The year brought significant developments to the legal profession and caselaw. The Texas Bar Journal Board of Editors has assembled a series of articles highlighting these issues. The topics featured are not exhaustive, and the opinions reflect only the views of the authors.

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ANTITRUST AND BUSINESS LITIGATION

By Emily Westridge Black and Carrington Giammitorio

The U.S. Supreme Court took up its first insider trading case in more than 20 years and issued an important opinion addressing the applicability of equitable tolling to the Securities Act of 1933’s statute of response.

Insider Trading Developments

More than 30 years ago, the Supreme Court held in Dirks v. SEC that a tippee may be liable for insider trading if the tipper breached a fiduciary duty in disclosing the information, which occurs when the tipper receives a personal benefit from the disclosure. In recent years, the circuit courts had split over what constitutes a “personal benefit.” In United States v. Newman, the 2nd Circuit Court of Appeals held that a personal benefit could not be inferred unless the tipper and the tippee have a “meaningfully close personal relationship” and engage in an exchange that results in “at least a potential gain of a pecuniary or similarly valuable nature” for the tipper. But in United States v. Salman, the 9th Circuit declined to follow Newman, and held that a tipper receives a personal benefit when he makes “a gift of confidential information to a trading relative.” The Supreme Court addressed the split in Salman v. United States, affirming the 9th Circuit’s interpretation of Dirks and noting that, when a tipper gives inside information to a trading relative, a fact-finder can infer that “the tipper benefits personally because giving a gift of trading information is the same thing as trading by the tipper followed by a gift of the proceeds.” In doing so, the court expressly rejected Newman’s pecuniary benefit requirement but did not address whether the tipper and tippee must have a close relationship.

Thereafter, the 2nd Circuit scuttled the close relationship requirement in United States v. Martoma. The three-judge panel reasoned that, under Salman, “gifting” confidential information with the expectation that the tippee will trade on it is the functional equivalent of a cash gift. Thus, there is no basis for distinguishing between “gifts” of confidential information to people with whom a tipper has a “meaningfully close personal relationship” and gifts to those with whom the tipper does not have such a relationship. Moving forward, the relevant inquiry is simply whether a tipper discloses the confidential information with an expectation that the tippee will trade on it.

No Equitable Tolling of Securities Act’s Statute of Repose

In June, the Supreme Court held in California Public Employees’ Retirement System v. ANZ Securities, Inc. that the three-year time limit in the Securities Act of 1933 is a statute of repose and, thus, not subject to equitable tolling. The underlying dispute began in 2008, when plaintiffs filed a putative class action relating to debt securities issued by Lehman Brothers Holdings Inc. between July 2007 and January 2008. The California Public Employees’ Retirement System, or CalPERS, was part of the putative class but was not a named plaintiff. In February 2011, more than three years after the offering at issue, CalPERS opted out of the class and filed a separate complaint. The district court dismissed CalPERS’ complaint as untimely, and the 2nd Circuit affirmed.

Justice Anthony Kennedy delivered the opinion of a 5-4 court, holding that the equitable tolling doctrine of American Pipe & Construction Co. v. Utah, which provides that commencement of a putative class action tolls the applicable limitations period as to all asserted class members until the action is resolved or the class is denied or decertified, could not supersede the express language in the Securities Act’s statute of repose. In doing so, the court rejected CalPERS’ argument that individual claims should be deemed to have been filed with the putative class claims. Going forward, the CalPERS opinion will provide security to defendants regarding the scope of their potential liability in class actions involving claims that are subject to statutes of repose.

Notes

3. 792 F.3d 1087 (9th Cir. 2015).
5. 869 F.3d 58 (2nd Cir. 2017).
The Texas Supreme Court addressed several important and recurring appellate issues last year. These issues include the recovery of lost-profits damages, the excessiveness of exemplary damages awards, and challenges to expert testimony as conclusory.

The Supreme Court reviewed a jury's award of lost profits and exemplary damages in Horizon Health Corp. v. Acadia Healthcare Co.1 Horizon, a provider of contract-management services, sued its former managers and salesperson for copying Horizon's confidential documents and joining a competitor. A jury awarded Horizon lost profits from a hospital contract, salesperson's future sales, and $1.75 million in exemplary damages.2 The court of appeals reversed the lost-profits award and suggested the exemplary damages should be remitted to about $220,000 per defendant.3 The Supreme Court agreed there was no evidence of lost-profits damages; there was no proof that, absent the defendants' misconduct, Horizon would have won the hospital contract, there was no evidence regarding the profitability of the salesperson's contracts, and the evidence was speculative about how long he would have remained at Horizon or how many contracts he would have sold.4 Addressing the amount of exemplary damages, the court held that courts must compare the amount of exemplary damages assessed against each defendant to the harm caused by each defendant.5 Because each defendant caused $20,000 or less in actual damages, the exemplary damages award of $220,000 per defendant was excessive, the court found.6

The Supreme Court also considered exemplary damages in Bennett v. Grant.7 Bennett fraudulently caused Grant to be indicted, but the indictments were quashed because the statute of limitations had expired.8 Grant sued Bennett for malicious prosecution and received $10,703 in actual damages and $1 million in exemplary damages.9 The court of appeals reduced the exemplary damages to $512,109, reasoning that Grant would have been eligible for $160,000 from the state if he had been wrongfully imprisoned.10 The Supreme Court reversed, holding that potential damages can include only the harm “likely to result” from a defendant's conduct, and Grant's wrongful imprisonment was unlikely because the statute of limitations had expired.11

The court also addressed whether expert testimony was conclusory in two cases. In Starwood Management, LLC ex rel. Gonzalez v. Swaim, Starwood hired attorney Don Swaim to recover an aircraft that was seized by the Drug Enforcement Agency, or DEA.12 Because Swaim failed to provide the DEA with timely pre-suit notice, Starwood’s case was dismissed.13 Starwood also retained attorney George Crow, who provided timely notice and successfully recovered other seized aircraft.14 Starwood sued Swaim for legal malpractice, and Crow offered an expert affidavit that Swaim’s failure to provide notice caused the forfeiture of the aircraft.15 The lower courts rejected the affidavit as conclusory, but the Supreme Court reversed, holding that Crow’s record of following the notice procedures and recovering the aircraft provided a proper basis for his opinion because it explained the link between the facts relied on and the opinion.16 The Supreme Court similarly held that expert testimony was not conclusory in Bustamante v. Ponte, a medical malpractice case.17 The experts based their opinions on specific evidence from their review of the defendants’ deposition testimony, the plaintiff’s medical records, a seminal medical study in which the experts participated, other studies, and their own clinical experience.18

Notes
1. 520 S.W.3d 848 (Tex. 2017).
2. Id. at 855-57.
3. Id. at 858.
4. Id. at 858-59.
5. Id. at 860-66.
6. Id. at 877-79.
7. Id. at 880.
8. 525 S.W.3d 642 (Tex. 2017).
9. Id. at 646-47.
10. Id. at 647.
11. Id. at 647, 652.
12. Id. at 651-53, 655.
14. Id.
15. Id. at *2.
16. Id.
17. Id. at *2-5.
19. Id.

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BANKRUPTCY LAW
By Aaron M. Kaufman

While Puerto Rico made headlines in 2017 following direct hits from Hurricanes Irma and Maria, the island has been headlining the bankruptcy news for quite some time. In May 2017, the commonwealth and several of its municipalities filed one of the largest municipal “bankruptcy” cases ever filed. Of course, the filings are not technically “bankruptcy cases” governed by the U.S. Bankruptcy Code—the U.S. Supreme Court ruled last time. In May 2017, the commonwealth and several of its municipalities filed a petition for Chapter 9 bankruptcy relief.

Thus, in response, Congress passed (and President Barack Obama signed into law) the Puerto Rico Oversight, Management, and Economic Stability Act, or PROMESA. Under PROMESA, an oversight board was appointed and tasked with passing substantial austerity measures for the territory and its municipalities. The act further authorized the oversight board to negotiate with creditors and, ultimately, if necessary, commence proceedings under Title III of PROMESA, which established a bankruptcy-like procedure for restructuring Puerto Rico’s obligations.

In May and July 2017, the oversight board filed five separate petitions under Title III of PROMESA, commencing some of the largest municipal “bankruptcy” cases in history, including cases for the Commonwealth of Puerto Rico, the Puerto Rico Sales Tax Financing Corporation, the Employees Retirement System for Puerto Rico’s government, the Puerto Rico Highways and Transportation Authority, and the Puerto Rico Electric Power Authority. While it remains unclear precisely what role the “bankruptcy” filings played in the recovery efforts, the austerity measures, coupled with the lack of liquidity available to the municipalities, have certainly hampered the island’s ability to recover at a rapid pace.

On the mainland, the U.S. Supreme Court issued two decisions impacting consumer debt collection practices. First, in Midland Funding LLC v. Johnson, the court ruled that creditors may file “stale” claims in bankruptcy cases—i.e., a claim for a debt that is time-barred under non-bankruptcy law—without necessarily violating the Fair Debt Collection Practices Act, or FDCPA. In this 5-3 decision, Justice Stephen Breyer explained that the Alabama statute of limitations, while an affirmative defense, did not prohibit the creditor from otherwise receiving payments from the debtor. Second, in Henson v. Santander Consumer USA Inc., Justice Neil Gorsuch penned the court’s unanimous decision holding that a debt buyer—i.e., a company that regularly purchases debt originated by someone else—was not necessarily a “debt collector” within the statutory definition and, thus, could not be held liable for any violations of the FDCPA. Still to be decided, though, was whether Santander could be considered a “debt collector” for other reasons—Gorsuch explained that those other reasons were not raised on the petition for certiorari.

