THE YEAR IN REVIEW

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

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ANTITRUST AND BUSINESS LITIGATION

By Emily Westridge Black and Jasmine Tobias

In 2016, the U.S. Supreme Court issued two important opinions addressing Article III standing and a third opinion reaffirming the primacy of the Federal Arbitration Act, or the FAA.

Article III Standing Developments

In *Spokeo, Inc. v. Robins*,[1] the court held that statutory violations alone are insufficient to confer Article III standing—instead, plaintiffs must allege concrete harm. The plaintiff in this case brought class action claims alleging that Spokeo violated the Fair Credit Reporting Act by misrepresenting class members' personal information on its website. Spokeo moved to dismiss, arguing that the plaintiff had not alleged actual harm sufficient to meet the injury-in-fact requirement for standing. The district court agreed and dismissed the case, but the 9th Circuit reversed, holding that the plaintiff had standing because of the alleged violation of statutory rights under the FCRA. The court vacated and remanded, holding that the 9th Circuit had analyzed whether the plaintiff had alleged a particularized injury but not whether he had alleged a "real" *concrete* injury-in-fact. "Congress' role in identifying and evaluating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right," the court held. Instead, Article III standing requires concrete harm "even in the context of a statutory violation." In other words, plaintiffs must allege a concrete harm apart from a "bare procedural violation."

In *Campbell-Ewald Co. v. Gomez*,[2] the court held that an unaccepted settlement offer or offer of judgment for full relief does not moot a plaintiff's case. This case involved a class action brought by Gomez alleging that Campbell-Ewald violated the Telephone Consumer Protection Act by sending text message solicitations on behalf of the U.S. Navy to individuals who had not opted-in to receive the messages. Before Gomez filed a motion for class certification, Campbell-Ewald offered to settle his individual claim and filed an offer of judgment pursuant to Federal Rule of Civil Procedure 68. Gomez rejected the settlement and allowed the Rule 68 offer to expire without accepting it. Campbell-Ewald then argued that Gomez lacked the Article III standing necessary to maintain the suit because the rejected offers mooted his claim. Reversing a lower court, the 9th Circuit held that the unaccepted offers did not moot Gomez's individual and class claims. Citing "basic" contract principles, the court affirmed and held that the parties remained adverse because Campbell-Ewald's offers had "no continuing efficacy" once rejected. Notably, however, the court refused to decide whether a claim could be mooted "if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." We expect defendants to test this approach going forward.

Enforcing the Federal Arbitration Act

In *DirecTV, Inc. v. Imburgia*,[3] the court once again reaffirmed the primacy of the FAA, holding that California customers were bound by a class-arbitration waiver in their DirecTV contracts, even though the waivers were unenforceable under California law when the contracts were entered in 2008. The court held that its 2011 ruling in *AT&T Mobility, LLC v. Concepcion*[4] that the FAA preempts state laws prohibiting class action waivers applied to retroactively invalidate the California law. The holding in *DirecTV* follows a line of recent Supreme Court decisions that strongly favor arbitration agreements, including *Concepcion*, *American Express Co. v. Italian Colors Restaurant*,[5] and *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp*.[6] This decision further strengthens the FAA and solidifies the place of arbitration in business litigation.

Notes

1. 136 S. Ct. 1540 (2016).
2. 136 S. Ct. 663 (2016).
3. 136 S. Ct. 463 (2015).
4. 563 U.S. 333 (2011).
5. 133 S. Ct. 2304 (2013).
6. 559 U.S. 662 (2010).

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APPELLATE LAW

By Warren W. Harris and Brian R. Hogue

The Texas Supreme Court addressed many interesting and important appellate issues this term. These issues include the requirements for personal jurisdiction, the viability of common-law grounds for vacating an arbitration award, and the proper characterization of pleadings.

In two companion cases, the court addressed the reach of Texas' long-arm statute. In *Cornerstone Healthcare Group Holding, Inc. v. Nautic Management VI, LP,* the court addressed whether a nonresident entity can avoid personal jurisdiction over a tortious interference claim by forming a Texas subsidiary to buy a Texas-based asset from a Texas-based seller.[1] After Cornerstone lost the right to purchase the asset, it sued the resident Texas buyer and its nonresident parents for tortious interference.[2] The nonresident parents contested personal jurisdiction because they did not have direct contact with Texas, they were distinct legal entities, and Cornerstone did not seek to pierce the corporate veil. The court of appeals agreed there was no jurisdiction.[3] The Supreme Court reversed because the nonresident entities impliedly consented to jurisdiction by directing and funding the acquisition of a Texas asset from a Texas seller and formed its Texas-based subsidiary for that purpose.[4] "[K]eeping legal entities distinct does not mean they can escape jurisdiction by splitting an integrated transaction into little bits."[5]

The court distinguished *Searcy v. Parex Resources, Inc.*,[6] which it decided the same day. In *Searcy,* the plaintiff brought a tortious interference claim against a nonresident buyer that purchased from a nonresident seller the shares of another nonresident entity that owned foreign assets.[7] The nonresident seller had operations in Texas, and its Texas-based executives negotiated the transaction.[8] The court, in *Searcy,* concluded that the nonresident buyer was not subject to specific personal jurisdiction because, unlike in *Cornerstone,* the nonresident buyer did not "specifically seek out a Texas seller or Texas assets."[9]

On the topic of arbitration, the court in *Hoskins v. Hoskins* resolved a split among the courts of appeals on whether the Texas General Arbitration Act precludes vacatur of an arbitration award on common-law grounds.[10] The court unanimously held that the TAA's enumerated vacatur grounds are exclusive and foreclosed common-law grounds for vacatur.[11] Under this ruling, courts can no longer consider manifest disregard of the law—or other common-law grounds—as a legal basis for vacating an arbitration award.[12]

In a decision on a procedural issue, the court reemphasized that formal pleading rules cannot be used to ignore a pleading's substance.[13] In *In re J.Z.P.,* the ex-husband filed a motion to modify a divorce decree, which the trial court granted after the ex-wife failed to respond.[14] After the trial court's plenary jurisdiction expired, the ex-wife filed a "Motion to Reopen and to Vacate Order," which argued that neither she nor her counsel had received notice of the ex-husband's motion.[15] The trial court denied the motion, and the court of appeals dismissed the ex-wife's appeal for want of jurisdiction because she had not captioned the motion as one to extend pleading deadlines under Rule 306a of the Texas Rules of Civil Procedure.[16] In a per curiam opinion, the court reiterated that the substance of the relief sought determines the nature of the pleading (not its title), reversed the judgment of the court of appeals, and remanded for further proceedings.[17]

Notes

1. 493 S.W.3d 65, 67-70 & n.7 (Tex. 2016).
2. *Id.* at 69.
3. *Id.* at 71-72.
4. *Id.* at 73.
5. *Id.* (quotation omitted).
6. 496 S.W.3d 58 (Tex. 2016).
7. *Id.* at 62-66.
8. *Id.* at 73-77.
9. *Id.* at 77.
10. No. 15-0046, 2016 WL 2993929, at *3-4 (Tex. May 20, 2016).
11. *Id.* at *7.
12. *Id.*
13. 484 S.W.3d 924 (Tex. 2016).
14. *Id.* at 924-25.
15. *Id.*
16. *Id.* at 924.
17. *Id.* at 925-26.

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BANKRUPTCY LAW

By Aaron M. Kaufman

The U.S. Bankruptcy Code generally provides the exclusive means for debt restructuring, whether compulsory or cooperative. As such, the code basically preempts states and municipalities from enacting their own debt restructuring schemes but, instead, allows them to file Chapter 9 bankruptcies—as many have done in recent years, including (perhaps, most notably) the city of Detroit.[1]

In Puerto Rico, unemployment rates, municipal bond obligations, and budget deficits have led some to compare the small island territory to Greece.[2] However, an unexplained 1984 amendment to the Bankruptcy Code expressly excluded Puerto Rico and its municipalities from Chapter 9 bankruptcy eligibility, removing the bankruptcy option all together. In response, local authorities enacted the Puerto Rico Public Corporation Debt Enforcement and Recovery Act in 2014, to provide a legislative solution to allow "consensual" debt restructuring for the territory's municipal obligations.

In an effort to prevent cram-down under the Recovery Act, a group of creditors challenged the law, leading the U.S. Supreme Court, in *Puerto Rico v. Franklin California Tax-Free Trust*,[3] to strike it down in a 5-2 decision. Justice Clarence Thomas, writing for the majority, held that a straightforward reading of the Bankruptcy Code required a conclusion that Puerto Rico remained a "State" for purposes of preemption but was still ineligible for Chapter 9 bankruptcy, at least, "until Congress intervenes." Justice Sonia Sotomayor, writing for the two-vote dissent, warned that the majority's overly mechanical application of the 1984 amendment (which contained no legislative history) unwisely left the territory waiting for congressional intervention, with no means to help its 3.5 million citizens through the financial crisis in the interim. In June, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act, or PROMESA, which, among other things, allows the island to engage in a bankruptcy-like restructuring process.[4]

Another key decision from the high court in 2016 concerned fraudulent transfers and dischargeability. In *Husky International Electronics, Inc. v. Ritz*,[5] the court resolved a circuit split and potentially gave creditors a powerful tool against debtors who may have engaged in asset transfers before bankruptcy. In this decision, the court rejected the 5th Circuit's historically narrow definition of "actual fraud" as used in 11 U.S.C. § 523(a)(2) and agreed that "actual fraud" can be shown under that provision without evidence of a debtor's false representations.

Finally, here in Texas, in *Janvey v. Golf Channel, Inc.*,[6] the Texas Supreme Court answered a certified question posed by the 5th Circuit last year[7] and explained that an unsuspecting recipient of payments from a Ponzi scheme has a viable "good faith" defense when it: "(1) fully performed under a lawful, arm's-length contract for fair market value, (2) provided consideration that had objective value at the time of the transaction, and (3) made the exchange in the ordinary course of the transferee's business."

In this case, Golf Channel could show that it gave reasonably equivalent value to the R. Allen Stanford entities in exchange for the $5.9 million it received for marketing services (including PGA sponsorship naming rights), even though the Stanford entities turned out to be a fraudulent Ponzi scheme with no legitimate business to benefit from such marketing services. The Texas Supreme Court ruling—setting in motion the reversal of the 5th Circuit's earlier decision—seems to have alleviated concerns over the future vitality of the "value in good faith" defense in the Ponzi scheme context.

