



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

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ANTITRUST AND BUSINESS LITIGATION

By Emily Westridge Black and Carrington Giammittorio

This year, the U.S. Supreme Court considered market definition in two-sided markets and issued two rulings with potentially broad implications for commercial disputes. The court also heard arguments in *Apple v. Pepper*, a case that implicates the limits of the *Illinois Brick* indirect purchaser rule.

Market Definition in Two-Sided Markets

In *Ohio et al. v. American Express*, the court considered how the relevant market should be defined in antitrust cases when the market at issue is two-sided.¹ The case involved a challenge to American Express's anti-steering rules (which prohibit merchants from incentivizing consumers to use credit cards that charge merchants lower fees). The petitioners argued the rules violated the Sherman Act because they reduced the incentive for card networks to lower merchant fees, injuring merchants.

In a 5-4 opinion, the Supreme Court disagreed, reasoning that a credit card network is a type of two-sided market called a "transaction" platform, where simultaneous sales of products or services are made to two different groups of buyers (here, consumers and merchants). The court held that these platforms must be analyzed as a whole (rather than focusing on one set of buyers), and antitrust harm results only when anticompetitive effects are felt by both sets of buyers.

Because AmEx's rules did not increase the cost of transactions or reduce the total number of transactions, they did not cause harm cognizable under antitrust laws. The court suggested AmEx's higher merchant fees could indicate healthy market competition because they contributed to benefits to consumers, including cash-back rebates.

Revisiting the Dormant Commerce Clause and Interpreting Foreign Law

The Supreme Court analyzed the dormant commerce clause in *South Dakota v. Wayfair*, overturning *Quill Corp v. North Dakota*'s physical-nexus rule for requiring out-of-state retailers to pay state sales taxes.² Vacating the decision of the South Dakota Supreme Court, Justice Anthony Kennedy's majority held that states should not be prevented from "collecting lawful taxes through a physical presence rule that can be satisfied only if there is an employee or a building in the state." Discussing changes to the retail sector in the internet age, the majority found that allowing "remote sellers to escape an obligation to remit a lawful state tax ... is unfair and unjust to ... competitors, both local and out of state, who must remit the tax; to the consumers who pay the tax; and to the states that seek fair enforcement of the sales

tax, a tax many states for many years have considered an indispensable source for raising revenue."

The court also held in *Animal Science Products v. Hebei Welcome Pharmaceutical*³ that federal courts are not "bound to adopt [a] foreign government's characterization" of its own laws—including its own antitrust laws. Here, Chinese companies argued they could not be liable for fixing the prices and export quantity of vitamin C sold in the U.S. because they were required to do so by Chinese law. The Ministry of Commerce for the People's Republic of China filed an amicus brief supporting that position. The district court entered judgment in favor of plaintiffs but the U.S. Court of Appeals for the 2nd Circuit reversed, holding that federal courts are "bound to defer" to a foreign government's official statement on its law. In a unanimous opinion, the Supreme Court disagreed, holding that Federal Rule of Civil Procedure 44.1 specifically authorizes courts to "consider any relevant material or source" when interpreting foreign law.

Looking Ahead

The court granted certiorari in *Apple v. Pepper*,⁴ taking an opportunity to consider the scope of the *Illinois Brick* doctrine, which limits antitrust standing to direct purchasers. In this case, consumers allege Apple monopolized the market for iPhone applications ("apps"). The district court dismissed, holding consumers do not have standing under *Illinois Brick* because they do not purchase directly from Apple, but rather from app developers, who use the App Store as a virtual marketplace. The U.S. Court of Appeals for the 9th Circuit reversed, criticizing the lower court's formalistic view. The case is now pending and has the "direct" attention of antitrust practitioners.

Notes

1. 138 S. Ct. 2274 (2018).
2. 138 S. Ct. 2080 (2018).
3. 138 S. Ct. 1865 (2018).
4. *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313 (9th Cir. 2017), cert. granted sub nom. *Apple v. Pepper*, 138 S. Ct. 2647 (2018).



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APPELLATE LAW

By Warren W. Harris and Walter A. Simons

The Texas Supreme Court addressed several important appellate issues this term, including error preservation and finality.

The Supreme Court addressed error preservation in two cases. In *Dudley Construction v. ACT Pipe & Supply*, ACT sued Dudley for misapplication of trust funds, among other claims.¹ The jury awarded ACT no damages on the trust-fund claim, but the trial court awarded damages in an order granting judgment notwithstanding the verdict.² On appeal, Dudley challenged the damages awarded by the court on the trust-fund claim, and ACT argued that the evidence conclusively established its entitlement to damages.³ The court of appeals remanded for further proceedings, concluding that the evidence did not support either the jury's failure to award damages or the amount of damages awarded by the trial court.⁴ In the Supreme Court, Dudley argued that ACT failed to present cross-points in the court of appeals preserving its challenges to the zero-damages finding.⁵ Although ACT had not labeled its arguments as cross-points, the court concluded that ACT preserved error because its substantive arguments would vitiate the jury's verdict.⁶

In *Musallam v. Ali*, Musa Musallam requested a jury question and received an adverse finding.⁷ Musallam unsuccessfully filed post-trial motions, arguing that the jury's finding was immaterial and unsupported by legally sufficient evidence.⁸ The court of appeals concluded that Musallam failed to preserve error because he did not object to the jury question.⁹ The Supreme Court reversed, explaining that an immateriality argument is not a jury charge complaint requiring an objection, and that a no evidence point may be preserved either by objecting to the question or by filing a motion for judgment notwithstanding the verdict or to disregard.¹⁰

The Supreme Court also addressed finality in two cases. In *McFadin v. Broadway Coffeehouse*, the trial court signed a judgment for Coffeehouse for the recovery of an interest in real property and later set the rental value as the supersedeas amount.¹¹ After an appeal, the trial court ordered McFadin to pay Coffeehouse the full amount of the supersedeas bond.¹² McFadin appealed that order, but the court of appeals dismissed the appeal for want of jurisdiction.¹³ The Supreme Court acknowledged that an order to pay a money judgment is generally nonappealable, but concluded that the trial court's order was appealable because it ordered monetary relief in excess of that contained in the original judgment.¹⁴ While the supersedeas bond was related to the judgment, the order requiring payment of the bond amount went beyond the provisions of the judgment.¹⁵