Finally, for the second year in a row, the Texas Supreme Court dabbled in bankruptcy in its decision in Noble Energy, Inc. v. ConocoPhillips Co. This time, the court construed a 2000 bankruptcy sale under which Noble assumed certain obligations. ConocoPhillips sued Noble for indemnification based on a pre-existing exchange agreement, but Noble argued that the exchange agreement was not among the list of contracts assumed under the bankruptcy sale. The Texas Supreme Court concluded that such obligations were important components of the rights and interests that Noble purchased and, more importantly, the sale order provided that any contracts not listed as rejected were deemed to be assumed. Thus, the court affirmed judgment in favor of ConocoPhillips and required Noble to continue indemnifying ConocoPhillips.

Notes

2. Dockets available at https://cases.primeclerk.com/puertorico/Home-Index.
4. __ U.S. __, 137 S. Ct. 1718, 198 L. Ed. 2d 177 (June 12, 2017).

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COMMERCIAL LITIGATION
By Brian P. Lauten

In commercial litigation and business tort cases, the caselaw continues to evolve in five areas of interest: (1) breach of fiduciary duty; (2) legal malpractice; (3) the Texas Citizens Participation Act (anti-SLAPP statute); (4) forum selection clauses and forum non conveniens; and (5) lost profits.

Breach of Fiduciary Duty

In First United Pentecostal Church of Beaumont v. Parker,
the Texas Supreme Court clarified that the remedy the plaintiff seeks in a breach of fiduciary duty case determines whether proof of causation and actual damages are required. The court held that proof of causation and actual damages are not required in a breach of fiduciary duty case where the remedy sought is equitable forfeiture and disgorgement; whereas, the plaintiff must still prove causation in the situation where the plaintiff seeks actual damages.  

Legal Malpractice

In a notable legal malpractice case decided this term, the Supreme Court was asked to adopt the “substantial factor” causation test. The court refused to do so in Rogers v. Zanetti, stating plainly that “but-for” causation and “suit-within-a-suit” causation is required when the malpractice is germane to the underlying case. Rogers requires the plaintiff to reconstruct “[w]hat should have happened if the lawyer had not been negligent,” Rogers extends causation linearly to such a degree that some may argue there is no meaningful way for the plaintiff to reasonably recreate that which may have happened in the underlying trial—but did not happen—because the lawyer's negligence got in the way.

The Anti-SLAPP Statute

In Hersh v. Tatum, the Supreme Court had to determine whether the Texas Citizens Participation Act (anti-SLAPP statute) applies to a plaintiff’s claim when the defendant denies ever having made a statement that could be protected. The court held that the anti-SLAPP statute applied to the plaintiff’s claim even though the defendant denied ever having made a statement at all because the statute’s applicability is governed by the plaintiff’s pleadings—not the defendant’s admissions or denials on the merits of the claim.

Forum Selection Causes and Forum Non Conveniens

A new trend may be gleaned from the Supreme Court’s decision in In re Oceanografia, where a several-year delay seeking mandamus relief did not result in waiver. The doctrines of laches and waiver no longer appear to be a tenable position in defeating a motion to dismiss based on either forum selection or forum non conveniens.

Lost Profits

In Horizon Health Corp. v. Acadia Healthcare Co., Inc., the court held that the plaintiff must prove that it would have actually been awarded the contracts it did not obtain absent the defendant’s misconduct. In other words, it may be legally insufficient to show that a defendant breached a fiduciary duty that resulted in a precipitous decline in business.

Notes

2. Id. at 220-22.
4. Id. at 411.
6. Id. at 466-467.
7. 494 S.W.3d 728 (Tex. July 1, 2016).

CONSTRUCTION LAW
By Gregory M. Cokinos and Anthony T. Golz

The Texas Supreme Court issued numerous opinions and rulings within the past year impacting construction law, including three opinions on Civil Practice and Remedies Code Chapter 150 alone. Several are noted below.

In Byrdson Services, LLC v. South East Texas Regional Planning Commission, the Supreme Court held that a contract may fall within the waiver of immunity found in Chapter 271 of the Local Government Code even if the local governmental entity is not the primary beneficiary. The court reasoned that Chapter 271 is written expansively to cover agreements providing services, so long as the services are provided “to” the governmental entity. Thus, even if the primary purpose of the contracts at issue was to benefit homeowners, the benefit to the commission—satisfying its contractual obligations to the state—was sufficiently direct and concrete for the contracts to fall within Chapter 271.

In Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc., the Supreme Court held that an owner’s failure to pay the balance due on a contract did not bar its recovery for the contractor’s prior breach. The jury found that both parties failed to comply with the contract and that the contractor failed to comply first, but the jury impliedly found
that the contractor’s breach was not material. The court held that the contractor’s breach—by providing a refrigeration system unable to maintain the target temperature—was not material as a matter of law, explaining that the issue of materiality is generally one for the fact-finder, and finding no conclusive evidence of materiality. The court further held that the owner’s subsequent breach did not discharge the contractor’s prior breach, as a material breach excuses only future performance, but not past performance.

In Levinson Alcoser Associates, L.P. v. El Pistolón II, Ltd., the court held that a certificate of merit cannot satisfy CPRC § 150.002(a)(3)’s “knowledge” requirement by relying on the expert’s licensure or active engagement in the practice. Rather, CPRC § 150.002(a)(3) requires some additional explication of evidence in the record reflecting the expert’s familiarity or experience with the practice area at issue in the litigation. Because nothing in the record reflected the expert’s knowledge of “the design of shopping centers or other similar commercial construction,” dismissal was required.

In Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corp., the Supreme Court further addressed CPRC § 150.002(a)(3), holding that the statute does not require an expert to establish his or her knowledge through testimony that would be competent or admissible as evidence. The court additionally held that CPRC § 150.002(b) does not require a certificate of merit to address the elements of each cause of action pleaded by the plaintiff. The statute instead requires the certificate to attest to the defendant’s professional errors and omissions and their factual basis.

In Pedernal Energy, LLC v. Bruington Engineering, Ltd., the Supreme Court held that CPRC § 150.002(e) affords trial courts discretion to dismiss either with or without prejudice and, therefore, a trial court’s decision to dismiss without prejudice is not necessarily an abuse of discretion.

Finally, the Supreme Court declined to review the most recent decision by the 14th Court of Appeals in Houston in Port of Houston Authority v. Zachry Construction Corp., bringing that case to an end. After more than 10 years of litigation, the trial court’s judgment awarding Zachry nearly $20 million in damages was affirmed. The Zachry case involves a number of significant legal issues affecting construction law. The construction practitioner is encouraged to review each opinion.

Notes
1. 516 S.W.3d 483 (Tex. 2016).
2. 518 S.W.3d 432 (Tex. 2017) (per curiam).
no reasonable expectation of privacy in a classroom, under the facts of the case, the coach had an expectation of privacy as to his locker room communications with school athletes.

Probable Cause for Arrest: State of Texas v. Ford

An officer approached the defendant, told her a store employee reported she was concealing store items in her purse, listened to the defendant’s claim she was still shopping and would pay for items, and observed store items in her cart. The officer picked up the jacket covering her purse, discovered the purse was zipped up and full of store merchandise, and arrested her in the store. Methamphetamine was found in her purse. Officer had probable cause to arrest and was not required to credit a suspect’s innocent explanation for her conduct when probable cause was apparent from other circumstances.

Suppression Rulings in Co-Defendant’s Case: State of Texas v. Arizmendi

Subsequent trial court order granting a co-defendant’s motion to suppress due to lack of probable cause is not “evidence” with respect to the suppression issue and is not a basis for the defendant’s motion for new trial.

Expert Testimony: Wolfe v. State of Texas

Applying the Kelly factors, the experts’ testimony on abusive head trauma based particular “constellation” of symptoms exhibited by the 7-month-old baby was sufficiently reliable testimony that addressed the subject of abusive head trauma generally and indicated that the types of injuries suffered were the product of an intentionally inflicted impact.

Mistrial at Punishment Hearing: Ex parte Pete

A trial court may grant a mistrial limited to a new punishment phase of trial. A defendant who moves for a mistrial limited to the punishment phase may not complain in a subsequent habeas corpus proceeding or appeal that his or her punishment hearing will be before a different jury, abrogating Bullard v. State.

Cellphone Records: Hankston v. State of Texas

The defendant’s rights relating to cellphone records are the same under both the Fourth Amendment and Article I, Section 9 of the Texas Constitution.

Discovery Documents—State’s Writ of Mandamus: Powell v. Hocker

Discovery statute does not allow a trial court to permit defense counsel to give copies of discovery materials to the defendant. The trial court had granted the defense counsel’s motion seeking “release” from the portion of Article 39.14 of the Texas Code of Criminal Procedure, which prohibits a defense attorney from giving the defendant copies of discovery information.

Notes

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CYBERSECURITY AND DATA PRIVACY LAW
By Shawn E. Tuma

New Texas Cybersecurity Laws

This update addresses two laws enacted by the Texas Legislature during its most recent session that went into effect on September 1, 2017.

The Texas Cybercrime Act, or HB 9, amended the criminal version of Texas’ “hacking” law, the Breach of Computer Security, or BCS, section of the Texas Penal Code to ensure that the methods of cyberattacks criminals currently use are understood to be prohibited by the statute. Ransomware, malware, and direct denial of service attacks are now specifically prohibited by the BCS. While this author believes these acts were already illegal under Texas’ prior version of the BCS and the federal Computer Fraud and Abuse Act, both of which are unauthorized access laws, having a belt and suspenders never hurts.

The Texas Cybersecurity Act, or HB 8, applies to state agencies and compels them to make cybersecurity a
top priority. This law places significant and much-needed cybersecurity requirements on state agencies that will help them better defend against cyberattacks and be in a much better position to respond should they occur. Examples include required risk assessments, cyberrisk management planning, vulnerability and penetration testing, and incident response planning.