Notes

1. *See, e.g., In re City of Detroit, Michigan*, Case No. 13-53846 (Bankr. E.D. Mich.), *docket available at* kccllc.net/detroit (last visited Nov. 1, 2016).
2. Alan Gomez, *Is Puerto Rico the Next Greece? Nest Eggs Could Suffer*, USA Today (Nov. 7, 2013), http://www.usatoday.com/story/news/world/2013/11/06/puerto-rico-economic-crisis/3314639/ (last visited Oct. 31, 2016).
3. __ U.S. __, 136 S.Ct. 1938, 195 L.Ed.2d 298 (June 13, 2016).
4. *See https://www.washingtonpost.com/news/powerpost/wp/2016/06/09/puerto-rico-fiscal-rescue-is-poised-to-pass-house-as-july-deadline-looms/?utm_term=.f64e9f59a95c (last visited December 9, 2016).*
5. __ U.S. __, 136 S.Ct. 1581, 194 L.Ed.2d 655 (May 16, 2016).
6. 487 S.W.3d 560 (Tex. 2016).
7. *See Janvey v. Golf Channel, Inc.*, 792 F.3d 539, 547 (5th Cir. 2015).

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COMMERCIAL LITIGATION

By Brian P. Lauten

In commercial litigation, the caselaw continues to evolve in five areas of interest: (1) restrictions on the recoverability of attorneys' fees under Chapter 38 of the Texas Civil Practice and Remedies Code; (2) a new statutory scheme, which governs the discovery of net worth; (3) the resolution of an appellate court split on whether an arbitration award can be vacated on non-statutory grounds; (4) the continuing evolution of our anti-SLAPP jurisprudence; and (5) recent decisions interpreting Texas Rule of Civil Procedure 91a Motions to Dismiss.

Recovering Attorneys' Fees

In contract disputes where the non-breaching party

seeks attorneys' fees, courts have held that Chapter 38 authorizes a recovery in favor of the prevailing plaintiff against a corporation or an individual only.[1] Accordingly, attorneys' fees, under Chapter 38, are not authorized against other legal entities.

The Discoverability of Net Worth

On June 19, 2015, the Texas Legislature codified section 41.0115 of the Texas Civil Practice and Remedies Code. Plaintiffs can no longer obtain net worth information by making a request for production; on the contrary, they must file a motion and show there is a "substantial likelihood" the claim will be successful.[2]

New Supreme Court Precedent on Vacating Arbitration Awards

In *Hoskins v. Hoskins*,[3] the issue was whether a party seeking to vacate an arbitration award under the Texas General Arbitration Act, or the TAA, might invoke extra-statutory, common-law vacatur grounds. The Texas Supreme Court held that section 171.088 provides the exclusive grounds for vacatur under the TAA. Therefore, the court held that, because "manifest disregard for the law" is not included in the section, the losing party's attempt to vacate the award on a non-statutory basis must fail.

Evolution of Anti-SLAPP Jurisprudence

Texas' anti-SLAPP—strategic lawsuits against public participation—statute, the Texas Citizens Participation Act, provides for the expedited dismissal of claims that implicate a defendant's right of free speech. A successful motion to dismiss entitles the movant to an award of attorneys' fees. "Justice and equity" is not an authorized standard for the recovery of attorneys' fees under the law; instead, the trial court may consider only whether the fee is "reasonable."[4] Interpreting the act, the Austin appellate court recently held that Rule 202 of the Texas Rules of Civil Procedure does not authorize pre-suit depositions when the potential claim would be subject to the law.[5]

New Decisions Impacting Rule 91a

The Texas Supreme Court recently held that a governmental entity's claim that it had immunity was properly asserted as a Rule 91a Motion to Dismiss. Reversing the court of appeals' judgment, the Supreme Court dismissed the plaintiff's case holding it had no basis in law as the trial court lacked jurisdiction.[6] Other recent decisions interpreting Rule 91a include: *In re Butt*[7] and *In re Essex Ins. Co.*[8]

Notes

1. *Alta Mesa Holdings, L.P. v. Ives*, 488 S.W.3d 438, 452-455 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *Choice! Power, L.P. v. Feeley*, No. 01-15-00821-CV, 2016 WL 4151041, *8-11 (Tex. App.—Houston [1st Dist.] Aug. 4, 2016, no pet.).
2. *In re Michelin N. Am., Inc.*, No. 05-15-01480-CV, 2016 WL 890970 (Tex. App.—Dallas March 9, 2016, mand. granted); *In re Robinson Helicopter Co.*, No. 01-15-00594-CV, 2015 WL 4623939 (Tex. App.—Houston [1st Dist.] Aug. 4, 2015, mand. denied).
3. No. 15–0046, 2016 WL 2993929, *7 (Tex. May 20, 2016).
4. *See Sullivan v. Abraham*, 488 S.W.3d 294 (Tex. 2016) (a reasonableness test applies).
5. *In re Chris Elliott*, No. 03-16-00231-CV, 2016 WL 5887349, *7 (Tex. App.—Austin Oct. 7, 2016, no pet.).
6. *City of Dallas v. Sanchez*, 494 S.W.3d 722 (Tex. 2016).
7. 495 S.W.3d 455 (Tex. App.—Corpus Christi May 9, 2016, no pet.).
8. 450 S.W.3d 524 (Tex. 2014).

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CONSTRUCTION LAW

By Gregory M. Cokinos and Anthony T. Golz

The Texas Supreme Court issued numerous opinions this year that impacted construction law, addressing subjects such as indemnity under Civil Practice and Remedies Code Chapter 82 to whether the grounds for vacatur enumerated in the Texas General Arbitration Act, or TAA, are exclusive. Three are noted in the following.

In *Centerpoint Builders, GP, LLC v. Trussway, Ltd.*,[1] the Texas Supreme Court held that a general contractor who is neither a retailer nor a wholesale distributor of any particular product is not necessarily a "seller" of every material incorporated into its construction projects for statutory-indemnity purposes. In the case, a roof truss collapsed and injured a worker. In the ensuing products-liability action, the general contractor argued that it was entitled to statutory indemnity from the manufacturer of the truss, but the court disagreed. Civil Practice and Remedies Code Chapter 82 defines "seller" not simply as "a person who sells" or "a person who places a product in the stream of commerce," but as a person "engaged in the business of" commercially distributing products. The court reasoned that the general contractor, like most builders, is "engaged in the business of" selling construction services, not building materials, and held that "one is not 'engaged in the business of' selling a product if providing that product is incidental to selling services."[2] Although the quantity of materials used is not dispositive, the fact that the general contractor used innumer-

able building materials supported the conclusion that any single material was incidental to its provision of construction services.[3]

In *TIC Energy & Chemical, Inc. v. Martin*,[4] the Supreme Court held that a subcontractor may be entitled to the exclusive-remedy defense as a fellow employee of the general contractor's employees by virtue of the general contractor's written agreement to provide workers' compensation insurance to the subcontractor. The sole issue in dispute was the legal effect of Texas Labor Code §§406.122(b) and 406.123 when agreements meeting the terms of both govern the general contractor and subcontractor relationship. Section 406.122(b) excludes subcontractors as the general contractor's employees if they are operating as an independent contractor and have a written agreement evidencing the relationship. Section 406.123, in turn, provides for an election by which a general contractor may become a statutory employer by agreeing, in writing, to provide workers' compensation insurance to the subcontractor. "Taken together, the only plausible reading of the statute is that Section 406.122 states a general rule of employment status for workers' compensation purposes and Section 406.123 deviates from that rule by creating the fiction of another."[5]

In *Hoskins v. Hoskins*,[6] the court held that the TAA does not permit an arbitration award to be vacated on common-law grounds not enumerated in the statute. The losing party in arbitration sought to vacate the award because the arbitrator manifestly disregarded the law. The court rejected the challenge, reasoning that the statutory text "could not be plainer": under CPRC §171.087, the trial court "shall confirm" an award unless vacatur is required under one of the enumerated grounds in section 171.088.[7] Therefore, "the TAA leaves no room for courts to expand on those grounds, which do not include an arbitrator's manifest disregard of the law."[8] It's important to note, however, that the court acknowledged that parties may contractually limit the arbitrator's authority so as to authorize vacatur on the basis of a common-law ground not enumerated in the TAA (e.g., agreeing that the arbitrator "does not have authority to render a decision which contains a gross mistake").[9]

Notes

1. No. 14-0650, 2016 WL 3413329 (Tex. June 17, 2016).
2. *Id.* at *6.
3. *Id.* at *7.
4. No. 15-0143, 2016 WL 3136877 (Tex. June 3, 2016).
5. *Id.* at *6.
6. No. 15-0046, 2016 WL 2993929 (Tex. May 20, 2016).
7. *Id.* at *4.
8. *Id.*
9. *Id.* at *5, 7.

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CONSUMER LAW

By Dana Karni

Consumer Debt Collection

In July 2016, the Consumer Financial Protection Bureau issued an outline of proposed changes to the Fair Debt Collection Practices Act. Richard Cordray, director of the bureau, said, "We are considering proposals that would drastically overhaul the debt collection market … this is about bringing better accuracy and accountability to a market that desperately needs it."[1] The proposed protections are intended to make sure that debt collectors: (1) collect the correct debt; (2) limit excessive or disruptive communications; (3) make debt details clear and disputes easy; (4) document debt on demand for disputes; (5) stop collecting or suing for debt without proper documentation; and (6) stop burying the dispute.[2]

Fair Credit Reporting Act

In May 2016, the U.S. Supreme Court issued its opinion in *Spokeo, Inc. v. Robins*.[3] The court held that "Article III standing requires a concrete injury even in the context of a statutory violation."[4] Although a concrete injury must actually exist, it does not have to be tangible.[5] However, it found that "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."[6] In relation to the FCRA, the court stated:

> Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA's procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that infor-

mation regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.[7]

The court found that the lower court ignored the concrete requirement of standing and only focused on the particularized requirement, so it vacated and remanded the case to be decided looking at both concreteness and particularity of injury.[8] This case will have significant implications on litigation under consumer laws that allow for statutory damages even without actual damages. Consumers must now make sure to plead injury-in-fact in addition to statutory violations. However, since the *Spokeo* opinion, waste of time and aggravation, as well as invasion of privacy, have been held to suffice as concrete injuries.[9]

State and Federal Fair Debt Collection Practices Acts

In *Davidson v. Capital One Bank (USA), Inc.*[10] and *Henson v. Santander Consumer USA, Inc.*,[11] the 11th and 4th circuits held that financial institutions not primarily engaged in debt collection as a business were not debt collectors under section 1692a(6) of the FDCPA, even though the debts did not originate from the financial institutions and the financial institutions were collecting on said debts.

