the trial court abused its discretion in refusing to compel arbitration and directed the trial court to enter an order compelling arbitration of the Drennans' wrongful death claims. The Court also disagreed with the Drennans' contention that the arbitration agreement was nevertheless unenforceable because it violated section 406.033(e) of the Texas Labor Code. Relying on United State Supreme Court precedent, the Court held that section 406.033(e) did not render the arbitration agreement void, because "an agreement to arbitrate is a waiver of neither a cause of action nor the rights provided under section 406.033(a), but rather an agreement that those claims should be tried in a specific forum." *Citing and quoting Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985).

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Employee’s agreement to arbitrate can survive the dissolution of an underlying contractual relationship.

In re Polymerica, LLC, 296 S.W.3d 74 (Tex. 2009) (orig. proceeding) (per curiam).

In this case, employee Angelica Soltero sued her former employer Polymerica, L.L.C. d/b/a Global Enterprises, Inc. (“Global”) for wrongful termination and retaliation for reporting sexual harassment. In 2002, Global contracted with third party Dickason Staff Leasing Company (“Dickason”) to manage its human resources department. Dickason issued a Dispute Resolution Plan (“Plan”), which was signed by Dickason and Soltero. Although Global was not a signatory, the Plan stated that it applied to any dispute between Dickason, Global and any “applicant for employment, employee or former employee, including legal claims such as discrimination, wrongful discharge or harassment.” The Plan included a mandatory process for resolving disputes, including arbitration under the Federal Arbitration Act. The Plan further provided that it was “a condition of employment and of continued employment” and that “employment or continued employment after the effective date of this Plan constitutes consent by the Employee to be bound by this Plan.”

Global subsequently distributed an employee handbook and required all of its employees, including Soltero, to acknowledge they received the handbook. The acknowledgment stated that the handbook “takes precedence over, supercedes, and revokes any previous memo, bulletin, policy or procedure issued prior to [July 6, 2003], by Global Enterprises on any subject discussed in the Handbook.” The handbook also included an arbitration provision, which required all disputes with Dickason and Global to be arbitrated.

Shortly after ending its agreement with Dickason and resuming management of its human resources department, Global terminated Soltero’s employment. Soltero sued Global under the Texas Labor Code for wrongful termination based on her national origin and retaliation for reporting sexual harassment. Global filed a motion to compel arbitration, which was denied by the trial court. On appeal, the court of appeals held that only claims that arose before the Global/Dickason contract ended were subject to arbitration. For support, the court relied on *In re Neutral Posture, Inc.*, 135 S.W.3d 725, 730 (Tex. App.--Houston [1st Dist.] 2003, no pet.). To avoid arbitration, Soltero nonsuited her claims that arose before the Global/Dickason contract ended and took the position that none of her claims were arbitrable. The trial court agreed and lifted the previously ordered stay.

Global appealed to the Texas Supreme Court, contending that all of Soltero’s claims were subject to arbitration. Soltero responded that although the Plan was binding, the handbook nullified the prior Plan. The Court disagreed because the handbook did not cover contracts like the Plan’s arbitration agreement. The Court also rejected Soltero’s argument that Global could not enforce the Plan’s arbitration agreement because it was not a signatory. The Court further concluded that *Neutral Posture*, the case relied on by the court of appeals, was distinguishable. Unlike the

arbitration agreement in that case, there was no condition that the Global/Dickason relationship must still exist in order to enforce the Plan’s arbitration agreement. Additionally, the Plan explicitly covered former employees. The Court therefore concluded that the arbitration agreement survived the dissolution of the Global/Dickason relationship, and Soltero’s promise to arbitrate included all of her claims against Global.

Texas Arbitration Act (TAA) does not abrogate the common law rule that arbitration awards must be final to be legally enforceable and subject to judicial review.

Collins v. Tex Mall, L.P., 297 S.W.3d 409 (Tex. App.--Fort Worth 2009, no pet.).

The primary issue in this case involved a matter of first impression – whether a trial court may review and confirm an interim or “partial final” arbitration award that does not dispose of all matters submitted to arbitration. The partial final award entered by a panel of arbitrators in favor of the appellees was based on the arbitrators’ determination that the appellant had failed to raise a material fact issue regarding the property and lis pendens at issue in order to avoid summary judgment. After the trial court confirmed the partial final award, appeal was taken.

The appellant argued on appeal that the trial court erred in confirming the partial final award, because it did not dispose of or determine all matters submitted to arbitration. Appellees responded that because section 171.086(b)(6) of the TAA permitted parties to file an application for a court order confirming an award “during the period an arbitration is pending,” it authorized courts to confirm an interim or partial award. The court of appeals disagreed that any language in the TAA specifically authorized a trial court to enter an order confirming a partial arbitration award or an award that does not resolve all matters submitted to arbitration. The court of appeals explained that:

While section 171.086(b) may contain language that permits a party to “file an application for a court order” confirming a partial award (in addition to other forms of relief) while the arbitration is pending, that language is purely procedural and does not grant the trial court the power to conduct judicial review of partial awards before the arbitrator’s decision becomes final. The mere fact that the legislature chose to allow parties to apply for confirmation of a partial award while arbitration is pending does not, in our view, demonstrate a legislative intent to abrogate the existing common law rule that arbitration awards must be final to be legally enforceable and subject to judicial review.

Because the partial final award did not resolve all matters submitted to arbitration, the court of appeals reversed and vacated the trial court’s confirmation order and remanded the case for further proceedings. ■



FEDERAL UPDATE

by Matt Frederick and Jason Fulton

Supremacy Clause; Treaties; McCarran-Ferguson Act *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714 (5th Cir. 2009) (en banc).

In *Safety National Casualty Corp.*, the en banc Fifth Circuit held that a non-self-executing treaty, once implemented by Congress, is not subject to “reverse-preemption” by the McCarran-Ferguson Act. The case arose out of a conflict between Lloyd’s underwriters and two insurers over the assignability of rights under a reinsurance agreement. The district court initially granted the underwriters’ motion to compel arbitration, but it later granted a motion to quash arbitration on the ground that a Louisiana statute (La. Rev. Stat. Ann. § 22:868) prohibited arbitration agreements in insurance contracts, and the state statute displaced the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “Convention”) through the “reverse-preemption” provision of the McCarran-Ferguson Act, which provides that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.” 15 U.S.C. § 1012(b). The district court certified the order for interlocutory appeal, and a panel of the Fifth Circuit reversed, holding that the McCarran-Ferguson Act did not cause the Louisiana statute to “reverse-preempt” the Convention or its implementing statute (the “Convention Act”). See *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 543 F.3d 744 (5th Cir. 2008), *vacated and reh'g en banc granted*, 558 F.3d 599 (5th Cir. 2009).

The majority followed the panel and vacated the district court’s order. It held, in essence, that the McCarran-Ferguson Act’s reverse-preemption provision was not implicated because the state statute in question was superseded by construction of a treaty—the Convention—not a statute; and the term “Act of Congress” (as a matter of plain meaning and Congressional intent in McCarran-Ferguson) does not include a treaty. The majority reasoned that a non-self-executing treaty, once implemented by statute, continues to be a treaty, not a statute. See Slip Op. at 13–14 (“The fact that a treaty is implemented by Congress does not mean that it ceases to be a treaty and becomes an ‘Act of Congress.’”). The majority was concerned to avoid asymmetrical treatment of self-executing and non-self-executing treaties under McCarran-Ferguson—it found “untenable” the notion that Congress intended the phrase “Act of Congress” “to exclude self-executing treaty provisions but to include treaty provisions that are implemented by federal legislation.” *Id.* at 14. The crux of the opinion, however, was the majority’s conviction that the conflict with state law arose from

construction of the Convention, not its implementing legislation. See, e.g., *id.* at 18 (“[I]t is by reference to the Convention that we have a command—a judicially enforceable remedy—that we ‘supersede’ Louisiana law . . .”). From the premise that state law is superseded by a treaty, not a statute, it follows that there is no “Act of Congress” to reverse preempt under McCarran-Ferguson. The majority thus concluded that “implemented treaty provisions, self-executing or not, are not reverse-preempted by state law pursuant to the McCarran-Ferguson Act.” *Id.* at 29.

The dissent took issue with the key premise of the majority opinion—that the Convention, not the Convention Act, superseded the Louisiana statute. In a thorough opinion (capped by an admirably concise outline of the argument), Judge Elrod criticized the majority for disregarding the Convention’s implementing act altogether for purposes of the McCarran-Ferguson analysis. Without the implementing legislation, the dissent pointed out, the Convention has no preemptive effect; only the Convention Act can preempt state law. Accordingly, the conflict of laws that implicates McCarran-Ferguson’s “reverse-preemption” provision is the conflict between the Louisiana statute and the act of Congress that animates the Convention, not the Convention itself. And under McCarran-Ferguson, the Convention Act cannot preempt the Louisiana statute because (a) the Convention Act does not “specifically relate[] to the business of insurance”; (b) the Louisiana statute “regulat[es] the business of insurance”; and (c) by implementing the Convention’s mandate to enforce arbitration agreements, the Convention Act would invalidate the Louisiana statute’s prohibition on arbitration.

Concurring in the judgment, Judge Clement criticized the majority and the dissent for begging the critical question—whether the Convention is self-executing. Both decisions assumed that it is not. The concurrence argued that the relevant provision of the Convention—the mandate that “[t]he court of a Contracting State . . . shall . . . refer the parties to arbitration”—is plainly self-executing under the reasoning of *Medellin v. Texas*, 552 U.S. 492 (2008). As a result, the Convention itself is a source of federal law capable of preempting the Louisiana statute under the Supremacy Clause. And because a self-executing treaty is supreme law but not an “Act of Congress,” it preempts the Louisiana statute but does not fall victim to the McCarran-Ferguson Act’s reverse-preemption clause. The concurrence noted that its analysis would have avoided the difficult constitutional question regarding the Supremacy Clause and the treaty power, which split the majority and dissent.

The en banc decision in *Safety National* creates a split with the Second Circuit, which held in *Stephens v. American International Insurance Co.*, 66 F.3d 41, 45 (2d Cir. 1995), that the Convention was subject to reverse-preemption under the McCarran-Ferguson Act because “the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation.”

Arbitration; Fees; Allocation of Authority Between Court and Arbitrator.

Dealer Computer Services Inc. v. Old Colony Motors Inc., 588 F.3d 884 (5th Cir. 2009).

Dealer Services and Old Colony entered into a contract that required arbitration of any disputes before the American Arbitration Association under its Commercial Arbitration Rules. A dispute arose, and Dealer Services initiated arbitration proceedings against Old Colony. Old Colony responded with affirmative defenses and counterclaims. When the AAA asked Old Colony to deposit \$26,900 in fees for the arbitration hearing, Old Colony responded that it was unable to pay. When Dealer Services refused the arbitrators' request to pay the full fee, the arbitrators suspended the arbitration indefinitely.

Dealer Services filed suit under the Federal Arbitration Act, 9 U.S.C. § 4, to compel Old Colony to pay its share of the arbitration fees. The district court ordered Old Colony to pay. The Fifth Circuit reversed and remanded for dismissal of the complaint.

The Fifth Circuit began its analysis by quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–84 (2002), for the proposition that “absent an agreement to the contrary, the parties intend that the arbitrator, not the courts, should decide certain procedural questions which grow out of the dispute and bear on its final disposition.” It held that “[p]ayment of fees is a procedural condition precedent that the trial court should not review.”

The court noted that in *Howsam*, the Supreme Court held that application of a limitations provision in the NASD arbitration rules was a procedural matter to be decided by the arbitrator, as opposed to a “gateway dispute” about arbitrability within the court's power to decide. Because the AAA rules gave the arbitrators discretion to require one party to pay the entire fee or suspend the arbitration, the Fifth Circuit reasoned that, like the limitations rule in *Howsam*, the payment of arbitration fees was “a procedural condition precedent.” The Ninth Circuit had reached a similar result in *Lifescan, Inc. v. Premier Diabetic Services, Inc.*, 363 F.3d 1010 (9th Cir. 2004), holding that a party's refusal to pay its share of arbitration fees did not constitute failure, neglect, or refusal to arbitrate where the arbitrator had the discretion to reallocate fees or suspend arbitration. The Fifth Circuit rejected Dealer Service's attempt to distinguish *Lifescan* on the ground that it did not involve affirmative claims for relief by the party that refused to pay its share of arbitration fees. It explained that the arbitrator could add the unpaid fees to Dealer Service's award or subtract them from an award in favor of Old Colony—not a perfect solution, the court conceded, but Dealer Services had agreed to the AAA rules, and its remedy lay with the arbitrator.

Attorney Conflict of Interest; Disqualification Based on Former Association

In re ProEducation International, Inc., 587 F.3d 296 (5th Cir. 2009).