Employee Theft of Data Violates Texas “Hacking” Law

In Merritt Hawkins & Associates, L.L.C. v. Gresham, the 5th Circuit Court of Appeals upheld a jury's verdict finding that an employee’s actions violated the Harmful Access by Computer Act, or HACA, where, before leaving his employment, the employee accessed his employer's computer network and copied proprietary files and deleted files in an effort to hide his activities. While the court did not explain its reasoning, an employee violates Texas’ “hacking” law, HACA, by accessing the employer's computer system without its “effective consent” and taking data to use for non-company business related purposes. Effective consent can mean using the computer system (a) for a purpose other than that for which consent was given, (b) in violation of a clear and conspicuous prohibition, or (c) in violation of an express agreement, inter alia.

Insurance Coverage for Social Engineering Requires Specialized Policy

In Apache Corp. v. Great American Insurance Co., the 5th Circuit Court of Appeals found losses stemming from social engineering scams like the business email compromise are not covered by computer fraud provisions of commercial crime insurance policies. Here scammers pretended to be a vendor of Apache and called one of its employees in the accounts payable department to advise that they were changing bank accounts then followed up the call with an email (on the purported vendor’s letterhead) to the employee advising of the new bank wiring instructions. After receiving this confirming email, Apache sent $7 million to the fraudsters (all but $2.4 million was recovered).

Apache made an insurance claim under the “Computer Fraud” provision of its commercial crime insurance policy premised on the argument that the email caused the transfer of the funds. This provision covered losses “resulting directly from the use of any computer to fraudulently cause a transfer” of funds. Rejecting this argument, the court found that the use of the email was incidental to the transfer.

Honorable Mentions

All Texas businesses should pay close attention to the New York State Department of Financial Services’ Cybersecurity Regulation that went into effect in March 2017 and the European Union’s General Data Protection Regulation that goes into effect in May 2018.

Notes
1. Tex. Penal Code § 33.02, et seq.
2. 18 U.S.C. § 1030, et seq.

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ENERGY LAW

By Brian C. Boyle

The energy industry faces a legal landscape that continues to shift amid rebounding production and a changing regulatory framework. But perhaps the biggest takeaway last year is that no case is over until the appeals run out, as 2017 was highlighted by several appellate decisions in cases that have been percolating for years.

Possibly the most notable decision, given the size of the trial court judgment and the implications for deal-making in the industry, came in Enterprise Products Partners LP v. Energy Transfer Partners LP, where the 5th Court of Appeals in Dallas reversed a $535 million verdict in which the jury found Enterprise had breached duties owed under a partnership formed with Energy Transfer Partners in connection with a proposed pipeline project. The court held that formation of a partnership was precluded as a matter of law due to unperformed conditions precedent set forth in the parties’ initial written agreements related to the venture. As it stands, the case provides important guidance for energy companies seeking to manage the risk of creating partnership obligations when negotiating joint ventures in Texas.

Another important decision was handed down by the Texas Supreme Court in Lightning Oil Co. v. Anadarko E&P Onshore LLC, which found that Anadarko did not commit a trespass when, with the permission of the surface...
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owner, it drilled horizontally through Lightning’s mineral estate to reach Anadarko’s mineral estate on an adjacent tract of land. The court explained that Anadarko’s drilling through Lightning’s mineral estate constitutes a trespass only if it infringes on Lightning’s ability to develop the minerals, which was not likely given well spacing rules and the flexibility provided by the accommodation doctrine. The court also found that the loss of small amounts of minerals due to Anadarko drilling a well through Lightning’s mineral estate is not a sufficient injury to support a trespass.

In other notable cases, the Texas Supreme Court denied a lessee’s efforts to avoid contractual obligations to pay royalties for production from pooled units; found that an operator of a carbon dioxide pipeline was a common carrier with eminent domain powers based on the likely future “public use” of the pipeline; addressed production in paying quantities issues affecting termination of bottom leases; found that the Railroad Commission of Texas does not have exclusive or primary jurisdiction over environmental contamination claims; and took a close look at the statute of limitations for contamination and nuisance claims related to production operations. And in Aruba Petroleum Inc. v. Parr, the 5th Court of Appeals in Dallas addressed the evidence required to prove a nuisance claim, reversing a $2.9 million jury verdict in favor of governmental group sought an injunction under the Resource Conservation and Recovery Act claiming that wastewater injection wells contributed to an increase in earthquakes occurring over eight years at Exxon’s Baytown refinery.

Finally, some important cases to watch this year include XOG Operating LLC v. Chesapeake Exploration LP, which will address the interpretation of retained acreage clauses, and Murphy Exploration & Production Co. USA v. Adams, which will consider offset well requirements in leases. With Texas appellate courts showing a willingness to scrutinize judgments in the energy space, we are bound to see significant decisions in the coming year.

Notes
1. Changes to energy regulations and enforcement will continue this year in light of the recent executive order to review regulatory hurdles burdening domestic energy production.
10. Case No. 15-0935, in the Supreme Court of Texas.
11. Case No. 16-0503, in the Supreme Court of Texas.

Environmental Law
By Michael Goldman

Last year was an exciting one for significant environmental law holdings from state and federal courts. Although space allows only a brief mention of the cases below, for the environmental practitioner, all are worth reading in full.

Federal Courts
In Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp., the plaintiffs brought a citizen suit under the Clean Air Act concerning unauthorized air emissions occurring over eight years at Exxon’s Baytown refinery. On remand, the U.S. District Court for the Southern District of Texas revised its conclusions of law concerning the economic benefit, duration, and seriousness penalty factors and assessed a nearly $20 million penalty.

In Sierra Club v. Chesapeake Operating, LLC, an environmental group sought an injunction under the Resource Conservation and Recovery Act claiming that wastewater injection wells contributed to an increase in earthquakes throughout Oklahoma. The U.S. District Court for the Western District of Oklahoma held that abstention under the Burford abstention doctrine was warranted because the state agency was more equipped to determine if there was a causal connection between the two.

The district court in the Southern District of Texas also made several interesting rulings in the USOR Site PRP Group v. A&M Contractors litigation this past year, which will likely impact cost-recovery claims for years to come.

Texas State Courts
The Texas Supreme Court continues to grapple with statute of limitations issues in environmental lawsuits. In ExxonMobil Corp. v. Lazy R Ranch, the Supreme Court
affirmed dismissal of common law claims related to Exxon’s historic oil and gas operations but declined to rule on whether the plaintiff was entitled to injunctive relief to remedy the continuing nuisance. In *Town of Dish v. Atmos Energy*, the court affirmed a summary judgment that dismissed the plaintiff’s trespass claims holding that the claims accrued when the town residents began complaining about noise and odor from nearby compressor stations, not when the last facility began operating.

In *Forest Oil Corp. v. El Rocio Land and Cattle Company, et al.*, the court confirmed that the Railroad Commission of Texas does not have exclusive jurisdiction over environmental claims against an oil and gas operator. In *Lightning Oil Company v. Anadarko*, the court held than an operator’s horizontal drilling through a mineral estate it does not own to reach oil and gas minerals on an adjacent property does not constitute a trespass. Finally, the court has agreed to hear *Morello v. State*, which seeks to hold an officer of a limited liability company individually liable for alleged environmental violations by the company.

Lawsuits brought under section 7.351 of the Texas Water Code by contingency counsel on behalf of governmental entities continue to raise eyebrows. Some defendants claim that these actions violate their due process rights, among other things. The state of Texas, which is joined as an indispensable party, has been sharing in the settlement proceeds. However, that relationship might now be strained in light of *In Re: Volkswagen Clean Diesel Litigation*, which abated several local governments’ later-filed lawsuits related to improper air emissions. The state of Texas has sought reversal of an agreed judgment that was entered without its permission in *State of Texas v. Brazoria County, et al.*

Many of the above issues will likely be further addressed, challenged, and refined in this coming year.

**Notes**

4. 519 S.W.3d 605 (Tex. 2017).
5. 518 S.W.3d 422 (Tex. 2017).
8. 2017 WL 3221748 (Tex. App.—Austin, no pet.).
9. 518 S.W.3d 926 (Tex. App.—Houston [1st App.] 2017, no pet.).

**MICHAEL GOLDMAN**

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ESTATE PLANNING AND PROBATE LAW

By Gerry W. Beyer

Tortious Interference With Inheritance Rights
The Texas Supreme Court in Kinsel v. Lindsey\(^1\) refused to recognize the tort but instead left the issue open for a future case.

Equitable Adoption
The 85th Legislature added language expressly including equitably adopted children in the intestacy adoption statute,\(^2\) effectively overruling Heien v. Crabtree.\(^3\) The court in Dampier v. Williams\(^4\) held that an adult may not be adopted by estoppel.