In *In re Elizondo*, the trial court issued an order granting

summary judgment to defendants on one of several claims, but erroneously included *Lehmann* language stating that the order was final and appealable and disposed of all claims and all parties.¹⁶ After plenary power expired, the trial court issued an amended order omitting the finality language.¹⁷ The Supreme Court held that the amended order was an attempt to correct judicial error after the expiration of plenary power and therefore was void.¹⁸ The court also concluded that the order stated clearly and unequivocally that it was final—"erroneous, but final"—and therefore the record was irrelevant.¹⁹

Notes

1. 545 S.W.3d 532, 535 (Tex. 2018).
2. *Id.*
3. *Id.* at 535-36, 539.
4. *Id.* at 536.
5. *Id.* at 537-39.
6. *Id.*
7. No. 17-0762, 2018 WL 5304678, at *1-2 (Tex. Oct. 26, 2018).
8. *Id.*
9. *Id.*
10. *Id.* at *1, 3-4.
11. 539 S.W.3d 278, 280-81 (Tex. 2018).
12. *Id.* at 281.
13. *Id.* at 281-82.
14. *Id.* at 284-85.
15. *Id.*
16. 544 S.W.3d 824, 825 (Tex. 2018) (per curiam) (citing *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205-06 (Tex. 2001)).
17. *Id.*
18. *Id.* at 829.
19. *Id.* 827-29.



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ARBITRATION LAW

By Yolanda C. Garcia and David A. Silva

Federal Developments

In May, the U.S. Supreme Court issued a 5-4 opinion in *Epic Systems Corp. v. Lewis*,¹ which further established the court's deference to employee arbitration agreements containing class and collective action waivers. The court's consolidation of three cases from the U.S. Courts of Appeals 5th, 7th, and 9th Circuits resolved a larger, six-circuit split regarding the enforceability of such waivers, holding that "arbitration agreements providing for individualized proceedings must be enforced." Although the lower courts in *Epic Systems* (7th Circuit) had found that the National Labor Relations Act's protection of "concerted activity" prohibited the petitioners from enforcing an individual arbitration agreement, the court rejected this argument, noting that while the National Labor Relations Act, or NLRA, secured for employees the "right to organize unions and bargain collectively," the NLRA did not include "a right to class actions." As such, the Federal Arbitration Act, or FAA, required courts "to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." In the short time since the ruling came down, multiple district and circuit courts have already cited *Epic Systems* in dismissing collective action cases brought by employees who had previously signed individual arbitration agreements.²

Texas Developments

The Texas Supreme Court recently limited the scope of an arbitrator's authority to compel arbitration when the moving party was not itself a signatory to the arbitration agreement. In *Jody James Farms, JV v. Altman Group*,³ an insurance agency sought to force arbitration upon an insured suing for damages related to a policy he purchased from the agency. The agency, which was not a named party or a signatory on the policy, nevertheless attempted to force the insured into arbitration under the policy's terms. The court noted that a party could not be "forced to arbitrate absent a binding agreement to do so," and found that the arbitrator had no authority to compel arbitration against the insured, since the agency was not a signatory to the policy. Prior to reaching this conclusion, however, the court identified "six scenarios in which arbitration with non-signatories may be required," including, for example, direct-benefits estoppel (noting that when "a claim depends on the contract's existence and cannot stand independently ... equity prevents a person from avoiding the arbitration clause that was part of that agreement.") While the court ultimately rejected the agency's argument in *Jody James*, practitioners should nevertheless find its analysis instructive.

Cases to Watch

The U.S. Supreme Court currently has *three* separate

arbitration cases scheduled for argument during the 2018 term, including one rising from the 5th Circuit. That case, *Henry Schein v. Archer and White Sales*,⁴ will assess whether the FAA permits a court to decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes the claim of arbitrability is "wholly groundless." Meanwhile, in *Lamps Plus v. Varela*,⁵ the court will consider whether the FAA forecloses a state law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements. Finally, in *New Prime v. Oliveira*,⁶ the court will address two issues: (1) whether a dispute over applicability of the FAA's Section 1 exemption is an arbitrability issue that must be resolved in arbitration pursuant to a valid delegation clause; and (2) whether the FAA's Section 1 exemption, which applies on its face only to "contracts of employment," is inapplicable to independent contractor agreements.

Notes

1. 138 S. Ct. 1612 (2018).
2. See, e.g., *Sifuentes v. Brema Investments*, No. H-17-1742 (W.D. Tex. June 27, 2018) (Magistrate memorandum recommending dismissal and order compelling arbitration); *Gaffers v. Kelly Services*, 900 F.3d 293 (6th Cir. 2018).
3. 547 S.W.3d 624 (Tex. 2018).
4. 878 F.3d 488 (5th Cir. 2017), cert. granted, 138 S.Ct. 2678 (Jun. 25, 2018) (No. 17-1272).
5. 701 Fed.Appx. 670 (9th Cir. 2017), cert. granted, 138 S.Ct. 1697 (Apr. 30, 2018) (No. 17-988).
6. 857 F.3d 7 (1st Cir. 2017), cert. granted, 138 S.Ct. 1164 (Feb. 26, 2018) (No. 17-340).



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BANKRUPTCY LAW

By Aaron M. Kaufman

Whoever accused the 5th Circuit of being out of touch with popular culture has not read the 5th Circuit's decision in *Furlough v. Cage (In re Technicool Systems)*.¹ In that opinion—in addition to holding that the debtor's owner was not a “creditor” with standing to object to the trustee's employment of counsel to sue the owner—the 5th Circuit invoked the well-known refrain: “the more money we come across, the more problems we see.”² The 5th Circuit's reference to a late 1990s hip-hop anthem was certainly “on trend” in 2018.

In more recent news, the Supreme Court unanimously held that a debtor's unwritten misrepresentations about his tax refund was not enough to except the resulting debt from discharge.³ The attorney-creditor, relying on representations that a future tax refund would pay the attorneys' fees, continued to work for the debtor, and only later discovered that the debtor lied about the refund.

While bankruptcy is intended to give fresh starts to honest debtors, Bankruptcy Code Section 523(a)(2) provides an exception if a creditor proves that its debt was incurred by either: (i) a statement *in writing* “respecting” the debtor's “financial condition;” or (ii) a false representation or actual fraud concerning something *other* than the debtor's “financial condition.” Because debtor's representations about his tax refunds were unwritten, the attorney-creditor argued that a representation about this “single asset” was not “a statement respecting the debtor's financial condition,” and, thus, need not be written to fall within the discharge exception.

