The Texas Bar Journal Board of Editors has assembled a series of articles highlighting significant developments to the legal profession and caselaw over the past year. The topics featured are not exhaustive, and the opinions reflect only the views of the authors.
ANTITRUST AND BUSINESS LITIGATION
WRITTEN BY EMILY WESTRIDGE BLACK AND SOPHIE COPENHAVER

This year, the U.S. Supreme Court issued an opinion addressing federal courts’ jurisdiction to confirm or vacate arbitration awards under the Federal Arbitration Act, or FAA. In the upcoming term, the Supreme Court will determine the constitutionality of Pennsylvania’s consent-by-registration personal jurisdiction scheme.

Federal Jurisdiction Over the Federal Arbitration Act

In Badgerow v. Walters, the Supreme Court held that federal courts have jurisdiction to confirm or vacate an arbitration award only when the application itself establishes a jurisdictional basis—that is, where there is diversity jurisdiction or where the application presents a federal question.

This case stems from arbitration of Denise Badgerow’s unlawful termination claim. The arbitrators sided with Walters, the employer. Badgerow then sued in Louisiana state court, alleging the arbitral proceeding was tainted by fraud. Walters removed the case and asked the federal district court to confirm the award. Badgerow sought remand, arguing that the federal court lacked jurisdiction under Sections 9 and 10 of the FAA. The federal court denied the motion, holding that it had jurisdiction over the matter because the parties’ underlying dispute involved federal law claims. The U.S. Courts of Appeals for the 5th Circuit affirmed.

In an 8-1 opinion, the Supreme Court reversed. The court emphasized that federal courts must have an “independent jurisdictional basis” to provide relief under the FAA and held that for motions to confirm arbitral awards under Sections 9 and 10, the jurisdictional basis must appear on the face of the application itself.

The court distinguished its holding in Vaden v. Discover Bank that a federal court may “look through” and exercise jurisdiction over a motion to compel arbitration under Section 4 of the FAA if the underlying dispute involves a federal question due to differences in the statutory language. Section 4 provides that a party may petition for an order to compel arbitration in “any United States district court which, save for such agreement, would have jurisdiction” over the dispute. Sections 9 and 10 of the FAA do not contain this language.

Going forward, motions under Sections 9 and 10 of the FAA will be heard by state courts, unless federal question or diversity jurisdiction exists. This may lead to more unpredictable outcomes as some state courts take a narrower view of the FAA. The drafting of residual venue clauses will become more important, as they may determine which state courts will hear motions to confirm or vacate an arbitration award.

Consenting to Personal Jurisdiction

In the upcoming term, the Supreme Court will hear Mallory v. Norfolk Southern Railway Co. and determine whether the 14th Amendment due process clause permits states to require corporations to consent to personal jurisdiction to do business in the state. The case began when Robert Mallory sued Norfolk Southern, a Virginia corporation, in Pennsylvania, claiming that he has developed cancer because he was exposed to carcinogens during his employment in Virginia and Ohio. Mallory does not allege that he was exposed in Pennsylvania. Instead, Mallory asserts that the court may exercise jurisdiction over Norfolk Southern under Pennsylvania law, which compels foreign corporations to register with the Department of State of the Commonwealth before doing business in the state and provides that registration constitutes a sufficient basis for state courts to exercise general personal jurisdiction over the corporations. The trial court held that this “consent-by-registration” scheme was unconstitutional and the Pennsylvania Supreme Court affirmed. This case is one to watch as several states have a consent-by-registration scheme.

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Texas Supreme Court

The Texas Supreme Court addressed several important appellate issues this year, including appellate timelines, error preservation, and permissive interlocutory appeals.

First, the court addressed the impact of filing errors on appellate deadlines. In Mitschke v. Borromeo, the trial court granted a motion to sever the plaintiff’s claims against several defendants after the trial court signed a summary judgment order in the defendants’ favor. The plaintiff moved for a new trial but filed his motion under the original cause number instead of the new cause number in the severed case. He then filed notices of appeal in both cause numbers several days “before the extended deadlines under Rule 26.1(a) would have run.” Due to the filing error, the court of appeals dismissed the appeal as untimely. The court reversed the court of appeals’ decision. Overruling Philbrook v. Berry, the court held that “when a party timely attacks an order that grants a final judgment and then files a notice of appeal that is otherwise timely, the court of appeals must deem the appeal to have been timely perfected despite a non-judicial procedural defect.”

Second, in Brouder v. Moree, the court reemphasized its “common-sense approach to error preservation.” There, the trial court denied a party’s written demand for a jury trial as untimely. Following a bench trial, the court of appeals held that the party failed to preserve the jury issue for appeal because he did not object to the trial court’s denial of his written demand, object at the bench trial, or “otherwise raise the issue with the trial court.” Although the court held that the trial court had not abused its discretion by ruling that the party’s jury demand was untimely, it also held that the court of appeals’ holding on error preservation was erroneous. In doing so, the court iterated that once “a party has obtained an adverse ruling from the trial court” it does not need “to take the further step of objecting to that ruling to preserve it for appellate review.”

Third, the court addressed trial courts’ discretion to permit interlocutory appeals. In Industrial Specialists, LLC v. Blanchard Refining Co., a party filed an unopposed motion to pursue a permissive interlocutory appeal under section 51.014(d) of the Texas Civil Practice and Remedies Code. The trial court granted the motion, but the court of appeals declined to accept the appeal and issued a one-page memorandum opinion stating that the petition failed to establish each requirement of a permissive appeal under Texas Rule of Appellate Procedure 28.3(e)(4). In a plurality opinion, the court affirmed the court of appeals’ decision, holding “that section 51.014(f) permits Texas courts of appeals to accept a permissive interlocutory appeal when the two requirements of section 51.014(d) are met, but it [also] grants the courts discretion to reject the appeal even when the requirements are met.” The plurality also held that the court of appeals’ one-page memorandum opinion sufficiently explained the court’s reasons for refusing the appeal.

Three justices dissented, arguing that the court of appeals’ “boilerplate conclusion that ‘the petition fails to establish each requirement of Rule 28.3(e)(4)’” did not satisfy Rule 47.1’s requirement that the court of appeals issue a written opinion “address[ing] every issue raised and necessary to final disposition of the appeal.”

In 2022, the court made a change to its petition process. Rather than virtually always requesting full merits briefing before determining whether to grant review, the court began using Texas Rule of Appellate Procedure 55.1, on occasion, to grant review before full merits briefing. Under this procedure, the court is still calling for full briefing after granting review.

U.S. Supreme Court

This was a blockbuster year for the U.S. Supreme Court. The court issued opinions on topics ranging from abortion to First Amendment rights. The court also dealt with an unprecedented leak of a draft opinion. In addition, the court underwent personnel changes, as Justice Stephen Breyer retired and Justice Ketanji Brown Jackson joined the court. The Supreme Court remained closed to the public for oral arguments until the start of the new term in October 2022.

NOTES
1. 645 S.W.3d 251, 254 (Tex. 2022).
2. Id.
3. Id.
4. Id. at 255.
5. Id. at 267.
6. 683 S.W.2d 378, 379 (Tex. 1985) (orig. proceeding) (per curiam).
7. Mitschke, 645 S.W.3d at 266.
9. Id.
10. Id.
11. Id.
12. Id. at *2.
13. 652 S.W.3d 11, 13 (Tex. 2022) (plurality op.).
14. Id.
15. Id. at 21.
16. Id. at 19-20.
17. Id. at 28-30, 34 (Busby, J., dissenting).

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BANKRUPTCY LAW
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This year, Texas courts and the U.S. Court of Appeals for the 5th Circuit continued to issue significant opinions on various bankruptcy topics. Several examples follow.