This case presented the question whether a former associate is disqualified from representing a party adverse to a client of his former

law firm when, during his association with the firm, he did not work on any of the client's matters or acquire any confidential information about the client. The Fifth Circuit, interpreting the Texas Rules and the ABA Model Rules, held that the attorney is not disqualified.

Kirk Kennedy was a former associate at Jackson Walker, LLP. Before, during, and after Mr. Kennedy's association with the firm, another Jackson Walker attorney represented MindPrint, Inc. against ProEducation International, Inc., first in state court and then in an adversary proceeding in bankruptcy court. After the bankruptcy court entered judgment in the adversary proceeding in favor of MindPrint and shareholders of ProEducation, and after MindPrint's motion for sanctions against the shareholders had been denied and appealed, Mr. Kennedy appeared in the bankruptcy case on behalf of one of the ProEducation shareholders.

MindPrint moved to disqualify Mr. Kennedy based on his prior association with Jackson Walker. The bankruptcy court granted the motion, applying two irrebuttable presumptions: (1) that “confidential information has been given to the attorney actually doing work for the client”; and (2) that “confidences obtained by an individual lawyer will be shared with the other members of the firm.” The court did not allow Mr. Kennedy to rebut the second presumption. The district court affirmed the bankruptcy court's order, and Mr. Kennedy appealed.

The Fifth Circuit applied Texas Disciplinary Rule of Professional Conduct 1.09 and ABA Model Rule 1.9(b), finding that “both require that a departing lawyer must have actually acquired confidential information about the former firm's client or personally represented the former client to remain under imputed disqualification.” It distinguished *In re American Airlines*, 972 F.2d 605, 614 n.1 (5th Cir. 1992), on which the bankruptcy court relied, on the ground that its statements regarding an irrebuttable presumption of shared confidential information were merely dicta and, moreover, were based on cases applying a superseded version of the Texas Rules. The court held that although Mr. Kennedy would have been disqualified from representing a party adverse to MindPrint while at Jackson Walker, his imputed knowledge of the client ended when he left the firm. Accordingly, under the Texas Rules and the ABA Model Rules, the bankruptcy court should have considered the evidence that Mr. Kennedy did not work for, or acquire confidential information regarding, MindPrint while at Jackson Walker.

At an evidentiary hearing in the bankruptcy court, Mr. Kennedy had testified that he was not aware of MindPrint until after he left Jackson Walker. MindPrint did not present any evidence that Mr. Kennedy knew of or worked for MindPrint while he was at the firm. Because the uncontroverted evidence was sufficient to overcome any imputed conflict of interest, the court did not decide whether the rules create a rebuttable presumption or whether there is no presumption at all.

Attorneys; Sanctions; Witness Preparation

Ibarra v. Baker, 338 Fed.Appx. 457 (5th Cir. 2009) (not designated for publication).

In *Ibarra v. Baker*, the Fifth Circuit affirmed the district court's sanction of two attorneys for improperly coaching witnesses.

Sean Ibarra took photographs of Harris County police officers executing a search warrant at a nearby address. The police officers demanded Ibarra's camera and, when he refused and fled, gave chase. An altercation followed that also involved Erick Ibarra. After being acquitted of criminal charges for evading and resisting arrest, Sean and Erik Ibarra commenced §1983 actions against various Harris County defendants for arresting them and seizing their belongings.

Two Harris county attorneys, Bakers and Sanders, represented some of the defendants. They hired Albert Rodriguez as a consulting and testifying expert. In his expert report, Rodriguez based his conclusion that the officers did not engage in wrongful conduct in part on the fact that the area was a "high crime area" and that the officer believed Ibarra was photographing him out of "retaliation."

After Rodriguez filed his preliminary expert report, the Ibarras took depositions of several witnesses. But prior to the depositions, with knowledge of Bakers and Sanders, Rodriguez met with each of the witnesses. In deposition, the witnesses testified in ways that mirrored concepts introduced in Rodriguez's expert report. One witness even had a series of notes that tracked points raised in Rodriguez's report. In response, the Ibarras moved for sanctions and the district court held two hearings. At the second sanctions hearing, the Ibarras' counsel questioned Baker and Sanders about apparently significant inconsistencies in the officers' testimony at the first sanctions hearing. Both attorneys denied knowing any of the testimony was false.

The district court concluded that "Rodriguez, the officers, and their attorneys, Sanders and Baker, gave false testimony and/or abided the giving of false testimony during the November 29, 2004, hearing before the Court." The court further found that Rodriguez had met with the witnesses in order to "coach" the witnesses to "ensure that their deposition testimony 'would conform to facts that supported his opinion.'" The district court also found that Baker and Sanders were involved in this scheme. The district court imposed monetary sanctions.

The Fifth Circuit observed that attorneys have substantial leeway in preparing a witness but cannot influence a witness to testify in a false or misleading way. The Court focused on the pattern of meetings between Rodriguez and each witness prior to that witness's deposition and Baker and Sanders's apparent knowledge of the practice. In addition, the Court pointed to the introduction of the concepts of "retaliation" and "high crime area" as new defense theories that only appeared after the witnesses' meetings with Rodriguez. The officers had not raised these concepts during the criminal trial of the Ibarras or in their incident reports. After considering the entire record, the Court concluded that the introduction of these new, factually unsupported theories reflected improper coaching of witnesses and it upheld the district court's sanctions against Baker and Sanders.

Contempt; Sanctions; Violation of Oral Court Order
Ingalls v. Thompson (In re Bradley), 588 F.3d 254 (5th Cir. 2009).

The bankruptcy court held a trustee of a Chapter 7 debtor's trust in civil contempt and imposed monetary sanctions for violating an oral injunction prohibiting the sale of certain trust assets. The district court and Fifth Circuit affirmed.

In the late 1990s, Gary Bradley transferred assets into a trust created to hide assets from creditors. He then filed bankruptcy but was denied a discharge because of the fraudulent scheme to hide assets in the trust. In the course of continuing litigation over the assets placed into the trust, the bankruptcy court entered an injunction barring the trustee, Bradley Beutel, from transferring trust assets. The injunction expired at the conclusion of a trial related to the trust assets, but the creditors filed a motion to continue the injunction pending the bankruptcy court's rulings on the trial.

The bankruptcy court held a hearing on the motion to continue the injunction in August. Beutel did not attend the hearing but his attorney did. At the hearing, the bankruptcy court orally set forth a new, more limited injunction in the presence of the Beutel's counsel and requested that counsel draft a proposed order. Counsel did so. During the period between the hearing on August 24, 2004 and September 20, 2004 when the Court signed the written injunction order, Beutel sold numerous trust assets. Beutel also disbursed the proceeds of the sale to himself and Bradley, both in violation of the terms of the oral order of the bankruptcy court at the August 24 hearing.

After discovering the sale and distribution, the bankruptcy court held a civil contempt hearing. The bankruptcy court held the trustee (and his successor) in civil contempt and imposed monetary sanctions in the full amount of the assets that Beutel, as trustee, had transferred out of the trust in violation of the oral injunction order. The bankruptcy court found that Beutel had actual knowledge of the order and rejected the trustee's claimed ignorance, noting that the order was on the record and that the trustee's counsel had attended the hearing and spent considerable time clarifying the terms of the new injunction with the court in order to craft the order.

The trustee's central argument on appeal to the Fifth Circuit was that the oral statements by the bankruptcy court at the August hearing were not enforceable by contempt until there was a written order. The Fifth Circuit distinguished two Seventh Circuit cases cited by the trustee, *Bates v. Johnson*, 901 F.2d 1424 (7th Cir. 1990), and *Hispanics United of DuPage County v. Village of Addison*, 248 F.3d 617 (7th Cir. 2001), on the basis that they did not involve contempt proceedings and because the bankruptcy court had followed up its oral order with an identical written order.

Reviewing the bankruptcy court's order, the Fifth Circuit explained that criminal contempt was a sanction to punish the contemnor and vindicate the court's authority while civil contempt was to coerce compliance or compensate another party for the contemnor's violation of a court order. The Fifth Circuit found the monetary sanction imposed by the bankruptcy court to be a form of remedial civil contempt because Beutel was liable for the sanction to the bankruptcy estate.

Further, the Fifth Circuit found that remedial civil contempt was within the power of a bankruptcy court to enforce its oral order through civil contempt. The Court determined that courts have inherent powers to enforce compliance with orders. As to bankruptcy courts, the Fifth Circuit confirmed that bankruptcy courts have similar authority to enforce compliance through civil contempt by virtue of a bankruptcy statute, 11 U.S.C. §105(a), and that this statutory contempt power included remedial civil contempt orders that could be validly applied for violations of an oral order. ■



APPELLATE UPDATE

by Kirsten Castañeda

State Appellate Courts

Appellate Procedure

The “issue presented” in an agreed interlocutory appeal should identify a controlling question of law as to which there is a substantial ground for difference of opinion. *State Fair v. Iron Mountain Info. Mgmt., Inc.*, --- S.W.3d ---, 2009 WL 3353654 (Tex. App.—Dallas Oct. 20, 2009, no pet.).

Section 51.014 of the Texas Civil Practice and Remedies Code allows an interlocutory appeal if: (1) the parties agree that the interlocutory order sought to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and (3) the parties agree to the order granting permission to appeal. *Id.* at *2. Texas Rule of Appellate Procedure 28.2 sets forth a procedure for agreed interlocutory appeals, including the requirement that the notice of appeal include: (1) a copy of the trial court’s order granting permission to appeal; (2) a copy of the appealed order; (3) a brief statement of the issues or points presented; and (4) a concise explanation of how an immediate appeal may materially advance the ultimate termination of the litigation. *Id.* State Fair and Iron Mountain agreed to an interlocutory appeal of the trial court’s grant of partial summary judgment in Iron Mountain’s favor, where the grounds included contract provisions limiting damages and shifting risk of loss to State Fair, as well as a *DeLanney* analysis of State Fair’s non-contract claims. *Id.* at *1. The notice of appeal framed the issue presented as:

Whether the trial court erred by granting Iron Mountain partial summary judgment that in the event the jury finds that Iron Mountain is liable to Plaintiff under any of Plaintiff’s causes of action, the maximum amount of damages that Plaintiff may be awarded from Iron Mountain is hereby limited to \$7,601.00.

Id. at *2. The notice did not identify a controlling question of law as to which there is a substantial ground for difference of opinion, or how the court’s order involves such a question. *Id.* The court of appeals went beyond the notice, “[i]n an effort to preserve the appeal,” and reviewed the entire record, including the summary judgment papers, the partial summary judgment order, the agreed motion for interlocutory appeal, the agreed order granting the motion for interlocutory appeal,

and the briefs on the merits. *Id.* Neither the trial court nor any party identified a controlling question of law per the statutory requirement, and at oral argument, the parties confirmed that they sought a standard appellate analysis of all bases that could support the partial summary judgment. *Id.* Because the parties failed to present the required controlling question of law, the court of appeals dismissed the appeal for want of jurisdiction. *Id.* at *3. Although certainly the facts here went beyond the notice of appeal, this opinion indicates that the best course would be to start off on the right foot and include the required controlling question of law in the notice of appeal. *See id.* at *2.

A Rule 11 agreement allowing a judgment debtor to tender an amount to stop the accrual of judgment interest on appeal does not waive restitution of the amount if the judgment debtor obtains a reduction of the judgment amount on appeal. *Miga v. Jensen*, --- S.W.3d ---, 53 Tex. Sup. Ct. J. 49, 2009 WL 3403331 (Tex. Oct. 23, 2009).

On appeal, the judgment debtor, Jensen, posted a supersedeas bond in the amount of \$29.5 million. *Id.* at *1. Despite the bond, post-judgment interest continued to mount, and shortly after the court of appeals’s decision, the parties entered into an agreed order under which Jensen made an “unconditional tender” to Miga of approximately \$23.5 million toward satisfaction of the judgment in order to terminate the accrual of post-judgment interest on that sum. *Id.* Jensen filed a petition for review, and in its opinion on the merits, the Court found that payment on a judgment will not moot an appeal of that judgment if the judgment debtor clearly expresses an intent to exercise his right of appeal, and appellate relief is not futile. *Id.* The Court held in that earlier opinion that Miga’s damages had been improperly measured and should be reduced to approximately \$1 million plus interest. *Id.* at *2. Jensen then sought restitution of the \$21.5 million difference between the amount previously tendered to Miga under the Rule 11 agreement, and the amount owed under the modified judgment. *Id.* Miga appealed a judgment requiring restitution. *Id.* The Court rejected Miga’s argument that the Rule 11 agreement precluded restitution, finding instead that the Rule 11 agreement was silent on the issue of whether Jensen could seek reimbursement if the appeal was successful. *Id.* at *3. The Court also rejected Miga’s argument that the voluntary payment rule precluded restitution, noting that Jensen made clear to Miga that he intended to pursue reduction of the judgment by appeal. *Id.* at *4. In this regard, the Court also noted that Jensen’s payment was made in the face of not only mounting post-judgment interest, but the coercive power of the judgment. *Id.* at *5. Finally, the Court rejected Miga’s argument that restitution would be inequitable where Miga had

paid \$5 million in income taxes on the amount tendered. *Id.* at *6. The Court stated that Miga's contention was not that restoring the \$5 million portion would be inequitable, but that restoring *any* of the payment would be inequitable. *Id.* The Court also stated that Miga's tax obligation arose because, well aware that Jensen would continue to fight to reverse the judgment, Miga gambled on the strength of his appeal and opted to accept the payment in advance of the appellate outcome. *Id.* Accordingly, the Court decided that, in this case, the lower courts correctly concluded that restitution comports with the equities of the situation. *Id.*

Arbitration

An objection to the disqualification of an arbitrator must be made on the same grounds later presented on appeal or else it is waived. *Myer v. Americo Life, Inc.*, --- S.W.3d ---, 2009 WL 3385323 (Tex. App.—Dallas Oct. 22, 2009, no pet. h.).