Justice Sonia Sotomayor quickly noted that “[t]he statutory language makes plain that a statement about a single asset can be a ‘statement respecting the debtor's financial condition.’” Following this logic, the court concluded that, even though the debtor's representations about his tax refund were false, they fit within the broad category of “a statement respecting the debtor's financial condition” that only became non-dischargeable if in writing. Under the plain meaning, the court held that Bankruptcy Code Section 523(a)(2) did not prevent the debtor from discharging this debt, because the fraud was unwritten. The decision marked the second time in the past four years that the court noted the unavailability of a statutory remedy under the Bankruptcy Code despite a debtor's blatant misconduct.⁴

A more recent decision of the 5th Circuit involves intellectual property rights where the debtor files bankruptcy and sells its assets.⁵ In *Provider Meds*, the debtors' cases had been converted to Chapter 7 where, unlike Chapter 11 cases, the trustee has only 60 days to assume or reject “executory contracts” (including potentially valuable IP licenses). After that 60-day window, the contracts are deemed rejected as a matter of

law. In *Provider Meds*, the purchaser gave value to acquire the debtor's licenses, only to find out a year later (after more litigation) that the debtors' rights under the licenses had been terminated as a matter of law before the sale. In this decision, the 5th Circuit held that the licenses were “executory” and, thus, rejected as a matter of law before the sale was consummated.

Speaking of intellectual property, the Supreme Court granted certiorari in late October to consider the impact of a debtor's trademark license rejection on the trademark licensee.⁶ For other types of intellectual property, the licensee may elect to retain its rights (with some limitations) even if the debtor rejects the license. Next year, the Supreme Court will resolve a circuit split and determine whether trademarks are like other types of IP, or whether the Bankruptcy Code's omission of trademarks from the definition of “intellectual property” warrants a different result for trademarks.

Notes

1. 896 F.3d 382 (5th Cir. 2018).
2. *Id.* at 386 (citing Notorious B.I.G., *Mo Money Mo Problems*, on Life After Death (Bad Boy/Arista 1997)).
3. *Lamar, Archer & Cofrin v. Appling*, 138 S. Ct. 1752, 201 L. Ed. 2d 102 (June 4, 2018).
4. See also *Law v. Siegel*, 134 S. Ct. 1188 (2014).
5. *RPD Holdings v. Tech Pharm. Servs.*, (*In re Provider Meds*), --- F.3d ---, 2018 U.S. App. LEXIS 30600 (5th Cir. Oct. 29, 2018).
6. See *Mission Prod. Holdings v. Tempnology*, (*In re Tempnology*), 879 F.3d 389 (1st Cir. 2018), cert. granted ___ S. Ct. ___, 2018 U.S. LEXIS 6265, 2018 WL 2939184 (Oct. 26, 2018).



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CONSTRUCTION LAW

By Matthew J. Sullivan

Starting in January 2018, the Construction Law Section began its publication of *The Change Order* so that its members receive periodic updates of recent Texas court decisions concerning construction law and related matters. *The Change Order* includes a brief description of the key points in each case with a link to the full opinion, and over 140 opinions have been identified in *The Change Order* through the August edition.

Among the many construction-related court opinions published this year, several are particularly relevant in construction-related disputes. In *Dudley Constr. v. ACT Pipe and Supply*,¹ the Texas Supreme Court answered the question of whether attorneys' fees are recoverable under Texas Property Code §§ 162.001-.033, more commonly known as the Texas Construction Trust Fund Act, or TCTFA. They are not. The TCTFA defines certain construction payments and loan receipts as trust funds and outlines a number of remedies when those trust funds are misappropriated in violation of the TCTFA. Due to a dispute between the general contractor, Dudley Construction, and its supplier, ACT, relating to two projects for different cities, Dudley did not pay ACT despite having received payment from the cities. ACT sued for breach of contract and violation of the TCTFA and sought attorneys' fees. Among other things, the jury found that Dudley misapplied trust funds and also awarded attorneys' fees to ACT. The court of appeals remanded the attorneys' fees issue to the trial court for determination and suggested that attorneys' fees are recoverable for a TCTFA claim. The Texas Supreme Court held that attorneys' fees are not recoverable under the TCTFA because the statute does not provide for them. In addition, the court noted that while a breach of contract claim might provide a path to recovery of attorneys' fees under Texas Civil Practice and Remedies Code § 38.001, a claim for "misapplication of trust funds is not one of the causes of action listed in [that] section."

Arbitration was the subject of a number of court opinions and understandably so considering the fact that the design and construction process typically requires numerous parties with predictably different contract terms. An important issue for construction law practitioners is how to compel arbitration when non-signatories to arbitration agreements are involved in the underlying dispute. In *Jody James Farms, JV v. Altman Group*,² the Supreme Court determined that arbitrability of a claim between a party to an arbitration agreement and a non-signatory is a gateway issue for the trial court to decide and not the arbitrator. The court also held that an arbitration agreement's mere incorporation of the American Arbitration Association's rules does not show a clear intent to arbitrate arbitrability with non-signatories. In arriving at its decision, the Supreme Court reviewed the

six scenarios identified by courts in which arbitration with non-signatories may be required.

Several other Supreme Court opinions important to construction law practitioners include: *Sky View at Las Palmas v. Mendez*³ (one satisfaction rule; joint liability is not required for application of one satisfaction rule; settlement credits applicable to breach of contract actions; single, indivisible injury analysis; collateral-source rule); *Wausau Underwriters Ins. Co. v. Wedel*⁴ (waiver of subrogation relative to worker's compensation claims; carrier's right to seek to recover indirectly from settlement that third party pays to the employee); *Adams v. Starside Custom Builders*⁵ (alleged defamatory communications made by email and blog about developer/builder related to a "matter of public concern" as defined by the Texas Citizens Participation Act); *Jefferson County v. Jefferson County Constables Association*⁶ (common law grounds to vacate arbitration award are narrow and "do not include an arbitrator's mere error in applying the law"); and *City of San Antonio v. Tenorio*⁷ (waiver of sovereign immunity under the Texas Tort Claims Act; notice requirements under the TTCA).

As noted above, there are over 130 additional opinions from other Texas courts of appeals that address the myriad issues important to construction law practitioners.

Notes

1. 545 S.W.3d 532 (Tex. 2018).
2. 547 S.W.3d 624 (Tex. 2018).
3. No. 17-0140 (Tex. June 1, 2018).
4. No. 17-0462 (Tex. March 1, 2018).
5. 547 S.W.3d 890 (Tex. 2018).
6. 546 S.W.3d 661 (Tex. 2018).
7. 543 S.W.3d 772 (Tex. 2018).