Make Wholes, Post-Petition Interest, and Solvent Debtors

The U.S. Court of Appeals for the 5th Circuit in In Re Ultra Petroleum held that for purposes of section 502(b)(2) of the Bankruptcy Code, the solvent debtor exception continues, therefore ruling that certain creditors were owed a make-whole premium and post-petition interest at the specified contract rate as a result of Ultra’s solvency.1 Notably, the 5th Circuit is aligned with the 6th and 9th circuit courts in finding that the contract rate applies,2 and parts with the bankruptcy courts for the District of Delaware and Southern District of New York that previously applied the federal judgment rate.3 The 5th Circuit also determined that a make-whole premium could be characterized as unmatured interest, and therefore may be disallowed as a claim against an insolvent debtor under section 502.4

Rejection of FERC-Regulated Contracts

The 5th Circuit issued two opinions affirming a debtor’s ability to reject contracts regulated by the Federal Energy Regulatory Commission, or FERC,5 and explained, “FERC cannot … bind a debtor to continue paying the filed rate after rejection. And it cannot usurp the bankruptcy court’s power to decide [a debtor]’s rejection motions.”6 In FERC v. Ultra Resources, the 5th Circuit held that the debtor could reject FERC-regulated pipeline contracts because rejection amounted to a breach and only had an indirect effect on the filed rate.7 The 5th Circuit further held that the debtor could pay rejection damages in the discounted amount set forth in their confirmed plan.8 Bankruptcy courts should consider rejection of FERC-regulated contracts under a heightened standard that includes consideration of the public interest,9 but a FERC proceeding on public interest is not required for such analysis.10

The 5th Circuit issued its second opinion in July in Gulfport Energy v. FERC. In Gulfport, unlike in Ultra, FERC issued orders prepetition requiring the debtor to continue performing under its gas contracts irrespective of (anticipated) rejection in bankruptcy and requiring a debtor to get FERC’s approval of any Chapter 11 plan that rejected the contracts.11 However, such distinction did not make a difference in the outcome.12 The 5th Circuit vacated the orders because they were unlawful, explaining that FERC (again) incorrectly viewed rejection as more than just a breach.13

Receiving Bankruptcy Relief Beyond the Grave

The Bankruptcy Court for the Western District of Texas held that a Chapter 13 case may be administered to completion and a discharge granted even after the death of the debtor.14 Judge Parker explained that Bankruptcy Rule 1016 allows for the continuation of plan payments and case administration after a debtor’s death.15 He also explained that the financial management course requirement can be waived as the purpose of the course, to prevent bankruptcy recidivism, is defeated and that death was a disability excepting a debtor from the requirement under section 109(h)(4) of the Bankruptcy Code.16

Equitable Mootness and Exculpation

Readers may recall that one of the significant decisions in 2021 involved a case the U.S. Supreme Court refused to hear when it denied, without comment, a petition for a writ of certiorari in a case seeking to test the viability of the equitable mootness doctrine.17 This year, the 5th Circuit weighed in by finding that equitable mootness did not prevent it from reviewing the claims in NexPoint v. Highland.18 It explained that the focus of the equitable mootness inquiry is on whether a court can avoid upsetting the reorganization in granting relief.19 On the merits, the 5th Circuit upheld the injunction and gatekeeping provisions of the confirmed plan but found that the exculpation was overbroad.20 The panel explained that section 524(e) of the Bankruptcy Code requires another source of authority, which sections 1123(b)(6) and 105(a) do not provide, for exculpation of non-debtors.21 Other than exculpation of a debtor, the creditors’ committee, and trustees, who are allowed to be protected under section 524(e), the court also found that the independent directors could be exculpated because they were appointed to act with the bankruptcy trustee under a bankruptcy court order.22

NOTES
2. Ad Hoc Comm. of Holders of Trade Claims v. Pac. Gas and Elec. Co. (In re PG&E Corp.), 46 F.4th 1047, 1061 (9th Cir. 2022) (“unsecured creditors of a solvent debtor retain an equitable right to postpetition interest pursuant to their contracts”); see also Official Comm. of Unsecured Creds. v. Dow Corning Corp. (In re Dow Corning Corp.), 456 F.3d 668, 680 (6th Cir. 2005) (“We conclude . . . that there is a presumption that default interest should be paid to unsecured claim holders in a solvent debtor case”). See also UPS Capital Business Credit v. Gencarelli (In re Gencarelli), 501 F.3d 1, 7 (1st Cir. 2007) (“When the debtor is solvent, the bankruptcy rule is that where there is a contractual provision, valid under state law, . . . the bankruptcy court will enforce the contractual provision.”).
5. FERC v. Ultra Resources Inc. (In re Ultra Resources Corp.), Case No. 20-20623 (5th Cir. Mar. 14, 2022); see also Gulfport Energy Corp. v. FERC, Case No. 21-60017 (5th Cir. July 19, 2022).
7. Ultra Res. at 7, 9, 10, 15.
8. Id. at 8-9, 14.
9. Id. at 15-16.
10. Id. at 17.
11. Gulfport at 2-6, 7.
12. Id. at 25.
13. Id. at 21, 26.
15. Id. at 2-3.
16. Id. at 5.
19. Id. at 13.
CONSTRUCTION LAW
WRITTEN BY GREGORY M. COKINOS AND ANTHONY T. GOLZ

The Texas Supreme Court issued numerous opinions this year that have impacted construction law. Several are noted below.

In *James Construction Group, LLC v. Westlake Chemical Corporation,* a divided Texas Supreme Court held that generally, a party’s substantial compliance with contractual notice conditions is sufficient to satisfy those conditions. But when a contract mandates written notice, a writing is required to comply with that condition, substantially or otherwise. The court also held that an intervention provision cannot be employed as an end-run around the more stringent requirements of the contract’s termination-for-default provision; and that a clause stating “no claim shall be made” for consequential damages functions solely as a waiver of liability for consequential damages, not a covenant not to sue for those damages.

In *Signature Industrial Services, LLC v. International Paper Company,* the Texas Supreme Court held that an indemnity agreement between an owner and a contractor was rendered ineffective by the Anti-Indemnity Act, which forbids certain construction contracts from requiring an indemnitor to indemnify an indemnitee for “a claim caused by the . . . fault . . .
or the breach of contract of the indemnitee[.]” The court held that the statute does not require factual inquiry into the “true” cause of the plaintiff’s injuries. Rather, absent fraud or some other unusual circumstance, examining the pleadings will generally be a sufficient basis to determine whether the “claim” at issue was “caused by” the fault or breach of contract of the party seeking indemnification. The court also held that the contractor was not entitled to recover consequential damages, as the principal damages sought (the decline in the contractor’s market value) were not foreseeable to the owner at the time the contract was made, and the contractor had not otherwise proven recoverable consequential damages with reasonable certainty.

In SandRidge Energy, Inc. v. Barfield, the Texas Supreme Court held that a property owner owes no duty to warn of open and obvious hazards under Chapter 95 of the Texas Civil Practice and Remedies Code. The statute requires an owner with actual knowledge of a dangerous condition to “adequately warn” contractors of the condition when the owner exercises control over the work being performed. Consistent with the general rule at common law, a property owner does not fail to adequately warn a plaintiff under Chapter 95 when the dangerous condition is demonstrably open and obvious.

In Energen Resources Corporation v. Wallace, the Texas Supreme Court held that Chapter 95 of the Texas Civil Practice and Remedies Code applies even when alleged negligence at an improvement other than the one on which the plaintiff was working contributes to the plaintiff’s injuries. In determining Chapter 95’s applicability, the relevant question is whether negligence involving the “condition or use” of the improvement on which the plaintiff was working was a cause of the plaintiff’s damages. Even if negligence elsewhere contributed to the plaintiff’s injuries, negligence at the improvement need not be the “only cause” of the plaintiff’s damages for the statute to apply.

Finally, in Maxim Crane Works, L.P. v. Zurich American Insurance Company, the Texas Supreme Court held that the word “employee” in section 151.103 of the Anti-Indemnity Act bears its common, ordinary meaning, which is unaffected by whether the indemnitee and injured employee are considered “statutory co-employees” for the purpose of the Texas Workers’ Compensation Act, or TWCA. Section 151.103 is a statutory “employee” exception that allows an indemnitor to provide indemnity or additional-insured coverage against claims by its employees, agents, and subcontractors. The court rejected the argument that the word “employee” in section 151.103 of the Anti-Indemnity Act should be interpreted to include any person or entity that the TWCA would treat as an employee of the indemnitee, explaining, “the TWCA does not affect the enforceability of an additional-insured provision under the [Anti-Indemnity Act].”