In *Anarion Investments LLC v. Carrington Mort. Servs., LLC*,[12] the 6th Circuit held that a limited liability company may bring suit as "any person" under the FDCPA.

In *Maria Hernandez v. Williams, Zinman, & Parham PC*,[13] the 9th Circuit found that all debt collectors, first or subsequent, must comply with section 1692g(a) validation notice requirements.

Notes

1. "Consumer Financial Protection Bureau Considers Proposal to Overhaul Debt Collection Market," July 28, 2016, http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-considers-proposal-overhaul-debt-collection-market/.
2. *Id.*
3. 797 F.3d 1309 (11th Cir. 2015).
4. 817 F.3d 131 (4th Cir. 2016).
5. 794 F.3d 568 (6th Cir. 2015).
6. No. 14-15672, 2016 WL 3913445 (9th Cir. July 20, 2016).
7. 136 S. Ct. 1540 (2016).
8. *Id.* at 9.
9. *Id.* at 8-9.
10. *Id.* at 9.
11. *Id.* at 10-11.
12. *Id.* at 11.
13. *Booth v. Appstack, Inc.*, C1301533JLR, 2016 WL 3030256 (W.D. Wash. May 25, 2016) and *Krakauer v. Dish Network, LLC.*, 1:14-CV-333, 2016 WL 4272367 (M.D.N.C. Aug. 5, 2016).

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CRIMINAL LAW

By Kenda Culpepper and Jeffrey W. Shell

Since our last update, the Texas Court of Criminal Appeals denied the state's motion for rehearing in *State v. Villarreal*,[1] holding that mandatory blood draws were unconstitutional. However, since then, the court has clarified that exigency is still a relevant factor in DWI cases when based on a totality of the circumstances. During 2016, courts also expanded rulings on resisting arrest and arrest warrants.

Cole v. State[2]

In this case, Cole drove his pickup at 110 miles per hour and struck another vehicle at a busy intersection in Longview, causing an explosion that killed the other driver instantly. When the police arrested him, Cole refused to provide a blood sample after officers read him the statutory warning. His blood was drawn without a warrant, and testing revealed intoxicating levels of a controlled substance. The trial court denied Cole's motions to suppress the blood-test results, but the court of appeals reversed.

The Court of Criminal Appeals reversed the court of appeals and explained that a proper exigency analysis should focus on whether officers have a reasonable belief that obtaining a warrant is impractical based on circumstances and information known at the time of the search. The court reasoned that the time to complete the investigation and the lack of law enforcement personnel available at the time hindered the pursuit of a warrant. Thus, the court concluded that exigent circumstances justified the warrantless blood draw.

Daniel James Weems v. The State of Texas[3]

By contrast, the Court of Criminal Appeals determined in *Weems* that the totality of the circumstances in the specific case did not warrant a finding of exigency. After Weems drove himself and a friend back from a bar, his car went off the road, flipped over, and struck a utility pole. It took about 40 minutes for officers to locate Weems, who ran from the scene and hid. Weems was arrested and hospitalized based on his injuries. His blood

was drawn without a warrant.

The trial court denied a motion to suppress the blood-test results. The court of appeals reversed the conviction, and the Court of Criminal Appeals affirmed, ruling that alcohol dissipation alone did not support a finding of exigency.

Finley v. State[4]

The Court of Criminal Appeals clarified Texas law regarding resisting arrest in *Finley* by asserting that the act of pulling away from a peace officer may be sufficient to show that the defendant used force against the officer. In this case, Finley's act of repeatedly failing to cooperate, tensing up, and pulling his arms away from arresting officers was sufficient to meet the elements of the offense.

Utah v. Strieff[5]

In *Utah v. Strieff*, which made its way to the U.S. Supreme Court in 2016, a detective investigated an anonymous tip by conducting surveillance of a residence in Salt Lake City. Based on observing frequent visitors to the residence and his suspicion of drug dealing, the detective detained Strieff who had exited the residence. The detective then requested Strieff's identification card. When dispatch reported an outstanding warrant, Strieff was arrested. A search incident to that arrest revealed evidence of methamphetamine and drug paraphernalia.

Strieff moved to suppress, arguing that the evidence was inadmissible because it was derived from an unlawful stop. The Supreme Court held that the evidence was admissible because, although the detention was unlawful, it was sufficiently attenuated by the pre-existing arrest warrant.

Notes

1. 475 S.W.3d 784, 817 (Tex. Crim. App. 2015) (per curiam).
2. 490 S.W.3d 918 (Tex. Crim. App. 2016).
3. *Weems v. State*, 493 S.W.3d 574 (Tex. Crim. App. 2016).
4. 484 S.W.3d 926 (Tex. Crim. App. 2016).
5. 136 S. Ct. 2056 (2016).

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ENERGY LAW

By Brian C. Boyle

The energy industry continues to face challenges in a market burdened by low oil prices and global oversupply of oil and gas. In these market conditions, bankruptcies and distressed litigation have shaped legal issues, while the Texas Supreme Court has addressed matters that will affect the industry as companies move forward following mergers and reorganizations.

One of the most controversial rulings in the energy space came in the bankruptcy of Sabine Oil & Gas Corporation. The bankruptcy court ruled that gas-gathering contracts between Sabine and two midstream companies did not contain covenants that run with the land under Texas law, which allowed Sabine to reject the contracts in the Chapter 11 bankruptcy.[1] Midstream companies have viewed this decision as contrary to Texas precedent treating certain midstream agreements as conveying real property interests. The *Sabine* ruling could have significant financial implications for the midstream industry and has prompted challenges by creditors in other bankruptcies.[2]

Putting to rest a 2015 decision that was nearly as controversial as *Sabine*, the Texas Supreme Court issued a substitute opinion in *Chesapeake Exploration, LLC v. Hyder et. al.*, confirming that an overriding royalty was free of all post-production costs under the lease at issue.[3] Ultimately, *Hyder* may simply stand for the proposition that the specific lease language controls the overriding royalty valuation and deductibility of post-production costs. Certain post-production costs should still be deductible where a lease provides for valuation "at the well" and does not otherwise provide for a "cost-free" royalty similar to the lease in *Hyder*.

Another important ruling handed down by the state's highest civil court came in *Apache Deepwater, LLC v. McDaniel Partners, Ltd.*, in which the court looked to precedent governing overriding royalties in holding that a production payment created through assignment of a lease ordinarily terminates upon expiration of that lease. Absent specific language to the contrary, a production payment survives only so long as the associated lease remains in existence.[4] When multiple leases are at issue, a production payment must be reduced proportionately if one or more of those leases terminates.

In *Coyote Lake Ranch LLC v. The City of Lubbock*, the Supreme Court also looked to oil and gas principles in holding that the accommodation doctrine applies to severed groundwater estates, such that the owner of groundwater rights must reasonably accommodate existing uses of the property by the surface owner.[5] This is significant

considering the importance of scarce water resources in many oil and gas-producing regions, as well as the likelihood that the court's plain-language approach in construing the water rights deed will be extended to future cases involving oil and gas leases.

Other cases pending before the Texas Supreme Court could have significant implications for the industry, such as the appeal of *Lightning Oil Co. v. Anadarko E&P Onshore LLC*, in which the lower court held that a surface estate owner has the right to drill through the earth beneath the surface even if the mineral estate has been severed.[6] This would allow a landowner to enter into a mineral lease with one company while entering into a surface-use agreement with a second company permitting it to drill horizontal wells on the land to reach its adjacent mineral estate.

Finally, challenges to energy regulations and agency enforcement powers—including the Federal Energy Regulatory Commission's market manipulation authority and the Environmental Protection Agency's Clean Power Plan—are likely to continue next year.

Notes

1. *See In re Sabine Oil & Gas Corp.*, 550 B.R. 59, 65-71 (Bankr. S.D.N.Y. 2016).
2. *See Official Committee of Unsecured Creditor of Tristr v. Tristream East Texas, LLC et al.*, No. 16-03234 (Bankr. S.D. Tex.).
3. 483 S.W.3d 870, 873-876 (Tex. 2016).
4. 485 S.W.3d 900, 906-907 (Tex. 2016).
5. No. 14-0572, 2016 Tex. LEXIS 415, at *24-30 (Tex. May 27, 2016).
6. 480 S.W.3d 628, 635-638 (Tex. App.—San Antonio 2015, pet. filed).

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ENVIRONMENTAL LAW

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

Last year environmental law saw significant holdings from Texas district courts and the Texas Supreme Court, as well as the U.S. Supreme Court. Although space allows only a brief mention of the cases that follow, for the environmental practitioner, all are worth reading in full.

In *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*,[1] the U.S. Supreme Court unanimously found a right of judicial review for the U.S. Army Corps of Engineers' jurisdiction determinations, which were found to constitute "final agency actions," thus triggering a right of review that is crucial to a landowner whose property is determined to contain "waters of the U.S."

In *BCCA Appeal Group, Inc. v. City of Houston*,[2] the Texas Supreme Court held that the city of Houston air quality ordinance was preempted by the Texas Clean Air Act.

In an effort to reduce the confusion resulting from varied uses of the term "nuisance," the Texas Supreme Court held in *Crosstex North Texas Pipeline, L.P. v. Gardiner*,[3] that the term refers to the particular type of legal injury that can support a claim or cause of action seeking legal relief, not a cause of action or the defendant's conduct or operations. In other words, the term "nuisance" describes a type of injury that the law has recognized can give rise to a cause of action because it is an invasion of a plaintiff's legal rights. The court also clarified that the term "nuisance" does not refer to the "wrongful act" or to the "resulting damages," but only to the legal injury—the interference with the use and enjoyment of property—that may result from the wrongful act and result in the compensable damages.

In *Morello v. State*,[4] the Austin appeals court held that an officer of a limited liability company was not individually liable because: (1) the state failed to invoke any veil-piercing theory that might apply to him; and (2) the state could not prove (and even disclaimed) that he participated in any tortious or fraudulent conduct that would have led to his personal liability as an agent of the company.

