THE YEAR IN REVIEW 2015

The year 2015 proved a mélange of emotions. We mourned the victims of Emanuel African Methodist Episcopal Church in South Carolina, the passengers killed and injured aboard Amtrak Train 188 that derailed in Philadelphia, the co-workers attacked at Inland Regional Center in San Bernardino, the people of Paris assaulted by ISIS gunmen and suicide bombers, and others. We were relieved when the World Health Organization declared that the Ebola epidemic in Liberia was over and realized our smallness when we saw the first-ever flyby of Pluto. We showed our pride and voiced our opposition when the U.S. Supreme Court ruled in favor of same-sex marriage. We felt the onward march of time when Cuba and the United States re-established diplomatic relations and warmth when Pope Francis visited our country, often deviating from his agenda to reach out to the poor and underprivileged.

The year also 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.

ANTITRUST AND BUSINESS LITIGATION

By Emily Westridge Black and William Marsh

In 2015, the U.S. Supreme Court analyzed when state regulatory boards may invoke state-action antitrust immunity. The court also denied certiorari in an important civil antitrust case that focuses on application of the Foreign Trade Antitrust Improvement Act of 1982.

An Examination of State-Action Antitrust Immunity

In *North Carolina State Board of Dental Examiners v. FTC*,[1] the Federal Trade Commission alleged that the North Carolina Board of Dental Examiners acted anticompetitively by sending letters to non-dentist teeth whitening companies accusing them of unlawfully practicing dentistry without the required license. The board sought dismissal, arguing that because it was created by the state to function as a regulatory agency, it enjoyed state-action immunity. Affirming the 4th Circuit, the Supreme Court rejected the board's argument and held that because "a controlling number of the Board's decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State"[2] that provides "realistic assurance that ... [the] anticompetitive conduct 'promotes state policy, rather than merely [its] individual interests.'"[3] "Mere potential for state supervision" is not enough; active supervision requires that the supervisor (1) review the substance of the decision, (2) have power to veto or modify the decision, and (3) not be an active market participant.[4] Whether supervision is sufficiently "active" depends on "all the circumstances of the case."[5] The board failed to meet the active supervision requirement because there was no evidence of any "decision by the State to initiate or concur with the Board's actions."[6]

The court's decision is now the subject of litigation. For example, in *Teladoc Inc. v. Texas Medical Board*,[7] the plaintiffs are seeking to invalidate a rule adopted by the Texas Medical Board that prevents doctors from treating patients over the phone without first conducting an in-person evaluation. The plaintiffs claim that the rule unlawfully stifles competition under section 1 of the Sherman Act. The TMB has moved to dismiss, arguing that it is actively supervised by the state and is therefore entitled to state-action antitrust immunity under *North Carolina State Board of Dental Examiners*.

Application of the FTAIA

The court declined certiorari in *Motorola Mobility LLC v. AU Optronics*,[8] an antitrust case from the 7th Circuit involving the Foreign Trade Antitrust Improvement Act. The FTAIA excludes from the Sherman Act "conduct involving trade or commerce (other than import trade or import commerce) with foreign nations[.]"[9] Motorola brought a private antitrust suit against the defendants, alleging its foreign subsidiaries purchased price-fixed liquid-crystal display panels from the defendants and incorporated them into cellphones that were sold and shipped to Motorola for sale in the United States. Although the price-fixed LCD components were purchased overseas, Motorola argued that its claims fell under an exception to the FTAIA that allows Sherman Act claims for foreign conduct that (1) has "a direct, substantial, and reasonably foreseeable effect" on domestic commerce; and (2) gives rise to an antitrust claim.[10] The 7th Circuit disagreed and held that Motorola's claims were barred under the FTAIA. The court drew a sharp distinction between Motorola and its foreign subsidiaries and held that even if the conspiracy satisfied the first prong of the FTAIA exception, it failed the second because the harm giving rise to any antitrust claim occurred in foreign commerce (when Motorola's foreign subsidiaries purchased the component parts) and was therefore recoverable, if at all, only under foreign law.[11]

The denial of certiorari left unresolved a potential circuit split. In *Hsiung v. United States*,[12] a criminal case involving the same conspiracy, the 9th Circuit upheld the defendants' Sherman Act convictions, finding that their conduct fell under the domestic effects exception to the FTAIA.

Notes

1. 135 S. Ct. 1101 (2015).
2. *Id.* at 1104.
3. *Id.* at 1112.
4. *Id.* at 1116-17.
5. *Id.*
6. *Id.* at 1116.
7. Civ. No. 1:15-cv-00343 (W.D. Tex.).
8. 775 F.3d 816 (7th Cir. 2015), *cert. denied*, 135 S. Ct. 2837 (2015).
9. 15 U.S.C. § 6a.
10. *Id.*
11. The court also found that the suit was barred by the indirect purchaser doctrine, which "forbids a customer of the purchaser who paid a cartel price to sue the cartelist, even if his seller—the direct purchaser from the cartelist—passed on to him some or even all of the cartel's elevated price." *Motorola Mobility LLC*, 775 F.3d at 821.
12. 778 F.3d 738 (9th Cir. 2015), *cert. denied*, 135 S. Ct. 2837 (2015).

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APPELLATE LAW

By Warren W. Harris and Lindsay E. Hagans

The Texas Supreme Court addressed a number of interesting and important appellate issues during the 2014-2015 term. We note several of them here.

The court decided *Brookshire Brothers v. Aldridge* last year and again tackled spoliation this term. In *Wackenhut Corp. v. Gutierrez*,[1] the court addressed (1) whether a party preserved error opposing a spoliation jury instruction when it responded to a pretrial motion for sanctions, but failed to object to the court including the instruction in the jury charge; and (2) if so, whether it was reversible error to submit the instruction. In a per curiam opinion, the court answered "yes" to both questions.[2]

In response to Gutierrez's pretrial request for a spoliation instruction, Wackenhut objected but failed to object to the spoliation instruction in the court's charge (though it did object to the submission of an instruction *after* the court read the charge to the jury).[3] After the trial court rendered judgment on the verdict in Gutierrez's favor, Wackenhut appealed but the court of appeals affirmed the judgment, holding that Wackenhut had waived any complaint under Texas Rule of Civil Procedure 272.[4] The Texas Supreme Court reversed the judgment of the court of appeals, holding that there was "no doubt" that Wackenhut timely made the trial court aware of its complaint by specifying the reasons for opposing a spoliation instruction in its pretrial briefing and obtaining a ruling.[5] On the second issue, the court applied the *Brookshire Brothers* framework and found that the trial court abused its discretion in submitting the spoliation instruction because, in light of the abundance of other available evidence, the spoliation did not irreparably deprive Gutierrez of presenting his case.[6]

The court addressed issues of expert testimony in two opinions, *Gharda USA, Inc. v. Control Solutions, Inc.*[7] and *JLG Trucking, LLC v. Garza*.[8] In *Gharda*, the issue was the reliability of "interdependent opinion testimony" from a series of four experts.[9] The court of appeals held that because each expert's individual testimony was reliable, the experts' collective testimony was reliable.[10] A unanimous court reversed, holding that the individual testimony of at least two experts was unreliable, thereby rendering unreliable the testimony of the experts who had relied on the unreliable opinions of those two experts.[11] Thus, there was no evidence of causation of the plaintiffs' claims.[12]

In *JLG Trucking*, the issue was the relevance of non-expert testimony supporting the defendant's alternative theory of causation that a second collision caused the injuries to the plaintiff, who was suing the first driver.[13] The plaintiff filed a pretrial motion requesting that the trial court exclude all evidence of the second accident on relevance grounds.[14] The trial court granted the motion, and the court of appeals affirmed.[15] But the Supreme Court reversed, concluding that the second accident was relevant to the issue of causation and the exclusion of evidence of the second accident prevented the defendant from cross-examining the plaintiff's expert on why the second accident was not an alternative cause of the plaintiff's injuries.[16] The Supreme Court held that the court of appeals conflated relevance and legal sufficiency of evidence and ordered a new trial.[17]

Notes

1. 453 S.W.3d 917 (Tex. 2015).
2. *Id.* at 918.
3. *Id.* at 918-19.
4. *Id.* at 919.
5. *Id.* at 920 (citing *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992)).
6. *Id.* at 921.
7. 464 S.W.3d 338 (Tex. 2015).
8. 466 S.W.3d 157 (Tex. 2015).
9. 464 S.W.3d at 342.
10. *Id.* at 347.
11. *Id.* at 349-52.
12. *Id.* at 353.
13. 466 S.W.3d at 161-62.
14. *Id.* at 160.
15. *Id.* at 160-61.
16. *Id.* at 162-63.
17. *Id.* at 164-65.