NOTES
1. 650 S.W.3d 592 (Tex. 2022).
2. 638 S.W.3d 179 (Tex. 2022).
3. 642 S.W.3d 560 (Tex. 2022).
4. 642 S.W.3d 502 (Tex. 2022).
5. 642 S.W.3d 551 (Tex. 2022).

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CONSUMER LAW
WRITTEN BY JON-ROSS TREVINO AND NEWTON TAMAYO

2022 has been a busy year in the world of consumer law. Consumer law practitioners should be aware of West Virginia v. Environmental Protection Agency, in which the U.S. Supreme Court reaffirmed the major questions doctrine. While that case was about the Clean Air Act, it also will have ramifications in cases where a consumer seeks a remedy invoking administrative agencies’ promulgated rules. Specifically, the Supreme Court held that in “cases in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority,’” at that point, the court will require the agency to “point to ‘clear congressional authorization’ for the authority it claims.” The court added, “something more than a merely plausible textual basis for the agency action is necessary.”

In Ivy v. Garcia, the 3rd Court of Appeals held an “as is” contract will not preclude a common law fraud and Texas Deceptive Trade Practices Act claim, where there is evidence the consumer was induced into the contract by either “fraudulent misrepresentation” or concealment.

New post-judgment rules took effect May 1, 2022. Among the new rules, judgment-creditors and courts are now required to give judgment-debtor notice of exemptions rights, resources available to the judgment debtor (i.e., information about texastlawhelp.org and Texas legal aids), and the Texas Supreme Court’s promulgated forms, as required by Texas
Rules of Civil Procedure, or TRCP, Rule 679b. If the judgment-debtor does raise exemptions, the rules require the court to hold a prompt hearing, that may be continued for good cause, and the assets may not be disbursed to the creditor for a period of 14 days, and the exempt asset must be returned to the judgment-debtor within three days if the court rules in the judgment-debtor’s favor. Lastly, the new rules make the orders appointing a receiver uniform, set a deadline for the receivership to terminate automatically in 180 days unless the court signs a new order, and sets a requirement for receivers to follow TRCP 679b.

In Perez v. McCreary, Veselka, Bragg & Allen, P.C., a subsequent case after Transunion v. Ramirez, the U.S. Court of Appeals for the 5th Circuit dismissed a Fair Debt Collection Practices Act claim for lack of standing and decertified the class-action lawsuit. In that case, the debt collector sent the plaintiff a letter obtaining to collect a time-barred debt. The court reaffirmed Ramirez and held the debt collector’s statutory violations were immaterial to the discussion of concrete injury. The court also held that the plaintiff’s argument that her state of confusion and the time spent consulting a lawyer were still not enough to satisfy the concrete injury standing requirements.

NOTES
2. Id. at 2608.
3. Id. at 2595.
4. Id. at 2609.
9. Id.
11. Id. at 820.
12. Id. at 823.
13. Id. at 825.
Ineffective Assistance of Counsel

In Swinney v. State, a jury convicted Timothy Swinney of aggravated assault with a deadly weapon. Before trial, he filed an election for the court to assess punishment if convicted. After Swinney was convicted, it was determined that the jury could grant probation, but the judge could not. Swinney was sentenced to eight years in prison. Swinney appealed, claiming his attorney had misinformed him regarding his ability to be sentenced to probation by the judge and therefore his attorney was ineffective. The court of appeals affirmed his sentence. The Court of Criminal Appeals says, “A successful IAC claim depends on (1) deficient performance and (2) prejudice. Prejudice may be measured in one of two ways: a reasonable probability of a different outcome or a reasonable probability of a different decision by the defendant.” If the deficient performance pertains to punishment, prejudice is evaluated by looking to the potential for having achieved a better result. “But if the deficient performance might have caused the defendant to waive a proceeding he was otherwise entitled to, then the reasonable probability that the deficient performance caused the waiver fulfills the prejudice requirement.” The different outcome analysis is somewhat relevant to deciding whether the defendant would have made a different decision, but it is not the proper analysis for deciding prejudice arising from erroneous probation eligibility advice. The record says nothing about the impact of the attorney’s erroneous advice and some evidence suggested a viable strategy of electing the trial court for punishment. Thus, the defendant failed to show he would have made a different decision had he been properly advised.

Jury Charge

In Do v. State, Phi Van Do drove drunk and hit a car. His blood alcohol concentration, or BAC, was 0.194 and 0.205. Do was charged with DWI and the charging instrument included an allegation of BAC over 0.15, making the offense a Class A misdemeanor. The state did not read the 0.15 allegation when reading the information. The appellant elected to have the trial court assess his punishment. The defendant objected to the 0.15 allegation at punishment. The court of appeals reformed the judgment sentence to a Class B misdemeanor.

A defendant must meet three requirements for submission of an Article 38.23 instruction to the jury: “(1) the evidence heard by the jury must raise an issue of fact; (2) the evidence on that fact must be affirmatively contested; and (3) that contested fact issue must be material to the lawfulness of the challenged conduct in obtaining the evidence.” The defendant met these requirements “[T]he evidence need not prove the existence of the fact; it just has to raise the factual issue.” The Court of Criminal Appeals reversed and remanded to the court of appeals to do a harm analysis.

NOTES
2.  634 S.W.3d 883.
State Banks Have Cybersecurity Incident Reporting Obligation and IRP Requirement
A Texas state-chartered bank that experiences a material cybersecurity incident in its information systems (which includes those of an affiliate or third-party service provider) is required to notify the banking commissioner and provide certain information. The notice must be made as soon as practicable but prior to customer notification and not later than 15 days following the bank’s determination that it will be required to notify consumers; report to state or federal regulatory agencies, law enforcement, or a self-regulatory body; or impact the bank’s ability to serve its customers or conduct business. This notice requirement must be incorporated in the bank’s incident response plan.1

Texas AG Enforces State Data Protection Laws Following Data Breach
The Office of the Texas Attorney General pursued an action against a company that had a data breach that exposed the sensitive personal information of over seven million individuals, including approximately 1.4 million Texas residents. The Texas attorney general, along with other state AGs, obtained a judgment through settlement for a $21 million civil payment to the states and required, among other things: the employment of a chief information security officer; implementation of an ongoing information security program that is documented and contains “administrative, technical, and physical safeguards appropriate to the size and complexity of the business and sensitivity of the” information it “collects, stores, transmits, and/or maintains”; and a written incident response plan.2

Former Owner Accessing and Locking Out New Owners From Company Email Violates Hacking Law
The former owner of a company that sold its assets, including its computer network and databases, violated Texas’ civil “hacking law,” the Harmful Access by Computer Act,3 by after the closing date circumventing security measures and continuing to access the company’s email account and locking out the new owners from the account.4 The court awarded $9,000 in actual damages.5

App Obtaining its Users’ Login Credentials to Other Accounts Violates Hacking Law by Accessing Those Accounts
American Airlines, or AA, sued Red Ventures, or RV, because RV’s “The Points Guy” App encouraged its users to provide their login credentials to AAs reward program accounts, allowing the app to then access and obtain the users’ account information from AA’s servers. AA’s allegation that it suffered competitive losses due to the RV’s acquisition, subsequent use of, and damage to data integrity of information by accessing AA’s database without its effective consent was sufficient to state a plausible claim for violating Texas’ civil Harmful Access by Computer4 statute.6

Non-clients brought civil claims against an attorney for actions taken within the scope of legal representation for violating state and federal wiretap statutes by using and disclosing electronic communications in the form of text messages and emails illegally intercepted by her client and others. The Texas Supreme Court held that Texas’ common-law attorney-immunity defense applies to the Texas wiretap claim but not the federal wiretap claim, which has differently worded statutory language.4

Company’s Information Security Procedures Help Authenticate Electronic Signature
Where a contractor challenged that it had electronically signed a mutual arbitration agreement during the electronic application process, evidence of the company’s information security procedures that maintained electronic records of each activity an applicant performs during the electronic application process, with unique identifiers and timestamps of such activities, provided conclusive evidence attributing the contractor’s signature to the agreement.7

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ENVIRONMENTAL LAW
WRITTEN BY TY’MEKA REEVES-SOBERS

In 2022, we saw continued policy shifts in environmental regulation on the federal level, with a heightened focus on emerging contaminants, environmental justice, and climate change, as well as a few significant court decisions with potential far-reaching implications.