Lawsuits brought under section 7.351 of the Texas Water Code by contingency counsel on behalf of governmental entities continue to raise eyebrows. In *Harris County and Texas Commission on Environmental Quality v. International Paper Company*,[5] the Houston appeals court affirmed a jury's take-nothing verdict in which Harris County sought $1.6 billion in penalties in addition to $10 million in attorneys' fees. Before trial, the defendants claimed that Harris County's enforcement violated their due process rights, among other things. The state of Texas, which is joined as an indispensable party, has been sharing in the settlement proceeds. However, that relationship might now be strained in light of *In Re: Volkswagen Clean Diesel Litigation*, in which the state claims that local governments are prevented from suing Volkswagen related to improper air emissions from its vehicles.

We expect many of these issues to be further addressed, challenged, and refined in the coming year.

Notes

1. 136 S. Ct. 1807 (2016).
2. 496 S.W.3d 1 (Tex. 2016).
3. 2016 WL 3483165 (Tex. June 24, 2016).
4. 2016 WL 2742380 (Tex. App.—Austin 2016, pet. filed).

5. 2016 WL 5851895 (Tex. App.—Houston [1st Dist.] 2016, no pet.).



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ESTATE PLANNING AND PROBATE LAW

By Gerry W. Beyer

The Texas courts have been busy over the past year deciding probate cases—some in predictable ways and others using approaches some practitioners would find surprising. This review covers the major lessons to be learned from the decisions rendered in probate cases during the latter part of 2015 and 2016 starting with three at the Texas Supreme Court.

1. "Common disaster" requires unknown death order.

The Texas Supreme Court held in *Stephens v. Beard*[1] that the term "common disaster" when used in a will without being defined requires that the death order of the indicated individuals be unknown. Thus, a murder-suicide did not qualify as a common disaster because the shooter lived two hours longer than the victim.

2. No equitable bills of review in probate cases.

The Texas Supreme Court confirmed in *Valdez v. Hollenbeck*[2] that the two-year period for a bill of review in Texas Estates Code § 55.251 abrogates the equitable bill of review in the probate context.

3. Personal representative lacks standing to "complain" about non-probate assets.

In *Bank of America v. Eisenhauer,*[3] the Texas Supreme Court refused to let a personal representative complain about a bank's breach of a multiple-party account contract because none of the funds in the account would be in the decedent's estate whether or not the bank breached the contract.

4. Viability of tortious interference with inheritance rights cause of action in question.

At least since the 1987 case of *King v. Acker,*[4] Texas lawyers have conducted themselves as if the state recognizes a cause of action for tortious inference with inheritance rights. Two recent cases, *Jackson Walker v. Kinsel*[5] and *Anderson v. Archer,*[6] have surprised some Texas estate litigators by holding that the state has yet to recognize the tort because there is no Texas Supreme Court case or legislation that does so expressly. It is anyone's guess whether the court will grant petition on these cases.

5. Adults may not be adopted by estoppel.

The court in *Dampier v. Williams*[7] addressed a claim that a person was the sole heir of an intestate decedent as his adopted by estoppel son. The court rejected this claim because the alleged acts of estoppel occurred after the person reached age 18 so there was never a legal impediment to a formal adoption.

6. Courts will not add to Estates Code will requirements.

Consistent with long-standing Texas law, the court in *Matter of Kam*[8] refused to augment the requirements for a valid will when it rejected the will contestant's claims that a will was invalid because the witnesses could not describe its contents, the testator did not sign in the presence of the witnesses, and the testator did not have a lengthy conversation with the witnesses before they attested. Likewise, in *Matter of Estate of Standefer,*[9] the court rejected the argument that the testator's handwritten signature on a will must match the typewritten version of the testator's name.

7. Muniment of title may preclude later administration.

After a will was admitted to probate as a muniment of title, the probate court opened an administration on the estate to allow the executor to pursue a potential claim. In *In re Jacky,*[10] the court determined that this order was void because the muniment of title order was not timely appealed and no timely bill of review had been filed.

8. Unstated motivation for disinheritance is not a valid will contest ground.

After the testator disinherited his daughter, she claimed that cutting her out was her father's way of exacting "vengeance" upon her for confronting him about his alleged sexual abuse of her many decades earlier. The court in *Merrick v. Helter*[11] rejected the daughter's claim that the will should be set aside on public policy grounds because there were no express terms in the will that explained the alleged improper reason.

Notes

1. 485 S.W.3d 914 (Tex. 2016).
2. 465 S.W.3d 217 (Tex. 2015).
3. 474 S.W.3d 264 (Tex. 2015).

4. 725 S.W.2d 750 (Tex. App.—Houston [1st Dist.] 1987, no writ).
5. No. 07-13-00130-CV, 2015 WL 2085220 (Tex. App.—Amarillo Apr. 10, 2015, pet. filed).
6. 490 S.W.3d 175 (Tex. App.—Austin 2016, pet. filed).
7. 493 S.W.3d 118 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.).
8. 484 S.W.3d 642 (Tex. App.—El Paso 2016, pet. filed).
9. No. 11-14-00221-CV, 2015 WL 5191443 (Tex. App.—Eastland Aug. 21, 2015, no pet. h.).
10. No. 01-16-00236-CV, 2016 WL 4203421 (Tex. App.—Houston [1st Dist.] Aug. 9, 2016, no pet. h.).
11. No. 03-14-00708-CV, 2016 WL 4429932 (Tex. App.—Austin Aug. 18, 2016, pet. filed).

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FAMILY LAW

By Georganna L. Simpson and Beth M. Hearn

Mandatory Transfers. A recent case clarified limitations on mandatory Suit Affecting the Parent-Child Relationship, or SAPCR, transfers. In *C.G.*,[1] the father filed a post-divorce SAPCR and a mandatory transfer motion based on the child's residence at the time. Subsequently, the mother moved twice, the father moved once, and the child began residing with the father instead of the mother. The trial court transferred the case to the county where the child lived when the SAPCR was filed and then transferred it a second time after one of the mother's moves. After a full bench trial, the court determined that it never acquired jurisdiction and that all its orders were void. On appeal, the court agreed that a transfer based on the child's residency must be filed with the initial pleadings and that any subsequent motions to transfer would be untimely.[2]

MSAs. Additionally, Texas courts continued to refine the law regarding mediated settlement agreements, or MSAs, compliant with the Family Code.[3]

Termination. The Family Code permits termination of a parent-child relationship if a parent signs a voluntary affidavit of relinquishment of parental rights and if termination is in the child's best interest.[4] An affidavit by itself does not conclusively establish a best interest finding. In *Morris*, after the parties signed an MSA agreeing to termination of the mother's parental rights, the father proved up the MSA in court. However, although the mother's signed affidavit stated that termination was in the child's best interest, no factual evidence was introduced to support that assertion, and the order granting the termination was reversed.

Arbitration Clauses. In *L.T.H.*,[5] the parties disagreed on the MSA's provisions for the father's visitation. The trial court agreed with the father's interpretation of the MSA and entered a final order. The appellate court determined that the MSA was ambiguous and that the trial court erred in resolving the dispute rather than referring the case to binding arbitration as provided in the MSA.[6]

Voluntary Consent. In *Araujo*,[7] the wife stated that she only signed the MSA because her first attorney "forced" her to sign. However, she introduced no evidence to corroborate her testimony, nor did she identify anything in her testimony that constituted a threat or rose to a level that would render her incapable of exercising her free agency or unable to withhold her consent. The court affirmed the order refusing to set aside the MSA.

Confidentiality. In *Triesch*,[8] the wife challenged the validity of a signed MSA after "discovering" she had an interest in certain real property, which she attempted to prove with statements made by the husband during mediation. However, due to the confidential nature of communications made during mediation, the husband's statements could not be used to undo an existing MSA.

Notes

1. *In re C.G.*, 495 S.W.3d 40 (Tex. App.—Corpus Christi 2016, pet. denied).
2. *See* Tex. Fam. Code § 155.201-155.207.
3. *See* Tex. Fam. Code §§ 6.602, 153.0071.
4. *In re Morris*, ___ S.W.3d ___, No. 14-16-00227-CV, 2016 WL 3457953 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding).
5. *In re L.T.H.*, ___ S.W.3d ___, No. 14-15-00366-CV, 2016 WL 4480892 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.).
6. *See Milner v. Milner*, 361 S.W.3d 615 (Tex. 2012).
7. *Araujo v. Araujo*, No. 13-15-00345-CV, 2016 WL 4578401 (Tex. App.—Corpus Christi 2016, no pet. h.) (mem. op.).
8. *Triesch v. Triesch*, No. 03-15-00102-CV, 2016 WL 1039035 (Tex. App.—Austin 2016, no pet. h.) (mem. op.).

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GOVERNMENT LAW

By Ryan Henry, Sandy Hellums-Gomez, and Victor A. Flores

Attorneys advising state, county, or municipal entities, including school districts and other special districts created by law, monitor a broad range of evolving caselaw and statutory regulations. This review of Texas government law briefly summarizes two significant legal issues many attorneys in this area followed in 2016: (1) claims resulting from flooding events and (2) issues related to the public school finance system.

Claims following flooding events

Caselaw related to taking flood-event claims has fluctuated over the past year. The Texas Supreme Court flip-flopped after rehearing *Harris County Flood Control District v. Kerr, et al.*,[1] eventually holding negligence cannot create takings liability and an entity must take action and be substantially certain it will result in flooding before liability attaches. Now integrate that with two courts of appeals opinions decided after *Kerr*.

In *City of Socorro v. Campos, et al.*,[2] the 8th Court of Appeals in El Paso held that while negligence cannot attribute liability, when the plaintiff alleged the city intentionally diverted water during a rainstorm with sandbags away from one subdivision, combined with its redesign of a channel, they were allegedly substantially certain it would flood another subdivision. This pleading is sufficient to waive immunity and get past a plea to the jurisdiction. But in *City of Magnolia, et al. v. Smedley*,[3] the 9th Court of Appeals in Beaumont held that the pleadings did not allege and the evidence in response to the plea did not establish that the city knew the harm was substantially certain to result when it developed a walkway adjacent to the plaintiff's property, which allegedly caused increased drainage and flooding. After reviewing the facts of each case, the standard for "substantially certain" seems to shift between cases, with one leaning more toward a negligence standard and the other to an actual knowledge standard.