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CONSUMER LAW

By Dana Karni

Constitutionality of the Consumer Financial Protection Bureau

The 5th Circuit Court of Appeals is currently considering the constitutionality of the Consumer Financial Protection Bureau's structure.¹ Multiple briefs were submitted on either side of the issue: Those in support of the CFPB argue that there is legal precedent spanning 80 years to support an independent, administrative agency with only one director whereas those in opposition to the current structure argue that an independent administrative agency must be headed by multiple commissioners, directors, or board members.² There is currently a split on this issue; the U.S. District Court for the Southern District of New York recently held the structure to be unconstitutional while the U.S. Court of Appeals for the District of Columbia Circuit held the structure to be constitutional.³

Minimum Contact for Personal Jurisdiction for Fraud

In *Trois v. Apple Tree Auction Ctr.*, the 5th Circuit held that, in relation to fraud claims, Apple Tree Auction Center willingly participated in a conference call to Texas, in which they made claims alleged to be fraudulent by the plaintiff, that proved sufficient minimum contact for Apple Tree to reasonably anticipate being called to court in Texas.⁴ However, the conference call was not sufficient for the breach of contract claim because the contract was executed and performed in Ohio.⁵

HR 5082

HR 5082 is currently on the Union Calendar in the U.S. House of Representatives. The bill was introduced to "amend the Fair Debt Collection Practices Act to exclude law firms and licensed attorneys who are engaged in activities related to legal proceedings from the definition of a debt collector, to amend the Consumer Financial Protection Act of 2010 to prevent the Bureau of Consumer Financial Protection from exercising supervisory or enforcement authority with respect to attorneys when undertaking certain actions related to legal proceedings, and for other purposes."⁶ Twenty attorneys general (not including Texas) opposed this bill in a letter to Congress on the grounds that it would give too much leeway to debt collection attorneys and would remove the AGs' ability to hold them accountable.⁷ However, the American Bar Association supports HR 5082 based on its reasoning that it would statutorily limit the FDCPA to creditor lawyers' collection practices and not their litigation activities, which was the intent of Congress when passing the FDCPA.⁸

Notes

1. *Consumer Fin. Prot. Bureau v. All American Check Cashing*, No. 18-60302 (5th Cir. July 9, 2018).

2. See *id.*; *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 6 (D.C. Cir. 2016), rev'd en banc, 881 F.3d 75 (D.C. Cir. 2018); and *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018).
3. See *Consumer Fin. Prot. Bureau v. RD Legal Funding*, 2018 WL 3094916 (S.D.N.Y. June 21, 2018); and *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018).
4. 882 F.3d 485, 491 (5th Cir. 2018).
5. *Id.* at 489.
6. Practice of Law Technical Clarification Act of 2018, H.R. 5082, 115th Cong., 2d Sess. (2018).
7. *Re: Practice of Law Technical Clarification Act of 2018 (H.R. 5082)*, April 19, 2018. https://ag.ny.gov/sites/default/files/hr_5082_multistate_letter.pdf.
8. "ABA Supports H.R. 5082, the 'Practice of Law Technical Clarification Act of 2018,'" March 2018. <https://www.americanbar.org/content/dam/aba/uncategorized/GAO/march2018fedregulationfactsheet.authcheckdam.pdf>.



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CRIMINAL LAW

By Kerry Fitzgerald

This case alert examines Fourth Amendment challenges, the state's pretrial failure to disclose an expert, an important DWI legal development, defective jury instructions, "no body, no weapon" sufficiency issues, and tapes.

A court order requiring production of cell-site location information records violates the Fourth Amendment absent a search warrant based upon probable cause.¹ In cases impacted, time will tell if parties push for dismissals or retrials, even remedial efforts to obtain belated search warrants for the same records.

On the date of trial, before jury selection, the judge took up a motion to suppress evidence. The state responded it had no advance notice, such motions were generally carried during trial, no pretrial hearing had been requested, and the state's witnesses were not in court at the time. The state refused to tender offense report or any evidence. The judge granted the motion. The state appealed, arguing lack of notice under Article 28.01 of the Texas Code of Criminal Procedure. Held: Statute required formal notice of pretrial hearing *only* when trial court designates a separate, pretrial setting for the hearing.²

When the defendant moved to exclude officer's testimony in a DWI case because the state failed to timely disclose him as an expert, the state moved for continuance. Court *sua sponte* declared mistrial. In the pretrial writ, the defendant claimed double jeopardy. The court held the state failed to produce record-based evidence to support finding of defendant's "implied consent" to mistrial.³

The defense challenged the sufficiency of evidence of a second DWI as the prior DWI was only proved during the punishment stage. Held: Single prior conviction was a punishment issue, not an element of the DWI second offense, notwithstanding in third-offense DWI cases, existence of two prior convictions were "jurisdictional facts" needed to establish felony status and, thus, elements of offense.⁴

The state's facts showed the defendant's unlawful entry into the victim's house, ambush, and assault whereas defensive evidence, substantially limited by trial court's rulings and jury instructions,⁵ tended to show the defendant's affair with the victim's wife, her consent to enter the victim's home, and self-defense. Held: Judge's refusal to instruct the jury on self-defense and necessity, if error, was not harmless. Remanded.^{6,7}

In *Mendez v. State*, a jury acquitted the defendant of murder but convicted him of aggravated assault. The judge instructed the jury on murder and aggravated assault and, *sua sponte*, (defense made no request or objection to instructions) on self-defense to justify the offense of murder, but not the lesser offense of aggravated assault. Held: By *sua sponte* instructing the jury on self-defense, the trial judge

assumed the duty to administer that instruction correctly, that is, applying self-defense to lesser-included offense of aggravated assault. Conviction reversed.⁸

Deadly conduct is the lesser-included offense in aggravated assault on a public servant case in which the indictment alleged the defendant used or exhibited a motor vehicle as a deadly weapon.⁹

The court found circumstantial evidence sufficient to prove murder in two unrelated murder cases in which there were no eyewitness, no confession, no body recovered, and no murder weapon found. In both cases, the victim disappeared, never to be seen or heard from again.¹⁰

Finally, the court also discussed video tapes, Facebook postings, and audio recordings in several cases of note.¹¹