Federal Regulatory Changes

On March 14, 2022, the U.S. Environmental Protection Agency, or EPA, published a direct final rule amending the “all appropriate inquiries,” or AA! rule, to include ASTM International’s updated Phase I environmental site assessment standards in EI1527-21. On May 2, 2022, following adverse commentary objecting to the rule’s recognition of dual standards to satisfy AA! and adding per- and polyfluoroalkyl substances, or PFAS, as a permissible non-scope consideration, the direct final rule was withdrawn.

On April 11, 2022, the Securities and Exchange Commission published a proposed rule that would require public companies to significantly expand certain climate-related disclosures in registration statements, periodic reports, and financial reports. While a final rule was expected in October 2022, it has been delayed due to the reopening of the comment period on October 7, 2022.

President Joe Biden signed the Inflation Reduction Act of 2022, or IRA, into law in August 2022. Key components of the IRA include the direction of significant funds to environmental justice initiatives, clean energy, and climate change issues.

On September 6, 2022, the EPA published a notice of proposed rulemaking designating perfluorooctanoic acid, or PFOA, and perfluorooctanesulfonic acid, or PFOS, as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. The 60-day public comment period ended November 7, 2022, after the EPA declined requests to extend it. Additionally, on October 28, 2022, the EPA signed the notice finalizing the fifth drinking water contaminant candidate list, or CCL 5. The CCL is a list, published every five years, of currently unregulated contaminants that may require regulation under the Safe Drinking Water Act. CCL 5 includes PFAS.

U.S. Supreme Court

On June 30, 2022, the court held in West Virginia v. EPA1 that the EPA lacked authority under the Clean Air Act to regulate greenhouse gas emissions from existing power plants through the proposed generation-shifting mandates in the Obama-era Clean Power Plan. The court’s reliance on the “major questions” doctrine could have broader implications on the EPA’s rulemaking authority.

Watch for the court’s upcoming decision in Sackett v. EPA2 deciding whether the U.S. Court of Appeals for the 9th Circuit used the proper test in determining whether wetlands are “waters of the United States,” or WOTUS, under the Clean Water Act. Oral arguments in the case were held in October 2022. The holding could impact the EPA’s yet-to-be proposed rule for a new WOTUS definition following the agency’s proposal to repeal the Trump-era rule.

Texas Regulatory Update

Prompted by recent emergency events, on June 1, 2022, the Texas Commission on Environmental Quality adopted a rule that permits the executive director to reclassify a site’s compliance history classification as “suspended” if the executive director determines that exigent circumstances exist. The rule became effective on June 23, 2022.

NOTES
5. 87 Fed. Reg. 54,415.

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ESTATE PLANNING AND PROBATE LAW
WRITTEN BY GERRY W. BEYER

Jury Trials in Trust Modification Actions

In Matter of Troy S. Poe Trust, the Texas Supreme Court held that Property Code § 112.054 “does not confer a right to a jury trial in a judicial trust modification proceeding.” The court explained that the section discusses the court making the decision to modify in its discretion and there is no mention of a jury. However, the court remanded the case for the appellate court to consider whether there may be a jury trial right under the Texas Constitution. The court refused to address this issue because it was not raised until the motion for rehearing in the lower court. Thus, whether a litigant may...
successfully demand a jury trial in a trust modification action remains uncertain.

Standing to Bring Trust Action

Property Code § 111.004(7) provides that a trust beneficiary designated only by a class designation does not automatically have standing to bring a claim against the trustee for misconduct. Instead, this beneficiary must present evidence showing that the court should grant the beneficiary interested person status. In Berry v. Berry, the Texas Supreme Court reversed the appellate court explaining that there were sufficient facts to support her claim that she is an interested person. For example, she has a present financial interest in the trust (the right to withdraw a proportionate share of any trust contribution) as well as a contingent interest in trust distributions that would occur when the named beneficiary (her father) dies.

Heirship Determination Statute of Limitations

Estates Code § 202.0025 provides that there is no statute of limitations for heirship determinations. However, the provision applies only if the intestate died on or before January 1, 2014. In Estate of Trickett, the court cited Estate of Ripley holding that “no limitations period applies to heirship proceedings absent the existence of a prior administration of the decedent’s estate or a prior conveyance of the decedent’s property to a third party.” The court also noted that the enabling legislation for Estates Code § 202.0025 explained that the statute was “intended to clarify current law” and that therefore an inference that there was a statute of limitations applicable for prior intestate deaths may not be made.

Meaning of “Survivor(s) thereof”

The phrase “survivor(s) thereof” used in a will refers to people in a designated group who outlive the testator and not the heirs of a deceased group member.

Late Probate

An applicant must normally file a will for probate within four years after the testator’s death under Estates Code § 256.003. However, late probate is authorized if the applicant is not in default for being tardy. Texas courts are lenient in finding that an applicant was not in default and often accept weak excuses. However, in two recent cases, the courts refused to let the applicant off the hook for being late: Marshall v. Estate of Freeman and Matter of Estate of Matter.

NOTES
1. 646 S.W.3d 771 (Tex. 2022).
2. Id.
3. 646 S.W.3d 516 (Tex. 2022).
6. Id.
9. No. 03-20-00449-CV, 2022 WL 1273305 (Tex. App.—Austin Apr. 29, 2022, no pet. h.) (applicant discovered the existence of the testator’s will more than four years before filing the application and an attorney told the applicant that the will needed to be probated over one year before the filing).
10. No. 08-20-00156-CV, 2022 WL 2827022 (Tex. App.—El Paso July 20, 2022, no pet. h.) (applicant had possession of the will within days of the testator’s death but did not file until six years later and an attorney advised the applicant that probate was needed several months earlier).

FAMILY LAW

WRITTEN BY SAMANTHA E. FRAZIER AND TASHA WILSON

Family law practitioners throughout Texas are grateful for the brilliant legal minds who create, update, and revise the Texas Family Law Practice Manual forms. With the recent changes in the Texas Family Code and caselaw, our colleagues of the State Bar of Texas Family Law Section council have been working tirelessly.

When drafting a medical support order, pay close attention to the section regarding the payment of uninsured costs. In the case of In re Roisman, the 1st Court of Appeals determined the provision regarding payment of uninsured medical costs for a child was not enforceable by contempt. The provision stated, “The party who incurs a health-care expense on behalf of a child is ORDERED to furnish the other party forms … reflecting the uninsured portion … within thirty days after the incurring party receives them. The non-incurring party is ORDERED to pay … within thirty days after the non-incurring party receives the forms …” (The court held that the provision’s “uncertainty and indefiniteness” would compel the non-incurring party “to engage in conjecture and speculation” to determine whether the payment was due within 30 days or 120 days and thus the provision was not enforceable by contempt.)

Practitioners should be careful when filing a judgment nunc pro tunc once a court’s plenary power has expired. In the case of In re C.D.G., the divorce decree and mediated settlement agreement, or MSA, differed in the length of time...
the husband would pay contractual alimony. Six years from the date of entry of the divorce decree, the husband’s attorney filed for a judgment nunc pro tunc to correct the contractual alimony. The 5th Court of Appeals held that although the divorce decree differed from the MSA when it was signed, it was a judicial error and not a clerical error. The court considered the trial court’s failure to render an oral judgment or file a memorandum with the clerk in the record of the case.7

In the case of In re D.A.A.-B., the 8th Court of Appeals held that in a same-sex marriage, the presumption of parentage under Texas Family Code §160.201 applies to same-sex couples. The court considered the wife’s unrebuted testimony establishing that the child was born during the marriage. The court considered the legislative intent of Texas Family Code §160.106 to allow female spouses to establish parentage just as male spouses.3 This case is fact-intensive, and we recommend practitioners review the court’s opinion in its entirety.