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BANKRUPTCY LAW

By Aaron M. Kaufman

The late celebrity known as Anna Nicole Smith maintained her influence over the bankruptcy system this year, as the U.S. Supreme Court issued its third related ruling since *Stern v. Marshall* in 2011. In *Stern*,[1] the

Supreme Court held that bankruptcy courts lack constitutional authority to adjudicate debtors' counterclaims against creditors where the counterclaims are not necessarily resolved in the process of adjudicating the claim objections. Courts in the post-*Stern* era have struggled with how to handle similar "*Stern* claims."[2] This year, in *Wellness International Network, Ltd. v. Sharif*,[3] the Supreme Court held that bankruptcy courts may adjudicate *Stern* claims where the parties consent and that such consent need not be explicit; it may be implied from the parties' conduct.

In professional compensation news, the Supreme Court considered whether a law firm could recover "fees in defense of fees" and held that there was no statutory exception to the American Rule under the U.S. Bankruptcy Code.[4] In other words, professionals cannot recover their additional legal costs incurred to respond to objections to fee applications. But, perhaps as a silver lining, the 5th Circuit reversed its own retrospective "tangible benefit" standard as espoused in *Pro-Snax*, and replaced it with a more flexible "reasonable at the time" standard,[5] potentially reducing the likelihood of costly fee disputes arising from future bankruptcy cases in Texas.

In fraudulent transfer news, the 5th Circuit initially affirmed an order allowing Ralph Janvey, the receiver for Stanford International Bank Limited, to claw back $6 million paid to the Golf Channel for ad space.[6] The rationale was that services provided were valueless to the fraudulent enterprise. The more problematic implication, however, is that third-party vendors may now have to vet customers to make sure they are not being paid by a fraudulent enterprise. Thankfully, in June, the 5th Circuit certified the question to the Texas Supreme Court to answer how "value" should be interpreted under the Texas Uniform Fraudulent Transfer Act,[7] which will have a tremendous impact on fraudulent transfer actions in the future, both in bankruptcy and other contexts.

Finally, three other noteworthy Supreme Court decisions from this year, in no particular order, held that (1) debtors may not "strip off" wholly unsecured junior liens in bankruptcy;[8] (2) an order denying a Chapter 13 plan is not final and appealable;[9] and (3) upon conversion of a case from Chapter 13 to Chapter 7, the Chapter 13 trustee must turn over to the debtor any undistributed post-bankruptcy wages.[10]

Notes

1. *Stern v. Marshall*, 564 U.S. __, 131 S. Ct. 2594, 180 L. Ed. 2d 475, 494 (2011).
2. *See Executive Benefits Ins. Agency v. Arkison*, 573 U.S. __, 134 S. Ct. 2165, 189 L. Ed. 2d 83, 91 (2014) (defining "*Stern* claims" as claims that bankruptcy courts have *statutory* authority to adjudicate but not *constitutional* authority).
3. __ 575 U.S. __, 135 S. Ct. 1932, 191 L. Ed. 2d 911 (2015).
4. *See Baker Botts L.L.P. v. ASARCO LLC*, __ 576 U.S. __, 135 S. Ct. 2158, 192 L. Ed. 2d 208 (2015).
5. *See Barron & Newburger, P.C. v. Tex. Skyline, Ltd. (In re Woerner)*, 783 F.3d 266 (5th Cir. 2015) (*en banc*); *Cf. In re Pro-Snax Distributors, Inc.*, 157 F.3d 414 (5th Cir. 1998).
6. *Janvey v. Golf Channel, Inc.*, 780 F.3d 641 (5th Cir. 2015).
7. *Janvey v. Golf Channel, Inc.*, 792 F.3d 539, 547 (5th Cir. 2015).
8. *Bank of Am. v. Caulkett*, __ 575 U.S. __, 135 S. Ct. 1995, 192 L. Ed. 2d 52 (2015); *see also Dewsnup v. Timm*, 502 U.S. 410, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992).
9. *Bullard v. Blue Hills Bank*, __ 575 U.S. __, 135 S. Ct. 1686, 191 L. Ed. 2d 621 (2015).
10. *Harris v. Viegelahn*, __ 575 U.S. __, 135 S. Ct. 1829, 191 L. Ed. 2d 783 (2015).

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COMMERCIAL LITIGATION

By Brian P. Lauten

Commercial litigation caselaw continues to develop in five highly explosive areas: (1) the early dismissal of tort claims under the Texas anti-SLAPP statute; (2) the heightened difficulty in proving a claim for wrongful termination under the Texas Whistleblower Act; (3) the enforceability of arbitration clauses in the attorney-client engagement agreement; (4) the broadening scope of the attorney immunity defense in legal malpractice cases; and (5) the statutory cap on exemplary damages that no longer has to be pled in order to be enforceable.

The Anti-SLAPP Statute

In 2011, Texas adopted an anti-SLAPP (strategic lawsuit against public participation) law.[1] A defendant may file a motion to dismiss if a legal action "is based on, relates to, or is in response to [that] party's exercise of the right of free speech, right to petition, or right of association."[2] If the movant proves that the act applies, the burden shifts to the plaintiff to establish by "clear and specific evidence" a prima facie case.[3] Ordinarily, the motion stays discovery.[4] If the motion is granted, the movant is entitled to attorneys' fees.[5]

In 2015, the Texas Supreme Court interpreted the act.[6] In *Lippincott*, the court held that the act applies to any communication. The court next held that emails related to whether a nurse properly provided medical services was a matter of "public concern." Accordingly, the act applied.[7]

Similarly, in *Lipsky*, the Supreme Court held that "clear and specific evidence" does not create a heightened evidentiary standard and includes circumstantial evidence.[8]

Whistleblower Claims

In *Office of the Attorney General v. Weatherspoon*,[9] the issue was whether reporting illegal conduct is protected if it is made to a supervisor with power to oversee only internal compliance, even if the supervisor is required to forward the report to law enforcement.[10] The Texas Supreme Court held that the Whistleblower Act does not extend to these reports.

Arbitration Agreements

In *Royston, Rayzor et al. v. Lopez et al.*,[11] the Texas Supreme Court held that an arbitration agreement in an attorney-client contract—which specified that the client and the firm would arbitrate disputes that arise between them, except for claims made by the firm for recovery of its fees and expenses—was enforceable.

The Attorney Immunity Defense

In a sharply divided 5-4 decision in *Cantey Hanger, LLP v. Byrd et al.*,[12] the Texas Supreme Court held that the affirmative defense of attorney immunity to non-clients for actions taken in connection with representing a client in litigation is a complete bar—even if there may otherwise be an actionable fraud made by the attorney to a third party.

The Statutory Cap on Exemplary Damages

Finally, in *Zorrilla v. Aypco Construction II, LLC et al.*,[13] the Texas Supreme Court held that the statutory cap on exemplary damages does not have to be pled as an affirmative defense to be enforceable.

Notes

1. *See* Tex. Civ. Prac. & Rem. Code §§ 27.001-.011 (Vernon 2011).
2. *Id.* at § 27.003(a).
3. *Id.* at § 27.005(c).
4. *Id.* at § 27.003(c).
5. *Id.* at § 27.009.
6. *Compare Lippincott v. Whisenhunt*, 462 S.W.3d 507 (Tex. 2015), *with In Re Steven Lipsky*, 460 S.W.3d 579 (Tex. 2015).
7. *See Lippincott*, 462 S.W.3d at 510.
8. *See Lipsky*, 460 S.W.3d at 591.
9. No. 14-0582, 2015 Tex. Lexis 877 (Tex. 2015).
10. *Id.* at *1.
11. 467 S.W.3d 494 (Tex. 2015).
12. 467 S.W.3d 477 (Tex. 2015).
13. 2015 Tex. Lexis 555 (Tex. 2015).

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CONSUMER LAW

By Dana Karni

Consumer Debt Collection

Consumer debt collection through litigation continues to be a highly contentious area of consumer rights law. The Consumer Financial Protection Bureau took action against two of the largest national debt buyers, Portfolio Recovery Associates and Encore Capital Group, the latter of which commonly litigates in Texas courts through its subsidiary Midland Funding. The CFPB ordered both companies to overhaul their debt collection litigation to the extent that the debt buyers were attempting to collect unenforceable debt using false statements and "robosigned" court documents.[1]

Texas state courts continue to maintain a high volume of debt-related litigation. Among notable cases, the 14th Court of Appeals reversed a judgment for a debt collector after the bench trial, finding that the plaintiff's evidence relating to the sale of the account made nine months after the sale, as well as hearsay statements about "offsets and credits," suggests issues of trustworthiness. It ruled that the evidence should not have been admitted.[2] The 13th Court of Appeals found a debt buyer's illegible cardholder agreement and a few monthly statements in Spanish to be insufficient evidence to support a breach of contract claim.[3]

State and Federal Fair Debt Collection Practices Acts

In *Serna v. Law Office of Joseph Onwuteaka, P.C.*,[4] the 5th Circuit found that statutory damages under the Fair Debt Collection Practices Act are permissible even in the absence of actual damages. The court also affirmed an attorney fee award in the amount of $72,133.50, finding it to be based on reasonable hourly rates. In *Clayton v. Asset Plus Cos., LP*,[5] the district court held that five debt collection telephone calls over the course of three months do not constitute harassment, but that a demand for prejudgment interest that the original creditor was not entitled to collect under state law was a violation of the FDCPA. On the other side of the spectrum, in *Lopez v. Portfolio Recovery Assocs., LLC (In re Lopez)*,[6] the bankruptcy court found a post-discharge assignee to be a debt collector and that it was subject to liability for more than 1,000 calls to the debtor and the debtor's family and friends.