Passage of Title
The Legislature enacted the Uniform Partition of Heirs Property Act as Property Code Chapter 23A and changed the common law so that under certain circumstances, a co-heir may adversely possess property owned by the other co-heirs.\(^5\)

Will Reformation
A will reformation action must now be filed within four years of when the will was admitted to probate.\(^6\)

Will Deposit
A person who has possession of a testator’s original will and cannot locate the testator may deposit the will with the county clerk of the county of the testator’s last known residence. This is helpful when an attorney has a will but does not know how to locate the testator or even if the testator is still alive.\(^7\)

Applications
Applications to probate a will with an administration or as a muniment of title and applications for letters of administration must now contain the last three numbers of the driver’s license and Social Security numbers of both the decedent (if known or ascertainable with reasonable diligence) and the applicant.\(^8\)

Notice to Creditors
Previously, the personal representative’s notice to creditors was by publication in a newspaper printed in the county where letters were issued. Compliance was sometimes difficult as many newspapers are physically printed in a county different from where they are distributed. Publication is now authorized in a newspaper “of general circulation” in the county where letters were issued.\(^9\)

Accountings
Under prior law, the personal representative in a dependent administration was required to file the annual accounting by the end of each year after receiving letters. This was virtually impossible because there was no lead time from the end of the year to when the accounting was due. Now, the personal representative has 60 days from the end of a year to file the accounting.\(^10\)

Small Estate Affidavit
The maximum value of an intestate estate (excluding homestead and exempt property) eligible to use the small estate affidavit procedure was raised to $75,000 from $50,000.\(^11\)

Trust Reformation
A court may now reform a trust if necessary or appropriate to (1) prevent waste, (2) achieve tax objectives, (3) qualify a beneficiary for governmental benefits, and (4) correct a scrivener’s error if the settlor’s intent is established by clear and convincing evidence.\(^12\)

Access to Digital Assets
The Texas Revised Uniform Fiduciary Access to Digital Assets Act provides guidance regarding how an executor, administrator, trustee, agent, and guardian may access a decedent’s digital assets such as e-mail accounts, social networking accounts, and other material stored online.\(^13\)

Durable Power of Attorney
The Legislature made extensive changes to many aspects of durable power of attorney law including the statutory form.

Medical Power of Attorney
The disclosure statement is no longer a separate document. Instead, it is included within the medical power of attorney form itself.\(^14\)

Mental Health Treatment Declaration
Instead of having two witnesses sign the declaration, it is now permissible for the declarant to have the declaration notarized.\(^15\)

Transfer on Death Motor Vehicles
New Estates Code Chapter 115 allows the owners of a motor vehicle to name a beneficiary who will own the vehicle upon the owner’s death. The designation cannot be changed by the owner’s will.
Ramifications of Divorce

An ex-spouse, as well as the ex-spouse’s relatives who are not also relatives of the deceased spouse, will not receive funds from a joint account with survivorship rights.16

Notes
2. Estates Code §§ 22.004 & 201.054(e).
3. 369 S.W.2d 28 (Tex. 1963).
4. 493 S.W.3d 118 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.).
8. Estates Code §§ 256.052(a), 257.051(a), & 301.052.
11. Estates Code § 205.001(3).
12. Property Code § 112.054(b-1), (e), & (f).
15. Civil Practice & Remedies Code §§ 137.003 & 137.011.

GERRY W. BEYER

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FAMILY LAW

By Georganna L. Simpson and Beth M. Johnson

Three cases clarified a party’s eligibility for spousal maintenance:

• receipt of Social Security disability payments is not determinative;1
• a professional degree does not disqualify a person from receiving spousal maintenance if the party can establish an inability to provide for his or her minimum reasonable needs; and2
• proof of a disability alone is insufficient without evidence that the disability prevents the party from obtaining gainful employment.3

The minimum-sum-balance rule is only applicable to fungible assets.4 In Stegall, the court rejected the husband’s argument that the minimum-sum-balance rule supported his claim that the cows he bought, sold, and traded throughout his life were separate property.

A petitioner cannot rely on post-filing events to establish standing.5 In J.A.T., the court rejected a third-party’s assertion that she had standing to seek conservatorship based on her actual possession of the child pursuant to temporary orders.
The Texas Family Code explicitly defines “sperm donor." In In re P.S., a woman impregnated herself with sperm of a friend who agreed to be a donor but later changed his mind. Under the statute’s plain language, without providing the sperm to a “licensed physician,” the friend could not be a “sperm donor.”

Obergefell is not applicable to parentage suits. In In re A.E., the court declined to extend Obergefell to a woman’s request for adjudication that she was the parent of her wife’s child.

Declining to follow the 8th Court of Appeals in El Paso’s precedent, the 2nd Court of Appeals in Fort Worth following its sister courts—5th Court of Appeals in Dallas and 1st Court of Appeals in Houston—held that a mother could seek a modification during the pendency of the appeal of the prior child-custody order.

Sixty-five years after Carle v. Carle, the Texas Supreme Court addressed the acceptance-of-benefits doctrine’s applicability to divorce decree appeals. The fact-specific doctrine is based in equity.

The 5th Court of Appeals in Dallas held that a memorandum ruling was a “final” order despite lacking the requirements of Texas Family Code § 105.006 and any specificity as to the rights and duties of the conservators or possession of, access to, and support for the children. The court “conclude[d] the memorandum substantially com-pi[e]d with the requisites of a formal judgment to be accorded final judgment status triggering the appellate deadline. Although it does not contain the items listed in Texas Family Code § 105.006, those items are clerical in nature, not substantive items that would preclude the memorandum from being a final judgment.”

Notes
4. In re Marriage of Segall, 519 S.W.3d 666 (Tex. App.—Amarillo 2017, no pet.).
6. In re P.S., 505 S.W.3d 106 (Tex. App.—Fort Worth 2016, no pet.).
10. In re B.D., No. 05-17-00674-CV, 2017 WL 3765848 (Tex. App.—Dallas 2017, no pet. h.) (mem. op.).

GOVERNMENT LAW
By Victor A. Flores

This year was an active judicial and legislative year for government law. New laws were passed impacting governmental entities, including among others: SB 4 (enforcing federal and state immigration laws at the local level—pending litigation); SB 1004 (pre-empting cities from negotiating adequate compensation for the use of public property—pending litigation); HB 1704 (awarding court costs and attorneys’ fees to the prevailing party in an action under the “permit vesting” statute, Chapter 245 of the Texas Local Government Code); and from the special session, SB 6 (requiring cities in large counties to receive voter approval on whether involuntary annexations can proceed).

In addition, Texas courts continued to make key distinctions in caselaw, including the following:

Public Information and a “Sacrosanct” Privilege: Paxton v. City of Dallas

The city of Dallas requested relief from two attorney general decisions concluding that the city must disclose confidential attorney-client communications regarding the McCommas Bluff Landfill and a convention-center hotel. The issue surfaced as Dallas withheld confidential information without requesting an AG decision within the prescribed 10-day deadline. Dallas didn’t submit its request for an AG decision until 26 days after receiving the landfill request and 49 days after receiving the hotel request.

Under the Texas Public Information Act, failure to assert exceptions within the statutory period generally results in a public-disclosure presumption. The governmental entity is then burdened with the responsibility of establishing a “compelling reason” to withhold that information.

In the landfill and hotel requests, the AG determined that the attorney-client privilege was not a compelling
reason. Following various trial and appellate court decisions (wherein the appellate courts held that the privilege was a compelling reason to withhold information), the AG filed its petition for review.

The Texas Supreme Court held that documents containing communication protected by the attorney-client privilege are deemed confidential within the meaning of statutory exception for disclosure under the Public Information Act. Specifically, Justice Eva Guzman wrote, “Robotic perfection by a governmental body’s public information officer is a statutory ideal, not an absolute requirement. To err is human, but to conduct a city’s legal affairs without the occasional error would require divinity. … We therefore conclude a ‘compelling reason’ to withhold confidential attorney-client communications exists and, absent waiver, rebuts the presumption that the information protected by the privilege is ‘subject to required public disclosure.’” This case solidifies the importance of the attorney-client privilege as applied to the act.

Wasson and the Tale of Two Leases: Wasson Interests, Ltd. v. City of Jacksonville; City of Dallas v. Trinity E. Energy, LLC; and City of Tyler v. Owens

In 2016, the Texas Supreme Court issued a significant opinion in the Wasson case. The city of Jacksonville leased its interest in lakefront property to Wasson Interests for residential use. Wasson then rented out that same property for commercial use, in violation of its lease agreement. The city issued Wasson an eviction letter and Wasson sued for breach of contract. Prior to Wasson, it was generally argued that, under Chapter 271 of the Texas Local Government Code, waiver of immunity only occurred when the contract was for goods or services. In Wasson, the court held that when a municipality enters any contract in its proprietary capacity, no immunity exists. This marks a significant change. Municipalities should anticipate that there will be increased litigation over what is or isn’t within their proprietary-governmental capacity, as it relates to contracts. The following 2017 cases represent this legal-knot.

In Trinity, the city of Dallas decided to lease minerals on city-owned property. Trinity East Energy informed the city of probable drilling sites within the subject property and requested pre-approval of the same before entering the city’s lease. The lease stated that it would not unreasonably oppose Trinity’s request for a variance or waiver if necessary for its operations. After the Dallas City Plan and Zoning Commission denied some of the drilling permits, the Dallas City Council was unable to gather the supermajority vote that was required to overturn the commission’s denial. Trinity subsequently sued Dallas for breach of contract. Dallas argued that the denial of Trinity’s permits was an exercise of its governmental functions in regulating parks, floodplains, and building codes and inspections. The trial court granted the city’s plea to the jurisdiction. However, shortly after the trial court granted the city’s plea, the Texas Supreme Court issued its opinion in Wasson. Therefore, the 5th Court of Appeals in Dallas, applying the Wasson analysis to Trinity, held that the city acted in its proprietary capacity when it leased the mineral rights to Trinity and, as a result, governmental immunity did not apply.

A few months later, another appellate court applied the Wasson analysis to a city of Tyler lease case. In Owens, Tyler had existing leases for land underneath Lake Tyler (constructed by the city), including those with the Owenses, Chatelains, and Terrys. In February 2017, the city issued the Chatelains a construction permit to build a boathouse. The Owenses filed a lawsuit alleging that the permitted boathouse was going to encroach onto their frontage. The city of Tyler filed a plea to the jurisdiction, asserting that it was operating in its governmental capacity, regulating land use. Conversely, the Owenses alleged that Tyler’s act of leasing the lakefront residential lots was a proprietary function. Here, the court determined that the heart of the case rested on Tyler’s decision to approve the location of the pier and boathouse and the issuance of the permit. The court further determined that Tyler had operated in its governmental capacity in regulating land use and was entitled to immunity, absent legislative waiver.