Public school finance system

Following decades of legal and legislative challenges, the Texas Supreme Court again considered the constitutionality of the public school finance system. In *Morath v. Texas Taxpayer & Student Fairness Coalition*,[4] the court unanimously upheld the current school finance scheme, in a departure from previous decisions regarding the issue. The court considered whether the current system meets the requirements of Article 7 of the Texas Constitution, which requires that the state provide adequate and efficient public schools. In its opinion, the court adopted a standard "very deferential" to the Legislature in evaluating the challenge and found the finance system to be adequate based on overall student performance, rejecting the trial court's conclusion to the contrary as being too reliant on a finding that money improves performance.

The court similarly rejected claims based on low-income and English language learner student performance because it doubted that money spent on those students would have a greater impact than money spent on other students and ruled that the system satisfied the efficiency requirement of Article 7 because the relative difference in funding available to wealthy versus poor districts is within an acceptable range. Further, it rejected claims by business groups and parent advocates that state regulation and lack of competition—in the form of vouchers—rendered the system inefficient. The court held that such policy choices were within the discretion of the Legislature and that it has the authority to fund charter schools differently.

We expect many of the issues included in the cases mentioned previously will be further addressed in 2017.

Notes

1. __ S.W.3d__No. 13-0303, 2016 WL 3418246 (Tex. 2016).
2. No. 08-14-00295-CV, 2016 WL 4801600 (Tex. App—El Paso September 14, 2016).
3. No. 09-15-00334-CV (Tex. App—Beaumont July 28, 2016).
4. 490 S.W.3d 826 (Tex. 2016).

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IMMIGRATION LAW

By Paul Zoltan

Virtually no new immigration-related legislation emerged from the 2016 scrum on Capitol Hill. Yet in the months leading up to November's election, the states, federal courts, agencies, and immigrants themselves dramatically reshaped how our immigration laws are interpreted and administered.

In March, the Department of Homeland Security published a final rule allowing F-1 nonimmigrants in science, technology, engineering, and mathematics programs to extend their post-graduation optional professional training by two years. The STEM extension somewhat softened the blow to employers when, in April, over 230,000 H-1B petitions were submitted for the 85,000 new H-1B visa numbers issued per fiscal year.

On the issue of immigration, Texas Attorney General Ken Paxton lost a legal battle and won one in June. U.S. District Judge David C. Godbey ruled that Texas could not block the resettlement of Syrian refugees in the state. But soon after, *U.S. v. Texas* bore fruit: an evenly divided U.S. Supreme Court upheld U.S. District Court Judge Andrew S. Hanen's injunction against the expansion of Deferred Action for Childhood Arrivals, or DACA, and the implementation of Deferred Action for Parents of Americans and Lawful Permanent Residents, DAPA. The decision came too late in Obama's second term for a re-do that—unlike DAPA and "DACA 2.0"—conformed to the Administrative Procedures Act.

In *Mathis v. United States*, the Supreme Court clarified when courts may look beyond the text of a penal code to determine whether a conviction renders a noncitizen deportable. State criminal statutes seldom define crimes in ways that track the Immigration and Nationality Act. This confounds many judges charged with determining whether, for instance, an assault conviction is a "crime of violence" or if it involves moral turpitude. When a law may be violated in different ways, and only some of these trigger deportability, courts have treated that law as "divisible" and looked to the record of conviction (indictment, plea, judgment, and sentence) to determine which "prong" was violated. By narrowing the circumstances that permit such an inquiry, *Mathis* makes it tougher for U.S. Immigration and Customs Enforcement to meet the "clear, unequivocal, and convincing" evidence standard to establish a noncitizen's deportability based upon the commission of a crime.

Another summer surge in Central American asylum seekers contributed to an unprecedented backlog in the nation's immigration courts. With over 500,000 pending cases nationally, immigration judges are setting cases out as far as 2020. In Texas' courts, noncitizen respondents wait an average of 729 days for their final hearing—nearly four times longer than they did 10 years ago.

August saw the expansion of the "provisional waiver" program that exempts certain noncitizens from being required to return to their country *before* seeking forgiveness for unlawfully residing in the U.S. The program now not only embraces the spouses, children, and parents of U.S. citizens, but also the beneficiaries of all employment- and family-based immigrant visa categories.

In September, Congress voted to extend by just two months the controversial EB-5 foreign investor program, throwing the initiative's future into doubt. Critics of the program pointed to the most recent of several much-publicized scandals: In April, the U.S. Securities and Exchange Commission alleged that a ski resort had run a "Ponzi-like" scheme that raised $350 million from foreign investors eager to attain U.S. residency.

Arguably, the biggest news for immigration law came in November with the election of Donald J. Trump. His campaign promise to end Obama's "illegal executive amnesties" augurs the termination of the provisional waiver program, the cancellation of over 700,000 employment authorization cards issued to DACA registrants, and the potential revocation of DHS' policy of arresting only those noncitizens who are "enforcement priorities."

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INSURANCE LAW

By Michael W. Huddleston

Many anticipated that the opinion in *Seger v. Yorkshire Ins. Co., Ltd.*,[1] would resolve whether a carrier who wrongfully refused to defend an insured was bound by any subsequent judgment against the insured under *State Farm Fire & Cas. Co. v. Gandy*.[2] The Texas Supreme Court limited the scope of *Gandy* in *Evanston Ins. Co. v. Atofina Petro. Inc.*[3] and *Lennar Corp. v. Markel Am. Ins. Co.*[4] Prior to *Gandy*, the court held in its initial opinion in *APIE v. Garcia (Garcia I)*[5] that an insured could enter a so-called sweetheart deal, assigning his rights against his liability

carrier to the claimant and the claimant may recover the amount of an agreed or other judgment despite the fact the insured is provided a covenant not to execute that protects it from the judgment. The court recognized that public policy favored ignoring that the insured suffered no harm from the judgment despite the covenant, noting this scenario provided a strong incentive for insurers to give due consideration to the interests of its insureds. In its second opinion, the court avoided the issue of the legitimacy of an assignment or covenant and resolved the case on its interpretation of the policy.

When *Seger* came out in June, so-called sweetheart deals were not the issue. Instead, the court, as in *APIE,* resolved the case on coverage, holding that the underlying claims were excluded under the policy's "leased-in employees/workers" exclusion. Equating the "not enforceable" (language in the statute) with "voidable" (not in the statute), the court rejected the insured's argument that the exclusion was "unenforceable" as required under the specific terms of Texas Insurance Code § 101.201(a). The court concluded that an insured provided a policy by an unauthorized carrier has a Hobson's choice: (a) seek enforcement of the policy as written or (b) rescind the policy and have no coverage.

A motion for rehearing was filed in *Seger,* receiving significant amicus support. The rehearing urged that the court rewrote the statute to substitute "voidable" for "not enforceable." The Supreme Court denied the motion for rehearing, leaving an opinion in place that is contrary to what the Segers urge is the purpose of the Texas surplus lines laws, which is to protect admitted domestic carriers and make it more difficult and perilous for non-admitted carriers who engage in unfair competition. Non-admitted carriers have known for years that violations of sections 101.201(a) and 981.005 mean that they cannot enforce their policy exclusions. An insured left with rescission as the only remedy, after a loss has already occurred, in fact has no remedy at all. The court's interpretation renders the "not enforceable" provision mere surplusage because Texas *already recognizes* that rescission is available where the contract is unauthorized and in effect illegal.

The *Gandy* debate continues to be the subject of frequent appellate opinions: *Great Am. Lloyds Ins. Co. v. Vines-Herrin*[6] and *Mid-Continent Cas. Co. v. JHP Devel., Inc.*[7] The latest draft of the Restatement of the Law of Liability Insurance dives into this debate, blending the approaches of numerous states. For now, the Texas Supreme Court has avoided the resolution of the continued viability of *Gandy*.

Notes

1. ___ S.W.3d ___ (Tex. June 17, 2016).
2. 925 S.W.2d 696 (Tex. 1996).
3. 256 S.W.3d 660 (Tex. 2008) (carrier refusing to defend not entitled to challenge "reasonableness" of settlement).
4. 413 S.W.3d 750, 751 (Tex. 2013) (carrier refusing to participate in pre-emptive, pre-suit settlements not entitled to challenge the reasonableness or claim prejudice from breach of the consent to settle condition).
5. 876 S.W.2d 842, 855 (Tex. 1994).
6. 2016 WL 4486656 (Tex. App.—Dallas 2016)(petitions for rev. pending)(where the carrier wrongfully refused to defend, the insured was entitled to protect itself by agreeing to arbitrate and then assigning its rights after the arbitration decision in exchange for agreeing not to appeal; rejecting the insurer's arguments that agreeing to arbitrate was per se a failure to engage in a "fully adversarial trial").
7. 557 F.3d 207 (5th Cir. 2009)("fully adversarial trial requirement of *Gandy* was not applicable where a default was entered after the carrier wrongfully refused to defend).

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INTERNATIONAL TRADE

By Elsa Manzanares and Michelle Schulz

From the historic changes in U.S. relations with Cuba to reform of the U.S. export control system, the past few years have seen significant and newsworthy changes in international trade law—2016 was no exception. What follows are some of last year's important developments in U.S. customs, export controls, and sanctions regulations.

In February, President Barack Obama signed into law the Trade Facilitation and Trade Enforcement Act of 2015, what many consider the most significant customs legislation since the Customs Modernization Act of 1993. Noteworthy provisions include new enforcement procedures for U.S. Customs and Border Protection to counteract evasion of antidumping duties by importers, including a requirement that customs and border officials formally investigate allegations of duty evasion within a specified time period. The legislation also enhanced import-related protection of intellectual property rights and authorized a number of trade facilitation programs administered by the federal government.

Ministers from 12 nations signed the Trans-Pacific Partnership, or TPP, free trade agreement. Though negotiations have concluded, the U.S. has yet to ratify TPP. Signatories include Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. Proponents of the deal argue a key benefit of its enactment would be tariff elimination over agreed timeframes. Duty reduction could be dramatic, as TPP countries import nearly $3 trillion in manufactured goods, farm products, and natural resource products per year. In the auto industry, for example, TPP

would eliminate a 30 percent tariff on imports of U.S. automobiles into Malaysia and a 27 percent tariff on imports of U.S. auto parts into Vietnam. Opponents of TPP cite concerns about specific provisions of the agreement, such as protections for pharmaceutical companies' prices for medicine.