Fair Credit Reporting Act

In November 2015, the U.S. Supreme Court heard arguments in *Spokeo, Inc. v. Robins*,[7] which promises an important ruling that touches on the intersection of the

Fair Credit Reporting Act, privacy rights, and class action litigation. The case stems from the complaint of a consumer whose profile, sold by Spokeo, contained inaccurate descriptions related to his age, education, employment, and personal status. The legal issue to be decided by the court is whether a statutory violation, without concrete harm, is sufficient for purposes of Article III standing for a private right of action. The decision will certainly have implications on dissemination of personal information online, as well as other consumer rights litigation where plaintiffs rely on bare statutory violations for Article III standing.

Notes

1. *See* Consent Order, *In the Matter of Encore Capital Group, Inc., et. al.*, Consumer Financial Protection Bureau 2015-CFPB-0022, Sept. 9, 2015; Consent Order, *In the Matter of Portfolio Recovery Assoc., LLC*, Consumer Financial Protection Bureau 2015-CFPB-0023, Sept. 9, 2015.
2. *Jenkins v. CACH, LLC*, No. 14-13-00750-CV, 2014 WL 4202518 (Tex. App.—Houston [14th Dist.] Aug. 26, 2014, no pet.).
3. *Uribe v. Pharia, L.L.C.*, No. 13-13-00551-CV, 2014 WL 3555529 (Tex. App.—Corpus Christi [13th Dist.] July 17, 2014, no pet.).
4. No. 14-20574, 2015 WL 3526977 (5th Cir. June 5, 2015).
5. No. 4:13-CV-2862, 2014 WL 6388430 (S.D. Tex. Nov. 14, 2014).
6. Ch. 13 Case No. 09-70659, Adv. No. 13-07019 (S.D. Tex. Mar. 12, 2015).
7. No. 13-1339.

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CRIMINAL LAW

By Kenda Culpepper and Jeffrey W. Shell

The year 2015 was big in the Texas Legislature. Starting in 2016, Texans will be allowed to openly carry a handgun in a belt or shoulder holster in many situations as long as they have a license. Most of the restrictions that previously applied to concealed handgun license holders will still apply to license to carry holders; however, a notable exception is the controversial decision to allow students with an LTC to carry concealed weapons in certain public college buildings, as determined by school administrators.

Drug laws have also been in the news. The Legislature made it easier to prosecute synthetic drug cases and easier to punish the distributors. On the other hand, the new Texas Compassionate Use Act legalized the prescription and dispensation of low-THC cannabis oil for the limited purpose of medically treating intractable epilepsy.

Legislators additionally changed the criminal law value ladders for the first time since 1993. Offenses in which the value of property taken or damaged is less than $100 can now only be charged as a class C ticket. Misdemeanor and felony value thresholds have increased significantly, effectively decreasing the punishment ranges for those crimes.

While the Texas Legislature was making these and other statutory changes—including those involving immigration, human trafficking, body cameras, and search warrants—the Texas Court of Criminal Appeals and the U.S. Supreme Court were busy as well.

Rodriguez v. United States, No. 13-9972 (April 21, 2015)

After a traffic stop, a K-9 officer attended to the incident and issued a warning for the traffic offense. The officer asked the driver for permission to walk his dog around the vehicle, which the driver refused. The K-9 officer detained the driver until a second officer arrived; upon arrival, the K-9 officer retrieved his dog, which alerted the officer to the presence of drugs in the vehicle. Seven or eight minutes elapsed from the time the K-9 officer issued the written warning until the dog alerted.

This case presented the question of whether the Fourth Amendment tolerated a dog sniff conducted after the completion of a traffic stop. The U.S. Supreme Court held that a police stop exceeding the time needed to handle the matter for which the stop was made violated the Constitution's shield against unreasonable seizures.

Heien v. North Carolina, No. 13-604 (December 15, 2014)

An officer stopped a vehicle because one of its two brake lights was out, but a court later determined that a single working brake light was all that the law required. This case presented the question of whether such a mistake of law could give rise to the reasonable suspicion necessary to uphold the seizure under the Fourth Amendment. The U.S. Supreme Court held that it could. Because the officer's mistake about the law was reasonable, the stop was lawful.

Ex parte Fournier and *Ex parte Dowden,* Nos. WR-82,102-01 and WR-82,103-01 (October 28, 2015)

After being convicted and sentenced for online solicitation of a minor, Curtis Fournier and Christopher Dowden filed applications for a writ of habeas corpus. The applicants sought relief on the basis of actual innocence and the unconstitutionality of section 33.021(b) of the Texas Penal Code. The Court of Criminal Appeals granted relief but reasoned that a criminal statute, which was declared unconstitutional, did not establish claims of actual innocence.

At the time of this publication, one case remained on rehearing in the CCA: *Ex parte Robbins* involves article 11.073 and the controversy over contradictory scientific evidence. The CCA denied rehearing as improvidently granted in *State of Texas v. Villareal*, which involved involuntary blood draws.

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ENERGY LAW

By Brian C. Boyle

The energy industry has faced a number of challenges during the past year as the market struggles to adjust to the plunge in oil prices. Many of these have arisen independent of the difficult market conditions, however, as several important matters have been percolating for years.

The Lone Star State has served as an important battleground for legal challenges to hydraulic fracturing, also referred to as fracking. In May 2015, Texas passed a law preventing local governments from imposing bans on hydraulic fracturing.[1] Some states, such as Oklahoma, followed suit by enacting similar legislation, while courts in other states overturned local fracking bans. Fracking challenges that allege a tie to increased seismic activity were also dealt a blow in Texas. In November, the Texas Railroad Commission declined to revoke injection well permits held by two companies, finding that there was insufficient evidence to support a conclusion that the wells contributed to seismic activity in the Barnett Shale area.[2] Although this finding is not binding on courts, it may provide a hurdle to litigation involving claims that fracking has caused earthquakes and associated damages.

The Texas Supreme Court made its mark on the energy industry in several 2015 cases, with perhaps the most notable being its interpretation of lease language impacting the calculation of royalty payments. In *Chesapeake Exploration, L.L.C. v. Hyder*,[3] the court sided with the plaintiff royalty owners and held that Chesapeake was not entitled to deduct post-production costs in calculating overriding royalties on gas under the oil and gas lease at issue. In doing so, the court reaffirmed the underlying premise of its key 1996 holding in *Heritage Resources, Inc. v. NationsBank*,[4] which emphasized that the specific lease language controls the royalty valuation and deductibility of post-production costs. The *Hyder* case has drawn significant interest and concern, prompting amicus briefs filed by several energy companies objecting to the court's interpretation of the lease. However, the impact of *Hyder* may be limited going forward, as certain post-production costs should still be deductible where a lease provides for valuation "at the well," and a lease's disclaimer of the *Heritage* holding will not be sufficient to alter lease language specifically providing for such valuation.

The Texas Supreme Court issued opinions on various other energy issues, including the scope of the duty owed by an executive-right holder to a non-participating royalty-interest holder[5] and the extent of reasonable due diligence required of lessors in searching Texas Railroad Commission records.[6] But, notably, the court declined to address the viability of subsurface trespass claims in a case involving wastewater disposal in connection with hydraulic fracturing.[7] In doing so, it failed to settle the question of whether a trespass action exists in Texas for subsurface water migration, an issue with potentially widespread implications.

These highlights cannot possibly touch on the many issues impacting the energy space during the past year, which also included the veto of the proposed Keystone XL pipeline and the apparent final chapter of the Deepwater Horizon legal saga. Looking ahead to 2016, the energy industry may be poised to experience an increase in activity—both litigation as well as acquisitions and divestitures—driven by sustained low oil prices.

Notes

1. *See* Tex. H.B. 40, 84th Leg., R.S. (2015) *available at* http://www.capitol.state.tx.us/tlodocs/84R/billtext/html/HB00040I.htm (last visited Nov. 18, 2015). H.B. 40 amends chapter 81 of the Texas Natural Resources Code by adding section 81.071.
2. *See, e.g.*, Jim Malewitz, *On Quakes, Regulator Sides with Energy Companies*, TEXAS TRIBUNE, Nov. 3, 2015, https://www.texastribune.org/2015/11/03/quake-question-railroad-commission-sides-energy-co/.
3. Cause No. 14-0302, 2015 WL 3653446 (Tex. June 12, 2015) (motion for rehearing filed).
4. 939 S.W.2d 118 (Tex. 1996).
5. *KCM Financial LLC v. Bradshaw*, 457 S.W.3d 70 (Tex. 2015).
6. *Hooks v. Samson Lone Star, Limited Partnership*, 457 S.W.3d 52 (Tex. 2015).
7. *Envtl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414 (Tex. 2015).