It will be interesting if the Texas Supreme Court reviews either of these cases and makes any further distinctions on Wasson. As stated above, until more cases are litigated under Wasson, it is wise to inform municipal clients of the current legal discussions surrounding the proprietary-governmental dichotomy, as it relates to contracts.

Notes
2. Id. at 253.
3. Id. at 266-67.
7. In Trinity, Petitioners Brief on the Merits was filed October 2017.
8. In Owens, Petition for Review was filed October 2017.

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IMMIGRATION LAW
By Paul Steven Zoltan

It has been a tumultuous year in immigration. Vowing to “restore the rule of law,” President Donald J. Trump issued two immigration-related executive orders within weeks of taking office. In February, the secretary of the Department of Homeland Security, or DHS, followed suit with two sweeping policy memoranda. Together, these four documents have since served as blueprints for immigration officials to carefully consult and reference in any decision or action.

Just one week into his administration, Trump halted refugee admissions from Syria and banned from entry for 90 days citizens from Iraq, Syria, Iran, Libya, Somalia, Sudan, and Yemen. Federal courts quickly blocked the first two “travel ban” iterations; the U.S. Supreme Court tentatively let stand the third (this one including Chad). In September, the administration announced that in 2018 it would re-settle only 45,000 refugees—the least since 1980.

The administration abandoned the Priority Enforcement Program, or PEP, which sought to focus enforcement resources on criminal aliens and recent arrivals. In PEP’s stead, DHS restored the Secure Communities program, which obligates local law enforcement officials to notify DHS of any noncitizens who come into their custody, no matter their history or circumstances.

To further bolster enforcement, the administration has said it will hire new immigration officials and expand detention capacity. In Texas, the administration will build a detention center in Conroe and is contracting space from local jails. Asylum officers and immigration judges have been sent to the border to speed the deportation of recent border-crossers. Working alongside them are U.S. attorneys, whom the U.S. attorney general has tasked with vigorously pursuing immigration-related criminal charges.

In April, the president announced a “Buy American and Hire American” campaign. As part of that initiative, employment-based H-1B visas now require additional evidence of eligibility. Denials are up and so too delays.

In August, DHS began personally interviewing green card applicants and, with the Department of State, made it easier to attribute fraud to nonimmigrants who violate the terms of their admission.

In 2017, the nation’s immigration courts confronted a backlog of over 600,000 cases. To cope, the administration announced its intention to curtail immigrants’ access to those tribunals: it will expand the expedited removal process, potentially barring the courtroom door to any noncitizen who cannot convince DHS that they’ve lived in the United States for at least two years.

The roughly 800,000 young adults registered under the Deferred Action for Childhood Arrivals, or DACA, program retained their eligibility for work authorization through 2017. In October, however, the president announced he would phase out the program: on each day beginning March 5, 2018, roughly 1,000 of these “Dreamers” will revert to being undocumented.

A tumultuous year indeed.

PAUL STEVEN ZOLTAN has practiced immigration law exclusively since 1992. He has chaired the District 6A Grievance Committee for the State Bar of Texas, the advisory board of the Dallas office of the International Rescue Committee, and the boards of directors of Proyecto Adelante and the Center for Survivors of Torture. He has taught immigration law and legal writing and reasoning at the University of Texas at Dallas. For his work educating immigrants about their rights under the Fourth and Fifth Amendments, the Dallas Peace & Justice Center awarded him its 2017 Justice Seeker Award.

INSURANCE LAW
By Michael W. Huddleston

Standing alone at the end of an eventful year of insurance law decisions is USAA Texas Lloyds Co. v. Menchaca. The court in that case affirmed its decision in Vail v. Texas Farm Bureau Mut. Ins. Co., which surprised many. The court also reaffirmed its commitment to stare decisis and to the continuing need for common law and statutory “bad faith” actions as an antidote to inappropriate first-party carrier behavior.

The issue in Menchaca: “[W]hether the insured can recover policy benefits based on jury findings that the insurer violated the Texas Insurance Code and that the violation resulted in the insured’s loss of benefits the insurer ‘should have paid’ under the policy, even though the jury also failed to find that the insurer failed to comply with its obligations under the policy.” The court held policy benefits could serve as “actual damages,” but the court remanded in the interests of justice given the significant clarification in the law provided by the court’s opinion.

Menchaca held that the common law and statutory duties “supplement” the parties’ contractual rights by “imposing procedural requirements that govern the manner in which insurers review and resolve an insured’s claim for policy benefits.” Reviewing the seemingly conflicting Texas law on the subject, the court distilled “five distinct but interrelated rules that govern the relationship between contractual and extra-contractual claims”:

1. Coverage: The insured must be legally entitled to coverage in order to recover “lost benefits” under statute;
2. Nexus: Carrier conduct must have a causal nexus to the loss of the benefits, noting Vail as an example; 
3. Absence of Coverage—Other Actions: Contract benefits may be recovered absent coverage if the insurer caused the benefits to be lost. The court gave three examples: (a) misrepresentation of a policy’s coverage; (b) waiver and/or estoppel of the carrier’s right to deny coverage; and (c) a violation causing the forfeiture of contract benefits; 
4. Independent Injuries: If there is no coverage, the insured can still recover damages from an independent injury not flowing from the contract; and 
5. Predicate: The statutory conduct must cause either the loss of actually covered benefits or an independent injury. 

Rule 3 opens a number of potential new frontiers for policyholders to consider. The suggested expansion of waiver and estoppel is particularly significant.

Explaining the fourth rule, the court stated: “[A]n insurer’s statutory violation does not permit the insured to recover any damages beyond policy benefits unless the violation causes an injury that is independent from the loss of the benefits.”

The court noted as an example Twin City Fire Ins. Co. v. Davis,1 holding that an insured who prevails on a statutory claim cannot recover punitive damages for bad-faith conduct in the absence of independent actual damages arising from that conduct.

The defense bar suggests that the court limited recovery to the lost benefits, excluding recovery of additional damages absent an independent injury. Policyholders counter that this is inconsistent with (a) the court’s reaffirmation of Vail, which the Menchaca court expressly recognized allowed lost contract benefits to be trebled without an independent injury; (b) its holding that policy benefits are actual damages recoverable in contract or for statutory violations; (c) Twin City, which dealt with a common law bad faith claim for punitive damages, which was not involved in Menchaca, and (d) the fact Twin City involved the “exclusive remedy” provision of the workers compensation act and thus presented a situation where there were no policy benefits payable.

Subsequent decisions interpreting Menchaca are conflicting.2 The Insurance Code itself does not require an independent injury for recovery of additional damages. It requires only “actual damages,” which, as Vail held, clearly includes lost contract benefits. USAA has filed a motion for rehearing in Menchaca asking for rendition or alternatively for more clarification for retrial.

Notes
2. 754 S.W.2d 129 (Tex. 1988).
3. 904 S.W.2d 663, 666 (Tex. 1995).
4. See, e.g., Cano v. State Farm Lloyds, 2017 WL 3279139 (N.D. Tex. 2017)(holding that if there is no coverage, no additional damages are recoverable absent an independent injury); Nat’l Sec. Fire & Cas. Co. v. Hurst, 2017 WL 2258243 (Tex. App.—Houston [1st.] 2017, pet. for rev. pending)(same); State Farm Lloyds v. Webb, 2017 WL 1739763 (Tex. App.—Beaumont 2017, no pet. hist.)(holding that policy benefits could not be trebled even if there was coverage and a causal nexus shown).

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INTERNATIONAL TRADE

By Michelle Schulz and Elsa Manzanares

The 2016 election cycle propelled international trade issues into the spotlight. Since President Donald J. Trump took office, there have been many noteworthy developments that have kept international trade practitioners on their toes.

On Trump’s third full day in office, the United States withdrew from the Trans-Pacific Partnership, or TPP, agreement. The remaining 11 TPP parties remain committed to concluding an agreement without U.S. involvement. Canada, Mexico, and the U.S. are currently renegotiating the North American Free Trade Agreement, or NAFTA. The ultimate outcome of the renegotiations remains to be seen. The parties abandoned their plan to complete talks by the end of the year and have now extended talks into the first quarter of 2018. As of this writing, the chapters on small- and medium-sized businesses and competition are essentially complete, but there has been no agreement on more controversial topics such as the Trump administration’s proposals for a five-year sunset clause, an increase in the NAFTA country content requirements for automobiles, and a U.S.-origin content requirement. Following the fourth round of talks in October, the parties announced that “significant conceptual gaps” remain. Trump also proposed withdrawal from the U.S.-Korea Free Trade Agreement, and the U.S. trade representative concluded special sessions with the Korean trade minister to consider amendments to the agreement. Meanwhile, the Transatlantic Trade and Investment Partnership between the European Union and the U.S. has been stagnant since 2016.

As part of the administration’s trade policy agenda to address unfair trade practices that harm American workers, the secretary of commerce initiated a rarely used trade remedy provision to review whether imports of aluminum...
and steel threaten U.S. national security. Likewise, a domestic producer of solar cells brought a complaint before the U.S. International Trade Commission to assess whether such imports are a substantial cause of serious injury to the domestic industry. Remedies in both reviews may include increased tariffs or quotas on these imports.