Myer and Americo entered into an arbitration agreement that provided for each side to appoint an arbitrator, with the two arbitrators to select a third. *Id.* at *1. In an ensuing arbitration, Americo appointed Ernest E. Figari, Jr., as an arbitrator, and Myer objected under AAA rule R-17, which requires that any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and good faith. *Id.* Figari was disqualified and removed, and Americo sent a letter to the AAA and Myer stating that Americo would proceed with the arbitration "without waiving its objection to the AAA's decision and without waiver of the right to appeal any decision in this matter based on the erroneous removal of Mr. Figari as Americo's designated member of the Arbitration panel." *Id.* at *1-2. Americo appointed a replacement arbitrator. *Id.* at *2. After the arbitration concluded, Americo argued to the trial court that the award should be vacated under section 5 of the Federal Arbitration Act because the award was not made by arbitrators who were appointed under the method provided in the arbitration agreement. *Id.* at *3. Americo explained that the relevant agreement did not require the party-appointed arbitrators to be "independent and impartial," and did not allow disqualification of a party-appointed arbitrator for partiality, bias, or any other basis. *Id.* Because the basis for the disqualification objection raised in the motion to vacate in the trial court, and on appeal, was different than the basis for the disqualification objection presented to the arbitrators below, the court of appeals held that the argument had been waived. *Id.* at *3-4. The court disagreed that the challenge to the arbitrator's authority was fundamental error that could not be waived. *Id.* at *4. The court cited to a Fifth Circuit opinion determining that the failure to file a "clear written objection to a defect in the [arbitrator] selection process constitutes waiver." *Id.*

Attorneys' Fees

Even if the evidence on attorneys' fees is competent, uncontroverted, and unchallenged, it remains a question of fact what amount of fees are reasonable under the relevant factors. *Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545 (Tex. 2009).

The plaintiff sought approximately \$215,000 in damages and approximately \$42,000 in attorneys' fees through trial, plus \$15,000 in appellate attorneys' fees. *Id.* at 546. The evidence of attorneys' fees was competent, uncontroverted, and unchallenged. *Id.* at 547. The jury awarded only \$65,000 in damages – approximately one-third the amount sought – and zero attorneys' fees. *Id.* at 546-47. On a motion to disregard the answer as to attorneys' fees, the trial court rendered judgment notwithstanding the verdict for attorneys' fees of \$7,500 through trial and up to \$15,000 in appellate fees. *Id.* The court of appeals vacated the \$7,500 portion of the fee award and rendered judgment for the entire \$42,000 in trial attorneys' fees instead, based on the unchallenged evidence. *Id.* at 547.. The Texas Supreme Court agreed that the evidence was legally insufficient to support the jury's award of zero attorneys' fees. *Id.* at 548. However, the Court disagreed that the unchallenged evidence established the amount of a reasonable fee as a matter of law. *Id.* One of the factors in determining a reasonable attorneys' fee is the amount involved, and the jury found that the amount involved was much lower than the plaintiff claimed it to be. *Id.* Thus, the evidence – albeit unchallenged – did no more than raise a fact issue to be decided by the jury. *Id.* Consequently, the court reversed the judgment as to attorneys' fees and remanded that part of the case to the trial court for a new trial. *Id.* at 548-49.

Civil Procedure

If the clerk's endorsement of the return of citation lacks the time of service, as required by Rules 16 and 105 of the Texas Rules of Civil Procedure, a default judgment must be overturned. *Insurance Co. of the State of Pa. v. Lejeune*, 297 S.W.3d 254 (Tex. 2009) (per curiam).

Texas Rule of Civil Procedure 16 requires that every officer or authorized person shall endorse on all process coming to his hand the day "and hour" on which he received them. *Id.* at 256. Similarly, Rule 105 requires the offer to whom process is delivered to endorse thereon the day "and hour" on which he received it. *Id.* Strict compliance with the rules governing service of citation is mandatory in order to sustain a default judgment against attack. *Id.* at *2. The defendant filed a restricted appeal from the plaintiff's default judgment. *Id.* The record showed that, although the plaintiff served the defendant by certified mail, the return of citation lacked the required notation showing the hour of receipt of citation. *Id.* Therefore, the default judgment could not withstand attack and was reversed. *Id.*

A court of appeals cannot render judgment based on an interlocutory liability finding where the trial court later dismissed the case for lack of jurisdiction. *City of Houston v. Trail Enters., Inc.*, --- S.W.3d ---, 53 Tex. Sup. Ct. J. 95, 2009 WL 3494980 (Tex. Oct. 30, 2009) (per curiam).

In a bifurcated inverse condemnation trial, the trial court found that a taking occurred and the jury awarded damages nearing \$17 million. *Id.* at *1. Before the trial court could enter a final judgment, however, the trial court granted the City's motion

for summary judgment on ripeness grounds and dismissed the case without prejudice for lack of jurisdiction. *Id.* The court of appeals reversed the dismissal order, but instead of remanding, rendered judgment on the jury verdict based on the trial court's liability finding. *Id.* Although the Supreme Court agreed with the court of appeals's conclusion that the case should not have been dismissed, the Court determined that the court of appeals lacked authority to render judgment. *Id.* The court of appeals circumvented the procedures for challenging a verdict's or judgment's propriety by treating a motion for summary judgment on jurisdictional grounds as a motion for JNOV. *Id.* Therefore, the court of appeals's rendition of judgment was reversed and the case remanded to the trial court for further proceedings. *Id.* at *2.

Texas Rule of Civil Procedure 93 does not require a defendant to make affirmative representations in response to the plaintiff's allegations. *In re Shelby*, 297 S.W.3d 494 (Tex. App.—Dallas 2009, orig. proceeding).

The Shelby defendants filed a verified denial that they were partners with the other defendants “in any respect or capacity whatsoever.” *Id.* at 496. The corporate officer who signed the verified denial testified at his deposition that the Shelby defendants were not legal partners with the other defendants, but were partners in a “nonlegal sense” because they collaborated on the project.” *Id.* On plaintiffs' motion to strike and for sanctions, contending that the corporate officer's deposition testimony was inconsistent with his verification, the trial court orally ruled that the words “in any respect or capacity” must be removed from the verified denial and replaced with a verified denial that the parties were not “legal” partners. *Id.* However, the trial court's written order required the Shelby defendants to amend the verified denial to “reflect the fact that they have made such statements that a form of partnership exists.” *Id.* The Shelby defendants filed for mandamus relief. *Id.* The Dallas Court of Appeals held that Rule 93 does not require a defendant to make affirmative representations in response to the plaintiff's allegations. *Id.* at 496-97. Therefore, the trial court's order constituted a clear abuse of discretion for which relators had no adequate remedy at law. *Id.* at 497.

Class Actions

Class certification is an abuse of discretion where it appears that the underlying claim does not have merit. *Exxon Mobil Corp. v. Gill*, --- S.W.3d ---, 53 Tex. Sup. Ct. J. 130, 2009 WL 3969129 (Tex. Nov. 20, 2009).

The plaintiffs were Exxon service station dealers who sought certification of a state-wide class of Exxon dealers in a suit against (wait for it) Exxon. *Id.* at *1. Exxon offered its dealers individual rebates based on dealer sales volume and hours of operation. *Id.*

The plaintiffs contended that they had no knowledge that Exxon added the rebate program cost back into the wholesale price it charged dealers for gasoline. *Id.* The trial court certified a state-wide class asserting three claims: (1) breach of the sales agreements; (2) breach of the duty of good faith imposed on “open price” contract provisions by § 2.305 of the Texas Business and Commerce Code; and (3) breach of rebate promises. *Id.* at *2. However, the plaintiffs did not contend that they were charged anything but the contract price for gasoline or that the prices charged were commercially unreasonable in amount or discriminatory. *Id.* Instead, the plaintiffs complained that Exxon promised that the rebate programs would provide dealers real economic benefits. *Id.* The court of appeals construed the three claims as separate breach of contract claims and rejected Exxon's argument that the plaintiffs were actually alleging fraud. *Id.* The Texas Supreme Court construed the three claims as one claim for breach of the open price provisions of the sales agreements. *Id.* The plaintiffs could not point to any contract term that prohibited Exxon from taking rebate costs into account in setting prices. *Id.* at *3. Under the objective standard imposed by the Court in *Shell Oil Co. v. HRN, Inc.*, 144 S.W.3d 429 (Tex. 2004), the Court determined that Exxon's alleged failure to disclose that it was setting prices to recoup rebate costs did not violate section 2.305's good faith requirement. *Id.* at *4. Because it appears that the plaintiffs' claims lack merit, a conclusion reached by a federal district court with regard to identical claims brought by all U.S. Exxon dealers outside Texas, the Court held that the class certification was based on the misapplication of *HRN*. *Id.* Therefore, the Court vacated the class certification order and remanded. *Id.*

Contracts

As a contractual term, “fair market value” may be insufficiently definite, as a matter of law, to create an enforceable contract. *Playoff Corp. v. Blackwell*, --- S.W.3d ---, 2009 WL 3490865 (Tex. App.—Fort Worth Oct. 29, 2009, pet. filed).

The parties allegedly entered into an oral employment contract that included a term requiring payment calculated by reference to Playoff's “fair market value.” *Id.* at *1, 4. Although “fair market value” is a legally recognized measure of damages, it may be insufficiently definite in some texts to create an enforceable contract term. *Id.* at *4. In this case, the only evidence of the contract term came from the plaintiff, who acknowledged that the parties did not have an understanding as to how market value was to be determined. *Id.* Thus, at most, the alleged agreement left a material matter – the methodology for establishing fair market value – open for future adjustment and agreement that never occurred. *Id.* at *5. Without an agreed method of calculating fair market value, the agreement was unenforceably indefinite as a matter of law. *Id.* at *7.



Declaratory Judgment

A declaratory judgment claim is not moot unless the conduct challenged by the plaintiff has been discontinued and there is no reasonable expectation that the wrong will be repeated. *Yarbrough v. Texas A&M Univ. - Kingsville*, --- S.W.3d ---, 2009 WL 3031895 (Tex. App.—Corpus Christi Sept. 24, 2009, rule 53.7(f) motion granted).

A declaratory judgment requires a justiciable controversy between the parties. *Id.* at *2. That said, a declaratory judgment claim is not moot unless: (1) the conduct challenged by the plaintiff has been discontinued; and (2) there is no reasonable expectation that the wrong will be repeated. *Id.*

Discovery

Level 2 discovery deadlines did not apply to defendant who was joined after Level 3 Scheduling Order had been entered, even though all the Scheduling Order deadlines had passed. *In re Kings Ridge Homeowners Ass'n, Inc.*, --- S.W.3d ---, 2009 WL 3337234 (Tex. App.—Fort Worth Oct. 13, 2009, orig. proceeding).

In *Kings Ridge*, the parties had moved for and obtained a Level 3 Scheduling Order setting various deadlines, including an expert designation deadline. *Id.* at *1-2. The deadlines passed, but trial was reset to a later date. *Id.* at *1. On the eve of trial, the parties agreed to join the Homeowners Association (HOA) as a plaintiff (due to an alleged assignment of claims), and the trial was once again reset. *Id.* at *2. However, no amended or new scheduling order was ever signed. *Id.* at *2, 7. When HOA designated an expert witness, the defendants moved to strike HOA's expert for failure to timely designate. *Id.* at *2. The defendants contended that HOA was governed by Level 2 discovery deadlines because the Scheduling Order had been nullified by the trial resetting, and HOA never requested a Level 3 discovery plan. *Id.* at *3. The court of appeals rejected the argument that HOA was governed by Level 2 when the case as to all the other parties was governed by Level 3. *Id.* at *4, 6. Application of different discovery and expert deadlines under different discovery levels for various parties in a multi-party suit would create unacceptable confusion and foster discovery disputes. *Id.* at *6. Moreover, the Level 2 discovery period had already ended when HOA entered the case, and its involuntary joinder could not be considered the filing of a "suit" so as to restart the Level 2 deadlines. *Id.* The court of appeals avoided answering the question of whether HOA's designation was timely under Level 3, finding instead that HOA established lack of unfair surprise so as to excuse any late designation. *Id.* at *7-8.