The U.S. Department of Treasury's Office of Foreign Assets Control and the Department of Commerce's Bureau of Industry and Security published several amendments to their respective Cuban sanctions regulations following Obama's announcement in 2014 of a new direction in U.S.-Cuba relations. The amendments increased opportunities for travel to Cuba by U.S. persons, authorized exports from the U.S. to increase support for the Cuban people, and expanded the authorization for physical and business presence in Cuba for certain entities and exporters.

In January, the U.S. announced the historic lifting of sanctions related to Iran's nuclear program. Although this measure was significant for non-U.S. persons, sanctions relief remains limited for U.S. residents. The trade embargo on Iran remains in place, leaving U.S. companies broadly prohibited from engaging in transactions involving Iran. The most significant opening for U.S. companies was the Office of Foreign Asset Control's issuance of a favorable licensing policy to permit U.S. persons to request authorization to export, re-export, sell, lease, or transfer to Iran commercial passenger aircraft and related parts and services for exclusively civil, commercial passenger aviation end-use.

As part of Obama's Export Control Reform Initiative, the Bureau of Industry and Security and the Department of State took steps to harmonize their respective regulations by revising terms used in the Export Administration Regulations for dual-use goods and the International Traffic in Arms Regulations for defense articles. The revisions clarify certain terms and add new definitions for others. The bureau also introduced new security thresholds for electronically transmitting encrypted technology and software without causing an "export" under the regulations.

In September, in an effort to further streamline the export regulations, Bureau of Industry and Security officials announced revisions to the Export Administration Regulations that eliminated the encryption registration requirement for exporters and amended the annual reporting requirements for exports of certain encryption products.

With trade policy in flux, international companies updated their compliance procedures substantially in 2016. As trade policy further evolves in 2017, we anticipate trade compliance will continue to be an important area of focus for risk mitigation.

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LABOR AND EMPLOYMENT LAW

By Michael P. Maslanka

The 5th Circuit deftly handled three employment law issues in 2016, each with broad practical applications. First, *Dillard v. City of Austin* and the intersection between an Americans with Disabilities Act disability and the employer's duty to reasonably accommodate it. Dillard worked for the city as a supervisor of manual laborers and took leave after being injured on the job. When the leave was exhausted, the city could have legitimately terminated him. It didn't. Instead, it placed him in a clerical position as an accommodation to his disability. He was later terminated for poor performance. While the city ultimately prevailed in the ADA lawsuit, the 5th Circuit rejected the city's argument that an employer is under no duty to reasonably accommodate an employee who could have been fired but was not. Rather, the court stressed that the duty of accommodation is continuous for the duration of employment.

In *EEOC v. Rite Way*, the court expanded the right of employees to be free from unlawful retaliation. Prior to the case, the court asked whether an employee "reasonably" believed she was opposing unlawful conduct. If so, the employee engaged in protected activity and is insulated from retaliation. But what constitutes a "reasonable belief"? In a well-crafted punch line to this perplexing question, the court declared: "(t)he reasonable belief standard recognizes there is some zone of conduct that falls short of an actual violation but could be reasonably perceived to violate (the law)."

The final case in this trifecta is *Heinsohn v. Carabin & Shaw*. The employer terminated an employee for poor performance with a conclusion-filled letter from the decision-maker. When asked in his deposition for details, the decision-maker had none. His subordinates had given him only conclusory reasons and had not asked for the employee's version of events. The court essentially employed a "snapshot" approach, looking only to what the decision-maker *knew* of poor performance *at the time*

of the termination. Thus, the employer had no facts. Summary judgment reversed.

And Texas appeals courts weighed in on disability and accommodation issues. *Donaldson v. Texas Department of Aging and Disability* interpreted the Texas Labor Code's provisions on reasonable accommodation. An employee was in a weakened state at work because of treatment for prostate cancer. As a result, the employer provided him with a part-time assistant to help with paperwork. She was promoted to a new position but was not replaced. He claimed that he asked for a replacement but that none were forthcoming. Summary judgment denied. Once an employer starts down the reasonable accommodation road, it must continue.

On December 1, 2016, the Department of Labor was set to require employers to pay $47,476 a year to employees if the employer wants to classify the employee as exempt from overtime. That's a dramatic increase from the current $23,660. Employers are now clamoring for a return to the previous regulations. On November 22, a federal district judge in the Eastern District of Texas issued a nationwide injunction preventing the rules from taking effect on December 1.

And finally, a federal district court recently adopted the Equal Employment Opportunity Commission's position that discrimination based on sexual orientation violates Title VII. A gay employee was allegedly harassed at work because of his relationship with another man. The commission argued that had the employee been a woman, he would not have been treated thus, making it a Title VII violation.[1] And on November 30, the United States Court of Appeals for the 7th Circuit heard en banc oral arguments on sexual orientation discrimination as a possible Title VII violation. Stay tuned to this development.

Notes

1. *EEOC v. Scott Medical Health Center* (W.D. Penn, November 4, 2016).

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LEGAL EDUCATION

By John G. Browning

Last year was a tumultuous time for legal education in Texas, filled with ups and downs. The state continued to offer a stronger employment market for law school graduates, even as the most recent American Bar Association statistics show that, nationally, only 59.2 percent of law school graduates in the class of 2015 have found long-term, full-time employment for which bar admission was required. And in a year in which bar passage rates across the country continued to decline, the Lone Star State provided one of the few bright spots. The passage rate for first-time Texas law school graduate test takers of the February 2016 Texas Bar Exam was 69 percent, while 82 percent of the first-time takers of the July 2016 passed. That was an improvement over the 76 percent passing rate for the July 2015 exam.

Among the Texas law schools with the highest first-timer passage rates for the most recent bar exam, the University of Texas School of Law led the way with a 93.9 percent pass rate, with Southern Methodist University Dedman School of Law not far behind with 91.1 percent. Baylor Law School posted an 86.9 percent passage rate, with the University of Houston Law Center and Texas Tech University School of Law close behind at 86 percent and 85.7 percent, respectively, followed by Texas A&M University School of Law (77.4 percent), St. Mary's University School of Law (73.6 percent), South Texas College of Law Houston (72.6 percent), and Texas Southern University Thurgood Marshall School of Law (66.1 percent).

Despite a rising bar passage rate statewide, the news was bleak for Texas' newest law school, UNT Dallas College of Law. In August, the fledgling yet innovative law school suffered a serious setback when the ABA Accreditation Committee recommended in a 21-page report that the school not receive provisional accreditation. The committee members stated in the report that they believed the school wasn't complying with ABA admissions standards of enrolling enough students who are capable of completing the requirements for a J.D. degree and passing the bar exam and expressed concern over the school's heavy dependence on tuition and the teaching quality of some of its adjunct faculty members. The law school responded in writing and with a presentation at an October hearing before the Council of the ABA Section of Legal Education and Admissions to the Bar, which remanded the accreditation decision to the committee for further review. While a decision is not expected until some time during the spring law school semester in 2017, UNT College of Law Dean Royal Furgeson remained upbeat about the school's prospects, saying in August "there's a giant need for affordable law schools like us, and we're going to meet that need." Despite the ABA's decision, UNT petitioned the Texas Supreme Court and received permission for its first graduates to sit for the July 2017 Texas Bar Exam.

Another Texas law school made national news over the controversy surrounding the change of its name. Early in the year, unranked South Texas College of Law changed its name to Houston College of Law and adopted a red and white color scheme similar to that of nationally-ranked University of Houston Law Center, which responded by filing a trademark infringement lawsuit, claiming the renaming was "nothing more than an improper shortcut to take advantage of the success UH has achieved." In October, U.S. District Judge Keith P. Ellison granted the University of Houston's request for a preliminary injunction, barring Houston College of Law from using the name and agreeing that prospective law students would be likely to assume a connection between Houston College of Law and the University of Houston. Dean Donald J. Guter recently announced that the school will now operate as South Texas College of Law Houston.

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PATENT LITIGATION

By Michael C. Smith

In 2016, four significant developments played out in patent litigation in Texas. Federal courts in the state saw a steep decrease in patent filings—especially those filed by "high-volume" non-practicing entities—similar to a substantial drop-off nationally. Courts continued to dismiss and award attorneys' fees in larger numbers of cases, while the Federal Circuit began to establish standards for the now popular motions to dismiss for lack of patentable subject matter. Parties and courts began grappling with the requirements of the 2015 amendments to the Federal Rules of Civil Procedure, which eliminated "bare-bones" pleadings in patent cases and narrowed the scope of permissible discovery. And, finally, Congress considered, but failed to pass, additional substantive legislation affecting patent litigation.

Decrease in patent filings

Filings of patent infringement cases decreased significantly nationwide in 2016, but filings in Texas courts declined even more. In 2015, the U.S. District Court for the Eastern District of Texas received about 43 percent of the nationwide patent filings. In 2016, filings in that court dropped by about 34 percent, with a noteworthy portion of the reduction coming from reduced filings by "high-volume" non-practicing entities.

Increased dismissals, sanctions, and transfers

A trend first seen in late 2015, increased dismissals, sanctions, and transfers continued through 2016. Texas federal district courts resolved numerous motions asserting lack of patentable subject matter under 35 U.S.C. § 101 under the new test set forth by the U.S. Supreme Court in *Alice Corporation Pty. Ltd v. CLS Bank International et al.*

Texas courts also gave significant awards of attorneys' fees to prevailing parties in patent infringement litigation under 35 U.S.C. § 285 with the substantially lowered requirements set forth in *Octane Fitness, L.L.C. v. ICON Health & Fitness, Inc.* Most notably, U.S. District Judge Rodney Gilstrap of Marshall granted the defendants' motion for fees in the *eDekka* litigation following a dismissal under § 101 and awarded about $390,000 to the remaining defendants.

Finally, grant rates in motions to transfer increased significantly during the year, rising to almost 57 percent in the Eastern District of Texas, even as the numbers of motions filed dropped substantially.

New federal pleading and discovery rules

Amendments to the Federal Rules of Civil Procedure, effective December 1, 2015, narrowed the scope of discovery by adding the requirement that all discovery sought must be "proportional to the needs of the case." While caselaw by Texas district courts is scant on the application of the new standards, it does provide a tool to address overbroad discovery requests.

The new rules also abrogated the use of the forms that had previously been attached. One of those forms had provided a basis for "bare-bones" pleadings in patent infringement cases, exempting patent cases from application of the plausibility requirements of the Supreme Court's holdings in *Twombly* and *Iqbal*. As a result of the change, plaintiffs have been required to provide more detail in their complaints alleging infringement. Texas district courts have provided a number of decisions defining the new level of detail in specific cases, but often, courts' requirements that detailed infringement contentions be provided early in the case have rendered disputes over the adequacy of language in pleadings largely moot.