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ENVIRONMENTAL LAW

By Michael R. Goldman, Jean M. Flores, and Carrick Brooke-Davidson

The year 2015 was an exciting one for significant environmental law holdings from state and federal courts. Although space allows only a brief mention of the following cases, for the environmental practitioner, all are worth reading in full.

U.S. Supreme Court

In *Michigan v. EPA*,[1] the U.S. Supreme Court reversed and remanded the Environmental Protection Agency's rule limiting mercury emissions from power plants, holding that the agency interpreted the Clean Air Act unreasonably when it deemed cost irrelevant to the decision to regulate power plants. On remand, the EPA must consider costs before issuing regulations.

Federal Courts

In *United States v. Citgo Petroleum Corp.*,[2] the 5th Circuit reversed an oil company's convictions for violating the CAA and Migratory Bird Treaty Act in connection with its wastewater treatment system at a Texas refinery. The company's CAA convictions were reversed because the jury instruction was erroneous in describing the scope of the regulations. The court overturned the MBTA convictions because the statute does not criminalize omissions that unintentionally kill birds.

In *In re Environmental Protection Agency*,[3] the 6th Circuit issued a nationwide stay enjoining the "waters of the United States" rule pending the court's determination as to whether it has subject matter jurisdiction. The court concluded that a nationwide stay would restore uniformity of regulation pending judicial review.

In *Vine Street, LLC v. Borg Warner Corp.*[4]—following the U.S. Supreme Court's reasoning in *Burlington Northern & Santa Fe Railway Co. v. United States*[5]—and reversing a lower court opinion, the 5th Circuit held that a company selling dry cleaning equipment and a perc supply did not take "intentional steps to dispose of a hazardous substance" and therefore did not qualify as an "arranger" under section 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act.

In *MEMC Pasadena, Inc. v. Goodgames Industrial Solutions, LLC*,[6] the court held that a waste broker was liable for cleanup costs under CERCLA and the Texas Solid Waste Disposal Act as an "arranger" on the basis that it suggested and coordinated with a waste disposal site, arranged for transport of the generator's waste to the site, received invoices directly from the disposal site, and delivered them to the generator with markups for the broker's service.

Texas State Courts

In *Environmental Processing Systems v. FPL Farming, Ltd.*,[7] the Supreme Court sidestepped the question of whether a subsurface trespass claim exists in Texas and instead reversed on the basis that the plaintiff failed to prove that the entry was unauthorized or without its consent. As a matter of first impression, the court recognized that lack of consent was an element of a trespass cause of action and not an affirmative defense.

In *Sciscoe v. Enbridge Gathering*,[8] the Amarillo court held that the mere migration of airborne particulates across one's property can constitute an actionable trespass.

In *Cerny v. Marathon Oil Corp.*,[9] the San Antonio court held that the plaintiff's nuisance and negligence claims concerning air emissions from nearby oil and gas operations were in the nature of toxic tort claims that required the stringent proof requirements imposed by the Texas Supreme Court in *Havner* and its progeny.

We expect many of the above issues to be further addressed, challenged, and refined in 2016.

Notes

1. 135 S. Ct. 2699, 192 L. Ed.2d 674 (2015).
2. 801 F.3d 477 (5th Cir 2015).
3. 803 F.3d 804 (6th Cir. 2015).
4. 776 F.3d 312 (5th Cir. 2015).
5. 556 U.S. 599 (2009).
6. 2015 WL 6473385 (S.D. Tex. Oct. 27, 2015).
7. 457 S.W.3d 414 (Tex. 2015).
8. 2015 WL 34663490 (Tex. App.—Amarillo [7th Dist.] 2015, no pet. h.).
9. 2015 WL 5852596 (Tex. App.—San Antonio [4th Dist.] 2015, no pet. h.).



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FAMILY LAW

By Georganna L. Simpson and Beth M. Hearn

The U.S. Supreme Court's 2015 decision in *Obergefell v. Hodges* greatly impacted our nation, and its effects on Texas family law are still unfolding.

Same-sex couples may exercise fundamental right to marry in all states. In *Obergefell*, 14 same-sex couples and two men whose partners are deceased sought the right to marry or to

have their out-of-state same-sex marriages recognized in their states of residence.[1] The 5-4 majority held that marriage is a fundamental right protected by the due process and equal protection clauses of the 14th Amendment. One week before *Obergefell*, the Texas Supreme Court affirmed a judgment granting a same-sex divorce on standing issues.[2] While the majority did not reach the constitutional question, it had "no quarrel with Justice Devine's" dissent analysis, concluding that same-sex marriage was not a fundamental right and that homosexuals were not a suspect class. Further, Devine opined that Texas's rational interest in defining marriage based on history and tradition and in a manner that promotes family stability and the well-being of children supported Texas's prohibition against same-sex marriages.

Laws denying same-sex marriage or refusing to recognize out-of-state same-sex marriages violate the U.S. Constitution. Two homosexual couples sought a declaratory judgment and permanent injunction prohibiting Texas from enforcing laws that ban or refuse to recognize same-sex marriages.[3] The federal district court granted a preliminary injunction, and the state appealed. Subsequently, following *Obergefell*, the 5th Circuit affirmed the injunction, remanded the case for judgment for the couples, and held that any law prohibiting or refusing to recognize same-sex marriage was unconstitutional. A few weeks later, a Texas appellate court dismissed an appeal of a same-sex divorce as moot in light of *Obergefell*.[4]

Lingering questions. Although *Obergefell* seemed a finish line of sorts for LGBT rights, many questions remain. Can a same-sex couple establish an informal marriage under Texas law? If so, could the date of marriage relate back to a time before *Obergefell*? Could a couple have feasibly held themselves out as married in Texas before June 26, 2015, despite the state's non-recognition of same-sex marriages? At what point would same-sex couples start amassing community property if they were previously married in another state—on the date of that marriage or as of June 26, 2015? When would a spouse become eligible for spousal maintenance? Are same-sex partners required to have foreseen the dramatic and rapid change in law and to have protected their property interests in what could not have been considered community property before *Obergefell*?

And—another pressing question—does a presumption of parentage apply to a child born or adopted during the same-sex relationship? A four-year statute of limitations currently applies to the presumption of paternity even if the father is later determined not to be the biological father—so biology in and of itself should not be considered a barrier to the presumption. The policy behind the limitation "is to avoid the severance of the parent-child relationship between the child and the presumed father—the *psychological father* [psychological parent?]. ..."[5]

Notes

1. *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015).
2. *State v. Naylor*, 466 S.W.3d 783 (Tex. 2015).
3. *De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015).
4. *In re A.L.F.L.*, No. 04-14-00364-CV, 2015 WL 4561231 (Tex. App.—San Antonio [4th Dist.] 2015, no pet. h.) (mem. op.).
5. *In re S.T.*, 467 S.W.3d 720 (Tex. App.—Fort Worth 2015, no pet.) (internal quotes omitted) (emphasis added).

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IMMIGRATION LAW

By Paul Steven Zoltan

Despite congressional inaction on immigration law, it's been a momentous year. Tens of thousands of unaccompanied children and families fled the rampant violence that grips much of Central America. Their arrival at the southern U.S. border during the summer of 2014 backlogged the nation's immigration courts and prompted the Obama administration to postpone executive action on immigration policy.

When action came, it was big: On November 20, 2014, President Barack Obama announced that the Deferred Action for Childhood Arrivals program would be expanded to provide work authorization and protection from removal to thousands more undocumented "dreamers"; a new program, Deferred Action for Parents of Americans and Lawful Permanent Residents, would provide that same protection to several million undocumented immigrants; and U.S. Immigration and Customs Enforcement would focus virtually all of its resources on recent arrivals and "criminal aliens."

In February 2015, a federal district court in Brownsville temporarily halted DAPA and the expansion of DACA, finding that the executive branch had exceeded its authority. In November 2015, the 5th Circuit Court of Appeals upheld that injunction, setting the stage for a U.S. Supreme Court showdown in 2016. While the legality of DAPA and DACA's *expansion* remains in question, the courts in 2015

resolved that states cannot withhold state benefits, such as drivers licenses, from *current* DACA registrants.

The president's November 20 pledge to go after "felons, not families" seemed to ring hollow as immigration authorities detained hundreds of the families that arrived during the 2014 surge. Like DAPA and "DACA 2.0," however, this policy of deterrence through detention ran afoul of the courts; in February 2015, a federal district judge in California forced the closure of family detention camps. Reports released by the American Civil Liberties Union and Human Rights Watch revealed a culture of impunity within U.S. Customs and Border Protection: Despite widespread abuses at checkpoints and in detention centers, in 2014 the agency responded to only 3 percent of the complaints it received.