Notes

1. *Carpenter v. United States*, 585 U.S. ____ (2018).
2. *Velasquez v. State*, 539 S.W.3d 289 (Tex. Crim. App. Feb. 7, 2018).
3. *Garrels v. State*, 2018 WL 4472674 (Sept. 19, 2018).
4. *Oliva v. State*, 548 S.W.3d 518 (Tex. Crim. App. May 23, 2018).
5. The trial court granted the state's pretrial motion in limine to prohibit the defense from mentioning any justification defenses because he was unlawfully carrying a weapon and he started the fight. The defense could not qualify the venire on any justification defenses, mention them in opening statement, offer any evidence in support of them, or argue them in closing. The application paragraph in the burglary case limited consent to the victim, notwithstanding evidence of the wife's consent.
6. The court of appeals only *assumed* refusal of instructions on self-defense and necessity was error and concluded it was harmless. Thus the remand to address whether refusal was in error.
7. *Rogers v. State*, 550 S.W.3d 190 (Tex. Crim. App. June 27, 2018).
8. 545 S.W.3d 548 (Tex. Crim. App. April 25, 2018).
9. *Safian v. State*, 543 S.W. 216 (Tex. Crim. App. March 21, 2018).
10. *Nisbett and Delacruz v. State*, 552 S.W.3d 244 (Tex. Crim. App. June 27, 2018).
11. *Fowler v. State*, 544 S.W.3d 844 (April 18, 2018); *Beham v. State*, 2018 WL 4344389 (Sept. 12, 2018); *White v. State*, 549 S.W.3d 146 (Tex. Crim. App. June 13, 2018).



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CYBERSECURITY AND DATA PRIVACY LAW

By Shawn E. Tuma

Lawyers' Cybersecurity and Data Breach Obligations

On October 17, 2018, the American Bar Association issued Ethics Opinion 483 titled *Lawyers' Obligations After an Electronic Data Breach or Cyberattack*¹ that made clear that lawyers' ethical obligations require them to address cybersecurity and data privacy issues.

Texas lawyers, like others engaging in business in Texas, have existing cybersecurity and data privacy duties to: (1) implement and maintain reasonable procedures to protect sensitive personal information, or SPI, they collect or maintain;² (2) follow appropriate data destruction procedures;³ and (3) notify any individual whose electronic SPI was or is reasonably believed to have been acquired by an unauthorized person.⁴ Existing federal laws, as well as laws in all 50 states, include some or all of these duties (including more stringent duties). Ethics Opinion 483 does not supplant these laws.

The opinion is both narrower and broader than existing federal and state laws. It focuses only on cyber incidents that involve information relating to the actual representation of a client. But, though its title states that it applies "after an electronic data breach," it contains proactive cybersecurity obligations required before there has been a data breach and what it considers a "data breach" is substantially broader than most traditional "data breach notification" laws.

Ethics Opinion 483 defines a "data breach" as "a data event where material client confidential information is misappropriated, destroyed or otherwise compromised, or where a lawyer's ability to perform the legal services for which the lawyer is hired is significantly impaired by the episode."⁵ The last component makes it atypical for a "data breach notification" law because it involves situations where an event may make data unavailable, such as a ransomware attack (or even a service provider network outage) that significantly impairs the lawyer's ability to perform legal services, even when there was no access to or exfiltration of the client's data.

The opinion focuses on the overall process of protecting information, not just the outcome. From a high level it requires lawyers to do the following: (1) be competent by keeping abreast of the benefits and risks associated with relevant technology; (2) have reasonable cybersecurity safeguards in place; (3) follow appropriate data destruction procedures; (4) actively monitor for breaches of client information; (5) address third-party risk; (6) investigate, respond to, and mitigate incidents; (7) develop and implement an incident response plan; and (8) notify clients in an appropriate manner when there has been a "data breach," as defined therein.

IT Service Provider Locking Customer Out of Server—Violation of Hacking Law?

An information services provider that locked a customer

out of a server it was providing, after the customer stopped paying, did not violate the Harmful Access by Computer Act.⁶ Under the contract it had a greater right to possess the server and was considered its owner.⁷

Viewing Pictures on Boyfriend's iPhone—Violation of Hacking Law?

Girlfriend accessing her boyfriend's iPhone to view pictures did not violate the Breach of Computer Security⁸ law because she did not know that she lacked his effective consent.⁹

Notes

1. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) [hereinafter Ethics Opinion 483].
2. Tex. Bus. & Comm. Code § 521.052(a).
3. Tex. Bus. & Comm. Code § 521.052(b).
4. Tex. Bus. & Comm. Code § 521.053(b).
5. Ethics Opinion 483 at 4.
6. Tex. Civ. Prac. & Rem. Code § 143.001, et seq.
7. *Puig v. High Standards Networking & Computer Services*, 2017 WL 4820171 (Tex. App.—Houston [1st Dist.] 2017).
8. Tex. Penal Code § 33.02, et seq.
9. *Thomas v. State*, 2017 WL 4400116 (Tex. App.—Houston [14th Dist.] 2017).



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ENVIRONMENTAL LAW

By Jean M. Flores

The past year has been an exciting one for environmental law practitioners. We saw a number of significant environmental policy directives and holdings, some of which are highlighted below.

Policy

On January 25, 2018, with a stated goal of reducing unnecessary regulatory burdens, the Environmental Protection Agency, or EPA, issued a guidance memo ending its 23-year-old Clean Air Act, or CAA, “once in, always in” policy that kept “major source” air toxics pollution controls in place permanently once facilities have triggered requirements for reducing emissions.¹

The same day, the associate attorney general directed the Department of Justice not to rely on agency guidance to establish a violation in affirmative civil enforcement cases.² The directive prohibits “effectively convert[ing] agency guidance documents into binding rules” and applies to future actions and actions pending as of January 25, 2018.

U.S. Supreme Court

In *National Association of Manufacturers v. Dept. of Defense*,³ the Supreme Court, reversing a 6th Circuit Court of Appeals opinion, held that challenges to the Waters of the United States, or WOTUS, Rule belong in the U.S. District Courts.

Federal Courts

Do pollution leaks into groundwater violate the Clean Water Act, or CWA? An apparent split on this topic between the 4th,⁴ 9th,⁵ and 6th U.S. Circuit Courts of Appeals has resulted in petitions for cert seeking Supreme Court review. The 4th and 9th Circuits have held that a violation of the CWA occurs when the groundwater flows directly into jurisdictional surface waters. The 6th Circuit, on September 24, 2018, rejected that theory, creating the split.⁶

In *Sierra Club v. FERC*,⁷ the U.S. Court of Appeals for the District of Columbia Circuit vacated approval of a pipeline, finding that the Federal Energy Regulatory Commission, or FERC, failed to include the “reasonably foreseeable” increase in greenhouse gas emissions from the end users. The environmental impact statement was held to be inadequate and remanded to the FERC.