The court in B.A.B held that the trial court erred in awarding grandparents temporary joint managing conservators due to failure to overcome the fit parent presumption. In a suit affecting parent child relationship case, the mother and father were named joint managing conservators. Shortly after, the mother died and the grandparents filed an intervention. The grandparents argued that the child had resided with them since birth and that the father voluntarily relinquished “actual care” of the child to them for one year or more. The 7th Court of Appeals determined that the father being named a joint managing conservator triggered the fit parent presumption. Furthermore, although the child had resided with the grandparents for over a year and the father only visited with the child, he did not voluntarily relinquish his “care, control or possession” for the requisite period.4

NOTES

IMMIGRATION LAW
WRITTEN BY ROY PETTY

Travelers to the United States have seen curtailment of their privacy, and the U.S. Supreme Court restricted the scope of review of negative decisions by immigration agencies. Customs and Border Protection, or CBP, searched and seized approximately 45,499 electronic devices at the international borders in fiscal year 2022 and “less than” 10,000 of those cellphones were forensically examined and copied into databases of the Department of Homeland Security, or DHS.2 CBP has seized the cellphone of at least one Texas attorney at the Dallas-Fort Worth International Airport.3

DHS does not divulge who maintains the downloaded content of seized cellphones but the agency warehouses certain financial information of U.S. citizens with a private contractor.4 DHS contractors have exposed confidential information of the public on the internet, raising the question whether the contents of seized cellphones could be exposed by hackers or contract error.5

In May 2022, the U.S. Supreme Court ruled that federal courts have no jurisdiction to review factual determinations made during the adjudication of most immigration benefits.6 In the words of Justice Neil Gorsuch, “a federal bureaucracy can make an obvious factual error, one that will result in an individual’s removal from this country, and nothing can be done about it.”7

On June 8, 2022, the Supreme Court decided Egbert v. Boule,8 which recognizes the immunity of CBP officers from lawsuits related to violations of constitutional rights. The case involved a CBP officer who beat up a confidential informant.

On October 5, 2022, the U.S. Court of Appeals for the 5th Circuit ruled that DACA, the Deferred Action for Childhood Arrival program, violated the Administrative Procedure Act.9 The court has kept the program in place while the U.S. district court analyzes whether the government’s regulatory fix can save the program. The program has allowed over 800,000 young people to remain in the United States with employment authorization.

In December 2022, the Supreme Court will consider the permanent injunction issued by the Southern District of Texas to preclude DHS from implementing its enforcement priorities memorandum. The memorandum prioritized the arrest and deportation of immigrants who recently crossed the border and immigrants presenting a threat to public safety or national security. Texas successfully argued at the lower court that DHS’s discretion was limited by federal statute.10

Immigration courts are backlogged by more than 1.9 million cases. Nearly 500,000 asylum applications are pending adjudication by DHS and are being adjudicated at the rate of about 48,000 applications per year. Adjudications of certain immigration benefits, e.g., immigrant visas, are backlogged by over three years.

NOTES

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In Monroe, the court adopted the Northfield exception subject to minor refinements. First, the initial inquiry is whether the pleading contains facts necessary to resolve the question of whether the claim is covered. Second, the court eliminated the requirement that the extrinsic evidence go to a "fundamental" coverage issue. Third, the extrinsic evidence must conclusively establish the coverage fact at issue.

After explaining when the Monroe exception arises, the court declined to consider extrinsic evidence in two cases. First, in Monroe, the court held that extrinsic evidence regarding the date on which property damage takes place overlaps with the merits of liability and could not be considered. Because the underlying dispute involved allegations of continuing damage, considering extrinsic evidence regarding the date when damage occurred would require an insured to admit that damage has occurred to trigger the insurer's duty to defend, potentially undermining the insured's defense in the underlying dispute.

Second, in Pharr-San Juan-Alamo Independent School District v. Texas Political Subdivisions/Casualty Joint Self Insurance Fund, the court declined to consider extrinsic evidence regarding whether a golf cart was designed for travel on public roads because the underlying pleading contained facts necessary to resolve the question of whether the claim was covered. Therefore, the threshold requirement for the Monroe exception—that the underlying petition contain a "gap"—was not met.

The court's narrow application of the newly minted Monroe exception suggests that extrinsic evidence may continue to play a limited role in the duty to defend analysis, although time will tell how the court's opinion in Monroe will affect the traditional scope of the duty to defend in Texas.

NOTES
1. 640 S.W.3d 195 (Tex. 2022).
2. 610 S.W.3d 878 (Tex. 2020).
7. Id. at 202-03 & n.10 (collecting cases with different qualifications for a "fundamental" issue of coverage).
8. Id. at 203.
9. Id. at 204.
10. Id.
11. 642 S.W.3d 466 (Tex. 2022).
12. 642 S.W.3d at 472-73.
INTERNATIONAL TRADE LAW
WRITTEN BY ELSA MANZANARES

The international trade landscape yielded newsworthy headlines again in 2022, with new directives creating more complexity for companies conducting international business transactions. Developments related to geopolitical conflicts—most notably the situation in Ukraine—dominated this year.

The most significant developments in international trade in 2022 involved the rollout of sweeping economic sanctions on Russia in response to the invasion of Ukraine. The U.S. and its allies implemented industry-wide economic sanctions against the Russian government and state-owned financial institutions and major Russian entities, as well as an investment ban and trade embargo in the disputed regions of eastern Ukraine. The actions represented comprehensive sanctions and forced U.S. and non-U.S. companies to conduct an immediate assessment of the sanctions risks to their business operations in Russia or commercial transactions with touch points to Russia and Belarus. The restrictive measures created significant restrictions on payments in Russia and complicated structures for winding up business with restricted entities.

In addition to the industry-wide sanctions, the U.S. and the European Union sanctioned multiple entities, individuals, and their families for their involvement in Russia's war on Ukraine. The U.S. also restricted imports of Russian oil, new investments in the energy sector in Russia, and licensing requirements on exports to Russia that previously did not require an export license. For exporters unaccustomed to obtaining export licenses, the sudden changes led to detentions and seizures of products at the border. The U.S. also expanded rules to require export licenses of many more foreign-made products that contain U.S. origin content or were produced with certain U.S. technology, software, or equipment.1

Events in Ukraine brought swift and intense attention to Russia by the U.S. government in 2022, but China will likely remain the long-term focus of U.S. national security and economic interests. In May, the U.S. Trade Representative, or USTR, announced commencement of the statutory four-year review process of the Section 301 tariffs imposed on goods from China. List 1 and List 2 tariffs would remain in place while the agency conducts a larger review through public comments on the effectiveness of the tariffs. Meanwhile, the lawsuit by over 6,000 importers in the U.S. Court of International Trade, or CIT, challenging the legality of the tariffs remains pending. In April, the CIT held that the USTR violated the Administrative Procedures Act when it did not adequately respond to more than 10,000 public comments it solicited before imposing tariffs on $300 billion in imports from China. Rather than immediately vacating the tariffs, the CIT provided USTR with an opportunity to explain its decision to impose tariffs and why it imposed tariffs on some goods but not others. In August, the USTR defended its decisions to impose the tariffs. Plaintiffs responded that the tariff actions were arbitrary and capricious and asked the court to vacate the tariffs and issue refunds. A ruling remains pending.2

Forced labor continued to be a hot topic in 2022. On December 23, 2021, President Joe Biden signed into law the Uyghur Forced Labor Prevention Act, or UFLPA, which prohibits the import into the U.S. of any goods, wares, articles, or merchandise mined, produced, or manufactured in the Xinjiang Uyghur Autonomous Region of China. For all merchandise entered into the U.S. on or after June 21, UFLPA requires U.S. Customs and Border Protection to apply UFLPA's rebuttable presumption that goods made in Xinjiang, or by related entities, are made with forced labor unless proved otherwise.

The events of 2022 are yet another reminder that changes to the international trade laws can occur at a moment’s notice, requiring businesses to remain vigilant and ready to adapt to avoid potential violations and penalties.

NOTES
1. 15 CFR §746.8.
2. In Re Section 301 Cases, Court No. 21-00052 (U.S. Court of International Trade).