Another of the president's November 2014 pledges—to "modernize" the way the Department of State as well as Citizenship and Immigration Services determine the availability of visas—also ran into trouble. It wasn't the pesky judiciary this time, but the agencies' own blunder. The Immigration and Nationality Act limits the number of most family- and employment-based immigrant visas. Immigrants subject to this "preference" system watch the monthly Visa Bulletin to determine when their "priority" (that is, filing) date becomes current. In 2015, the CIS and DOS debuted a Visa Bulletin that listed not only each current priority date but also an earlier date when a noncitizen may *apply* for that visa. To immigrants' dismay and their attorneys' frustration, the CIS and DOS botched the first of these new-fangled Visa Bulletins: Within weeks of its publication in September, the agencies pushed back the "filing date" for many employment-based visa categories.

Nationally, the Supreme Court forbade the 50 states from withholding marriage licenses to gay couples. Among those who benefited from *Obergefell v. Hodges* were foreign-born companions of U.S. citizens and residents who may wed (and file their family-based visa petitions) without leaving Texas.

In Texas, fulminating against local efforts to "obstruct" the enforcement of federal immigration law, legislators appeared poised to pass legislation that would outlaw "sanctuary cities." And immigrant advocates blocked efforts to roll back the Texas Dream Act, which grants in-state tuition to graduates of Texas public schools regardless of their immigration status.

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INSURANCE LAW

By Michael W. Huddleston

Expanding the Four Corners. Refining and, some would say, "rewriting" the rules of construction was a focal point in 2015. The court in *In re Deepwater Horizon*[1] allowed the carrier to use limitations in an indemnity clause in a separate drilling contract to limit additional insured coverage.[2] The court found that the insurance policy incorporated the drilling contract based on the AI policy requirement of "a written contract."

Tying the indemnity clause limitations to the AI coverage presented a more vexing task. The drilling contract required BP to be an AI, "except Workers' Compensation for liabilities assumed by [Transocean] under the terms of this contract." The court held that the *plain language* of this clause set out two separate requirements, not a single one tied only to workers' compensation. Thus, the court avoided deciding whether the rules of construction are different for a "sophisticated insured" and whether contra proferentem applies to the incorporated contract.[3] Also unanswered is whether an incorporated contract can be used not only to limit but also to broaden coverage. Scriveners will be working overtime to consider what else can be done under *Deepwater* to limit AI coverage, such as cutting short the limits of coverage to an amount different from that set forth in the policies.

Anachronistic Terms Must Be Interpreted in Light of Modern Practice and Made Uniform for Standardized Policies. In *McGinnes Indust. Maint. Corp. v. Phoenix Ins. Co.*,[4] the policy required a defense of a "suit." No suit was brought, but Environmental Protection Agency potentially responsible party letters and/or a unilateral administrative order had been received. The initial letter included a long list of requested information, much like a subpoena. In a 5-4 decision written by Texas Supreme Court Chief Justice Nathan L. Hecht, the court held that "suit" at the time the policies were issued literally meant legal proceedings in a court, but in modern practice, administrative proceedings under the Comprehensive Environmental Response, Compensation, and Liability Act have replaced legal actions. Therefore, a CERCLA PRP letter and related proceedings sufficed, and a complaint or petition in a court was not required.

The *McGinnes* court held that standardized policy terms should be interpreted in a way that achieves uniformity with the decisions in other jurisdictions, noting its decision was consistent with the decisions of the highest courts in seven states. Justice Jeff Boyd's dissent characterized this as the "everybody's doing it" rule, pointing out that there was in fact little uniformity and that the court had previously criticized the *uniformity* approach in *U.S. Fid. and Guar. Co. v. Goudeau*.[5]

Cleanup Costs Are "Damages." The *McGinnes* court expressly held that cleanup costs are "damages" covered under a commercial general liability policy, reasoning that any other interpretation of "suit" would lead to the policy providing indemnity but no defense, which would leave the insured in charge of defense without an incentive to fully defend.

Coming Attractions. At issue in *Yorkshire Ins. Co., Ltd. v. Seger*[6] is whether the "fully adversarial trial" rule of *State Farm Fire and Cas. Co. v. Gandy*[7] applies where the carrier has wrongfully refused to defend and the insured is too poor to provide a defense. The court will have to reconcile *Gandy* with *Evanston Ins. Co. v. ATOFINA Petro., Inc.*,[8] which held that a breaching carrier may not challenge the reasonableness of the amount of a settlement between the insured and the claimant.

Notes

1. No. 13-0670 (Tex. Feb. 13, 2015).
2. *Id.* at *6.
3. *See Certain Underwr. at Lloyds London v. Perraud*, 2015 WL 4747318 (5th Cir. Aug. 12, 2015) (refusing to adopt the "sophisticated insured" doctrine and noting the failure of *Deepwater* to address the issue).
4. No. 14-0465, 2015 WL 4080146 (Tex. June 26, 2015).
5. 272 S.W.3d 603, 608 (Tex. 2008).
6. 407 S.W.3d 435 (Tex. App.—Amarillo [7th Dist.] 2013, pet. granted).
7. 925 S.W.2d 696, 714 (Tex. 1996).
8. 256 S.W.3d 660 (Tex. 2008).

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LABOR AND EMPLOYMENT LAW

By Michael P. Maslanka

The year 2015 belonged to the Fair Labor Standards Act. Enacted in the 1930s, enforcement was spotty. As Shakespeare wrote in *Measure for Measure*, "the law hath not been dead, but it hath slept." The FLSA, though, is rising from its slumber. Let's start with the recent $18.3 million settlement between the U.S. Department of Labor and Texas-based Halliburton, covering 1,016 employees in 28 different job classifications. The allegation: The employees were incorrectly classified as exempt employees (no overtime eligibility). The DOL's message: Just because an employee is salaried does not make them exempt; rather, their job duties drive their status. By the way, Oil Patch be warned. The DOL is expanding its investigation of pay practices to industries servicing the oil and gas sector.

And, on July 15, during the sleepy summer doldrums, the DOL issued "Administrator's Interpretation No. 2015-1," an innocuous title for a far-reaching document. Its mission is to convert as many independent contractors (no overtime) into employees (overtime) as possible. The position of the DOL is to ask a simple question: Does the worker rely upon a single source for income? If so, the worker is more than likely an employee than he or she is a true independent contractor with their own business, which would naturally serve more than one client.

There is a lot more. Per the Code of Federal Regulations, exempt employees must earn at least $455 a week and perform a white-collar job (executive, professional, administrative). Last year saw the promulgation of revisions to the CFR requiring a minimum salary level of $970 week. And the DOL announced that it is intending to review the job-duties test of each exemption with an eye to contracting exemption coverage. The comment period on the proposed regulations just expired. So, expect the revised regs to be ready for prime time in 2016.

And 2015 saw the 5th Circuit grapple yet again for an answer to an unanswerable question: how to tease out what is in another human being's heart (for us, how to decide whether a discrimination lawsuit gets to the jury). Check out *Porter v. Houma Terrebonne Housing Authority*, in which the court looked at a plaintiff's allegations that, among other things, a manager left her a sexually suggestive voice mail as well as sent her an offensive email. The manager denied he had done so until confronted with the voice mail and the email. Because the defense of "who you going to believe, me or your lying eye" did not work, the court said that the retaliation claim (refusal by an employer to allow an employee to rescind her resignation) gets to go to a jury.

And the 5th Circuit mined the mother load of issues on pretext in *Burton v. Freescale Semiconductor*. The opinion is like chocolate cake for employment lawyers: really rich and oh so delicious, full of all sorts of tasty legal principles. Here is one yummy slice: An employee is terminated for repeated poor performance yet there is no written documentation of same. As my mother used to opine, "If you say something is important, then treat it as important." Don't, and presto—off to jury you will go!

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LEGAL EDUCATION

By John G. Browning

Nationally, 2015 marked yet another bleak year for law schools. According to the Law School Admission Council, 53,548 people submitted fall 2015 law school applications as of early August, down 1.8 percent from 2014 and down from more than 100,000 applicants in 2004. First-year law school enrollment dropped to its lowest point in 36 years, and a number of law schools have responded by trimming their class sizes. Many have also frozen hiring or cut faculty in response to the dwindling pool of applicants. Debt loads for law students remain as staggering as they've ever been, with American Bar Association statistics revealing that the average debt for a public law school graduate is $84,600 and $122,158 for a graduate of a private law school. Studies by the National Association for Law Placement show that about two-thirds of the Class of 2014 (66.3 percent) obtained a job for which bar passage was required.

Across the country, there is a concern that the shrinking pool of law school applicants has translated to a diluted quality of admitted students, which in turn has negatively affected bar passage rates in many states. An analysis by University of St. Thomas law professor Jerry Organ demonstrated that the population of entering students with the lowest LSAT scores has grown to more than 20 percent, while those with the best scores now make up only 16 percent. While the notion that such tests serve as indicators of academic success is a subject of debate, the fact remains that bar exam passage rates in many states have taken steep dives. California's pass rate of 46.6 percent for the July exam was at its lowest since the fall of 1986. New York, New Jersey, Ohio, Pennsylvania, Florida, Georgia, the District of Columbia, and other jurisdictions have all seen their bar passage rates decline. In Texas, pass rates for first-time test takers fell to 76.6 percent for the July exam, compared with 80.85 percent for July 2014. The University of Texas and Southern Methodist University had the highest pass rates (87.68 and 84.85 percent, respectively), while Texas Southern University Thurgood Marshall School of Law and St. Mary's University had the lowest (55.46 and 61.96 percent, respectively). Almost all schools, however, saw drops among first-time test takers.