The area of sanctions and embargoes saw an overall increase in restrictions in 2017. In August, Congress passed the Countering America’s Adversaries Through Sanctions Act. The act limits the president’s authority to terminate, waive, or modify the Russia sanctions without Congressional approval. The act also modifies and expands existing directives in the financial and energy sectors and requires the president to block assets and bar from the U.S. any person undermining cybersecurity on behalf of the Russian government. On the Cuba sanctions, Trump issued a presidential memorandum that rolled back certain authorizations granted during the Obama administration. The revised rules prohibit direct financial transactions with listed entities linked to the Cuban military, limit some people-to-people travel, and provide for stricter enforcement of authorized travel.

In September, Trump issued an executive order targeting those who do business with North Korea. Under the order, the U.S. Department of the Treasury’s Office of Foreign Assets Control will designate persons who operate in various sectors in North Korea, such as construction and energy, those who own or operate ports in North Korea, and those who have had one significant import from or export to North Korea. All assets belonging to those on the list and found in the U.S., or controlled by U.S. persons, will be frozen. Regarding Iran, in October, the president refused to certify to Congress that Iran was compliant with the nuclear deal reached in 2015 and called on Congress to draft legislation amending the act.

With many developments on the horizon, international trade is expected to generate even more headlines in 2018. Companies doing business abroad should be sure to incorporate sufficient resources into their trade compliance programs for risk mitigation.

MICHELLE SCHULZ is a trilingual international trade attorney who represents Fortune 500 companies, oil and gas companies, aerospace companies, manufacturers and distributors, defense contractors, and other entities in all aspects of international trade compliance and enforcement. She is co-chair of Gardere Wynne Sewell’s international and international trade practice groups and is a cleared advisor who was present throughout two rounds of NAFTA negotiations.

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LABOR AND EMPLOYMENT LAW
By Michael P. Maslanka

The biggest news in employment law was the en banc decision by the 7th Circuit Court of Appeals in Hiney v. Ivy Tech Community College. The decision: sexual orientation is a protected classification under Title VII of the Civil Rights Act of 1964. Why? Because when you take an adverse employment action against a man or a woman because he or she is in a same-sex relationship, you are taking an action because of the employee’s sex.

The Texas Supreme Court is currently considering whether the Texas Labor Code prohibits same-sex harassment. The court conducted oral argument in September. The U.S. Supreme Court emphatically said “yes” to this question; it is unlikely that the Texas Supreme Court will follow a different path. Keep a lookout for the decision in Clark v. Alamo Heights Independent School District.¹

In Exxon Mobil Corp. v. Rincones,² the court determined that compelled defamation is not a claim in Texas, there is no protected activity and thus no retaliation claim when an employee (here: Hispanic) asks a supervisor why another employee (here: white) was treated differently than he was, and for a plaintiff to prove unlawful discrimination through disparate treatment, the plaintiff must establish that the comparator had the same job responsibilities, supervisors, capabilities, and disciplinary records and that there were no mitigating factors for the employees to be treated differently.

In Horizon Health Corp. v. Acadia Healthcare, the court ruled on whether evidence supported the damages award for lost profits. The court determined that concrete evidence is needed to base these assumptions.

Non-competes continue to be hot with two major developments. The 3rd Court of Appeals in Austin dismissed a cookie-cutter suit for breach of a non-compete based on the defendant’s assertion that the lawsuit violated the Texas Citizens Participation Act, which prohibits a lawsuit against a citizen who seeks to exercise the right of free speech and association. The defendants in Elite Auto Body et al. v. Autocraft Bodyworks framed their leaving one company to set up another as engaging in freedom of speech and association and won.

Finally, an important case from the 14th Court of Appeals in Houston—employee claw back provisions are a restraint of trade and thus are an invalid non-compete. Kelley Rieves v. Buc-ee’s Ltd. was a victory for employees and for competition.

Notes
1. Case No. 16-0244.
2. 520 S.W. 3d 572 (Tex. 2017).

MICHAEL P. MASLANKA is an assistant professor of law at UNT Dallas College of Law and is publishing two books this year: Maslanka’s Field Guide to Texas Employment Law and Learning Employment Law, of which he is a co-author.

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LEGAL EDUCATION
By John G. Browning

For Texas law schools, 2017 was a year of transformation, as institutions battled adversity, weathered leadership reorganizations, and coped with the omnipresent concerns of changes in the national legal education landscape and of bar passage rates. On the adversity front, reports of sexual harassment and gender discrimination at Texas Southern University Thurgood Marshall School of Law prompted the American Bar Association to hand down sanctions against the program in July. The school was publicly censured and ordered to pay $15,000, turn in a plan for reducing sexual harassment and gender discrimination on campus, and submit possible remediation programs.

Texas’ newest law school, the UNT Dallas College of Law, received happier news as it bounced back from the ABA’s initial August 2016 denial of provisional accreditation. Following an appeal by the school as it elevated its LSAT scores and bolstered its financial reserves, UNT received its provisional accreditation in June 2017. Dean Royal Furgeson said, “The ABA process has strengthened our law school and made us a better law school. The first rejection was challenging to work through, but it highlighted our weaknesses, and we made adjustments to make us better.” The law school also witnessed the graduation in May of its inaugural class, as 74 graduates participated in the Juris Doctor hooding ceremony.

But this encouraging news was bittersweet, as Furgeson announced in October that he would be leaving the dean’s suite in June 2018. The school is conducting a national search for his replacement. Other Texas law schools also experienced a change in leadership, as Jack Wade Nowlin was named Texas Tech University School of Law’s new dean in June. A native Texan and University of Texas School of Law graduate, Nowlin had been a professor and senior associate dean at the University of Mississippi School of Law. Meanwhile, at Texas A&M University School of Law, Dean Andrew Morriss left in August to begin serving as the founding dean of the university’s School of Innovation and as vice president for entrepreneurship and economic development. Morriss, who became dean of the law school in 2014 and oversaw its surge in the national rankings, was succeeded by Thomas Mitchell, who is serving as interim dean pending a national search for a permanent replacement.

Indeed, on Dean Morriss’ watch, Texas A&M University School of Law made big news. The school wasn’t even ranked in 2014 but climbed to No. 111 in the U.S. News and World Report rankings in 2016. In 2017, Texas A&M climbed to No. 92, making it the fifth Texas school in the top 100—the University of Texas School of Law holds the top spot at No. 14, followed by SMU Dedman School of Law at No. 46, Baylor Law School at No. 51, and the University of Houston Law Center at No. 54. Texas A&M also made national news in November when it became the latest law school nationally—and first in the Lone Star State—to announce that it would accept the GRE in admissions. A growing number of law schools across the country, including Harvard Law School, now accept the GRE in lieu of the LSAT.

And finally, what about bragging rights about 2017 bar passage rates? Baylor took the top spot with a 92.9 percent pass rate, followed by the University of Texas at 91.6 percent, Texas Tech at 87.1 percent, the University of Houston at 86.1 percent, SMU Dedman at 85.44 percent, Texas A&M at 83.45 percent, St. Mary’s at 73.72 percent, South Texas at 66.32 percent, Texas Southern at 63.62 percent, and UNT at 59.32 percent. The overall Texas bar passage rate for first-time takers was 77.89 percent.

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PATENT LITIGATION
By Michael C. Smith

On May 22, the U.S. Supreme Court issued a highly anticipated decision that substantially narrowed the venues in which a patent holder could file a case alleging patent infringement. Four months later, on September 21, the Court of Appeals for the Federal Circuit provided litigants with substantial guidance on the newly relevant language in the patent venue statute. The new decisions have drastically reduced Texas federal courts’ share of patent case filings.

Venue in Patent Cases

Under 28 U.S.C § 1400, patent infringement cases may be brought in the judicial district where (1) the defendant resides, or (2) where the defendant has committed acts of infringement and has a regular and established place of business. In 1990, the Federal Circuit interpreted the meaning of “resides” in § 1400 to mean anywhere the company was subject to personal jurisdiction.
TC Heartland

In TC Heartland LLC v. Kraft Foods Grp Brands, LLC, the Supreme Court set aside that interpretation and held that for domestic corporations, the term “resides” in § 1400 means only the defendant’s state of incorporation. The court did not express any opinion on the implications of the decision on foreign corporations, thus for the moment, leaving the law with respect to venue against foreign corporations and unincorporated associations untouched. As a result, where previously a corporation could be sued for patent infringement anywhere it sold or offered an accused product for sale, now it can only be sued in its state of incorporation, or where it commits infringing acts and has a “regular and established place of business.”

Even before TC Heartland, patent filings in Texas federal courts had been dropping, with most of the drop coming in “bulk filer” cases. But immediately after the Supreme Court’s holding, filings in the patent-laden Eastern District of Texas dropped approximately half from even the new lower levels. In the 150-day window before TC Heartland, 543 patent cases—a full 33 percent of all patent cases filed nationwide—were filed in the Eastern District of Texas, but in the 150 days after TC Heartland, only 14 percent of patent cases (237) were filed there.

In re Cray

The Supreme Court’s decision in TC Heartland focused attention on the “regular and established place of business” option for venue under § 1400(b), which for the first time since 1990 was broader than the “resides” prong. The first guidance from the Federal Circuit on the interpretation of this statutory language after TC Heartland was In re Cray, in which the Federal Circuit rejected a district court’s interpretation of the patent venue statute as not requiring that the defendant’s place of business be a physical one. Instead, its analysis revealed three general requirements relevant to the inquiry:

1. there must be a physical place in the district;
2. it must be a regular and established place of business; and
3. it must be the place of the defendant.

The Federal Circuit’s opinion in In re Cray provided litigants with substantial guidance on the issue of what can be argued to constitute a “regular and established place of business” under § 1404(b)’s second option.