Patent reform legislation

In Washington, D.C., both the proposed Innovation

Act by Rep. Bob Goodlatte of Virginia and the PATENT Act co-sponsored by Texas' U.S. Sen. John Cornyn were reported by their chambers' respective judiciary committees but failed to see floor action during the year. Similar legislation is likely to be proposed during the new Congress.

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PERSONAL INJURY LAW

By Melanie L. Fry

In 2016, the Texas Supreme Court provided clarification in a number of personal injury areas, including the Texas Medical Liability Act, the Texas Tort Claims Act, premises liability law, and Chapter 95 of the Texas Civil Practice and Remedies Code.

Texas Medical Liability Act

In *Christus Health Gulf Coast v. Carswell*,[1] the court held that a fraud claim alleging that a hospital took post-mortem actions to cover up malpractice, including improperly obtaining the widow's consent for a private autopsy, was a health care liability claim. Despite finding that the professional or administrative services underlying the plaintiffs' complaint were directly related to allegedly improper health care, the court held that the plaintiffs' post-mortem fraud claim did not relate back to the filing of the original medical malpractice claim and was thus barred by limitations.

In *Hebner v. Reddy*,[2] the court held that pre-suit service of a qualifying expert report upon an "eventual named party," after providing requisite notice, complied with the expert-report deadline in the TMLA.

Ferae Naturae

In *Union Pacific Railroad Co. v. Nami*,[3] the court applied the common law doctrine of ferae naturae (property owner is generally not liable for harm caused by indigenous wild animals) to bar the claim of a railroad employee who was bitten by mosquitoes and contracted West Nile virus.

Premises Liability and Premises Defects

In *Sampson v. University of Texas at Austin*,[4] the court clarified that "condition or use of tangible property" under the Texas Tort Claims Act means that the contemporaneous action or service (use) or state of being (condition) of the tangible personal property itself caused the injury, while "premises defect" means that the tangible personal property created the dangerous real-property condition. The court concluded that a negligence claim for injuries caused by an extension cord strung across a pedestrian walkway was based on a premises defect.

In *Occidental Chem. Corp. v. Jenkins*,[5] an employee sued both the current owner of a chemical plant (his employer) and the former owner of the plant following an injury caused by an acid-addition system installed by the former owner. The court held that premises liability—and not negligence—principles apply to a property owner who creates a dangerous condition on its property, regardless of how the injured plaintiff pleads. If an injury occurs after the condition's creator has conveyed the property, the premises liability claim generally lies against the new owner.

TCPRC Chapter 95

In *First Tex. Bank v. Carpenter*,[6] a bank's "go-to guy" for roof repairs was injured while showing an insurance adjuster the bank's roof damage. The court of appeals held that the plaintiff was not a "contractor" under Chapter 95 of the TCPRC because there was no actual contract between the parties. The Supreme Court disagreed, holding that an "actual" contract does not have to exist for a person to be considered a contractor for purposes of Chapter 95.

In *Ineos USA, LLC v. Elmgren*,[7] an independent contractor's employee was injured at a petrochemical plant and sued the plant and a plant employee. The court held that Chapter 95 applies to all categories of negligence claims, not just premises liability, but it does not apply to claims against a property owner's agent or employee who does not own the property, even if the agent is acting in a managerial capacity on the property owner's behalf.

Notes

1. No. 14-0362, 2016 Tex. LEXIS 392 (Tex. May 20, 2016).
2. No. 14-0593, 2016 Tex. LEXIS 412 (Tex. May 27, 2016).
3. No. 14-0901, 2016 Tex. LEXIS 571 (Tex. June 24, 2016).
4. No. 14-0745, 2016 Tex. LEXIS 486 (Tex. June 10, 2016).
5. 478 S.W.3d 640 (Tex. 2016).
6. 491 S.W.3d 729 (Tex. 2016).
7. No. 14-0507, 2016 Tex. LEXIS 504 (Tex. June 17, 2016).

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TAX LAW

By David E. Colmenero and John Strohmeyer

The past year has seen significant federal and state legislative and regulatory action for Texas tax lawyers, including a comprehensive overhaul of partnership audit rules by Congress, the issuance of two controversial sets of regulations by the U.S. Department of the Treasury and IRS, and an ongoing regulatory overhaul of Texas administrative rules by the Texas Comptroller of Public Accounts.

Revised Partnership Audit Rules

On November 2, 2015, President Barack Obama signed into law a set of statutory provisions that will substantially overhaul the manner in which many partnerships and pass-through entities are audited. The Bipartisan Budget Act of 2015 will generally apply to partnership returns filed for partnership tax years beginning after December 31, 2017. Throughout the past year, both taxpayers and tax practitioners have been working to understand the new rules, identify key areas implicated, and develop strategies to address those issues. On March 28, 2016, the IRS invited comments on the new rules and the State Bar of Texas Tax Section submitted comments in April. In August, the Treasury Department issued temporary regulations, which provide guidance on making an early election application under the new legislation.

IRC Sec. 385 Regulations

The IRS issued finalized and temporary regulations under Section 385 that address how to determine whether certain interests in a corporation are considered debt or equity. These regulations were in response to the increasing number of corporate inversions and earnings-stripping techniques used by some corporate taxpayers to reduce their U.S. tax liability by shifting income to foreign entities. The proposed regulations consisted of three new sets of rules: (1) authority to treat certain interests in a corporation as part debt and part equity (Prop. Treas. Reg. § 1.385-1), (2) new documentation requirements for related party debt to be treated as such (Prop. Treas. Reg. § 1.385-2), and (3) rules for the re-characterization of certain related party debt as equity (Prop. Treas. Reg. § 1.385-3, -4). The final and temporary regulations substantially revise the proposed regulations to target the transactions of greatest concern and remove some of the more controversial elements of the proposed regulations.

IRC Sec. 2704 Proposed Regulations

In August, the IRS issued a much anticipated set of proposed regulations under Section 2704 of the Internal Revenue Code that provide rules for determining the value of interests in entities held by family members for transfer tax purposes. Thousands of comments were submitted to the IRS during the comment period, including some from the State Bar Tax Section. In addition, two members of the Tax Section—Celeste Lawton and Laurel Stephenson—testified in the Tax Section's name before the Department of the Treasury and the IRS in Washington, D.C., in December. Two other members of the Tax Section testified in other capacities.

Texas Comptroller Review of Rules

On the state side, the Texas Comptroller has been actively proposing revisions to a large number of the agency's rules. The regulatory provisions that are either in the process of being amended or have been recently amended are too many to list. Most notably, however, the comptroller issued a set of proposed revisions to the procedural rules that govern the administrative hearings process. Members of the Tax Section have contributed commentary either orally or in writing, including a submission in September addressing proposed amendments to Comptroller Rule 3.292, Repair, Remodeling, Maintenance and Restoration of Tangible Personal Property.

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TEXAS ACCESS TO JUSTICE

By Harry M. Reasoner

Ideally, every citizen who has a legitimate need for a lawyer but cannot afford to hire one should obtain pro bono representation. The cold reality is we have neither enough lawyers volunteering to do pro bono work nor enough funding for legal aid to make this even remotely possible. Four out of five of those who apply for free legal assistance must be turned away. The overarching goal of the Texas Access to Justice Commis-

sion is to create more paths to justice for more Texans.

The State Bar of Texas, the Texas Access to Justice Foundation, and the Texas Access to Justice Commission—with leadership from the Texas Supreme Court—have striven to increase legal aid funding and pro bono efforts across the state. Voluntary ATJ contributions through the dues statement increased last year to a record level of $1,323,295. A survey released in 2016 found that in the previous year, Texas lawyers contributed 1.87 million pro bono hours with a value of more than $4.67 billion. The gala sponsored by the bar and the commission has raised over $2 million for civil representation of veterans over the past six years. The 84th Legislature appropriated $3 million for basic civil legal services for veterans over the biennium.

The commission is exploring areas that do not require increased funding, such as legislative and rule changes that could simplify legal burdens for those of limited means. At the request of the House Judiciary & Civil Jurisprudence Committee, the commission submitted a report in August on how to improve access to the judicial system for self-represented litigants.

In October, the commission submitted proposed amendments to Canon 3B(8) of the Texas Code of Judicial Conduct to clarify that judges can make reasonable accommodations to ensure all litigants, including the self-represented, have the opportunity to be heard in court. The commission also proposed policies to clarify what clerks and court personnel can and cannot do when interacting with self-represented litigants.

As a companion to the Transfer on Death Deed passed last session, the commission is working on legislation to permit people to transfer title to their vehicle on death. Low-income people would be able to transfer their three most important assets—a home, a car, and a bank account—at minimal cost, outside of probate.

After the commission documented the troubles low-income litigants had obtaining affidavits of indigency, the Texas Supreme Court revised Texas Rule of Civil Procedure 145 and its counterparts. The court clarified that the issue is whether the party can *afford* to pay costs and tightened how a Statement of Inability to Afford Payment of Court Costs can be contested.

The promulgation of plain language forms in areas of high need for low-income people continues. A basic will form is in the works, as are Small Estate Affidavit Muniment of Title forms. Landlord-tenant forms will be soon to follow.

Efforts to increase pro bono work informs everything the commission does. To increase the number of attorneys who can do pro bono, a joint work group of the bar and commission proposed changes to Article XIII of the State Bar Rules and Chapter 81 of the Texas Government Code that would allow inactive attorneys, who may be temporarily out of the workforce, to practice law solely for pro bono purposes.

The commission's endeavors to encourage a culture of pro bono service are wide-ranging. In 2016, Pro Bono Spring Break placed 83 law students in 12 legal aid organizations in 14 cities, and the ATJ Internship Program funded 15 students to work with legal aid across the state. To drive home the importance of pro bono, the ATJ Poverty Simulation launched last year asks participants to walk a month in the shoes of a low-income Texan.

Although much remains to be accomplished, it is inspiring and rewarding to see the progress made and what a difference for good our profession can make.

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TEXAS SUPREME COURT

By Scott P. Stolley

In its 2015-2016 term, the Texas Supreme Court addressed various topics of general interest to Texas lawyers.