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LABOR AND EMPLOYMENT LAW
WRITTEN BY TRANG Q. TRAN

In Stramaski v. Lawley, the U.S. Court of Appeals for the 5th Circuit held that holding public officials individually liable for retaliation under the Fair Labor Standards Act, or FLSA, also is consistent with its prior holdings regarding individual liability in other FLSA contexts. Governmental employees can be sued in their individual capacity for FLSA violations generally, such as for failure to pay overtime wages. The 5th Circuit has previously held that “individual[s] with managerial responsibilities” could be held jointly and severally liable for damages if the individual failed to comply with the FLSA.1

In Wanton v. Wal-Mart Stores, Texas, L.L.C., a pro se plaintiff sued Wal-Mart and obtained a jury's verdict on a retaliation claim under Title VII and 42 U.S.C. 1981 and was awarded $51,177 in back pay and $75,000 in punitive damages. The 5th Circuit rejected Wal-Mart’s challenge to the jury verdict form, punitive damages, and evidentiary challenges.2

In Soto v. MD Anderson Cancer Center,, the 5th Circuit ruled that MD Anderson is an arm of the state and cannot be sued under the Americans with Disabilities Act and the Texas Commission on Human Rights Act. The court held that MD Anderson is entitled to sovereign immunity and did not waive its sovereign immunity by accepting federal funds.3

In Hinkle v. Phillips 66 Co. and other recent cases, the 5th Circuit held that the arbitration agreement only covered claims between the inspection firm and the inspectors, not...
claims against a third-party client. By only suing the client and not the employer (inspection firm), the inspectors were able to avoid arbitration of their overtime claims.4

NOTES

OIL, GAS, AND ENERGY LAW
WRITTEN BY JORGE GUTIERREZ

Activity in the Texas oil patch in 2022 continued its frenetic pace since the pandemic, and with it came new developments in Texas energy jurisprudence. The following are some of the noteworthy cases from this year.

An issue that seems to generate more than its fair share of disputes concerns the proper (improper?) deduction of costs in calculating amounts payable to royalty owners. In Nettje Engler Energy, L.P v. BlueStone Nat. Res. II, LLC, the Texas Supreme Court had an opportunity to provide further guidance by clarifying its position in an earlier case, although some practitioners argue the court went beyond clarification. In Engler, the lease provided that the mineral owner’s royalty was “free of cost in the pipeline.” Although the case largely turned on a determination of whether a gas gathering system was a pipeline (the court held it is), the language of this particular agreement is commonly used in royalty clauses, so other royalty owners may face the same outcome as Engler. We can expect additional guidance on this topic relatively soon, as the court recently heard oral arguments in Devon Energy Prod. Co., L.P v. Sheppard.5 In that case, the court was asked to decide if the lease required the operator to add postproduction costs incurred by third-party purchasers to the gross proceeds before calculating the mineral owner’s royalty.

Who knew correcting a deed was so complicated? Last year, the Texas Supreme Court held, under the Texas correction instrument statute, that original parties to a recorded property conveyance can themselves correct a material mistake even after a third party acquired the property, so long as the third-party owner was not an innocent purchaser.6 The case was remanded to the court of appeals to determine whether the probate court correctly found the third-party owners were not innocent purchasers. The answer is, it depends, according to Yates Energy Corp. v. Broadway Nat’l Bank.7 One third-party owner, Yates, received a copy of a correction deed a few years before Yates assigned partial interests to other parties. The court of appeals found Yates had actual notice, despite deficiencies in the correction deed, and therefore Yates was not an innocent purchaser, whereas certain of the subsequent assignees may not have had notice. The matter was remanded to the probate court for determination, and likely continued litigation. The holding of the Texas Supreme Court will probably have other repercussions for property owners and their lessees who often use correction instruments for title curative and other purposes. As an example, the Texas Title Examination Standards will be updated with a cautionary note and guidance for title attorneys based on the Broadway Nat’l Bank case.8

The holding in Hlavinika v. HSC Pipeline P’ship, LLC9 may lead pipeline companies to sharpen their pencils when calculating the market value of an easement, especially when dealing with increasingly sophisticated landowners. Although the court found HSC Pipeline had eminent domain authority to condemn the land, the landowners will have a second chance to challenge the pipeline company’s $132,000 valuation based on the agricultural use of the land. The court acknowledged that the existing use of land is presumed to be its highest and best use, but landowners can rebut this presumption. In this case, the Hlavinikas have sold easements to other pipeline companies. The court found the trial court improperly excluded the property owner’s testimony of recent arm’s length transactions as evidence to support a $3.3 million valuation for the easement. The court remanded the case to the trial court to establish the value.

Under a master service agreement, an over-insured contractor minimizes an operator’s liability exposure, right? Not necessarily so. In Cimarex Energy Co. v. CP Well Testing, L.L.C.,10 a case concerning the Texas Oilfield Anti-Indemnity Act, the U.S. Court of Appeals for the 5th Circuit addressed a somewhat common situation in which a party holds more insurance than is required under the master service agreement, or MSA, to support its indemnity obligations. In this case, the agreement required $3 million of liability insurance, but the contractor had $11 million. After Cimarex settled a lawsuit for $4.5 million, the contractor offered to pay Cimarex indemnity damages of $3 million. The appellate court held the contractor’s indemnity obligation was limited to $3 million, which was the total amount of insurance coverage obtained for the benefit of Cimarex pursuant to the MSA.

NOTES
1. 639 S.W.3d 682 (Tex. 2022).
7. 650 S.W.3d 483 (Tex. 2022).
8. 26 F4th 683 (5th Cir. 2022).

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Apart from the pending case of Andy Warhol Foundation for the Visual Arts Inc. v. Goldsmith, it is possible that we will see the end of 2022 without a significant intellectual property decision by the U.S. Supreme Court. However, there are a few courts of appeals decisions that carry their weight and a few interesting decisions in the field of non-fungible tokens and trademarks we can look forward to. Two trademark decisions by the courts of appeals stand out.

**Meenaxi Enterprise Inc. v. Coca-Cola Co.**

This decision sheds light on the process of cancellations of trademarks. In 2021, Coca-Cola sought to cancel two registrations owned by Meenaxi Enterprise, Inc. namely, THUMBS UP and LIMCA, generally for sodas and concentrates to make soda. Coca-Cola pursued a claim that Meenaxi misrepresented the source of the goods on which the marks are used, and the Trademark Trial and Appeal Board, or TTAB, canceled the two registrations on grounds of misrepresentation. Meenaxi appealed and the U.S. Court of Appeals for the Federal Circuit reversed the TTAB’s finding. The court concluded that Coca-Cola had not established a statutory cause of action based on lost sales or reputational injury to show misrepresentation and warrant cancellation.

**In re: Steve Elster**

Giving a win to free speech in trademark registration, the court held that TTAB’s rejection of a trademark application of the phrase “Trump Too Small” unconstitutionally restricted the applicant’s free speech.

Registration of the mark “Trump Too Small” for clothing was refused registration by the United States Patent and Trademark Office, or USPTO, and then by the TTAB on appeal. Registration was refused on two counts. One, that it “[c]onsists of or comprises a name . . . identifying a particular living individual” without the individual’s “written consent.” Secondly that it “falsely suggest[s] a connection with persons, living or dead.” It did not matter to the examiner that the mark was “intended as political commentary.”

The appeal court, in its decision, reversed the refusal and held that Section 2(c) of the Lanham Act involves content-based discrimination that is not justified by either a compelling or substantial government interest to limit free speech. The court was “not convinced by the government’s argument that Lanham Act bars are comparable to speech restrictions in a limited public forum.”

As for the patent decisions of 2022, the Supreme Court denied certiorari in all of the patent cases, and significant among this was the June 2022 decision to deny certiorari in American Axle & Manufacturing v. Neapco Holdings. This decision would have given much needed guidance on the test for determining statutory subject matter under 35 U.S.C. § 101 and clarification of the Alice Test. The other significant decision was Nippon Shinyaku Co. Ltd. v. Sarepta Therapeutics Inc.

**Nippon Shinyaku Co. Ltd. v. Sarepta Therapeutics Inc.**

In a decision about forum selection, the court found that the broad forum selection clause in the private agreement was valid and can prevent an action before the Patent Trial and Appeal Board, or PTAB. Nippon and Sarepta executed a mutual confidentiality agreement, or MCA, in 2020. Section 6 of the MCA contained a mutual covenant not to sue, whereby each party agreed that during a defined covenant term, the parties agreed not to sue each other and including for patent infringement litigations, declaratory judgment actions, patent validity challenges before the USPTO or Japanese Patent Office. All potential actions arising under U.S. law relating to patent infringement or invalidity, and filed within two years of the end of the covenant term, shall be filed in the U.S. District Court for the District of Delaware. However, on the same day the covenant term ended, Sarepta filed seven petitions for inter partes review, or IPR, at the PTAB. The court found that the MCA prevented Sarepta from filing an IPR.