Disqualification

A judge will not be disqualified if only one of the two prongs of the test is satisfied, and the Texas disqualification rule is different from the federal "appearance of impropriety" standard. *In re Wilhite*, --- S.W.3d ---, 2009 WL 3152961 (Tex. App.—Houston [1st Dist.] Sept. 25, 2009, mand. denied).

The plaintiffs moved to disqualify the trial judge, who had been a partner at a law firm that twice represented the defendant in suits filed against it for injuries from asbestos exposure at the Alcoa Rockdale plant. *Id.* at *1. Like those two lawsuits, the present lawsuit was brought based on one plaintiff's injuries allegedly from asbestos exposure at the Alcoa Rockdale plant. *Id.* As opposed to the recusal standard, a judge is disqualified under Texas Rule of Civil Procedure 18(b)(1)(a) if: (1) the judge or the judge's law firm was the attorney for a party in the case; and (2) the matter before the judge is the same matter that was before the judge or judge's law firm. *Id.* at *3. The "same matter in controversy" must be involved, regardless of whether it is the same lawsuit. *Id.* at *2. The plaintiffs contended that their lawsuit involves the same matter in controversy as the two earlier lawsuits because they all involve claims of asbestos exposure at the Alcoa Rockdale plant during the same period of time and share some of the same evidence. *Id.* at *4. The court of appeals disagreed, determining that "these similarities are insufficient to show that these three lawsuits are the same matter in controversy." *Id.* The court discussed the following distinguishing factors: (1) each plaintiff sued for his/her own personal injury, unrelated to the injuries sought by the other plaintiffs; (2) nothing showed that the injuries arose from the same incident or the same exposure to asbestos; (3) each lawsuit involved defendants in addition to Alcoa who were not shared in common among all three lawsuits; (4) the same pleadings and defenses can be found not only in these three lawsuits, but also in hundreds or thousands of lawsuits in Texas against Alcoa; and (5) the present lawsuit is not between the same plaintiff and same defendant over a series of lawsuits concerning the exact same subject. *Id.* at *4-5. Therefore, the court concluded that the present lawsuit did not involve the "same matter in controversy" as the previous two lawsuits, and that the judge was not disqualified. *Id.* at *5-6. The court also noted, in response to the dissent, that the federal "appearance of impropriety" standard of disqualification matches the Texas rule for recusal, but not disqualification. *Id.* at *5. Justice Jennings dissented, providing a detailed analysis of the issues involved in the three lawsuits, and concluding that they all "concern the same matter in controversy, which involves the same defendant in similar asbestos litigation stemming from asbestos exposure at the same location over a significant, overlapping period of time." *Id.* at *12 (Jennings, J., dissenting).

Insurance

For purposes of a known falsity exclusion from defamation coverage, what a corporation's officers know extends to vice principals. *Chrysler Ins. Co. v. Greenspoint Dodge of Houston, Inc.*, 297 S.W.3d 248 (Tex. 2009).

An insurance policy defined the insured (Greenspoint) to include its officers, directors, or shareholders. *Id.* at 251. The policy did not mention vice-principals. *Id.* The court of appeals concluded that only the named types of representatives' knowledge could be imputed to the corporation for purposes

of the known falsity exclusion from defamation coverage. *Id.* The Texas Supreme Court took a contrary view, stating that the definition of the insured did not purport to define Greenspoint universally, but instead identified other persons or entities who may qualify as additional insureds under the policy. *Id.* at 252-53. Policy coverage applies separately to each insured seeking coverage, which allows each insured to receive separate coverage. *Id.* Intent and knowledge for coverage purposes are determined from the standpoint of the insured at issue. *Id.* at 253.. In this case, the insured was Greenspoint. *Id.* at 252. A vice-principal represents the corporation in its corporate capacity, and the vice-principal's acts are the acts of the corporation itself, creating direct – not vicarious – liability. *Id.* at 253. Under the policy's known falsity exclusion, defamation coverage was excluded for statements made or directed by the insured with knowledge of their falsity. *Id.* Greenspoint was a named insured, and in proceedings below, Greenspoint was found to have made the defamatory remarks through its vice-principals with knowledge of their falsity when made. *Id.* Accordingly, the policy did not cover the defamation at issue. *Id.*

Jurisdictional Discovery

A trial court abuses its discretion in denying jurisdictional discovery regarding the degree to which the defendants may solicit and conduct business in Texas in ways that are not easily investigated without procuring information directly from the defendants themselves. *Lamar v. Poncon*, --- S.W.3d ---, 2009 WL 3152181 (Tex. App.—Houston [1st Dist.] Oct. 1, 2009, pet. filed).

Texas Rule of Civil Procedure 120a(3) provides for limited jurisdictional discovery where it appears from the affidavits of a party opposing a special appearance that he cannot, for reasons stated in the affidavit, present facts essential to justify his opposition to the special appearance. *Id.* at *7. The plaintiffs moved, with attached affidavits, three times for jurisdictional discovery. *Id.* The defendant contended that the affidavits were insufficient because they did not directly contradict the affidavit in support of the special appearance. *Id.* The trial court denied the motions. *Id.* The court of appeals held that the trial court abused its discretion. *Id.* The court noted that the Texas Supreme Court in *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 575 (Tex.2007) remanded the case for consideration of general jurisdiction where the plaintiffs there established extensive business contacts with Texas. *Id.* In the case at hand, the plaintiffs' affidavits outlined discovery aimed at possible marketing and business activities that were not easy to discover and establish through sources other than the defendants themselves. *Id.* Accordingly, the trial court should have given the plaintiffs the opportunity to conduct discovery to determine if the defendants had such contacts. *Id.*

Jury Argument

Arguing that a naturalized United States citizen who was born in India committed “judicial terrorism” and “extortion,”

along with a wholly unsupported reference to “cultural issues,” constituted incurable jury argument warranting reversal. *Showbiz Multimedia, LLC v. Mountain States Mortgage Ctrs., Inc.*, --- S.W.3d ---, 2009 WL 3248211 (Tex. App.—Houston [1st Dist.] Oct. 8, 2009, no pet. h.).

Vinay Karna was a naturalized United States citizen who was born in India. *Id.* at *1. He formed the two Showbiz corporations as part of a plan to purchase a motel. *Id.* He attempted to obtain financing through the defendants, and sued when the financing fell through. *Id.* The plaintiff alleged fraud, as well as breach of contract and breach of fiduciary duty. *Id.* At trial, the defendants vigorously countered the plaintiffs' description of what had occurred. During closing argument, counsel for one of the defendants characterized Mr. Karna's suit as “us[ing] this court in a judicial terrorism. He has extorted money—attempted to extort money from 21 different groups.” *Id.* Counsel also stated about Karna that a witness was “scared to death of this man. There's cultural issues. She's scared to death of him” *Id.* Plaintiffs' counsel did not object to the former argument, but did object to the latter. *Id.* The question on appeal was “whether the characterization of [Karna's] conduct as judicial terrorism and extortion, together with the other comments made by counsel, would reasonably leave an incurable impression on the jury in a manner beyond that supported by the evidence.” *Id.* In concluding that it did, the court of appeals determined that the commercial lending dispute at bar did not support the inflammatory appeal made to the jury. *Id.* The court instructed that “[t]he judiciary must at a minimum ensure that a trial is free from improper appeals to race or nationalism that the introduction of the words ‘terrorism’ and ‘extortion,’ together with a wholly unsupported reference to ‘cultural issues’ brought into this case.” *Id.* at *3. Accordingly, the court concluded that the argument strikes at the heart of the jury trial system and was incurable, requiring reversal and remand. *Id.*

Jury Charge

Extraneous prejudice, which establishes that error in submitting a question of law to the jury was harmful, effectively requires a review of the jury's answer under a legal sufficiency or no-evidence standard. *Hicks v. Pilgrim Poultry, G.P.*, --- S.W.3d ---, 2009 WL 3348582 (Tex. App.—Texarkana Oct. 20, 2009, no pet.).

A trial court commits error if it submits a question of law to the jury. *Id.* at *6. This error is harmful if it results in extraneous prejudice. *Id.* Extraneous prejudice exists when the jury gives an answer that is incorrect as a matter of law. *Id.* An answer is incorrect as a matter of law if the jury answered the question differently than the trial court would have been required to answer it. *Id.* at *7. This inquiry effectively requires a review of the jury's answer under a legal sufficiency or no-evidence standard. *Id.* In the case at bar, the court of appeals determined that the jury's answer was not supported by legally sufficient evidence and, therefore, did not comport with the answer the trial court was obligated to give. *Id.* at *7-8.

Labor & Employment

The public-employer employee-grievance procedure required by Texas Government Code section 617.005 must provide access to a person in a position of authority who has the authority to correct the complained-of wrong. *Yarbrough v. Texas A&M Univ. - Kingsville*, --- S.W.3d ---, 2009 WL 3031895 (Tex. App.—Corpus Christi Sept. 24, 2009, rule 53.7(f) motion granted).

Also in *Yarbrough*, the Corpus Christi Court of Appeals addressed the requirements of chapter 617 of the Texas Government Code, which governs collective bargaining for state employees. *Id.* at *1. Section 617.005 provides that chapter 617 does not impair the right of public employees to present grievances concerning their wages, hours of employment, or conditions of work. *Id.* The plaintiff, a professor at the University, received a negative evaluation from her supervisor. *Id.* at *3. According to University policy: (1) only the supervisor had the power to change the evaluation; and (2) the professor's only remedy was to write a rebuttal letter to be placed in her file with the negative evaluation. *Id.* The University contended that section 617.005 required only that the public employer provide access to persons in a position of authority to *air* the employee's grievances, not access to persons who could actually *remedy* the problem complained of in the grievance. *Id.* at *4. The court disagreed, noting that “[s]urely, a public employer's obligations under section 617.005 are not satisfied by a policy that vests sole discretion to remedy grievances in the hands of the supervisor who created the underlying situation giving rise to the complaint. We will not limit a public employer's duty under section 617.005 to merely providing a sounding board for employee venting; to do so without also requiring that the person in authority to be able to remedy the complaint would render an employee's grievance rights meaningless.” *Id.* (internal footnote omitted). Therefore, section 617.005 requires a public employer to: (1) allow its employees access to persons in positions of authority for purposes of presenting their grievances; where (2) the persons must have the authority to correct the complained-of wrong. *Id.* at *5. The court specifically stated that such person is not under any sort of *per se* legal compulsion to take action, nor is a hearing required for every grievance presented. *Id.*

The cost-shifting provision of Texas Local Government Code section 89.004(b) does not apply to successful claims asserted under the Texas Whistleblower Act. *Bates v. Randall County*, 297 S.W.3d 828 (Tex. App.—Amarillo 2009, pet. filed).

Two former employees of the Randall County Road and Bridge Department filed suit against the county, alleging that their employment was terminated after they reported that other employees were operating road equipment without proper commercial driver's licenses. *Id.* at 831. The plaintiffs brought claims against the county under the Texas Whistleblower Act, and a jury returned a verdict awarding the plaintiffs back wages and lost employee benefits. *Id.* at 832. Attorneys' fees were

tried to the court. *Id.* The plaintiffs sought attorneys' fees, but the county asserted that the plaintiffs should be ordered to pay the county's costs and attorneys' fees under section 89.004(b) of the Texas Local Government Code. *Id.* The Texas Whistleblower Act provides that the prevailing plaintiff is entitled to sue for reasonable attorneys' fees, but the Local Government Code provides that the plaintiff shall pay the costs of the suit if, after presentment of a claim, the commissioners court offers to settle for more than the plaintiff ultimately recovers (which happened in this case). *Id.* The trial court signed a judgment in accordance with the jury's verdict, and awarded attorneys' fees to the plaintiffs. *Id.* On appeal, the Amarillo Court of Appeals noted that the attorneys' fees provisions of the Texas Whistleblower Act and the Local Government Code appeared to conflict as applied. *Id.* at 836. The court of appeals concluded that the cost-shifting provision of the Local Government Code does not apply to a Texas Whistleblower Act claim. *Id.* at 837. Had the Legislature wanted to include a cost-shifting provision in the Whistleblower Act, it could have done so with a provision just like the one included in the Local Government Code. *Id.* Since the only attorneys' fees provision in the Texas Whistleblower Act provides that the prevailing plaintiff is entitled to sue for reasonable attorneys' fees, the court of appeals held that the Legislature did not intend to shift costs to a prevailing plaintiff, even if the plaintiff's recovery was less than the county offered in settlement before suit. *Id.*

The “dual persona” doctrine does not allow a plaintiff to avoid the exclusive remedy provision of the Texas Workers' Compensation Act and impose liability on a subscribing employer as “successor in interest” to a prior employer. *Union Carbide v. Smith*, --- S.W.3d ---, 2009 WL 3152138 (Tex. App.—Houston [1st Dist.] Oct. 1, 2009, no pet. h.).