Delivering a strategic loss to the White House, in *Clean Air Council v. Pruitt*,⁸ the District of Columbia Circuit held that the EPA lacked authority under the CAA to stay a methane emissions rule because the EPA failed to pass a test of central relevance and impracticability in timely raising an objection.

Texas State Courts

*Ring Energy v. Trey Resources*⁹ held that suits involving Texas Railroad Commission permits do not have exclusive venue in Travis County.

Finally, local government suits under Section 7.351 of the Texas Water Code¹⁰ by contingency fee lawyers continue to raise eyebrows. The state, an indispensable party, shares in the settlement proceeds. In one recent case, subsequently dismissed, a county sought millions in civil penalties against the owner of a Leaking Petroleum Storage Tank Program site—with a Texas Commission on Environmental Quality “no further action” letter—alleging violations for releases of petroleum to ground waters during the corrective action performed with TCEQ oversight and during a state-lead cleanup.

Notes

1. William L. Wehrum, Assistant Administrator, Memorandum, Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act (Jan. 25, 2018), https://www.epa.gov/sites/production/files/2018-01/documents/reclassification_of_major_sources_as_area_sources_under_section_112_of_the_clean_air_act.pdf.
2. Office of the Associate Attorney General Memorandum, Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases (Jan. 25, 2018), <https://www.justice.gov/file/1028756/download>.
3. National Association of Manufacturers v. Dept. of Defense, et al, 583 U.S. ___, 138 S. Ct. 217 (2018).
4. *Upstate Forever, et al v. Kinder Morgan Energy Partners*, 887 F.3d 637 (4th Cir. 2018).
5. *Hawai'i Wildlife Fund, et al v. County of Maui*, 886 F.3d 737 (9th Cir. 2018).
6. *Kentucky Waterways Alliance et al v. Kentucky Utilities Company*, 905 F.3d 925 (6th Cir. 2018).
7. *Sierra Club v. Federal Energy Regulatory Commission*, 867 F.3d 1357 (D.C. Cir. 2017).
8. *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017).
9. *Ring Energy v. Trey Resources*, 546 S.W.3d 199 (Tex. App.—El Paso 2017).
10. Tex. Water Code § 7.351.



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ESTATE PLANNING AND PROBATE LAW

By Gerry W. Beyer

Tortious Interference With Inheritance Rights

The Texas Supreme Court held in *Archer v. Anderson*,¹ that “[t]he tort of intentional interference with inheritance is not recognized in Texas.” The court reasoned that “existing law affords adequate remedies for the wrongs the tort would redress” such as a constructive trust. Additionally, “the tort would conflict with Texas probate law.” The court closed the door on this issue, which was left open by the court’s opinion in *Kinsel v. Lindsey*.²

Mandatory Arbitration Provisions

The court in *Ali v. Smith*³ refused to enforce a will provision requiring beneficiaries to arbitrate all disputes. The court recognized that the Texas Supreme Court in *Rachal v. Reitz*⁴ enforced an arbitration clause in a trust against the beneficiaries because although they did not affirmatively consent to the clause, they were deemed to do so based on the theory of direct benefits estoppel. The court rejected the argument that the administrator’s actions of attempting to enforce the will by suing for breach of duty and accepting payment of attorneys’ fees triggered direct benefits estoppel. A dissenting justice would enforce the arbitration provision believing that by accepting the appointment as a personal representative of the estate, each party should be deemed to have assented to the arbitration provision.

Standing of Contingent Trust Beneficiary

In *Mayfield v. Peek*,⁵ the court agreed that a contingent trust beneficiary had standing to sue the trustee for breach of fiduciary duties even though her interest was subject to defeasement by a trust revocation or modification. However, the court pointed out that the contingent nature of her interest could make it difficult to prevail on the merits of her claim.

Will Construction

The key issue in the Texas Supreme Court case of *Knopf v. Gray*⁶ was what interest the testatrix devised in her will when she said, “Now [Son] I leave the rest to you . . . Understand the land is not be sold but passed on down to your children . . . TAKE CARE OF IT AND TRY TO BE HAPPY.” Although the trial and appellate courts held that the will unambiguously granted her son a fee simple interest, the court reversed holding that the devise created a life estate in her son and a remainder in his children.

Joint Accounts

Although many or perhaps even most people would assume when opening a joint bank account that checking a box next to a phrase that said “with right of survivorship”

and then initialing beside it would be sufficient to create survivorship rights, the court in *Hare v. Longstreet*⁷ held otherwise. The court explained that the signature card lacked language substantially similar to the language required by Texas Estates Code § 113.151(b) (“On the death of one party to a joint account, all sums in the account the date of the death vest in and belong to the surviving party as his or her separate property and estate.”). Merely stating that the account has the right of survivorship is insufficient to make it so.

Life Insurance

In *Sveen v. Melin*,⁸ the U.S. Supreme Court held that the Minnesota statute that automatically revokes life insurance beneficiary designations of an ex-spouse was valid even though the insured ex-spouse made the beneficiary designation prior to the enactment of the statute. The court determined that the statute did not violate the contracts clause of the U.S. Constitution. Accordingly, the Texas-equivalent statutes, Family Code §§ 9.301 (life insurance) and 9.302 (retirement benefits), will be effective even if the designation of the ex-spouse as a beneficiary occurred prior to the effective dates of the statutes.

Notes

1. No. 16-0256, 2018 WL 3090810 (Tex. June 22, 2018).
2. 526 S.W.3d 411 (Tex. 2017).
3. 554 S.W.3d 755 (Tex. App.—Houston [14th Dist.] 2018, no pet.).
4. 403 S.W.3d 840 (Tex. 2013).
5. 546 S.W.3d 253 (Tex. App.—El Paso 2017, no pet.).
6. 545 S.W.3d 542 (Tex. 2018).
7. 531 S.W.3d 922 (Tex. App.—Tyler 2017, no pet.).
8. 138 S. Ct. 1815 (2018).



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FAMILY LAW

By Georganna L. Simpson and Beth M. Johnson

The Texas Supreme Court resolved the appellate split on the definition of Texas Family Code Section 102.003(a)(9)'s "actual care, control, and possession."¹ The court held that the statute is satisfied when a nonparent shares a residence with a child, cares for the child, and exercises actual control typically exercised by parents. The nonparent's standing is not conditioned on the parents' abdicating legal control of the child.

The Texas Supreme Court recently offered a definition of "just and right" and "due regard" in relation to the division of the community estate.² While the specific facts of *Bradshaw v. Bradshaw* are unlikely to reoccur, the court explained that "just" means "[l]egally right; lawful; equitable." "Right" means "[t]hat which is proper under law, morality, or ethics." "Due regard" means the "[a]ttention, care, or consideration" that is "[j]ust, proper, regular, and reasonable."