In its wake, patent litigants are beginning to explore what activity meets the test, including when one entity’s activities occurring at a physical place in a district can be imputed to another, what proof is required to make or defend against an allegation of improper venue, and what effect the new test will have on cases involving multiple defendants and on pharmaceutical patent litigation under the Hatch-Waxman Act.

Notes

2. 871 F.3d 1355 (Fed. Cir. 2017).

Michael C. Smith

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PERSONAL INJURY LAW

By Melanie L. Fry and Josué J. Galván

While nine-digit product liability verdicts dominated headlines elsewhere, the Texas Supreme Court had a different focus in 2017. The court went back to the basics in personal injury law, rendering opinions on issues like duty, causation, governmental immunity, and establishment of a prima facie case of defamation.

Existence of a Duty

The Texas Supreme Court continues to assess when and why a duty exists to control others. In Pagayon v. Exxon Mobil Corp., friction between convenience store employees led to a fistfight, resulting in the death of a patron. The court explicitly rejected the broad duty imposed on employers to control employees in Section 317 of the Restatement (Second) of Torts, holding that Exxon owed no duty to supervise its employees under the circumstances. In UDR Tex. Props., L.P. v. Petrie, the court held that a property owner owed no duty to protect a visitor from criminal acts of third persons. The court clarified that foreseeability and reasonableness of risk of harm to an invitee must be analyzed separately, and that the factors outlined in the landmark case Timberwalk Apartments, Partners, Inc. v. Canin apply only to the foreseeability analysis.

Causation Evidence

In Bustamante ex rel. D.B. v. Ponte, a premature infant suffered near blindness from developing retinopathy of prematurity, or ROP. The Texas Supreme Court reversed the court of appeals’ judgment for the defendants and held that
legally sufficient evidence supported the jury’s finding that the neonatologist’s negligence in failing to timely screen and treat the ROP more likely than not caused the infant’s impaired vision. The court held that the court of appeals erred by not applying the substantial factor test, by rejecting the plaintiffs’ statistical evidence, and by holding that the plaintiffs’ testimony was conclusory.

Texas Tort Claims Act

In Marino v. Lenoir, plaintiffs brought a medical malpractice action following the death of a pregnant mother and her unborn twins. The court held that a doctor paid by a governmental unit, the University of Texas Medical System Foundation, was not entitled to Texas Tort Claims Act protection for governmental unit employees. The foundation did not own the clinic where the patient was treated, control physicians at hospitals not owned by the foundation, or control the doctor’s day-to-day tasks.

In Univ. of the Incarnate Word v. Redus, a University of the Incarnate Word, or UIW, police officer used deadly force on a student following a traffic stop off campus, and the student’s parents sued. The Texas Supreme Court held that UIW was a “governmental unit” entitled to interlocutory appeal of the denial of its plea to the jurisdiction based on governmental immunity. Under the Texas Tort Claims Act, the university derives its status and authority to employ peace officers from the Legislature. Because law enforcement is uniquely governmental, UIW is a governmental unit as to that function.

Texas Citizens Participation Act

Texas courts continue to construe the state’s relatively new Citizens Participation Act, Texas’ anti-SLAPP statute, which allows motions to dismiss claims that are based on the exercise of free speech. A plaintiff can avoid dismissal by establishing a prima facie case for each element of the claim. In two cases, the Texas Supreme Court analyzed whether the plaintiffs met that burden on a defamation claim: a statement disparaging a youth baseball club for not preventing a coach’s affair was not defamation per se; but a magazine article’s “Welfare Queen” reference was defamatory. Of note, the Supreme Court criticized one court of appeals’ reliance on Wikipedia as the linchpin on a critical issue as improper.

Notes
2. 517 S.W.3d 98 (Tex. 2017).
3. 972 S.W.2d 749 (Tex. 1998).
4. 529 S.W.3d 447 (Tex. 2017).
5. 526 S.W.3d 403 (Tex. 2017).

TAX LAW

By Bruce A. McGovern

The effects of Hurricane Harvey presented significant tax issues for individuals and businesses. In response, the IRS issued administrative guidance and Congress passed the Disaster Tax Relief and Airport and Airway Extension Act of 2017, (“2017 Disaster Relief Act,”) which became effective on September 29, 2017.

40 Percent Employee Retention Credit

The 2017 Disaster Relief Act provides that employers conducting an active trade or business in the Hurricane Harvey, Irma, or Maria disaster zones are entitled to a tax credit equal to 40 percent of wages paid to employees while the business was inoperable because of the storm. Up to $6,000 of wages are eligible, which means the maximum credit per employee is $2,400.

Leave-Based Donation Programs

Leave-based donation programs allow employees to forgo vacation, sick, or personal leave in exchange for payments the employer makes to charitable organizations. The IRS provided guidance under which neither employees nor employers have adverse tax consequences from cash payments employers make pursuant to such programs before 2019 for relief of those affected by Hurricanes Harvey and Irma.

Increased Access to Retirement Funds

The 2017 Disaster Relief Act permits certain individuals who suffered economic losses from Hurricanes Harvey, Irma, or Maria to withdraw before 2019 up to $100,000 from an employer-sponsored retirement plan or IRA without the normal 10 percent penalty on early withdrawals. Recipients can report the resulting income ratably over a three-year period and can accomplish a tax-free rollover by contributing the funds to an eligible retirement plan within three years.

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For those affected by the hurricanes, the legislation increases the limit on loans from qualified employer plans. Eligible individuals can borrow up to the lesser of $100,000 or 100 percent of the person’s vested account balance.

**Easier Deduction of Casualty Losses**

The 2017 Disaster Relief Act makes it easier to deduct personal casualty losses attributable to Hurricanes Harvey, Irma, or Maria. Normally, personal casualty losses are deductible only to the extent they exceed $100 and to the extent the sum of all such losses exceeds 10 percent of adjusted gross income. The deduction is available only to those who itemize their deductions. The legislation provides that a “net disaster loss” (as defined) is deductible to the extent it exceeds $500, is deductible without regard to the normal 10 percent threshold, and is deductible by those who take the standard deduction as well as those who itemize.

**Use of Prior-Year Earned Income to Calculate Tax Credits**

The 2017 Disaster Relief Act provides that certain individuals who resided in a hurricane disaster area can elect to use prior-year earned income to determine the earned income credit and child tax credit.

**Increased Limits on Charitable Contribution Deductions**

Increased limits apply to charitable contributions made through December 31, 2017, for relief efforts in the Hurricane Harvey, Irma, and Maria disaster areas. Provided certain requirements are met, the 2017 Disaster Relief Act increases the limit for individuals to 100 percent of adjusted gross income and for corporations to 100 percent of taxable income.

**Certain Filing and Payment Deadlines Extended**

The IRS has extended several filing and payment deadlines to January 31, 2018, for individuals and businesses anywhere in Florida, Georgia, Puerto Rico, and the U.S. Virgin Islands, as well as parts of California and Texas. These deadlines include the October 16, 2017, deadline for 2016 returns of individuals who filed timely extension requests and the September 15, 2017, and January 16, 2018, deadlines for quarterly estimated tax payments.

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**TEXAS ACCESS TO JUSTICE**

By Harry M. Reasoner

The 85th Legislature passed several bills that will increase access to justice without requiring additional state funding.

Individuals cannot represent themselves in probate court, except in very limited circumstances. Thus, low-income people, who cannot afford an attorney, cannot transfer title properly for a car. For the past two sessions, the Texas Access to Justice Commission has focused on ways for low-income people to transfer assets without need of probate on basic assets. With the enactment of SB 869 regarding vehicles, people can now pass the three assets a low-income Texan is most likely to own—a car, a home, and money in a bank account—to a named beneficiary outside of probate.

Self-represented litigants, or SRLs, also need access to legal information and forms to have an opportunity of properly proceeding in court. HB 1021 encourages the creation of law library self-help centers by clarifying that existing law library filing fees can be used to offset self-help center expenses. It also helps smaller counties by allowing them to partner together to create a law library.

SRLs frequently arrive at the courthouse seeking information on where to get legal help. SB 1911 requires courts to post information on where SRLs can get it, including local legal aid offices, lawyer referral services, and a self-help website jointly chosen by the Office of Court Administration and the commission.

Inactive attorneys, many of whom are temporarily out of the workforce for caregiving purposes but who wish to keep up their skills by performing pro bono, have previously been barred from doing so. The passage of HB 1020 opens up a new pool of 16,000 potential pro bono attorneys by permitting the Texas Supreme Court to create rules that allow inactive lawyers to practice law for the sole purposes of pro bono.

Home ownership is a critical component of keeping people out of poverty. Unfortunately, homes are often lost due to a lack of information on loan status. Home sellers who finance five or fewer homes per year—typically
owner-financed situations—are currently not required to provide basic information, such as the amount of principal or interest paid during the year to homebuyers. SB 830 would have required the provision of an annual accounting. Although it passed through the Legislature, it was vetoed by Gov. Greg Abbott. The commission will revisit the issue next session.

The commission’s non-legislative efforts included a proposed change to the Texas Code of Judicial Conduct to clarify what judges can do when an SRL is party to the suit. The commission also suggested two policies on the treatment of court patrons to clarify what court clerks and personnel can and cannot do to assist SRLs. Finally, the commission worked with the Supreme Court Advisory Committee to revise Texas Rule of Civil Procedure 183 regarding interpreters and soon will be working on a sample language access plan for Texas courts to enhance the availability of competent interpreters in proceedings.

The commission is delighted to report that the number of legal service providers and law students participating in Pro Bono Spring Break—a program that immerses future lawyers into the civil legal aid arena and provides hands-on experience with people needing legal help—nearly doubled this year.