The Smiths sued the defendant, Hexion Specialty Chemicals, Inc., both in its capacity as a direct employer of Mr. Smith and as the “successor-in-interest” to the liabilities of Smith-Douglas Company, Mr. Smith's former employer. *Id.* at *5. It was undisputed on appeal that Mr. Smith was covered by workers' compensation insurance while employed by Hexion after its merger with Smith-Douglas, and that this workers' compensation coverage applied to the mesothelioma at issue. *Id.* Prior to trial, the lower court granted summary judgment that the Smiths' claims against Hexion were barred by the exclusive remedy provision of the Texas Workers' Compensation Act, but allowed the Smiths to pursue their claims against Hexion as successor-in-interest to Smith-Douglas with regard to Mr. Smith's asbestos exposure before the merger. *Id.* at *6. In support of the trial court's ruling, the Smiths argued that the “dual persona” doctrine allowed them to avoid the exclusive remedy provision of the Act. *Id.* at *8. The “dual persona” doctrine is a concept based on the surviving corporation's responsibilities under the statutory merger scheme as separate from its role as corporate employer under the workers' compensation laws. *Id.* No Texas court has ever adopted the dual persona doctrine as a means for imposing liability on a subscribing employer despite the exclusive remedy provision, and the Houston First District Court

of Appeal refused to apply the doctrine in the case at hand. *Id.* at *9-10.

Legal Malpractice

The Texas Supreme Court has stated the standards for calculating the amount of damages that would have been collectible in an improperly prosecuted prior lawsuit, and has held that attorneys' fees and expenses paid for representation in the underlying lawsuit may be recovered as damages to the extent they were proximately caused by the lawyer's negligence. *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Dev. & Research Corp.*, --- S.W.3d ---, 53 Tex. Sup. Ct. J. 77, 2009 WL 3494978 (Tex. Oct. 23, 2009).

When a former client sues a lawyer for improperly prosecuting a prior lawsuit, the plaintiff must prove the amount of damages that would have been collectible in the prior suit. *Id.* at *1. The question is what evidence is necessary to prove those damages. *Id.* The Texas Supreme Court held in *Akin, Gump* that the amount of damages that would have been collectible in the prior suit is the greater of the amount of a judgment for damages that would have been either paid or collected from the underlying defendant's net assets. *Id.* The time at which this collectibility is determined is as of or after the time a judgment was first signed in the underlying case. *Id.* Proving the underlying defendant was solvent is one way to prove collectibility when "solvent" means the underlying defendant owned sufficient property subject to legal process to satisfy all outstanding debts and have property remaining to satisfy some or all of the damages the malpractice plaintiff would have recovered. *Id.* at *6. Generally, the amount that would have been collectible will be the greater of either: (1) the fair market value of the underlying defendant's net assets that would have been subject to legal process for satisfaction of the judgment as of the date the first judgment was signed or at some point thereafter; or (2) the amount that would have been paid on the judgment by the defendant or another, such as a guarantor or insurer. *Id.*

In addition, the Texas Supreme Court rejected the notion that attorneys' fees are not recoverable as damages for legal malpractice. *Id.* at *11-12. The Court recognized that, if an attorney has breached his or her fiduciary duty to a client, then part or all of the fees the client paid may be recovered through disgorgement or forfeiture. *Id.* at *12. However, the purpose of this rule is to discourage agents' disloyalty, whereas the purpose of damages for negligence is to compensate an injured party. *Id.* at *13. The Court adopted the rule that a malpractice plaintiff may recover damages for attorneys' fees paid in the underlying case to the extent the fees were proximately caused by the defendant attorney's negligence. *Id.*

Legislative Continuances

It is a clear abuse of discretion to compel a legislator's deposition to explore the statements made in the affidavit supporting a motion for legislative continuance. *In re*

Brittingham-Sada, --- S.W.3d ---, 2009 WL 3296516 (Tex. App.—San Antonio Oct. 14, 2009, orig. proceeding).

After State Senator Uresti submitted an affidavit supporting a motion for legislative continuance, the opposing party filed a motion for sanctions and an emergency notice of intention to take Senator Uresti's deposition. *Id.* at *1. The notice stated that the deposition was necessary to respond to the motion for continuance and to seek sanctions, and requested the production of categories of documents related to Senator Uresti's representation and participation in the lawsuit. *Id.* The trial court ultimately denied the motion for legislative continuance and ordered Senator Uresti to appear for deposition. *Id.* at *2. However, the statute governing legislative continuances is mandatory if a party or its attorney is a member of the Legislature while it is in session, without regard to whether the attorney is necessary to the party or the extent of the legislator's participation in the lawsuit. *Id.* Although a court has inherent power to sanction, it appears that the Texas Legislature contemplated that ethical sanctions for abuses of the legislative continuance procedure – including sanctions for filing a sham affidavit – would be assessed through the Texas Ethics Commission. *Id.* at *4. Consequently, the San Antonio Court of Appeals conditionally granted mandamus relief. *Id.* at *5.

Limitations

The due diligence requirement of the discovery rule is not limited to cases involving a contractual relationship. *Hunt Oil Co. v. Live Oak Energy, Inc.*, --- S.W.3d ---, 2009 WL 3337646 (Tex. App.—Dallas Oct. 19, 2009, no pet. h.).

The discovery rule is a very limited exception to limitations that applies when the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable. *Id.* at *3-4. An injury is inherently undiscoverable if it is, by its nature, unlikely to be discovered within the prescribed limitations period despite due diligence. *Id.* at *4. The due diligence requirement is not limited to cases involving a contractual relationship. *Id.* at *5. Thus, it applies equally to negligence claims. *Id.*

Trade Secrets

It would be difficult to conclude that evidence of damages, including punitive damages, could not be found anywhere but through trade secrets. *In re Union Pac. R.R. Co.*, 294 S.W.3d 589 (Tex. 2009) (orig. proceeding).

The plaintiff sought discovery of Union Pacific rate structures, and there was no dispute that the rate structures were trade secrets. *Id.* at 591, 592. However, the trial court denied Union Pacific's motions for protective order and ordered the information produced to the attorneys and necessary employees. *Id.* at 591. Union Pacific sought mandamus relief. *Id.* On review in the Texas Supreme Court, the Court noted that the plaintiff

bore the burden to demonstrate with specificity how the lack of the trade secret information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat. *Id.* at 592. Union Pacific had admitted that it was financially capable of bearing the costs to position railcars in the manner the plaintiff claimed they should be positioned. *Id.* at 593. The Court determined that the plaintiff had not demonstrated why she “need[ed]” the specific rate structures to advance any argument on the merits of her negligence claim. *Id.* at 593. The Court noted that, in the trial court, the plaintiff appeared to seek the rate schedules also for purposes of establishing damages. *Id.* Although the plaintiff did not make that argument in the Texas Supreme Court, the Court “note[d] that we would have difficulty concluding that evidence of damages, even punitive damages, could not be found anywhere but through trade secrets.” *Id.* After analyzing the remainder of the factors with regard to production of trade secrets, the Court conditionally granted the requested mandamus relief. *Id.*

A co-testator can act as a witness to another co-testator in the same joint will, and a person can be a witness to a will without intending to be a witness. *In the Estate of Fuselier*, --- S.W.3d ---, 2009 WL 3079643 (Tex. App.—Texarkana Sept. 29, 2009, orig. proceeding).

If a will is not entirely in the testator’s handwriting, it must be attested by two or more credible witnesses above the age of fourteen who sign the will in the presence of the testator. TEX. PROB. CODE §§ 59(a), 60. The purported joint will of Charles and Dena Fuselier was in Dena’s handwriting, not Charles’s. *Id.* at *1. The will was signed by three people: Dena, Charles, and Rebecca W. Miller. *Id.* After Charles’s death, Dena applied to probate the joint will, which was contested by one of Charles’s daughters from a previous marriage. *Id.* In response to the daughter’s contention that the will was not properly witnessed under section 59 of the Probate Code, Dena argued that her signature could constitute both a co-testator’s signature and a witness’s signature. *Id.* There is no Texas precedent prohibiting this dual role. *Id.* at *2. In addition, there is Texas precedent allowing a person to be a witness to a will without intending to be a witness. *Id.* So long as the co-testator meets the qualifications of section 59 (*i.e.*, is above the age of fourteen and signed the will in the other co-testator’s presence), her signature may serve as a witness’s signature, too, regardless of her intended purpose in signing the will. *Id.*

Utilities

Gas utilities and pipeline companies have the power to condemn rail district property and to run pipelines under railroads. *Fort Worth & W. R.R. Co. v. Enbridge Gathering (NE Tex. Liquids), L.P.*, --- S.W.3d ---, 2009 WL 3153260 (Tex. App.—Fort Worth Oct. 1, 2009, no pet.).

Worsham-Steed Gas Storage, Cowtown Pipeline Partners, and Enbridge Gathering sought acquisition of an easement

for installation and maintenance of a pipeline under railroad tracks owned by Cen-Tex Rural Rail Transportation District, and on which Fort Worth & Western owned easements to conduct rail operations. *Id.* at *1. Among other things, Cen-Tex contended that the appellees were not empowered to condemn property owned by Cen-Tex because the Texas Utilities Code and Texas Natural Resources Code authorize gas companies and common carriers to condemn the property of “any person or corporation,” and Cen-Tex is neither a person nor a corporation. *Id.* at *2. Under the Code Construction Act, a “person” includes a “governmental subdivision.” *Id.* Therefore, Cen-Tex is a person whose property may be condemned under the relevant statutes. *Id.* In addition, Cen-Tex and Fort Worth & Western both contended that the gas companies did not have the right to lay pipelines under railroads. *Id.* at *3. The applicable section of the Texas Utilities Code allows a gas corporation to lay and maintain lines “over and across” a railroad. *Id.* Based on the history leading to the enactment of the statute, the language of a prior version of the statute, and the Legislature’s objectives for the statute, the court of appeals concluded that “across” includes both above- and under-ground placement. *Id.* at *3-4. Therefore, gas companies have authority to run pipelines under railroads. *Id.* at *4.

Fifth Circuit

Class Actions

In deciding whether to grant permission to appeal under CAFA, the Court considers whether the issues presented in the proposed appeal are unique to CAFA. *Alvarez v. Midland Credit Mgmt., Inc.*, 585 F.3d 890 (5th Cir. 2009).

The plaintiffs sought permission to appeal the denial of a motion to remand, under the Class Action Fairness Act. *Id.* at 893. In their petition, the plaintiffs articulated two grounds for appeal that were unique to CAFA, and two grounds for appeal that were not unique to CAFA, including whether the causes of action asserted were subject to the *Rooker-Feldman* limitations on federal jurisdiction. *Id.* The Fifth Circuit granted permission to appeal. *Id.* When the plaintiffs filed their brief on the merits, it contained only one of the four issues: whether the *Rooker-Feldman* doctrine precludes exercise of federal jurisdiction in this case. *Id.* The Fifth Circuit did not imply any improper motives with regard to the change, and recognized the plaintiffs’ assertion that changed circumstances led to the different approach. *Id.* at 893 n.4. However, the Court also stated that, in exercising its discretion to hear CAFA appeals in the short time limits imposed by Congress, the Court must weigh the time the CAFA appeal will take from earlier-filed appeals, against the benefit of hearing the CAFA appeal at the interlocutory juncture. *Id.* at 894. “Part of this weighing necessarily involves consideration of the unique nature of the issues presented in the proposed appeal.” *Id.* Because the unique issues presented in the petition were eliminated in presenting the brief, and because the sole issue

in the brief concerned complex issues of federal versus state jurisdiction, the Fifth Circuit vacated its earlier order granting permission to appeal as improvidently granted, and denied permission to appeal. *Id.*

Disqualification

The Model Rules and the Texas Disciplinary Rules of Professional Conduct both require that a departing lawyer have actually acquired confidential information about the former firm's client or personally represented the former claim to remain subject to imputed disqualification. In re ProEducation Int'l, Inc., 587 F.3d 296 (5th Cir. 2009).