Hologic Inc. v. Minerva Surgical Inc.

In August 2022, the Federal Circuit issued its opinion on remand and determined it was well-established that Minerva is the doctrine of assignor estoppel. The court had to determine whether limitations of the doctrine applied in this case. It concluded that claim 1 was not “materially broader” than the claims assigned to Hologic and therefore assignor estoppel should apply. This matter went up to the Supreme Court in 2021 and was remanded back to the court of appeals.

NOTES
2. In re: Steve Elster, Case No. 20-2205, in the U.S. Court of Appeals for the Federal Circuit.

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PERSONAL INJURY LAW
WRITTEN BY JULIAN C. GOMEZ

Below is a summary of some of the Texas Supreme Court’s 2022 personal injury-related opinions and a few other—though not all—statewide changes that affected personal injury law this past year.

COVID-19
While COVID-19 remained, its stranglehold gave way. Trial courts across the state brought parties and their counsel back into their courtrooms. In-person hearings and trials supplanted their videoconference cousins, sometimes begrudgingly. Video depositions and mediations remain the norm. And the Texas Supreme Court and intermediate courts of appeals produced opinions at a steady clip.

Eight Corners Rule Exception
The Texas Supreme Court, in Monroe Guaranty Insurance Co. v. BITCO General Insurance Corp., officially adopted an exception to the eight-corners duty to defend rule and allowed courts to consider extrinsic evidence when the evidence (1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved.

But the Exception Does Not Apply Unless There Is a Gap
The court, in Pharr-San Juan-Alamo Independent School District v. Texas Political Subdivisions Property/Casualty Joint Self Insurance Fund, however, refused to apply the new eight-corners rule exception because there was not a “gap” in the pleading that would leave a court unable to determine the duty to defend.

Not All High-Speed Chases Waive Governmental Immunity
In City of San Antonio v. Maspero, the court reaffirmed that the waiver of governmental immunity in high-speed chases depends on the chase’s facts.

If It Is Not Necessary, It Is Not Necessary
Following the rule of judicial restraint when drafting opinions, the court, in SandRidge Energy, Inc. v. Barfield, left open the question of whether the necessary-use exception applied to contractors at common law or under Chapter 95 of the Civil Practice and Remedies Code.

Relevance and Discoverability Are Not Synonymous
While medical billing, education, employment, and prior automobile wreck insurance records, which were all held by third parties, may be relevant, the Texas Supreme Court held, in In re Central Oregon Truck Co., Inc., that this evidence is not automatically discoverable and that courts must consider proportionality and try to impose reasonable limits, especially if the burden or expense of the proposed discovery outweighs its likely benefit.

Grocery Store Parking Lot Divot Did Not Cut the Mustard
In United Supermarkets, LLC v. McIntire, the court held that an unremarkable “divot” in a grocery store parking lot, less than an inch deep, was not unreasonably dangerous as a matter of law.

Opinions Must Address All Issues … Corporate Representatives and Subpoenas
Relying on another rule of judicial opinion drafting, the Texas Supreme Court held, in In re Zach Brown, that opinions must address all issues raised and necessary for final disposition and that Texas Rule of Civil Procedure 199 does not trump Rule 176; thus, a trial court must consider if Rule 176 authorizes the trial subpoena of a corporate representative.

A Lawsuit and Third-Party Claim Form Are Sufficient Governmental Notice
In Leach v. City of Tyler, the court held that a timely filed lawsuit that describes the date, time, location, degree of damage, and incident satisfies the Texas Tort Claims Act’s six-month notice requirement, and that a third-party’s claim form satisfies a governmental entity’s independent and different 30-day notice requirement.

Duty to Defend and Duty to Indemnify Are Decided at Different Times
The U.S. Court of Appeals for the 5th Circuit, in PennAmerica Insurance Company v. Tarango Trucking, LLC, held that if a duty to defend exists, Texas courts decide the duty to indemnify when the underlying lawsuit concludes.

No Diversity Defeats Snap Removal
Finally, in In re Levy, the 5th Circuit held that snap removals are improper when the named parties, including unserved defendants, are not completely diverse.

NOTES
1. 640 S.W.3d 195 (Tex. 2022).
2. 642 S.W.3d 466 (Tex. 2022).
3. 640 S.W.3d 523 (Tex. 2022).
4. 642 S.W.3d 560 (Tex. 2022).
5. 644 S.W.3d 668 (Tex. 2022).
6. 646 S.W.3d 800 (Tex. 2022).
9. 30 F4th 440 (5th Cir. 2022).

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REAL ESTATE LAW
WRITTEN BY ROLAND LOVE

This report addresses a 12-month period beginning in September 2021. We did not have a legislative session during this time, but many important new laws took effect September 1, 2021, and January 1, 2022. The Texas Supreme Court also issued some interesting real estate-centric opinions during this period, and finally both the Texas Title Examination Standards Board and the Texas Real Estate Commission, or TREC, had significant activity.

Some of the more notable bills effective September 1, 2021, include a new process for releasing an abstract of judgment lien from a homestead, removing racial deed restrictions found in deeds, and a requirement to provide notice of a public improvement district, or PID, before entering into a contract for the sale of real property. Similarly notice of flooding must be provided to a prospective tenant before execution of a lease. Also, homeowner associations were required to register with TREC if they had 60 lots or more. Any management company is required to register with TREC. TREC is using this information to create a resource for prospective sellers and buyers. Finally, resale certificates were capped at $375 with an update limited to $75.1

On January 1, 2022, Chapter 53 of the Texas Property Code was substantially changed to broaden the scope of work included and expand the class of those that can claim a mechanic’s lien. The time for filing an affidavit claiming a lien was simplified and limitations for bringing a claim were shortened to one year unless a written extension is recorded before the one-year period. Property tax homestead exemptions were also modified to permit filing at any time by a new homeowner if the property was not already subject to a homestead exemption and would have qualified as a residence on January 1 of that year.2 Also, wrap mortgages were extensively regulated.3

The Texas Supreme Court addressed real estate multiple times in the past year. An important decision was rendered in Pape Partners, Ltd. v. DRR family Properties LP,4 in which the court held that the courts, rather than the Texas Commission on Environmental Quality, had jurisdiction to determine questions of ownership to surface water rights. Also important, in Mitchell v. MAP Resources, Inc.,5 the court found that a 1999 default judgment based on service by publication violated the due process of a defendant (deceased in 2009) whose address was available in the property tax records and some recorded deeds.

Also in 2022, the Texas Title Standards Joint Editorial Board published significant modifications to the Title Examination Standards to respond to recent legislation and court opinions, along with adding several new standards related to adverse possession and cotenancy. For example, revised standards and comments address the changes to the mechanic’s lien laws in Texas Property Code Chapter 53 such as the increased scope of work and claimants, the process for filing an affidavit claiming a lien, and a one-year limitation for filing a lawsuit to assert the lien.6

Finally, changes were made by TREC to the contract forms to address legislation requiring a disclosure of any PID affecting the real property. The disclosure is required to be made before executing the contract, although a post execution disclosure creates a waiver of the right to terminate if the sale is closed. A recordable disclosure of a PID is executed at closing. Other remedies are provided in the event of an untimely disclosure or failure to disclose. The modified contract forms and addendum were adopted effective September 1, 2021.7

NOTES
7. See https://www.trec.texas.gov.

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During 2022, Congress passed legislation that included changes to the tax laws, while the Internal Revenue Service, or IRS, announced additional relief for taxpayers still recovering from the COVID-19 pandemic. Furthermore, the U.S. Supreme Court issued a favorable opinion for a taxpayer in a case involving a request for a collection due process, or CDP, hearing.