In yet another case challenging the enforceability of a Texas Family Code compliant mediated settlement agreement, or MSA, the court held that a provision that the MSA was "subject to the Court's approval" did not remove the parties' entitlement to judgment on the MSA as written.³ Further, even if parties mutually agree in open court not to seek judgment on an MSA, a party may still subsequently seek judgment on that MSA, even after further hearings, a psychological evaluation, and temporary orders.⁴

Absent evidence showing a material, adverse effect on the ability to parent, a party's immigration status should not be used as a basis to deny joint managing conservatorship.⁵

A parent can seek adult disabled child support regardless of whether that parent lives with the child.⁶ In *C.J.N.-S.*, the child had a disability before turning 18. Although the child lived alone, the mother assisted the child with day-to-day chores. When the child's condition worsened, the mother sought support from the father, who challenged the mother's standing since she neither lived with the child, nor had guardianship over the child. The Texas Supreme Court interpreted the applicable statute to grant standing to a parent regardless of physical custody or guardianship. In a different case, Justice Eva Guzman stated that legislative guidance would be beneficial to address important unanswered questions regarding court-ordered support for a disabled child, such as whether expert testimony is required to prove a disability.⁷

A modification proceeding is a completely separate suit from the suit that resulted in the order from which the modification is sought.⁸ Given such, the 5th Court of Appeals in Dallas—noting a split among its sister courts⁹—held a trial court has authority to consider a new modification suit during the pendency of an appeal of a prior child-custody order.

When a district court holds a de novo hearing, the court cannot limit the evidence to just the transcript from the

hearing before the associate judge.¹⁰ Although the transcript may be considered, the parties must also be permitted to present witnesses and evidence if they wish to do so.

Notes

1. *In re H.S.*, 550 S.W.3d 151 (Tex. 2018).
2. *Bradshaw v. Bradshaw*, 555 S.W.3d 539 (Tex. 2018).
3. *In re C.C.E.*, 530 S.W.3d 314 (Tex. App.—Houston [14th Dist.] 2017, no pet.).
4. *In re Minix*, 543 S.W.3d 446 (Tex. App.—Houston [14th Dist.] 2018, orig. proceeding) (mandamus denied).
5. *Turrubiarres v. Olvera*, 539 S.W.3d 524 (Tex. App.—Houston [1st Dist.] pet. denied).
6. *In re C.J.N.-S.*, 540 S.W.3d 589 (Tex. 2018).
7. *In re D.C.*, 549 S.W.3d 136 (Tex. 2018) (J. Guzman, concurring).
8. *In re G.E.D.*, No. 05-17-00160-CV, 2018 WL 258982 (Tex. App.—Dallas 2018, no pet.) (mem. op.).
9. See *In re E.W.N.*, 482 S.W.3d 150 (Tex. App.—El Paso 2015, no pet.).
10. *In re R.R.*, 537 S.W.3d 621 (Tex. App.—Austin 2017, orig. proceeding).



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GOVERNMENT LAW

By Victor A. Flores

In government law, there has always been a healthy supply of diverse legal issues being reviewed by the Texas Supreme Court. However, this year, the court's new four-factor test in the *Wasson II* case has captured the attention of many government lawyers wrestling with waiver of governmental immunity as applied to contractual disputes.

A stir around the topic was renewed on September 23, 2018. The Hays Street Bridge Restoration Group, in its contractual dispute with the city of San Antonio, was one of the first parties to argue *Wasson II*'s four-factor test before the Texas Supreme Court during oral arguments.

Governmental Immunity Applied to Contractual Disputes 2.0

In 2016, new caselaw was written when the Texas Supreme Court applied the Texas Tort Claims Act's governmental and proprietary standard to contract disputes when reviewing governmental immunity. During 2018, the court revived and expanded its review of *Wasson Interests v. City of Jacksonville*.¹

In *Wasson I*, the city of Jacksonville leased lakefront property to Wasson Interests. Under the city's lease, property was limited to residential use. Still, Wasson continued to use the property for a bed and breakfast and event center. The city issued an eviction letter and Wasson sued for breach of contract. As noted above, the Texas Supreme Court held that the governmental and proprietary standard should be applied to contract disputes. The court referred the case back to the lower court to determine whether the contract at issue was proprietary or governmental. Subsequently, the 12th Court of Appeals in Tyler held that the lease was part of Jacksonville's governmental function. Wasson appealed and the Texas Supreme Court reviewed the case for a second time, *Wasson II*.²

In *Wasson II*,³ the court held the focus of the governmental and proprietary dichotomy "belongs on the nature of the contract, not the nature of the breach."⁴ Stated differently, the legal analysis was limited to whether the city acted in its governmental or proprietary capacity when it leased the lakefront property to Wasson. The court then analyzed that issue based on four factors: whether (1) the city's act of entering into the lease was mandatory or discretionary; (2) the leases were intended to benefit the general public or city's residents; (3) the city was acting on the state's behalf or its own behalf when it entered the leases; and (4) the city's act of entering into the leases was sufficiently related to a governmental function.⁵ The court provided a thorough analysis with each of these four factors and determined that the city was performing a proprietary function when it released its lakefront property.⁶

The court's decisions in *Wasson I* and *II* definitely mark a cornerstone in governmental law and the application of

governmental immunity to contractual disputes. However, this area of law remains fluid and government law attorneys should continue to monitor developing caselaw, including *City of San Antonio v. Hays Street Bridge Restoration Group*.⁷

In two other notable cases, the Texas Supreme Court held that county constables are police officers under the Collective Bargaining Act and found that open-enrollment charter schools are not subject to the Texas Whistleblower Act.

County Constables Are Police Officers

The Texas Supreme Court settled a split between the 13th Court of Appeals in Corpus Christi and the 4th Court of Appeals in San Antonio over whether the Fire and Police Employee Relations Act⁸ applied to county constables.