Attorney Kennedy sought to represent a creditor in a bankruptcy proceeding against ProEducation. *Id.* at 297. Kennedy previously had worked in the bankruptcy section of Jackson Walker LLP during a period of time when another Jackson Walker bankruptcy attorney, who worked down the hall from him, represented MindPrint, Inc., a competing creditor in the same ProEducation bankruptcy proceeding. *Id.* at 297-98.. MindPrint moved to disqualify Kennedy from representing the other creditor. *Id.* at 298. The bankruptcy court found that Jackson Walker's knowledge of MindPrint's client confidences extends to former employees. *Id.* The bankruptcy court applied two irrebuttable presumptions: (1) confidential information has been given to the attorney actually doing work for the client; and (2) confidences obtained by an individual lawyer will be shared with the other members of his firm. *Id.* The bankruptcy court granted MindPrint's motion to disqualify. *Id.* The Fifth Circuit examined both Texas Disciplinary Rule of Professional Conduct 1.09 and Model Rule of Professional Conduct 1.09, and concluded that, despite slightly different language, both rules required that a departing lawyer must have actually acquired confidential information about the former firm's client, or personally represented the former client, to remain under imputed disqualification after the departure. *Id.* at 300-01. Although the Texas Supreme Court has not yet addressed this exact fact pattern, the Texas Commission on Professional Ethics had published an opinion explaining the impact of Texas Rule 1.09 on the precise issue. *Id.* at 301-02. The opinion states that if the departing attorney has not personally formerly represented the client, he will not be deemed to be vicariously contaminated by his colleague's prior representation or consultation with that client. *Id.* Although the bankruptcy court was wrong to apply an *irrebuttable* presumption that confidences will be shared with other attorneys, the Court appeared to place the burden on the "migrating attorney" to "remove imputed disqualification." *Id.* at 303-04. The Court concluded that, under both the Texas and Model rules, Attorney Kennedy should have had the opportunity to demonstrate that he did not obtain confidential information regarding MindPrint during his time at Jackson Walker. *Id.* at 304.

Labor & Employment

A plaintiff does not exhaust administrative remedies so as to permit an ERISA claim where her "notice of appeal" merely expresses an intention to appeal. Swanson v. Hearst Corp. Long Term Disability Plan, 586 F.3d 1016 (5th Cir. 2009).

Exhaustion of administrative remedies is a prerequisite to an ERISA action in federal court. *Id.* at 1018. To exhaust her administrative remedies, the plaintiff was required to appeal the termination of her benefits within 180 days. *Id.* The plaintiff argued that she filed her appeal by sending a letter within the 180-day period to Hartford as notice of her appeal. *Id.* However, the plaintiff's letter merely expressed an intention to appeal. *Id.* It did not include any factual or substantive arguments, and it did not include any evidence. *Id.* at 1019. Indeed, the materials making the plaintiff's case did not arrive until more than three years later. *Id.* That Hartford did not formally state its position that her letter was inadequate to invoke an appeal, until after the deadline had passed, did not estop Hartford from opposing the ERISA claim on the basis that the plaintiff failed to exhaust her administrative remedies. *Id.*

Voting Rights

The United States Supreme Court has not implicitly overruled the Fifth Circuit standard for determining what constitutes a majority under the first Gingles requirement. Reyes v. City of Farmers Branch, Tex., 586 F.3d 1019 (5th Cir. 2009).

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court set forth two requirements with regard to a district proposed under section 2 of the Voting Rights Act. *See id.* at 1021 & n.4. The first *Gingles* requirement is that the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. *Id.* at 1021. The Supreme Court did not explain what constitutes a majority, but the Fifth Circuit has held that courts must consider the "citizen voting-age population" of the group challenging the electoral practice. *Id.* The plaintiffs argued on appeal that the Supreme Court implicitly overruled this standard in *Bartlett v. Strickland*, 129 S.Ct. 1231 (2009), providing instead that only voting-age population – not *citizen* voting-age population – matters under the first *Gingles* test. *Id.* at 1021 n.2, 1023. The Fifth Circuit examined the plurality opinion in *Strickland* and concluded that the "citizen voting-age population" standard remains good law. *Id.* at 1024-25. ■





THOSE WHO CAN, DO; THOSE WHO REALLY CAN, TEACH

Insights at the Intersection of Teaching & Practice from Professor Tracy Walters McCormack

by Gretchen Sween

Creating an opportunity that would permit Tracy Walters McCormack to sit still for a while and talk about herself was no easy feat. Since McCormack transitioned nearly ten years ago from full-time litigator to full-time director of the advocacy program at the University of Texas School of Law, she has not exactly slowed down. She now multi-tasks even more proficiently—juggling the demands of teaching and of advocating for greater communication among law students, the bench, and the bar regarding the ever-shifting challenges that practitioners face. I managed to entice her to “double-dip” one evening such that she was able to meet with me while simultaneously hosting an event to welcome law-student members to a newly formed Inn of Court, an organization committed to improving the skills, professionalism, and ethics of the bench and the bar.

Before joining the full-time UT Law faculty in 2000, Professor McCormack spent fourteen years as a litigator. But during most of those fourteen years, McCormack also served as an adjunct professor at the law school, teaching trial advocacy skills and Texas Civil Procedure courses.

I wanted to know: Despite the obvious demands and the minimal financial compensation, why do lawyers elect to teach? Sure, lawyers like to give advice. Indeed, most of us relish any opportunity to mouth off about our opinions regarding the proper way to go about doing all manner of things. But does the experience of teaching the nuts and bolts of law practice make those who do it better practitioners—and particularly, better trial lawyers? If so, how does that work?

Because Professor McCormack is someone who spent a number of years doing both very successfully, it seemed likely that her story could provide some insights. Did her pre-law background somehow suggest that she would be called to be a trial lawyer who would ultimately teach others to be trial lawyers and how to use trial skills simply to be better lawyers?

As an undergraduate at the University of Notre Dame, Professor McCormack’s major was a daunting combo of English, philosophy, and theology. “As I approached graduation, it became relatively clear that my preparation thus far meant that I was going to have to become a nun (somewhat difficult since I was not Catholic), or learn Greek, or acquire some more practical skills. I opted for the latter.” She decided that satisfying this mandate meant going to law school.

Three years after graduating from Notre Dame, she earned a J.D. from the University of Texas. “But initially, I had *no* intention,” she explained emphatically, “of coming to Texas—let alone staying in Texas. I only applied to UT as an afterthought. It was not on my radar because I was somewhat wary of the entire South. But when someone in the admissions office called my dad and broke the news that I was being offered a full scholarship,

he was just thrilled. In fact, when he told me the news, I don’t believe I’d ever before heard such pride in his voice. I then remember pulling out the Yellow Pages, which then had regional maps in the front, to find out where Austin was. I didn’t have the chance to visit the city or the campus first; I accepted the offer sight unseen.”

After a teary send-off, her parents returned home to Wheeling, West Virginia and left McCormack to make her way in an apartment she had rented on the East side, also sight unseen. She spent her first few weeks without a car, telephone, or even any furniture. This launch did not exactly convince her that Texas was the place she wanted to call home long term. “I swore to every new friend I made that I *hated* Texas and I would leave as soon as I could—and would never look back.” And to prove the point, she spent the summer after her first year back home working as a briefing clerk to the Honorable Thomas B. Miller, Presiding Justice, West Virginia Supreme Court of Appeals. And she continued to set her sights on heading back North to practice.

But at some point during her Three-L year that all changed.

“By my third year, I finally had a car. That allowed me to get a fuller sense of Austin. Just a few weeks before graduation, I ended up accepting an offer to join the litigation section of an Austin firm, Clark, Thomas & Winters. That’s where I got trial experience right away.”

Did you come to law school with the idea that you would become a trial lawyer?

“Oh, no! When I came to law school, I had very little sense of what lawyers even do. I didn’t even know what kinds of lawyers there were.”

Professor McCormack hails from Wheeling, West Virginia, a small town in the Pittsburgh Tri-State area—directly across the river from Ohio and only about ten miles from the Pennsylvania border. Wheeling was a pivotal city in the Commonwealth of Virginia until 1861 when several western counties seceded from the state to remain part of the Union; Wheeling then became the first, but not the last, capital of West Virginia. Racial diversity, however, has never been Wheeling’s claim to fame. Today less than 6% of the population is non-White. As an African-American, Professor McCormack’s father, whom she affectionately describes as “a real Einstein,” never had a real shot at a formal education. He began his working life as a dishwasher in the kitchen of a local hospital. But over the years, he worked his way up to leading the hospital’s entire engineering department, and he now sits on the hospital’s board of directors. Meanwhile, Professor McCormack’s mother toiled as a housekeeper. In other words, Professor McCormack did not spring from a family of professionals who could have given her concrete guidance about the best path to college, law school, private practice, and then a position heading

the advocacy program at one of the nation's largest and most prestigious law schools. In fact, Professor McCormack only had two childhood experiences that gave her any notion of what lawyers do. One experience was working on Sunday evenings with her family cleaning the offices of a local practitioner; the more abstract and seminal experience was the general sense that, as an African-American coming of age in the 1960s and '70s, the doors that were opening for her had something to do with the hard work lawyers of some variety had been doing.

"We were the first kids in Wheeling to integrate the public and then the private schools. As a matter of fact, until I went to UT, I was used to being one of the only black kids in any given class."

But most of her associations with Wheeling seem rather positive. "For a small town, Wheeling did have an impressive array of cultural offerings. We had a symphony, theaters, the Capitol Music Hall.¹ And I was involved in theater as a kid."

Did your experiences doing theater have anything to do with your decision to become a trial lawyer?

"Not really. Back then, I did not associate performing with what lawyers did."

Did your law school experience awaken an interest in trial work?

"During my first year, I was disoriented like most everyone, not sure what it is that I might be good at. Then, because of the way the first year curriculum was structured at the time, I was forced to stand up and give an oral argument in conjunction with the One-L moot court competition. Honestly, if I had not been *required* to do that, I would never have gravitated toward trial law."

After her initial experience with moot court, McCormack got involved with the mock trial program that was just developing at UT Law under the leadership of Pat Hazel, Jack Ratliff, and Michael Tigar. She won the novice mock trial competition and was invited to join an interscholastic team. "I was flabbergasted that someone thought I could do this. But these experiences helped me see what I was good at." Not long after graduation, she was recruited to coach the same interscholastic mock trial team in which she had participated. Soon thereafter, she became an adjunct instructor in a nine-day intensive trial skills program that venerable trial lawyer Mike Tigar had founded at UT.

Considering the demands associated with a litigation practice, how did you find time for teaching and coaching?

"Because it was important to me, I made time for those activities—early in the day and in the evenings."

Why?

"While I was practicing, teaching provided me with many

'ah, ha!' moments. For instance, I remember when I was asked to teach Texas Civil Procedure. I had not taken Texas Civil Procedure in law school because I had been so certain that I was not going to remain in Texas. Of course, by the time I taught the class, I had been practicing in Texas for a number of years; I'd been to trial numerous times. But the process of teaching required that I understand the 'whys' behind the Rules. I need to know 'why' something is in order to really 'get it.' But as a practitioner, we learned the Rules by watching senior attorneys and then doing our best to emulate what they did. No one explained why particular choices were being made along the way. Teaching forced me to dig deeper. In my view, grasping the 'why' that underlies the Rules permits you to shift gears in response to changed circumstances. A lawsuit is always in flux. But if a person's understanding of the Rules is only mechanical, she can't respond quickly enough to the changes. Teaching, not practice, permitted me to fit the pieces together and see the big picture."

Aside from enriching your global knowledge of the Rules that govern litigation, can you identify a specific lesson that you gleaned from teaching—something that actually changed your approach to practice?

"Teaching the Rules really brought home the importance of preserving error, especially in the jury charge. The charge is supposed to reflect the big picture—which I could see more clearly as a result of teaching procedure. I continue to emphasize to my students that

the charge is foundational—it should shape discovery, guide case development, every step of the way."

After you segued to teaching full-time, was there anything you learned that you wished you had known as a practitioner?

"As a practicing trial lawyer, I don't think I ever appreciated how the ability to persuade a person is tied to personality type. I didn't fully appreciate that there isn't just one way to do something. Persuasion works differently with different people; and to be effective, you have to reach jurors as individuals. This fundamental concept—that individuals have different learning styles—is something I wish I had been able to utilize in voir dire, in particular. It is just so critical—that a case, starting with voir dire, be tried on multiple levels simultaneously. For me, analogizing to languages drives home this point: If you have French and German speakers on your jury, but you only speak to them in English, they will not be persuaded. As a lawyer, you need to present your case so that it works for auditory, kinesthetic, and visual learners. When I did voir dire as a practitioner I felt competent, but I really had no idea what we were doing. I didn't know, until I started teaching, what kind of information I should have been trying to elicit to make the best use of strikes. Back then, we really relied on gross stereotypes—engineers are good for the defense, artists are good for plaintiffs, stuff like that. Learning about different learning styles—from the process of teaching—is what caused me to rethink the principal purpose of jury selection."

“The process of teaching required that I understand the ‘whys’ behind the Rules.”

¹ Thanks to Wikipedia, one can learn that, well before Tracy McCormack's time, Wheeling's 2,500-seat Capitol Music Hall, which opened in 1928, sponsored a popular radio program in the early forties that featured musical performances by workers at a local steel plant. In later years, the Music Hall featured country music icons like Johnny Cash, June Carter-Cash, Merle Haggard, and Tammy Wynette.

When Professor McCormack agreed to take charge of UT Law's advocacy program, both Jack Ratliff and Mike Tigar were gone and Pat Hazel was preparing to retire. By then, there was no "program" per se, just two classes.² But the challenge represented by that state of affairs—of developing a comprehensive program that would serve the shifting needs of the students and of the bar—was exactly what appealed to McCormack.