So what are Texas law schools doing to combat problems, such as mounting student loan debt, and the challenge of producing "practice-ready" graduates? The *Texas Bar Journal*'s November 2015 issue featured accounts from the deans of Texas's 10 law schools detailing each school's efforts. Virtually all schools have beefed up their clinical offerings, including SMU's addition of new clinics to assist victims of domestic violence and human trafficking—bringing their clinical program to a total of 10 clinics. Other schools have introduced public service or pro bono requirements; in recognition of its Pro Bono and Public Service Program, Baylor received the ABA's Pro Bono Publico Award (becoming only the third law school in 31 years to earn this honor). The University of Texas has partnered with its highly regarded McCombs School of Business to develop course offerings intended to provide students with greater financial and business literacy. Perhaps the most "outside-the-box" innovation is Texas Tech School of Law's introduction of Strategic Memory Advanced Reasoning Training, a product of partnering with UT-Dallas's Brain Performance Institute. Texas Tech began introducing students during orientation to strategies and exercises designed to improve their focus, strategic thinking, and decision-making skills.

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PATENT LITIGATION

By Michael C. Smith

Two significant developments in Texas patent litigation took place in 2015. First, legislative efforts to limit activities by so-called patent trolls—also known as patent assertion or nonpracticing entities—returned to Congress and made its first appearance in the Texas Legislature. Second, courts continued to grapple with the U.S. Supreme Court's 2013-2014 cases, which bolstered several significant defenses in patent cases and lowered the test for prevailing parties to recover attorneys' fees.

Patent Legislation

Legislative activity in the patent arena for Texas practitioners began in the spring when the Texas Legislature enacted a new section of the Texas Business and Commerce Code to prohibit demand letters containing bad faith claims of patent infringement.

In Washington, both the proposed Innovation Act (HR 9), sponsored by Virginia Rep. Bob Goodlatte, and the Protecting American Talent and Entrepreneurship Act, co-sponsored by Texas Sen. John Cornyn, saw substantial activity. While the drive for patent reform lost steam in the fall, many expect the issue to return to the forefront in the spring of 2016.

Implementing Recent Supreme Court Cases

The U.S. Supreme Court's unprecedented intervention into substantive patent law culminated in the decisions in its groundbreaking 2013-2014 term. These became the centerpiece for patent litigation in 2015. In Texas, litigants are devoting substantial effort to determining whether an asserted patent is invalid because it does not actually claim patentable subject matter under 35 U.S.C. § 101 under the new test set forth in *Alice Corporation Pty. Ltd v. CLS Bank International et al.* They are also devoting their attention to determining whether attorneys' fees should be awarded to prevailing parties in patent infringement litigation under 35 U.S.C § 285 under the substantially lowered requirements set forth in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*

Three decisions by Texas district courts in 2015 indicate the significance of these issues both for this year and into the future. First, in the most significant patentable subject matter ruling during the year, on September 21, U.S. District Judge Rodney Gilstrap of Marshall granted the defendants' motions to dismiss in the approximately 101-defendant *eDekka* litigation, holding that the challenged claims of the patent in suit were not eligible for patent protection because they were not directed to a patentable subject matter.

Second, while numerous Texas district courts had previously rejected claims for fees under § 285—even under the new standard—in cases where the plaintiff voluntarily dismissed the case in 2015, two courts reached the § 285 issue following defense wins after trials on the merits. In *Ushijima v. Samsung Electronics*, U.S. District Judge Lee Yeakel of Austin concluded that the case was not "exceptional" for § 285 purposes, holding that neither the strength of the plaintiff's litigation position nor the manner in which the case had been litigated was unreasonable. Similarly in *RLIS v. Cerner Corp.*, U.S. Circuit Judge Gregg Costa of Galveston presided over a trial in which the jury found no infringement and invalidated the asserted claims. After reviewing the post-*Octane* holdings in detail, Costa concluded that the defendant had failed to meet its burden of showing that the plaintiff's overall conduct in the case was vexatious, unreasonable, in bad faith, or otherwise exceptional, and accordingly denied the motion for attorneys' fees.

With § 101 and § 285 decisions expected to continue to play a significant role in patent litigation in Texas, 2016 promises more activity on both the legislative and caselaw fronts.

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PERSONAL INJURY LAW

By Melanie L. Fry

Statutory interpretation dominated Texas's personal injury jurisprudence in 2015. The results: a landmark decision on seat belt evidence, increased guidance in the world of health care liability claims, and a labored opinion on the meaning of "recreation."

Seat Belt Evidence

In *Nabors Well Services, Ltd. v. Romero*,[1] the Texas Supreme Court overruled more than 40 years of precedent prohibiting evidence of a plaintiff's failure to use a seat belt. Noting that "much has changed in the past four decades," the court held that relevant evidence of nonuse of seat belts is admissible to determine proportionate responsibility, provided that the plaintiff's conduct was a cause of his or her damages.

Health Care Liability Claims

In two cases, the Texas Supreme Court held that slip-and-fall claims by hospital visitors were not health care liability claims. The court announced that a safety standards claim is an HCLC only if a "substantive nexus" exists between the safety standards and the provision of health care.[2] For a claim to be an HCLC, it must have more of a relationship to the provision of health care than that it arises from an occurrence inside a hospital.[3] This fresh guidance will likely impact the court's decision in *Christus Health Gulf Coast v. Carswell*,[4] argued November 13, regarding whether a fraud claim alleging misrepresentations to get consent for an autopsy constitutes an HCLC.

In another important Texas Medical Liability Act opinion, *Fredericksburg Care Company, L.P. v. Perez*,[5] the court held that the Federal Arbitration Act preempts the TMLA's conspicuousness requirements for arbitration clauses applicable to HCLCs. A unanimous court enforced a non-TMLA compliant clause in a nursing home contract.

Recreational Use Statute

While the court interpreted the TMLA with relative ease and no dissent, the Texas recreational use statute proved more difficult. In *University of Texas at Arlington v. Williams*,[6] a majority of justices agreed that the recreational use statute, which provides protection to landowners who open their property for specific public recreational purposes, did not apply to competitive sporting events and spectators. But a majority could not agree why. A plurality determined that watching competitive sports is not "recreation," although the court previously determined that the use of playground equipment was "recreation" because it was associated with enjoying the outdoors.

Cases to Watch

Two 2015 cases involving million-dollar jury awards may have important repercussions in personal injury law. The Texas Supreme Court accepted the 5th Circuit's certified questions in *Forte v. Wal-Mart Stores, Inc.*,[7] regarding whether statutory civil penalties are exemplary damages subject to chapter 41 of the Texas Civil Practice and Remedies Code. The court's answers will have lasting implications for parties seeking only statutory civil penalties and not actual damages, as a number of amici have noted.

In another case drawing outside attention, the 5th Court of Appeals in Dallas overturned a $1.2 million jury verdict in a pelvic mesh case involving a TVT Obturator.[8] The plaintiff was required to prove that a specific defect in the device, and not simply the device itself, was the cause of her injuries. This decision will have far-reaching ramifications in other similar medical device cases in Texas.

Notes

1. 456 S.W.3d 553 (Tex. 2015).
2. *See Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496 (Tex. 2015).
3. *See Reddic v. East Texas Medical Center Regional Health Care System*, No. 14-0333, 2015 WL 6558270 (Tex. Oct. 30, 2015).
4. 433 S.W.3d 585 (Tex. App.—Houston [1st Dist.] 2013, pet. granted).
5. 461 S.W.3d 513 (Tex. 2015).
6. 459 S.W.3d 48 (Tex. 2015).
7. 780 F.3d 272 (5th Cir. 2015).
8. *See Johnson & Johnson v. Batiste*, No. 05-14-00864-CV, 2015 WL 6751063 (Tex. App.—Dallas [5th Dist.] Nov. 5, 2015, no pet. h.).

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TAX LAW

By Susan Wetzel and Scott Thompson

Last year saw many significant legislative, judicial, and regulatory changes affecting employee benefit plans and compensation. Because of this, we focused our 2015 review on employee benefits. Some of the more notable changes are discussed here.