The State Bar of Texas Legal Access Division had a number of successes as well, including the launch of Pro Bono Texas, a website that pro bono attorneys can access for pro bono opportunities, training materials, mentors, free CLEs, and no-cost document production software. The Legal Access Division also launched Texas Legal Answers, a statewide portal where low-income Texans can post their legal questions that are answered by pro bono attorneys. Attendance at the annual Poverty Law Conference, a CLE on substantive poverty law issues, increased by 40 percent.

Strong relationships were forged with legislative offices on the non-partisan matter of access to justice, the Supreme Court continued its leadership, and the number of lawyers committing financially to access to justice efforts with their dues payment increased significantly.

Substantial strides were made in serving low-income Texans. While much is left to be done, thousands of Texans will benefit by what has been accomplished.

**TEXAS SUPREME COURT**

By Scott P. Stolley

In the 2016-17 term, the Texas Supreme Court was unusually active in deciding issues that directly affect lawyers.

The court addressed contingent fees in *In re Davenport*, where the attorneys had an agreement to recover 40 percent of “the total sums recovered.” The court held this meant only 40 percent of the cash settlement and did not include 40 percent of the partnership interest that the client also received.

In *First United Pentecostal Church v. Parker*, a lawyer absconded with money in the firm’s trust account. The client sued a second firm lawyer, whose only culpability was lying to cover up the embezzlement. The court held that the second lawyer was not liable for conspiracy and joint venture, since there was no evidence of an agreement to form either. But he could be liable for equitable relief under breach of fiduciary duty, which did not require a finding of causation.

In *Rogers v. Zanetti*, a client sued the lawyer who had drafted an agreement for him and the lawyer who had defended a lawsuit about the agreement. The court held that the drafting lawyer’s alleged errors were rendered irrelevant by the jury’s finding of the client’s antecedent fraud. And the defending lawyer was not liable: (a) for failure to communicate a settlement offer, since there was no evidence the case would have settled; and (b) for not designating a rebuttal valuation expert, since there was no evidence that this likely caused an inflated verdict.

The court held in *In re National Lloyds Ins.* that the defendant’s attorney-billing information was not discoverable. The court reasoned that en masse production of the insurer’s fee records would invade the work-product privilege, which is not waived merely by challenging the opponent’s fee claim.

In *Chavez v. Kansas City Southern Ry.*, the issue was whether the client was bound by a settlement signed by her lawyer. The court reversed a summary judgment against the client, holding that the railroad did not meet its summary judgment burden to prove conclusively that the client could not rebut the presumption that the lawyer had authority.

In pending cases relating to law practice, look for the court to rule on: (a) whether client communications with a non-attorney patent agent are privileged (*In re Silver*); and (b) whether a lawyer with an unenforceable oral contingent-fee agreement can recover in quantum meruit (*Hill v. Shamoun & Norman, LLP*).

Regarding discovery, the court issued a must-read opinion about electronic discovery. See *In re State Farm*
Lloyds. The opinion emphasizes that all discovery is subject to a proportionality rule. The court also ruled that for a court to require a Rule 202 pre-suit deposition, the court must have jurisdiction over the potential lawsuit. See In re City of Dallas.

The court issued two blockbuster insurance opinions. In Great Am. Ins. Co. v. Hamel, the insurer wrongfully failed to defend, and after an adverse judgment, the insured assigned its insurance rights to the plaintiffs. The court held that the insurer was not liable for the judgment because the trial was not “fully adversarial.” In USAA Texas Lloyds Co. v. Menchaca, the court issued an encyclopedic opinion discussing when the insured may recover policy benefits under a claim of statutory bad faith.

Finally, the court continued its fascination with the anti-SLAPP statute, deciding four cases. The court ruled in one that even private statements are covered by the statute when they involve a matter of public concern (ExxonMobil Pipeline Co. v. Coleman), in another that the plaintiff did not present clear-and-specific evidence of damages (Bedford v. Spassoff), and in another that the defendant could invoke the statute even while denying having made the statement (Hersh v. Tatum). The fourth case (D Magazine Partners, L.P. v. Rosenthal) is most notable for the court’s discussion of using Wikipedia as an authority. Look for the court to decide three more anti-SLAPP cases in the current term.

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TRADEMARK LITIGATION
By Katherine A. Compton

In June 2017, the U.S. Supreme Court considered whether the First Amendment’s free speech clause trumps the Lanham Act disparagement clause,1 which prohibits trademarks that “disparage . . . or bring . . . into contempt[ ] or disrepute” any “persons, living or dead.”

Simon Tam, lead singer of The Slants, sought trademark registration for his rock band name. The name appears to be a derogatory term for persons of Asian descent, but the members of the band felt that by taking that slur as their band name, they would “reclaim” the moniker and “drain its denigrating force as a derogatory term for Asian persons.” The group drew “inspiration from childhood slurs and mocking nursery rhymes.”

The United States Patent and Trademark Office, or USPTO, denied the application based upon a provision of the Lanham Act disparagement clause. The examining attorney at the USPTO relied upon numerous dictionaries defining “slants” or “slant-eyes” as derogatory or offensive terms.

Tam contested the denial of registration before the examining attorney and before the USPTO Trademark Trial and Appeal Board to no avail. He took the case to the Court of Appeals for the Federal Circuit, which found the disparagement clause facially unconstitutional under the First Amendment’s free speech clause. The Federal Circuit court found that the disparagement clause of the Lanham Act is “viewpoint-based discrimination . . . and cannot satisfy strict scrutiny.”

The USPTO filed a petition for certiorari, which was granted to decide whether the disparagement clause is “facially invalid under the free speech clause of the First Amendment.”9 The USPTO made several arguments attempting to stop the registration.

The USPTO first argued that trademarks are government speech, not private speech, because trademarks are registered by the USPTO, an arm of the federal government, and thus exempt from First Amendment scrutiny.10 The Supreme Court struck down this argument stating that “it is far-fetched to suggest that the content of a registered mark is government speech.”11 The USPTO next argued that registration of a trademark is analogous to cases in which the government provided cash subsidies or their equivalent. The court held that the contrary is true—the USPTO does not pay monies to the registrant of a trademark—the registrant pays a filing fee for registration. Finally, the USPTO argued that the disparagement clause should be sustained under a new doctrine that combines the government speech cases with the subsidy cases.14 However, the court found those cases are no more relevant than the subsidy cases.

The court found that the Lanham Act disparagement clause constituted viewpoint discrimination violating a bedrock principal of the First Amendment. In striking down the disparagement clause the court stated, “The government has an interest in preventing speech expressing ideas that offend. And, as we have explained, that idea strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate.’”16

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remains to be seen, though it will not likely affect cases involving physical presences in the Eastern District. A decision for the U.S. District Court for the Eastern District against the largest defendants, many of which maintain permanent physical presences in one state. And in Bristol-Myers, the court held that for purposes of specific jurisdiction, the extent of a defendant’s contacts with the state did not matter—what matters is the connection between the forum state and the facts giving rise to the case.6

**Matal v. Tam.** A dance-rock band composed of Asian-American members attempted to trademark the band’s name, The Slants. The U.S. Patent and Trademark Office denied the trademark on the basis that the band’s name was derogatory and thus violated the Lanham Act’s “disparagement clause.” The en banc Federal Circuit found the disparagement clause facially unconstitutional under the First Amendment, and the Supreme Court affirmed. The court concluded that trademarks are not government speech and that the disparagement clause could not survive either intermediate or strict scrutiny. We'll see whether Congress addresses the court’s concerns.

**Ziglar v. Abbasi.** A group of post-September 11 detainees sued various federal officials seeking damages for alleged constitutional violations (i.e., a “Bivens claim”). The district court and court of appeals allowed the bulk of the claims to go forward, but the Supreme Court reversed. The court concluded that Bivens, as an “implied cause of action,” was “disfavored” judicial activity” and all but eliminated such claims except in the three particular scenarios in which it had previously been upheld: illegal searches/seizures, gender discrimination, and prisoner medical treatment, none of which was at issue in this case. TBJ

**Notes**
5. Daimler, 134 S. Ct. at 761 n.19.  

**U.S. SUPREME COURT**

By Dustin Howell

The October 2017 term of the U.S. Supreme Court saw the arrival of Neil Gorsuch, who was confirmed by the Senate in April 2017. Justice Gorsuch authored only a handful of decisions in his first term, but it does appear that he is following in his predecessor’s textualist footsteps.1 And while they may lack the headline-grabbing appeal of the previous term, this term’s decisions did address matters that could affect your practices and your client’s interests.

**TC Heartland LLC v. Kraft Food Groups Brands LLC.** This case substantially reined in a previously broad interpretation of the patent venue statute. In 1990, the U.S. Court of Appeals for the Federal Circuit read the patent-venue statute’s definition of “reside” to incorporate the general-venue statute’s definition of the same term, thereby authorizing venue in any forum in which the defendant was subject to personal jurisdiction. The Supreme Court disagreed, holding that venue in a patent case is appropriate only where the defendant (1) is incorporated or (2) maintains a regular and established place of business. The fallout of this decision for the U.S. District Court for the Eastern District of Texas, a leading patent venue under the prior precedent, remains to be seen, though it will not likely affect cases against the largest defendants, many of which maintain permanent physical presences in the Eastern District.

**BNSF Railway Co. v. Tyrrell,**3 Bristol-Myers Squibb Co. v. Superior Court of California.4 Sticking with the civil procedure theme, this pair of cases continued the court’s trend of limiting the scope of personal jurisdiction. A defendant is subject to general personal jurisdiction in (1) the state in which it is incorporated; (2) the state of its principal place of business; and (3) a state in which defendant’s operations are “so substantial and of such a nature as to render the corporation at home in that State.”5 In BNSF, the court made clear that activity-based general personal jurisdiction, to the extent it can be found at all, may only be found in one state.

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