"Law schools in general are not big on change. They are certainly not arenas for experimentation. But a principal part of my job on the advocacy side is to develop classes that respond directly to changing market conditions, to changing times. A part of my job is staying apprised through practitioners regarding the bar's needs. Also, I invite the students themselves to give me candid feedback in response to the curriculum—what skills they need, what sources and exercises were or were not helpful. Law isn't like other aspects of academia—you really can't afford to lose touch with the profession that your students are preparing to enter."

What is one change in the profession that you have observed since you moved from practicing to teaching full-time?

"When I came on, the evidence was overwhelming that the jury trial was in decline; yet our limited advocacy offerings were all focused on jury skills. I recognized that the classes needed to reflect what students are really going to go out into the world and be expected to do. Students needed to learn how to be an effective advocate in ADR, in negotiations. But I also learned that the need to teach trial skills remained—because law school might be the only place where new lawyers could try out those skills for some time."

That is, because of the vanishing jury trial, Professor McCormack recognized that fewer and fewer law students were going to be able to have the kind of experiences that she had shortly after graduation. "When we got out, we were fearless. And we were thrown right in. Now, young lawyers and even experienced practitioners can be a bit paralyzed by the magnitude of it all—if and when they finally get a chance to go to trial. When you come out of law school and you've gotten affirmed for being good at mock trial, you don't know better—you think you can conquer the world. And I think that attitude is what you *need* when you go to trial—*especially* when you are inexperienced. You can be crippled by too much hindsight—especially if you haven't had the chance to get comfortable with trial skills through lots of repetition. If you spend years waiting to get to trial for the first time, and if the stakes are so high that firms believe they cannot trust new lawyers to play a role at trial, it gets harder and harder to see how lawyers will have the right

² The program now includes five advocacy classes. And since Professor McCormack took over, the program has brought UT ten national championships and twelve regional championships in interscholastic moot court and mock trial competitions.

'trial lawyer spirit' necessary to meet the challenge when the time comes."

It sounds as if you spend as much time teaching the bar as you do law students. Is that a fair assessment?

"One of my roles is to be a link between, on one hand, the great trial lawyers before me who went to trial hundreds of times and, on the other hand, the generation of lawyers coming up now when jury trials are rare. I am working on several video interview projects to try to capture some of the wisdom from the older generation. 'Texas Legends' will focus on the experiences of great trial lawyers, like Joe Jamail. And 'The Atticus Profiles' will focus on lawyers, like Broadus Spivey, who devoted their entire professional life to doing the right thing. These are projects that will allow me to expand the scope of my teaching beyond the conventional classroom, beyond the law school."

The number of projects Professor McCormack has launched during her brief tenure as director of UT law's advocacy program is truly eye-popping. For instance, McCormack is responsible for the "Judges in Residence" program,

which brought the United States Court of Appeals for the Fifth Circuit to UT Law. And one of her more ambitious endeavors is the Fall Litigation Institute, launched in 2007.

"Initially, we had 50 students; this year we have 140. The response has been amazing."

To make the Fall Litigation Institute work, Professor McCormack has had to rely on her small, fiercely committed staff of two, Cheryl Brandt and Marla Massin, and on many practicing lawyers who agree to give up part of a Friday each week during the fall semester to teach specific trial skills. These quasi-volunteer instructors come from the U.S. Attorney's Office, the Texas Attorney General's Office, the Travis County D.A.'s office, big firms, small firms, solo practices, and consulting groups.

Professor McCormack has no shortage of practicing litigators who are willing to make time to teach or coach for the advocacy program. Perhaps this is because they, like Professor McCormack herself, recognize that teaching hones the very skills that make an effective advocate—not just the ability to stand up in front of an audience and persuade, but also a commitment to respecting differences in one's audience, improvising in response to change, and remaining hungry for new opportunities to learn. McCormack does not just teach law students, she also teaches the bar, the bench, and members of the academic community. She teaches the importance of looking simultaneously *back* at the paths forged by some of the most accomplished among us and *ahead* to the changing needs and demands associated with practicing law in this millennium.

"I hope to convey a message that all of us, as members of this profession, play a crucial role in how *justice* is perceived by everyone else." ■

We play a crucial role in how justice is perceived by everyone else.



EVIDENCE & DISCOVERY UPDATE

by Mary Evelyn McNamara

Texas Supreme Court

Railroad's Rate Structures Protected by Trade Secret Privilege.

In re Union Pac. R.R. Co., 294 S.W.3d 589 (Tex. 2009) (orig. proceeding).

This Bexar County case involved personal injury claims against Union Pacific Railroad. Chlorine gas was released from a train car after a train collision. Among the plaintiff's claims was that Union Pacific should have placed the rail car carrying chlorine further back in the line of train cars. Union Pacific's manager of chemical transportation safety testified in deposition that the railroad could place hazardous cargo anywhere in the line, except within five cars of the engine. After learning this, the plaintiff sought Union Pacific's rate structures for handling hazardous materials and comparative rate structures for handling chlorine gas. Union Pacific filed a protective order and motion to quash. The trial court ordered the information released to attorneys and necessary employees only.

Union Pacific sought mandamus relief in the Fourth Court of Appeals, which was denied. Union Pacific then sought mandamus relief before the Texas Supreme Court, arguing that the information is protected by the trade secret privilege, contractual confidentiality provisions, and federal law, and that the request is overly broad and unduly burdensome.

The Court agreed that the information is protected by the trade secret privilege and thus did not reach the other two grounds for mandamus relief. The Court found that Union Pacific's affidavits established trade secret protection, and the plaintiff had presented no evidence to the contrary. Once trade secret status was established, the burden shifted to the plaintiff to establish that the information is "necessary or essential to the fair adjudication of the case, weighing the requesting party's need for the information against the potential of harm to the resisting party from disclosure." *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 732 (Tex. 2003). The plaintiff claimed that the rate information was necessary to rebut Union Pacific's claim that placing hazmat cars at the back of the train would be cost-prohibitive. The plaintiff also claimed that she had no alternative means of proving that Union Pacific recognized, yet disregarded, a higher duty with respect to hazardous materials. It was unclear to the Court why the plaintiff needed the specific rate structures to advance this negligence theory. Additionally, the disclosure of the rate structures risked harm to Union Pacific. Because the plaintiff failed to meet the burden that disclosure of the rate structures was material and necessary, the Court granted Union Pacific's petition for writ of mandamus.

Abuse of Discretion to Compel Production of Hard Drives Without Evidence of Forensic Experts' Qualifications to Analyze Electronic Evidence.

In re Weekley Homes, L.P., 295 S.W.3d 309 (Tex. 2009) (orig. proceeding).

In this mandamus proceeding arising from a Dallas County case, the Court determined whether the trial court abused its discretion by ordering four of defendant Weekley Homes' employees to turn over their computer hard drives to forensic experts for imaging, copying, and searching for deleted emails.

The underlying case involved a real estate development contract dispute. The plaintiff, HFG, sent a request for production to Weekley Homes that included a request for emails related to the development and contract. Weekley Homes produced thirty-one emails, one of which, predating the contract in dispute, addressed the existence of multiple unsafe subdivision lots that required remedial measures. HFG moved to compel Weekley Homes to search for deleted emails on backup devices. A representative for Weekley Homes testified that deleted emails were saved for only a thirty-day cycle. After the trial court denied HFG's motion to compel, HFG filed a motion for access to computer hard drives of four of Weekley Homes' employees, so that HFG's consultants could perform a forensic analysis of the hard drives. Weekley Homes complained of the intrusiveness of the request. The trial court nevertheless granted the motion. Weekley Homes sought mandamus relief in the Fifth Court of Appeals, which was denied.

At the outset, the Court determined that the deleted emails are electronic information under Texas Rule of Civil Procedure 196.4. Weekley Homes argued that HFG failed to comply with Rule 196.4 because it never specifically requested production of "deleted emails." Rule 196.4 provides that, "[t]o obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced." Tex. R. Civ. P. 196.4. The Court found that because the scope of HFG's requests was understood before trial court intervention, Weekley was not prejudiced by HFG's failure to follow the rule. The Court opined that to ensure compliance with the rules and avoid confusion, however, parties seeking production of deleted emails should expressly request them.

Examining whether HFG followed the procedure under Rule 196.4 was only one step in the Court's analysis. Because Rule 196.4 does not provide express guidelines for the manner or means by which electronic information that is not reasonably available in the ordinary course of business may be ordered produced, the Court looked to the federal rules and courts applying them for guidance. Under both federal and Texas law, the Court determined

that providing access to information by ordering examination of a party's electronic storage device "is particularly intrusive and should be generally discouraged, just as permitting open access to a party's file cabinets for general perusal would be."

Although the trial court could have concluded that HFG made a showing that Weekley Homes did not search for relevant deleted emails that HFG requested, that did not justify access to the computer hard drives. In the Court's analysis, the missing step was a demonstration that Weekley Homes' electronic information storage methodology would allow retrieval of emails that have been deleted or overwritten, and what that retrieval would entail. A complicating factor was that two and a half years had elapsed between the time the emails were created and HFG requested them. Also included in the Court's analysis was an examination of the one Texas case addressing a similar situation, *In re Honza*, 242 S.W.3d 578 (Tex. App.—Waco 2008, pet. denied). A distinguishing factor in *Honza* was that the party seeking the electronic discovery presented extensive evidence concerning its expert's experience and qualifications. Here, HFG presented no evidence that its experts were qualified to perform the search given the particularities of the specific storage devices at issue, or that the search methodology would likely allow retrieval of relevant deleted emails. The Court concluded, therefore, that the trial court abused its discretion by granting the motion compelling production of the hard drives.

Note: This opinion includes a road map for the procedures to seek electronic discovery under Texas Rule of Civil Procedure 196.4.

Evidence of Damages Legally Insufficient to Support Post-Answer Default Judgment.

Bennett v. McDaniel, 295 S.W.3d 644 (Tex. 2009).

In this Wheeler County case, the Bennetts sued McDaniel alleging that McDaniel had damaged the roof of their home, which the Bennetts had hired him to repair. McDaniel filed an answer, but did not appear when the case was called for trial. At trial, Mary Bennett testified that she received an estimate to repair the roof in the amount of "approximately 72 or \$7300.00," and that she incurred "actual damages of \$7500.00 to repair this roof." The estimate was not in the record. The trial court rendered a default judgment in favor of the Bennetts for \$7,500 in actual damages, \$10,000 in punitive damages, and \$1,500 in attorney's fees.

The Court disagreed with the court of appeals that the damages evidence was legally insufficient because the estimate did not appear in the record. Instead, the Court found the damages evidence legally insufficient because Mary Bennett did not testify that the damages were reasonable. Pursuant to the Court's recent holding in *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922 (Tex. 2009), when the evidence is legally insufficient to support a post-answer default judgment the proper disposition is to remand for a new trial. Accordingly, the Court reversed the default judgment and remanded the case to the trial court for a new trial.

Limited Pre-Arbitration Discovery Available on Issues of Scope or Arbitrability.

In re Houston Pipe Line Co., L.P., No. 08-0800, 53 Tex. Ct. Sup. J. 57, 2009 WL 1901640 (Tex. Oct. 23, 2009) (supp. op. on reh'g).

We reported on this case in the Fall 2009 issue of *News for the Bar*. The question before the Court was whether the trial court abused its discretion by permitting pre-arbitration discovery on damage calculations and other potential defendants, instead of deciding a motion to compel arbitration. The Court determined that because the discovery ordered was overbroad and beyond the issues raised in the motion to compel, the trial court abused its discretion by ordering the pre-arbitration discovery rather than ruling on the legal issues raised by the motion to compel. One of the parties filed a motion for rehearing, complaining that the Court's holding could foreclose all pre-arbitration discovery in the underlying case. The Court overruled the motion for rehearing. It reiterated that although the discovery order below was overbroad and must be vacated, the trial court retains discretion to order limited pre-arbitration discovery on issues of scope or arbitrability, if necessary.

Expert Testimony Legally Insufficient to Establish Design Defect in Clothes Dryer.

Whirlpool Corp. v. Camacho, 298 S.W.3d 631 (Tex. 2009).

The Court considered whether the plaintiff's expert testimony was legally sufficient to establish a design defect in a Whirlpool clothes dryer. In the underlying Hidalgo County case, Margarita Camacho testified that the Whirlpool dryer, which they had purchased used, caught fire. The fire destroyed their mobile home and killed their fifteen year-old son, who was trapped. In the ensuing investigation, the fire marshal concluded that the fire did not start in the dryer; the experts hired by the Camachos' attorneys concluded that it did; and Whirlpool concluded that it did not.