Arbitration

The court held in *Cardwell v. Whataburger Rests. LLC* that a court must address all defenses raised in opposition to arbitration. In *RSL Funding, LLC v. Pippins*, the court ruled that a party did not waive its right to compel arbitration as to some parties when it actively litigated with other parties who were not covered by the arbitration agreement. And in *Hoskins v. Hoskins*, the court held that the Texas General Arbitration Act lists the exclusive grounds for vacating an arbitration award.

Attorney Disqualification

The court held in *In re RSR Corp.* that *In re Meador*, rather than *In re American Home Products Corp.*, supplies the factors for determining if counsel must be disqualified for having received confidential information from an opposing party's former employee.

Legal Malpractice

In *Stanfield v. Neubaum*, the court held that judicial error can be a new and independent cause that relieves an attorney of malpractice liability.

Insurance Coverage

The court held in *J&D Towing, LLC v. Am. Alternative Ins. Corp.* that loss-of-use damages are available in addition to market value when personal property is totally destroyed. And in *U.S. Metals, Inc. v. Liberty Mutual Group, Inc.*, the court held that mere incorporation of the insured's defective component into a refinery was not "physical injury" under the insured's liability policy.

Dominant Jurisdiction

In *In re J.B. Hunt Transport, Inc.*, a trucking company filed the first lawsuit in Waller County, while the occupants of the other car later sued in Dallas County. The court held that the Waller County court had dominant jurisdiction.

Personal Jurisdiction

The court found specific personal jurisdiction in two different cases. In *Cornerstone Healthcare Group Holding, Inc. v. Nautic Management VI, L.P.*, the defendants, through their own conduct when affiliated entities bought some Texas hospitals, purposefully availed themselves of doing business in Texas. And in *TV Azteca v. Ruiz*, some Mexican media companies that had actively operated in Texas were subject to Texas jurisdiction for a defamation claim arising from a television broadcast that emanated from Mexico.

Healthcare Liability

The court rejected arguments that hospital visitors' slip-and-fall claims are covered by the Texas Medical Liability Act. *See Galvan v. Mem'l Hermann Hosp. Sys.* and *Reddic v. E. Tex. Med. Ctr. Reg'l Health Cars Sys.*

Discovery

The court held in *In re DePinho* that a pre-suit deposition under Texas Rule of Civil Procedure 202 is not available if the potential lawsuit is not ripe. And in *In re H.E.B. Grocery Co., L.P.*, the court found error in denying an independent medical exam of the plaintiff.

Grounds for New Trial

The court held in *In re Bent* that one ground for a new trial was not supported by the record and the other grounds were not stated with sufficient specificity.

Indemnity

In *Centerpoint Builders GP, LLC v. Trussway, Ltd.*, a general contractor, which had been sued by an injured worker, was not entitled to chapter 82 indemnity from a truss manufacturer. The court held that the general contractor was not a "seller" of the truss.

Reasonably Equivalent Value

In *Janvey v. The Golf Channel, Inc.*, the court addressed "reasonably equivalent value" under the Texas Uniform Fraudulent Transfer Act, finding the requirement is met if the transferee provided a market-value performance in an arm's-length transaction in the ordinary course of business. Value is to be determined objectively at the time of the transaction, not in hindsight.

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TRADEMARK LITIGATION

By Katherine A. Compton

South Texas College of Law announced on June 22, 2016, that it was changing its name to Houston College of Law.[1] Five days later, the Board of Regents of the University of Houston on behalf of its member institutions, including the University of Houston Law Center, filed suit for trademark infringement in the U.S. District Court for the Southern District of Texas.[2] On October 14, 2016, the court granted a preliminary injunction against the defendant, finding there was a likelihood of success on the merits. The decision prevented the Houston College of Law (formerly known as South Texas College of Law) from using the trademark "Houston College of Law" as a name, mark, or source identifying for its legal education services.[3]

In making its decision, the court analyzed each factor necessary to succeed on a trademark infringement case, including a showing that: 1) the claimed mark is eligible for protection; 2) the party seeking protection is the mark's senior user; 3) there is likelihood of confusion; and 4) the likelihood of confusion would cause plaintiff irreparable harm for which there is no adequate legal remedy. The court determined that the plaintiff's trademarks were eligible for protection and had the superior mark.

In focusing on likelihood of confusion, the court looked at the similarity of the marks and noted that the 5th Circuit uses a "subjective eyeball test" to determine the similarity of marks.[4] The court wrote in its opinion that it was troubled by not only the similarity of the wording of the two names but also by the way in which

the defendant deployed its mark into the marketplace, using block letters, like the plaintiff, that emphasized the word "HOUSTON," and using a red and white color scheme, again, just like the plaintiff.[5] The defendant had previously used dark crimson and gold but changed the colors to a shade of red that is "more reminiscent of the hue that has long been employed by UH [plaintiff]."[6]

The court next considered evidence of actual confusion and determined that the University of Houston's expert's survey that showed 25 percent consumer confusion was substantially stronger than the defendant's expert.[7] The plaintiff also provided a number of specific instances of actual consumer confusion, including a prospective law student who assumed that the Houston College of Law was affiliated with the University of Houston.[8]

After determining that the plaintiff would be irreparably harmed, the court balanced the hardships and, citing *T-Mobile U.S., Inc. v. Aio Wireless LLC*, stated: "The harm to [UH's] brand, which it has spent [millions] of dollars and [many decades] creating, substantially outweighs the … harms that [defendant] will suffer in stopping the use" of the Houston College of Law mark.[9] Following a hearing held on October 26, 2016, the Houston College of Law, formerly the South Texas College of Law, stated it would announce a new name by November 4. If the University of Houston has no conflict with the new name, the court stated, it will begin to be implemented, and that process must finish by the year's end. Officials announced three days later that the new name would be South Texas College of Law Houston.

Notes

1. Memorandum Opinion Setting Out Findings of Fact and Conclusions of Law, *The Board of Regents of the University of Houston System on Behalf of the University of Houston System and its Member Institutions et al., v. Houston College of Law, Inc., formerly known as South Texas College of Law*, Civil Action No. 4:16-CV-1839 (S.D. Tex.)(ECF No. 67).
2. *See The Board of Regents of the University of Houston System on Behalf of the University of Houston System and its Member Institutions et al., v. Houston College of Law, Inc., formerly known as South Texas College of Law*; Civil Action No. 4:16-CV-1839 (S.D. Tex.); Complaint (ECF. No. 1).
3. Memorandum Opinion (ECF No. 67).
4. *Board of Regents of the University of Houston et al.* at 12.; *T-Mobile US, Inc. v. AIO Wireless LLC*, 991 F.Supp.2d 888, 921 (S.D. Tex. 2014) (quoting *Exxon Corp. v. Tex. Motor Exchange of Houston, Inc.*, 628 F.2d 500, 504 [5th Cir. 1980]).
5. *Id.* 12.
6. *Id.* 20.
7. *Id.* 25.
8. *Id.* 28.
9. *Board of Regents of the University of Houston et al.*; *T-Mobile*, 991 F.Supp.2d at 929.

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U.S. SUPREME COURT

By Dustin Howell

With Justice Antonin Scalia's death in February 2016, the U.S. Supreme Court found itself in the rare circumstance of having an even number of justices and finished the term with four ties announced in nine-word orders leaving the lower courts' decisions intact. Nonetheless, the court managed to decide several cases that could affect your practices and your clients' interests, a few of which are summarized here.

Birchfield v. North Dakota.[1] Are warrantless breath and blood tests permissible under the Fourth Amendment? The defendants in this consolidated appeal refused breath and blood tests in states that criminalized such refusals. The court concluded that the Fourth Amendment permitted warrantless *breath* tests but held warrantless *blood* tests were not permissible, reasoning that piercing the skin implicated "significant privacy concerns" necessitating a warrant.

Americold Realty Trust v. ConAgra Foods, Inc.[2] When determining diversity of citizenship, must a court consider the residence of a trust's shareholders, or just its trustees? Plaintiffs sued a real-estate trust over a contract dispute in state court. The defendant trust removed the case to federal court. Plaintiffs challenged the district court's jurisdiction, arguing that certain trust shareholders' citizenship defeated diversity because they were citizens of the same states as the plaintiff corporations. The 10th Circuit held that diversity was defeated, and the Supreme Court affirmed, reasoning that because the trust was not incorporated, its citizenship was determined from the citizenship of its "members," including shareholders.

Halo Electronics, Inc. v. Pulse Electronics, Inc.[3] Is the Federal Circuit's two-part test for determining whether a patent plaintiff is entitled to enhanced damages proper? Since 2007, the Federal Circuit has applied a two-part test to determine whether an award of enhanced damages under United States Code § 284 was appropriate: (1) did the infringer act despite an objectively high likelihood that its actions constituted infringement, and (2) was the risk of infringement known or so obvious it should have been known. The Supreme Court, emphasizing district courts' discretion in analyzing infringers' conduct, abrogated the test, concluding that it read too much into the statute and was "unduly rigid."

Campbell-Ewald Co. v. Gomez.[4] Is class certification defeated when a named plaintiff rejects a settlement offer that would afford the plaintiff complete relief of his

claim? The recipient of an unsolicited text message from a U.S. Navy contractor filed a nationwide class action, arguing that the contractor violated the Telephone Consumer Protection Act when it sent a recruiting text message to 100,000 recipients. The contractor made a settlement offer to the nominal plaintiff, which he rejected. The contractor then argued that the settlement offer mooted the claim, and thus the class action, because it offered him complete relief. The Supreme Court disagreed, holding that an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case, reasoning that because the offer was no longer operative after the plaintiff's rejection, the parties remained adverse.

DirecTV, Inc. v. Imburgia.[5] DirecTV's service agreement incorporated an arbitration provision that included a waiver of so-called "class arbitration." It further provided that if such waivers were unenforceable "under the laws of your state," then the arbitration provision as a whole would be invalid. The plaintiff, a DirecTV subscriber in California, sued DirecTV in state court. DirecTV then moved to compel arbitration. The state court declined to compel arbitration, citing California courts' rejection of class-arbitration waivers. The Supreme Court reversed, holding that the state court's interpretation conflicted with, and was thus preempted by, the Federal Arbitration Act. **TBJ**

Notes

1. 136 S. Ct. 2160 (2016).
2. 136 S. Ct. 1012 (2016).
3. 136 S. Ct. 1923 (2016).
4. 136 S. Ct. 663 (2016).
5. 136 S. Ct. 463 (2015).

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