**Inflation Reduction Act of 2022**

On August 16, 2022, President Joe Biden signed the Inflation Reduction Act of 2022 into law. Under the act, there is a 15% alternative minimum tax imposed on publicly traded corporations (excluding S corporations, regulated investment companies, and real estate investment trusts) with average annual adjusted financial statement income over $1 billion over a three-year period. The minimum tax applies to tax years beginning after December 31, 2022. The act includes a nontaxable excise tax of 1% of the fair market value of corporate stock repurchases (subject to certain exceptions), occurring after December 31, 2022. The act also extended the excess business loss limitation under I.R.C. § 461(l) for noncorporate taxpayers through tax years beginning before January 1, 2029. Furthermore, the act increased IRS funding by approximately $79.6 billion over the next 10 years, the majority of which was allocated to enforcement actions and operations support. Taxpayers may also be eligible for several tax credits that were extended or expanded, including the following:

- Clean vehicle credit in an amount up to $7,500 for purchasing a qualifying new clean vehicle, subject to retail price and income limitations;
- Clean vehicle credit equal to the lesser of $4,000 or 30% of the sales price of a used vehicle, subject to retail price and lower income limitations than for new vehicles;
- Nonrefundable residential clean energy credit equal to 30% of eligible expenses if the taxpayer installs solar energy equipment in his or her residence from January 1, 2022, through December 31, 2032 (the percentage of eligible expenses is reduced in 2033 and again in 2034 until it expires in 2035); and
- Energy efficient home improvement credit equal to 30% of all eligible home improvement costs for property placed in service after December 31, 2022, and before January 1, 2033 [annual limits of $1,200 per taxpayer and $600 per item (except for heat pumps, heat pump water heaters, biomass stoves and boilers, which have a $2,000 credit limit)].

**Penalty Relief**

As a continuation of its efforts to assist taxpayers who have been adversely affected by the COVID-19 pandemic, the IRS issued Notice 2022-36, 2022-36 I.R.B. 188 (August 24, 2022), which provides penalty relief to individuals and businesses with respect to specific returns for the tax years 2019 and 2020. The taxpayer is not required to call or write the IRS to request this relief. Instead, the IRS will grant this relief automatically as long as certain conditions are met. The IRS will allow relief from failure to file penalties under I.R.C. § 6651(a)(1) with respect to the Form 1040, 1041, and 1120 series. Penalty relief is also applicable to civil penalties imposed on Forms 5471 or 5472 when these forms are attached to a late-filed Form 1120 or 1065, civil penalties related to Forms 3520 or 3520-A, and penalties assessed for late filing or failure to show required information on Forms 1065 or 1120. The taxpayer will receive a credit or refund if the penalty was previously paid. To qualify for relief, the particular form must be specifically identified in the notice, and the taxpayer must have filed the applicable 2019 or 2020 return on or before September 30, 2022. The IRS notes that this penalty relief initiative will allow the agency to concentrate on processing backlogged correspondence and tax returns to assist in resuming normal business operations by the 2023 filing season.

**Supreme Court Case Involving CDP Litigation**

Under I.R.C. § 6330(d), if a taxpayer timely files a CDP request and subsequently does not agree with the determination by the IRS Independent Office of Appeals, the taxpayer may request judicial review by filing a petition in the U.S. Tax Court within 30 days of the date of appeals’ determination, and “the Tax Court shall have jurisdiction with respect to such matter.” In *Boechler, P.C. v. Commissioner,* the U.S. Supreme Court held that the 30-day time period to file a petition seeking review of a CDP case is a nonjurisdictional deadline subject to equitable tolling. In *Boechler, P.C.*, the petitioner sent the petition to the U.S. Tax Court one day after the 30-day time period referenced in I.R.C. § 6330(d). Nevertheless, the Supreme Court concluded that the statutory language “does not clearly mandate the jurisdictional reading . . . given that ‘such matter’ lacks a clear antecedent.” Accordingly, the Supreme Court remanded the case for a determination of whether Boechler, P.C., is entitled to equitable tolling under the facts of the case.

**NOTES**

2. See § 10101 of the Act, which amends I.R.C. § 55(b).
5. See § 13401 of the Act, which amends I.R.C. § 30D.
6. See § 13402 of the Act, which adds I.R.C. § 25E.
7. See § 13301 of the Act, which amends I.R.C. § 25D.
8. See § 13301 of the Act, which amends I.R.C. § 25C. The current rules still apply to property placed in service in 2022 (credit of 10% of qualified energy efficient costs or 100% of the costs for the installation of certain water heaters and air conditioners).
10. Please note that penalty relief may be granted for other forms included in Notice 2022-36 as this article does not provide an exhaustive list.
12. 142 S. Ct. 1493, No. 20-1472 (April 21, 2022).

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serves as senior counsel in the Houston office of Chamberlain, Hrdlicka, White, Williams & Austin. She has extensive experience representing individuals and businesses in federal tax disputes before the Internal Revenue Service and in the U.S. Tax Court. Fountain is also the secretary of the State Bar of Texas Tax Section.
The Texas Access to Justice Commission began 2022 celebrating the statewide access to justice accomplishments of former commission Chair Harry Reasoner. For over 12 years, he oversaw the commission’s efforts to significantly enhance funding and develop additional avenues for increasing access to justice for low-income Texans.

He led the development of the heralded Champions of Justice for Veterans Gala, an event to raise money to help impoverished veterans in dire need of legal assistance. This year, it raised over $550,000, a record amount. He and the commission are most grateful to the State Bar of Texas, the stalwart gala co-chairs, lawyers, firms, foundations, corporations, and the commission staff who contributed to its success. The speaker, retired U.S. Army Lt. Gen. Nadja West, who was the 44th U.S. Army surgeon general and former commanding general of the U.S. Army Medical Command, was outstanding. She inspired the sellout crowd with her life story of service to our nation and her eloquent words stressing the critical importance of providing needed legal services to veterans. She emphasized that help must be available for those who have so selflessly served their country and now need help themselves. Looking forward to next year, the commission greatly appreciates that Reasoner has agreed to chair the 2023 gala.

In last year’s article, he reminded us that our society and all lawyers must be informed of both the terrible impact on low-income Texans “having no realistic way to seek justice” as well as our country’s great need to honor the ideal in our Pledge of Allegiance of “justice for all.” Texas Supreme Court Chief Justice Nathan L. Hecht says, “Justice for only those who can afford it is neither justice for all nor justice at all.” He adds, “[i]f the justice system is to deliver on the faith America asks people to place in it and on the values it claims to preserve, greatly improved access to justice is an imperative.”

Progress has been made. For example, the greatly increasing use of remote hearings during the devastation and sadness of a pandemic has proven a boon to progress in access to justice. Judges have reported more participation by self-represented litigants in court proceedings conducted remotely. The savings of travel time and expense and the convenience of remote participation have proven beneficial both to court participants as well as in the disposition of court matters. This year, the Supreme Court Advisory Committee supported rules to govern the use of virtual hearings, an important step forward.

Language access is critical for preserving the legitimacy of the judicial process and the efficient functioning of our courts. While work to develop and implement language access plans continues, work also continues to provide templates for legal aid lawyers and low-income self-represented litigants to avoid interpreter costs. Additionally, the Supreme Court recently approved will forms recommended by the Probate Forms Task Force to help in passing title to real property and the elimination of unnecessary legal disputes. Educational and training programs are presented to encourage pro bono work and assist courts handling matters most frequently impacting low-income Texans.

Even with such efforts, though, the fourth Legal Services Corporation Justice Gap Report, published this year, shows the stark reality. It revealed that 92% of the civil legal problems of low-income Americans did not receive any or enough legal help. It estimated that 74% of low-income households experienced at least one civil legal need in the past year. The estimated number of low-income Texans is approximately 5.4 million. This fall, the Texas Supreme Court asked the commission to study and recommend proposed rule changes for the court’s consideration that would address the civil justice gap by (1) allowing qualified non-attorney paraprofessionals to provide limited legal services directly to low-income Texans and (2) permitting non-attorneys to have economic interests in entities that provide legal services to low-income Texans while preserving professional independence. The commission will seek extensive input from State Bar members and other constituencies as it studies these issues in 2023. As a society, as lawyers, and as the commission, along with our fellow stakeholders in the fight for equal access to justice, our work is cut out for us.

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