The Camachos brought a products liability and wrongful death suit against Whirlpool, asserting that Whirlpool's use of a corrugated tube in the dryer's air circulation system was a design defect because it became clogged and caused lint to be discharged into the dryer cabinet where lint particles were ignited by the dryer's heater element and ignited particles were circulated into the dryer drum where they ignited the clothes. The Camachos claimed that the fire escaped the dryer drum through the back of the dryer cabinet and caught the trailer on fire. To prove their design defect claim, the Camachos relied on testimony from Judd Clayton, an electrical engineer.

Clayton's testimony was the only evidence of a design defect. He opined that the fire started when the clothes in the dryer drum were ignited by smoldering lint particles. Clayton's opinion was that the corrugated tube allowed lint to hang up on the inside of the tube and clog it, causing the fire, and that the fire then escaped through the back of the dryer and ignited the Camachos' home.

Whirlpool challenged almost every assertion made by the Camachos as to both liability and damages, including Clayton's assertion that lint particles ignited by the heating element ignited clothes in the dryer drum. Whirlpool additionally objected to admission of Clayton's opinions as to design defect and safer alternative design on the ground that they were not reliable. It also challenged the legal sufficiency of the evidence to support the jury submission of design defect on the basis that Clayton's testimony was the only support for the submission and his testimony was

not reliable, was based on unfounded assumptions, and was conclusory. The trial court denied Whirlpool's challenges. The jury found that a design defect in the dryer was a producing cause of the fire and the son's death. Based on the verdict, the trial court entered judgment against Whirlpool. The Thirteenth Court of Appeals affirmed.

The Court determined that the court of appeals did not perform a proper legal sufficiency review about whether Whirlpool conclusively disproved that the fire occurred as Clayton testified it did. Applying the *Robinson* factors, the Court concluded that the data on which Clayton relied did not support his opinions. *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995). Most of Clayton's theory of how the fire was caused by a clogged lint transport lacked testing. Additionally, his theory was developed for the litigation in this case. *See id.* at 559 (“[O]pinions formed solely for the purpose of testifying are more likely to be biased toward a particular result.”). Also, his opinions and theory had not been published in any scientific journal, treatise, or publication so they could be subjected to peer review by someone other than an expert retained by the Camachos in the lawsuit. Further, Clayton did not demonstrate that his theory had been accepted as valid by any part of a relevant scientific or expert community at large.

Because Clayton's testimony was the only evidence that the alleged design defect caused the fire, there was no evidence to support the finding that a design defect in the dryer caused the mobile home fire. The Court reversed and rendered a take-nothing judgment.

Error Not to Include Reasonable Time Limit in Order Compelling Discovery.

In re Deere & Co., 299 S.W.3d 819 (Tex. 2009) (orig. proceeding).

In this discovery dispute, the Court determined that a trial court's order compelling production of documents was overly broad because the order neglected to limit discovery to a reasonable time period. The underlying products liability suit arose from a man falling under a John Deere 410D backhoe loader. The man was standing on a side step, which allegedly broke and caused him to fall.

The plaintiff's request for production to John Deere included “all [non-governmental] documents of customer complaints received by [Deere] relative to the sidestep on any model backhoe.” Deere objected to the request as overly broad. At the hearing on plaintiff's motion to compel, the parties agreed to limit production to documents relating to models with similar handles and step assemblies, going back twelve to fifteen years, when production began on the 410D. The plaintiff's proposed order, however, included more than thirty product lines but did not include any time limit.

At an ensuing hearing, the trial court sought to narrow the discovery requested. It heard evidence from the plaintiff's expert that the models included in the proposed order were sufficiently similar. Deere did not present any refuting evidence but sent a post-hearing letter to the trial court stating that the 410D and other models had been modified in 1996. The trial court entered the plaintiff's order without any changes. Deere sought mandamus relief in the Tenth Court of Appeals, which was denied. The Court held that the trial court properly sought to narrow the discovery but abused its discretion by failing to include a reasonable time limit in its discovery order. The Court granted Deere's petition for writ of mandamus and directed the trial court to vacate that part of its order that compelled Deere to produce documents relating to lawsuits or complaints about the models identified as potentially relevant without setting a reasonable time limit. ■



NEWS FROM THE BAR

President-Elect Candidates Announced

Candidates for 2010-2011 State Bar of Texas president-elect are **Bob Black** of Beaumont and **Debbie Bullion** of Sugar Land. The election will take place this spring, results will be announced April 30, 2010, and the winner will serve as State Bar president from June 2011 through May 2012.

Board Votes on Professional Liability Insurance Disclosure

On January 29, 2010, the State Bar of Texas Board of Directors, by a vote of 39-1, recommended to the Supreme Court of Texas that attorneys not be required to disclose whether or not they carry professional liability insurance unless a client or prospective client asks for that information.

2010 State Bar YouTube Contest: The Importance of the Legal System

State Bar President Roland Johnson encourages all Texans to create a 30-second video, similar to a public service announcement, that answers one of these questions:

- 1. Why are lawyers important to our society?**
- 2. How is the court system important to our society?**

This contest is open to residents of Texas and attorneys licensed to practice in Texas. To enter, submit/post your video to www.youtube.com/group/texansonjustice. Videos must be 30 seconds long or less. Mail an original copy of your video on DVD or videotape to YouTube Contest, c/o State Bar of Texas, Attn: Judy Marchman, 1414 Colorado St., Austin TX 78701. Include your name and YouTube username on the copy. The deadline for entries is April 1, 2010.



A VIEW FROM THE BENCH: Judge Jennifer Walker Elrod

by John McFarland

The federal courts building in Houston is a famously dour building. Boxcar windows dot the structure like little square portholes; the building itself resembles nothing so much as an air-raid bunker. A stark and austere interior seems well suited to the task of meting out justice. So you are in for quite a pleasant surprise when you reach the top floor and the chambers of Fifth Circuit Court of Appeals Judge Jennifer Walker Elrod. The severe white floors and dark walls give way to hardwoods that give a pleasant clip-clop as you walk down the hall; the cream walls capture and diffuse the sparse natural light streaming in from the small and infrequent windows.

Maria Valdez greets you with a warmth normally reserved for extended members of the family. A cup of chicory coffee reminds that New Orleans is the favored seat of the Fifth Circuit and sets a perfect mood to meet the estimable Judge Jennifer Walker Elrod.

Judge Elrod was born in Port Arthur and grew up in Baytown. She graduated magna cum laude from Baylor University with a B.A. degree in economics. She graduated cum laude from Harvard Law School in 1992. She is married to Hal Elrod and has two daughters, twelve and nine. In addition to her service on the Fifth Circuit, she takes great pride in her service on the Board of the Texas Center for Legal Ethics and Professionalism, which celebrates the twentieth anniversary of the Texas Lawyer's Creed this year and her celebrated performances in the Houston Bar Association's annual Night Court supporting legal services to the poor, through which she has played roles such as Christine in *The Phantom of the Law Firm* and Snow White in this year's production, among others. She also teaches her Sunday school class and is a co-leader of her daughters' Brownie troop ("Cub Scouts have packs," she corrects, "Brownies have troops.")

After a two-year clerkship for Judge Sim Lake, United States District Court Judge for the Southern District of Texas, Houston Division, she joined Baker & Botts, LLP, where she tried many cases on the firm's Farm Bureau and Centerpoint dockets and cases addressing matters as diverse as antitrust and ERISA. In 2002, she won the Republican primary for the 190th District Court of Harris County; Governor Rick Perry appointed her to the bench after her victory in the primary and she won reelection in 2002 and 2006. In March 2007, President George W. Bush nominated her to replace Judge Patrick Higginbotham on the Fifth Circuit when Judge Higginbotham took senior status; the Senate confirmed the nomination in October 2007. Her first published opinion for the Fifth Circuit, *United States v. Spencer*, was released on January 14, 2008; other notable

opinions include *Merced v. Kasson*, 577 F.3d 578 (5th Cir. 2009) (addressing religious liberties), *Nowlin Peake (In re Nowlin)*, 576 F.3d 258 (5th Cir. 2009) (addressing calculation of "projected disposable income" in bankruptcy), and *United States v. Mondragon-Santiago*, 564 F.3d 357 (5th Cir. 2009) (addressing standards for criminal sentencing).¹

On the 190th District Court, Judge Elrod presided over hundreds of trials. While she misses the day-to-day interaction with juries and lawyers, the "hustle and bustle of the trial courts," and the drama of the courtroom, she has thrived in her new role on the appellate court. She recreates some of that "hustle and bustle" through her hiring of interns, clerks, and briefing lawyers. "I try to get as many students and young lawyers in here as I can, so that they are exposed to this environment." She takes the mentoring part of this endeavor very seriously and maintains long-term relationships with the people who serve in her court.

This author tried a jury trial in Judge Elrod's court some years ago. She was earnest, hard-working, insightful, and, above all, fair. "It was important to me that my rulings be transparent, that the parties know exactly why I had ruled the way that I did. I wanted to get it right, but I also wanted to make sure the parties could correct me where I got it wrong."

She notes with some irony that she had "much more power – more discretion – as a trial court judge than now [sitting on the appeals court]. For a huge range of issues, it is the trial courts that are vested with discretion, and the Court of Appeals will only reverse where there has been an abuse of discretion." She notes that "trial judges make hundreds of small determinations a day in the course of handling their dockets, while appellate judges make fewer decisions and most of them only by consensus with other judges." Much more so than the trial court, the appeals court "is charged with upholding the fabric of the law, with establishing the structure for the rule of law, with establishing settled expectations."

Of course, her service as a trial court judge also informs her perspective as an appellate judge. This is nowhere more evident than in her recent dissent from a denial of rehearing *en banc* in *Huss v. Gayden*, 585 F.3d 823 (5th Cir. 2009). In a carefully worded dissent, she asks of the majority: "What is a trial judge to do when he or she is persuaded that an expert witness is not qualified to render a specific-causation opinion because of the witness's deficient explanation or lack of specific experience?" She scours the record to determine "what [the trial lawyers] were telling the trial court; is it different than

¹ Some of the background information was obtained through and/or confirmed by Wikipedia: http://en.wikipedia.org/wiki/Jennifer_Elrod.

what they are telling us?” Judge Elrod holds a dim view of an appeal that purports to second-guess the trial court judge without having provided the trial court with the arguments and authorities necessary to reach the argued-for result.

Judge Elrod’s offices include a library of the Federal Reports and Federal Supplements, among other reference material. She gestures to them to make a point. “In those books there are thousands of pages, thousands of cases, thousands of decisions. And yet there are so many questions of law that are still open, so many answers that we have yet to provide.” She adheres to the concept of judicial minimalism and considers herself “a textualist,” but also strives in her opinions to provide clear instruction. Providing “settled expectations and guidance on questions of law is a critical function of the appellate courts.”

This leads to a discussion of her views for what makes a good lawyer. “A passion for it, and integrity, those are the two critical attributes. And courage, a sense of adventure.” She has specific tips for trial lawyers:

- **Don’t underestimate the intellectual engagement of the jury.**
- **Remember to preserve error.**
- **Get your documents in the record.**
- **Get orders in writing quickly. Volunteer to write proposed orders yourself if necessary.**
- **Maintain a good reputation throughout the courthouse.**

Of course, her service on the Fifth Circuit has given her great insight from which any appellate lawyer could learn. She is good-natured about her youth but warns anyone presenting argument to avoid comments regarding such matters. “Don’t compare the ages of the members on the panel. That just can’t go anywhere good.” She has more practical advice, too. “Remember who you are arguing to. Judges like tradition and the nature of the appellate courts reinforces that. Don’t bring a PowerPoint presentation to argument.” In fact, Judge Elrod

does not recommend using any demonstratives. “The panel cannot read them, and they distract from your argument.” And if the judge does not hear what you have said, you may as well have not bothered to say it. “Speak slowly and into the microphone.”

The most common mistake that lawyers make in presenting oral argument is “to try to get it all in.” If you try to make three points, “you will probably fail to make even one, so know what’s important and emphasize that.” That said, Judge Elrod notes that many lawyers give back time in their argument. “It’s a sign of experience to know you don’t have to fill the full twenty minutes.” Back away from the microphone; you may have already won.

Appellate advocates “should argue cases from relevant legal rules and not merely based on facts and outcomes.” Build your case “from the ground up based on the applicable rules of law in our circuit.” “Unpublished or out-of-jurisdiction authority” should only be used “to the extent that it persuasively applies the same or similar rules.” She identifies the published opinions of the district courts in the Fifth Circuit as “a significantly underutilized resource.” “These cases are almost always well-researched and based on applicable circuit precedent.” Also, when state law applies, the circuit judges are aware that the district court may have more focused experience applying that law.

A tremendous resource that some practitioners may not know about is the availability of oral arguments presented over the last two years online at <http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx>. An appellate lawyer can listen to legendary advocates argue complex cases the day after the argument is conducted. She views this both as a great opportunity to learn from the best advocates practicing appellate law and also a great step forward in terms of the public’s interest in open courts.



The State Bar of Texas thanks Judge Jennifer Walker Elrod for her time and service, and this author thanks her for her gracious hospitality.