Same-Sex Spouse Recognition

In *Obergefell v. Hodges*, the U.S. Supreme Court recognized the constitutional right of same-sex couples to be lawfully married in any state in the nation—even those with constitutional or statutory prohibitions on same-sex marriage.[1] Consequently, the IRS proposed regulations amending various sections of the Internal Revenue Code so that for federal tax purposes the terms "spouse," "husband," "wife," and "husband and wife" mean an individual who is lawfully married to another, regardless of sex.[2]

Health Plans

Congress made two legislative changes affecting the Affordable Care Act. First, the Protecting Affordable Coverage for Employees Act amended the ACA to prevent an automatic expansion of the definition of "small employer" for purposes of state insurance markets that would have included employers with 51 to 100 employees.[3] Instead, states now have the option to adopt the more expansive definition or continue to apply the current definition that includes only employers with up to 50 employees.[4] More recently, the Bipartisan Budget Act of 2015 repealed the ACA's automatic enrollment requirement that would have applied to employers with 200 or more employees.[5]

In preparing to implement the ACA's Cadillac tax in 2018, the IRS sought comments on various implementation approaches, such as determining what coverage is subject to the tax, determining the cost of coverage, and applying certain annual statutory limits.[6] The IRS also sought comments on other implementation issues, including who should be "covered providers" and employer aggregation, among others.[7]

In Notice 2015-68, the IRS proposed regulations on reporting minimum essential coverage under the ACA related to individuals covered by multiple health plans and using truncated taxpayer identification numbers.[8] The notice also announced penalty relief for failing to report TINs with respect to 2015 coverage.[9]

The IRS clarified that tax-exempt, voluntary employees' beneficiary associations, created to provide post-retirement health benefits, may also provide health benefits to active employees if funds are segregated for each distinct purpose.[10]

Retirement Plans

The IRS issued final regulations on determining the required minimum contributions for single-employer defined benefit plans to satisfy the minimum funding obligations under Internal Revenue Code section 412.[11] The final regulations generally adopt previously proposed regulations but also provide guidance on the excise tax imposed under Internal Revenue Code section 4971 for failing to meet these minimum funding requirements.[12]

Executive Compensation

The IRS issued final regulations under Internal Revenue Code section 162(m), which generally imposes a deduction limit of $1 million on compensation paid by a publicly held corporation to certain executive officers.[13] The deduction limit does not apply to qualified perform-

ance-based compensation, including stock options and stock appreciation rights.[14] An equity compensation plan can satisfy the per-employee limit on the number of options or stock appreciation rights granted during a specific time period by imposing an aggregate limit on all equity awards granted to an individual during that time period.[15] The final regulations also clarify that restricted stock units are not eligible for certain transition relief applicable to awards granted before a non-publicly held corporation goes public.[16]

Finally, the IRS proposed rules intended to crack down on certain management fee waiver practices by private equity firms that try to convert management fees into profits interests, which would receive more favorable capital gains tax treatment.[17] The IRS proposed a facts and circumstances test to determine whether an arrangement is a disguised payment for services subject to ordinary income tax rates and, potentially, additional tax under Internal Revenue Code sections 409A and 457A.[18]

Notes

1. *Obergefell v. Hodges*, 576 U.S. __ (2015).
2. Definition of Terms Relating to Marital Status, 80 Fed. Reg. 64378 (proposed Oct. 23, 2015) (to be codified at 26 C.F.R. pts. 1, 20, 25, 26, 31, and 301).
3. Protecting Affordable Coverage for Employees Act, Pub. L. No. 114-60, § 2, 129 Stat. 543, 543-44.
4. *Id.*
5. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 604.
6. Internal Revenue Service, Section 4980I—Excise Tax on High Cost Employer-Sponsored Health Coverage, Notice 2015-16.
7. Internal Revenue Service, Section 4980I—Excise Tax on High Cost Employer-Sponsored Health Coverage, Notice 2015-52.
8. Internal Revenue Service, Information Reporting on Minimum Essential Coverage, Notice 2015-68.
9. *Id.*
10. Internal Revenue Service, Private Letter Ruling 201532037 (Apr. 8, 2015.
11. Determination of Minimum Required Pension Contributions, 80 Fed. Reg. 54374 (Sept. 9, 2015) (to be codified at 26 C.F.R. pts. 1 and 54).
12. *Id.*
13. Certain Employee Remuneration in Excess of $1,000,000 under Internal Revenue Code § 162(m), 80 Fed. Reg. 16970 (Mar. 31, 2015) (to be codified in 26 C.F.R. pt. 1).
14. *Id.*
15. *Id.*
16. *Id.*
17. Disguised Payment for Services, 80 Fed. Reg. 43652 (proposed July 23, 2015) (to be codified at 26 C.F.R. pt. 1).
18. *Id.*

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TEXAS ACCESS TO JUSTICE

By Harry M. Reasoner

The access to justice community strives to bridge gaps between low-income Texans and their ability to obtain access to justice. Although the population in need has increased, federal funding for legal aid in 2014 adjusted dollars has dropped from almost $639 million in 1994 to $375 million in 2015. Current interest rates have decimated Interest on Lawyers Trust Accounts funding.

The Texas Legislature has provided major support. With the leadership of the Texas Supreme Court, the Texas Access to Justice Commission helped secure $17.56 million for basic civil legal services, $3 million in grants for programs to provide legal services to veterans who otherwise could not afford counsel, and $10 million for victims of sexual assault and human trafficking.

Civil legal aid funding was bolstered by amendments to the 2013 Chief Justice Jack Pope Act, authored by Sen. Charles Perry and Rep. Senfronia Thompson. The legislation expands the types of civil penalties and payments recovered by the Texas Attorney General for violations of the Business and Commerce Code that can be received by legal aid.

The Champions of Justice Gala Benefiting Veterans raised $401,600 to provide civil legal services for low-income Texas veterans. The Champion of Justice Society now has 331 members who have contributed more than $134,000 in support of access to justice.

The Legislature also passed several bills that will improve access to justice without requiring additional funding. The transfer-on-death deed is a way for people to transfer clear title to property upon their death to another person outside the probate process. This is important because low-income Texans often have property complications arising from cloudy title that can cause the loss of a family home. This new deed can be completed without the help of a lawyer and recorded for less than $50.

Banks are now required to provide information about payable-on-death accounts at the time an account is opened or modified and to separate POD information from all other account disclosure information. A POD account enables a bank account holder to designate one or more beneficiaries to receive the account funds upon the holder's death. These accounts are especially beneficial to low-income Texans because many times the money in the decedent's account is less than what it costs to obtain it through probate.

A decedent's heirs will now be able to obtain information about the decedent's bank account balance, making it easier for them to determine if the estate's assets can cover the costs of its debts. This information is needed to determine if a small estate affidavit can be filed, which is a less expensive way of probating certain estates with total assets of $50,000 or less.

The Legislature has also directed the Texas Supreme Court to promulgate forms in the areas of landlord-tenant and probate law.

The State Bar is striving to help bridge gaps by providing support services for pro bono attorneys. To meet the growing population of limited English proficient clients, the State Bar provides interpreter and document translation services for pro bono attorneys through the Language Access Fund. In FY 2015, the LAF provided 4,374 interpreter calls, 150 on-site interpreters, and 180 translated documents in more than 55 languages. The State Bar is also creating a mentor-matching program to help attorneys connect with mentors to advise them on their pro bono cases. Mentors and mentees can earn CLE credit.

To achieve our nation's goal of justice for all and to honor our profession's standards, we must redouble our efforts for those who cannot afford lawyers and provide innovative means that don't require funding.

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TEXAS SUPREME COURT

By Scott P. Stolley

For the first time ever, the Texas Supreme Court issued opinions in all argued cases before the state's fiscal year-end in August 2015. The court also issued the restyled Texas Rules of Evidence, effective April 1, 2015. The changes are nonsubstantive, except for Rules 511 and 613.

In caselaw developments, the court held that a summary-judgment order was not final, despite a Mother Hubbard clause, where the order did not address competing claims for attorneys' fees.[1] And the court abolished the rule excluding evidence that a vehicle occupant was not wearing a seat belt.[2]

The court weighed in on the Deepwater Horizon oil spill, ruling that BP is not an additional insured under Transocean's liability policy. This case is a must-read in any dispute involving additional-insured status.[3]

In two cases of particular interest to the bar, the court made it harder to sue lawyers. In one, the court held that a party's attorneys had immunity when sued by the opposing client for preparing a bill of sale to transfer some property awarded in a divorce decree.[4] In the other, the court upheld an arbitration agreement in a law firm's engagement letter.[5]

In cases of procedural importance, the court held that money awarded as disgorgement is not "compensatory damages" that must be included in calculating the amount of a supersedeas bond;[6] that in cases involving serial appeals, post-judgment interest runs from the judgment date on which the trial court had a sufficient record to render an accurate judgment;[7] that the failure to produce some videotape did not warrant a spoliation instruction because the plaintiff was not deprived of a meaningful opportunity to present his claim;[8] that a discovery request for other claim files involving homeowner's claims arising out of the same storms was an impermissible fishing expedition;[9] and that the Texas punitive-damages cap is not an affirmative defense that the defendant must plead.[10]

On the statutory front, the court interpreted the recreational use statute, holding that a claim by a spectator who fell at a stadium was not barred;[11] the Texas Medical Liability Act, holding that it did not apply to the claim of a hospital visitor who fell on a wet lobby floor;[12] and the anti-SLAPP statute, holding that a communication does not have to be "public" to be covered by the act.[13]

In the coming year, look for the court to issue opinions in these closely watched cases:

- *Williams v. Texas Taxpayer & Student Fairness Coalition*, involving another constitutional challenge to the Texas school-finance system;
- *Janvey v. The Golf Channel*, involving interpretation of the Texas Uniform Fraudulent Transfer Act as applied to the Stanford Financial receivership;
- *In re Bent*, involving the standard for reviewing an order that grants a new trial based on factual insufficiency; and
- *Hoskins v. Hoskins*, involving whether an arbitration award can be set aside on common-law grounds or only on the grounds set forth in the Texas Arbitration Act.

Notes

1. *Farm Bureau County Mut. Ins. Co. v. Rogers*, 455 S.W.3d 161 (Tex. 2015).
2. *Nabors Wells Servs., Ltd. v. Romero*, No. 13-0136 (Tex. Feb. 13, 2015).
3. *In re Deepwater Horizon*, No. 13-0670 (Tex. Feb. 13, 2015).
4. *Cantey Hanger, LLP v. Byrd*, No. 13-0861 (Tex. June 26, 2015).
5. *Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, No. 13-1026 (Tex. June 26, 2015).
6. *In re Longview Energy Co.*, No. 14-0175 (Tex. May 8, 2015).
7. *Ventling v. Johnson*, 466 S.W.3d 143 (Tex. 2015).
8. *Wackenhut Corp. v. Gutierrez*, 453 S.W.3d 917 (Tex. 2015).
9. *In re National Lloyds Ins. Co.*, 449 S.W.3d 486 (Tex. 2014).
10. *Zorilla v. Aypco Constr. II, Ltd.*, No. 14-0067 (Tex. June 12, 2015).
11. *Univ. of Tex. at Arlington v. Williams*, No. 13-0338 (Tex. March 20, 2015).
12. *Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496 (Tex. 2015).
13. *Lippincott v. Whisenhunt*, No. 13-0926 (Tex. April 24, 2015).

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TRADEMARK LITIGATION

By Katherine A. Compton

Costco to Pay Punitive Damages to Tiffany & Co. for Sale of Bogus Engagement Rings

The Tiffany & Co. signature blue box has been known to carry a few surprises. But in November 2012, the luxury jewelry brand received a surprise of its own when it learned that Costco Wholesale Corp., the largest warehouse chain in the United States, was selling what it purported to be Tiffany rings. Costco used the word "Tiffany" in its display cases to advertise rings that were not manufactured or licensed by Tiffany. On February 14, 2013, Tiffany filed its lawsuit for trademark infringement and counterfeiting. The lawsuit alleged that hundreds, if not thousands, of Costco members purchased engagement rings that they believed were authentic Tiffany products.[1]

Costco filed a fair use affirmative defense and counterclaim that "Tiffany" has become a generic term meaning a certain style of ring.[2] Specifically, Costco contended that "Tiffany" is a generic term for a ring "comprised of multiple slender prongs extending upward from the base to hold a single gemstone."[3]

Both parties moved for summary judgment. In a decisive victory for Tiffany, federal court Judge Laura Taylor Swain granted summary judgment to the luxury brand.[4] The court found that Tiffany succeeded in its trademark infringement claim by showing that (1) it holds a mark that is entitled to protection; and (2) Costco's use of that mark is likely to cause consumer confusion.[5]

Substantial evidence of consumer confusion was provided by Tiffany's expert Jacob Jacoby, who conducted a consumer confusion survey.[6] Tiffany relied upon the factors set out in *Polaroid Corp. v. Polarad Elecs. Corp.*[7] In support of Tiffany's motion for summary judgment, a Costco customer testified that she was brought to tears when the Tiffany diamond she purchased at Costco fell out. It was then that she realized she had not purchased a genuine Tiffany ring.[8]

The court also found that Tiffany succeeded in its counterfeiting claim. The court found that Costco used "in commerce [an identical] counterfeit of a registered mark in connection with the sale, offering for sale or advertising" of its rings and that such use was "spurious" and "likely to cause confusion, or to cause mistake, or to deceive."[9] The court also granted Tiffany summary judgment on Costco's fair use affirmative defense and rejected Costco's counterclaim that "Tiffany" is a generic term for a kind of ring setting.[10]

Finally, the court found that Costco's actions were willful and that Tiffany would be entitled to an accounting of profits as a result of Costco's willful infringement and punitive damages.[11] A jury trial is set for January 11, 2016, to determine the damages for trademark infringement and counterfeiting.[12]

Notes

1. *Tiffany & Co., v. Costco Wholesale Corp.*, 13CV1041-LTS-DCF, (S.D.N.Y. Feb. 14, 2013) (the "Tiffany Action"), Complaint ("Compl.") at ¶¶ 4-6. ECF No. 1.
2. Answer to Complaint, Counterclaim ("Costco Answer, Counterclaim"), Tiffany Action, ECF No. 5.
3. Costco Answer, Counterclaim at ¶¶ 11, 13.
4. Opinion and Order, 2015 U.S. Dist. LEXIS 119319 (Sept. 8, 2015), ("MSJ Order"), Tiffany Action, ECF No. 175.
5. *Sports Auth. Inc. v. Prime Hospitality Corp.*, 89 F.3d 955, 960 (2d. Cir. 1995). MSJ Order at *29.
6. *Id.* at *17.
7. 287 F.2d 492, (2d Cir. 1961).
8. MSJ Order at *15.
9. MSJ Order at *34.
10. *Id.* *35.
11. *Id.* *55.
12. Order (Nov. 4, 2015), Tiffany Action, ECF No. 200.

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U.S. SUPREME COURT

By Dustin Howell

Even by Supreme Court standards, this was an exceptional year for high-profile, blockbuster cases. The goal of this update is to shed light on a few of the lesser-discussed cases that may, nonetheless, have a significant impact on your practices and your clients' concerns.

***Baker Botts L.L.P. v. ASARCO,* 135 S. Ct. 2158 (2015).** Are fees incurred in litigating fee applications recoverable from the bankruptcy estate? The court upheld an award of fees incurred in litigating the bankruptcy itself, but reversed the award of fees incurred in litigation related to the firm's interim fee applications, concluding that such fees were not contemplated in the Bankruptcy Code. In the absence of an express statutory provision, the default American Rule—that each party bears its own expenses—applies. While this ruling appeared in the bankruptcy context, its reasoning could apply in other arenas where fee litigation occurs—for example, in equitable receiverships.

***Horne v. USDA,* 135 S. Ct. 2419 (2015).** Does the Fifth Amendment's takings clause apply to personal property? The U.S. Department of Agriculture required raisin producers to set aside a percentage of their annual crop for the federal government, which then sold or disposed of the raisins. The Horne family refused to comply and was fined the dollar equivalent of the required set-aside. The Hornes challenged the program as an unlawful taking without just compensation. The Supreme Court agreed,

holding that the takings clause applies equally to personal and real property. This decision could set the stage for similar challenges of federal programs requiring owners to set aside property for the government.

***Reed v. Town of Gilbert,* 135 S. Ct. 2218 (2015).** May a city impose different sign regulations depending on whether the signs are ideological, political, or directional? A church put up signs directing people to its Sunday services but received citations for leaving them up too long. Directional signs had strict size and time limitations, while political and ideological signs received more favorable treatment. The court unanimously held that the sign code discriminated on the basis of content and did not survive strict scrutiny. The concurring opinions and ensuing scholarly commentary have noted that this opinion could be read to dramatically expand the reach of a previously limited view of what is considered a "content-based" restriction.

***Michigan v. EPA,* 135 S. Ct. 2699 (2015).** Must an agency consider the financial burden of its regulations? In implementing the Clean Air Act, the Environmental Protection Agency concluded that the estimated $9.2 billion cost of certain power plant regulations was irrelevant to the initial decision to regulate. The Supreme Court disagreed, explaining that agencies "must operate within the bounds of reasonable interpretation," and that the EPA "strayed far beyond those bounds" when it ignored costs in deciding whether to regulate. This reasoning opens the door to future challenges to regulatory overreach on the basis of cost.

***Yates v. United States,* 135 S. Ct. 1074 (2015).** Is a fish a "tangible object"? No, at least not for the purposes of the Sarbanes-Oxley Act. A commercial fisherman faced prosecution for destroying evidence—an undersized grouper—after he threw the fish overboard. He was convicted under a spoliation provision of the act, which criminalized destroying "tangible objects" with intent to impede a federal investigation. The majority reversed, concluding that while a fish is undeniably a "tangible object," the act was meant to target activities associated with corporate and accounting cover-ups in the wake of the Enron scandal. Justice Kagan, dissenting, would have applied the literal meaning: "A fish is, of course, a discrete thing that possesses physical form," citing the Dr. Seuss classic, *One Fish Two Fish Red Fish Blue Fish*. **TBJ**

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