The Texas Supreme Court resolved the split among the appellate courts and held: "[D]eputy constables 'regularly serve[] in a professional law enforcement capacity in the police department of a political subdivision.' ... Accordingly, deputy constables are 'police officers' under the Collective Bargaining Act."⁹

Texas Whistleblower Act Does Not Apply to Open-Enrollment Charter Schools

In *Neighborhood Centers v. Walker*, Doreatha Walker, a teacher at Promise Community School (operated by Neighborhood Centers) was fired after filing several complaints against the school with the Texas Education Agency and Houston Health Department.¹⁰ Generally, the Texas Whistleblower Act prohibits local governmental entities, including public school districts, from retaliating against employees for reporting violations of the law to appropriate agencies.¹¹

In Walker's case, the Texas Supreme Court reviewed whether the Texas Whistleblower Act specifically applied to an open-enrollment charter school operated by a tax-exempt entity. The court relied on its interpretation of the Texas Charter Schools Act Section 12.1058(c), which provides that "an open-enrollment charter school operated by a tax exempt entity ... is not considered to be a ... local governmental entity unless the applicable statute specifically states that the statute applies to an open-enrollment charter school."¹²

The Texas Supreme Court held that the Texas Whistleblower Act did not contain any such specific statement. Therefore, the Whistleblower Act did not apply to open-enrollment charter schools.¹³

Notes

1. 489 S.W.3d 427 (Tex. 2016) (*Wasson I*).
2. *Wasson Interests v. City of Jacksonville*, --- S.W.3d ---, 2018 WL 4838309 (Tex. Oct. 5, 2018).
3. In *Wasson II*, the court issued its opinion on June 1 and later withdrew and replaced that judgement with one issued on October 5. However, the court's opinion remained relatively unchanged.

4. *Wasson*, --- S.W.3d at ---, 2018 WL 4838309, at *5.
5. *Id.*
6. *Id.* at *8.
7. 551 S.W.3d 755, Tex. App.— San Antonio, Mar. 1, 2017, review granted (Jun. 1, 2018). The Restoration Group alleged that the city of San Antonio breached a memorandum of understanding (agreement) by failing to develop a park near the Hays Street Bridge. As of the date this article was submitted, the Texas Supreme Court had yet to issue its opinion for the *Hays Street Bridge Restoration Group* case.
8. Tex. Loc. Gov't Code ch. 174.
9. *Jefferson County v. Jefferson County Constables Association*, 546 S.W.3d 661, 673 (Tex. 2018).
10. *Neighborhood Centers v. Walker*, 544 S.W.3d 744 (Tex. 2018).
11. Tex. Gov't Code § 554.002.
12. *Neighborhood Centers*, 544 S.W.3d at 745.
13. *Id.* at 754.



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IMMIGRATION LAW

By Paul S. Zoltan

Immigration remained in the headlines through much of 2018 as the Trump administration worked to impose new limits on immigration, stem the tide of migrants and refugees arriving at the southern border, and tackle a residual backlog of over 700,000 deportation cases.

In April, the U.S. Department of Justice, or DOJ, began criminally prosecuting aliens who illegally enter the United States. This “zero-tolerance” policy resulted in the separation of over 2,500 children from their parents. In June, a federal district court enjoined the practice of separating families, but not before U.S. Immigration and Customs Enforcement, or ICE, had deported more than 450 parents while their children remained stateside.

Away from the nation’s borders, ICE in 2018 doubled the number of workplace enforcement actions—including one near Paris, Texas, that prompted many immigration lawyers to step forward pro bono. The Department of Homeland Security doubled the number of localities where police collaborate with ICE in federal immigration enforcement.

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Yet the administration failed to convince federal courts that it has the authority to financially punish so-called “sanctuary” cities that withhold their full cooperation with ICE. Similarly, judges disallowed a temporary suspension of border-jumpers’ rights to apply for asylum and continued to block the termination of the Deferred Action for Childhood Arrivals, or DACA, program. By contrast, the U.S. Supreme Court lifted the lower courts’ partial injunction of the third iteration of the administration’s travel ban, which blocks admission to most nationals of North Korea, Syria, Iran, Yemen, Libya, Somalia, and Venezuela.

In June, the DOJ construed the Immigration and Nationality Act, or INA, to disqualify for asylum most victims of criminal violence and to permit judges to dismiss such “non-state persecutor” claims without hearing testimony. It expansively interpreted provisions in the INA that disqualify for asylum any alien who has engaged in persecution or supported a broadly defined “terrorist” organization. To speed the resolution of removal cases, the DOJ required for the first time that immigration judges meet productivity goals, setting for each judge an annual quota of 700 resolved cases. The DOJ also construed the INA to forbid these judges from dismissing or administratively closing removal cases except in circumstances explicitly authorized by the INA, the regulations, or an Article III court.

U.S. Citizenship and Immigration Services, or CIS, began permitting agents to deny applications for immigration benefits without allowing the alien to rebut the ground for refusal and announced plans to greatly expand the application of the “public charge” ground of inadmissibility.

In business immigration, CIS began forbidding its agents, in virtually all cases, from granting residency without interviewing the alien; conducted a lottery process to randomly select 85,000 H-1B petitions for adjudication among more than twice that number of applicants; and received Congress’ authorization to continue the EB-5 investor program through December.

In September, the U.S. Department of State announced that in 2019 it would reduce the annual cap for refugee admissions to 30,000, the lowest since the program’s commencement in 1980. Less than half this number is likely to be admitted: In 2018, 25,000 of the 45,000 refugee visas went unused due to delays and rejections consequent to “extreme vetting.”



PAUL S. ZOLTAN

co-founded and helps to administer Dallas’ Refugee Support Network, trains courtroom observers to check for due process violations at the Dallas Immigration Court, and teaches community groups about their rights under the Fourth and Fifth Amendments to the U.S. Constitution. For his advocacy, he received the 2018 Lifetime Achievement Award from the Dallas Bar Association Immigration Law Section.

INSURANCE LAW

By Michael W. Huddleston

In *USAA Texas Lloyds v. Menchaca*,¹ or *Menchaca II*, the Texas Supreme Court granted the insurer’s rehearing and “unanimously” (a) reaffirmed the rules in the first opinion, (b) provided additional “guidance” on issues raised on rehearing, and (c) concluded the trial court erred in disregarding jury question one, which asked whether the insurer “failed to comply with its obligations under the policy.” *Menchaca* remains the most talked about insurance decision in Texas.

The court “disagreed” with the carrier position that a policyholder “can never recover policy benefits as damages on a statutory-violation claim,” again reaffirming that the court remains committed to its prior decision in *Vail v. Texas Farm Bureau*.² In new language, the court clarified the “General Rule”: “[A]n insured cannot recover policy benefits for an insurer’s statutory violation if the insured does not have a right to those benefits under the policy.” The corollary, the “Entitled-to-Benefits Rule,” was described in new language as providing: “[I]f the insured was entitled to the [contractual] benefits and the insurer’s statutory violation caused the insured to lose those benefits, the statute authorizes the insured to recover those benefits as ‘actual damages . . . caused by’ the statutory violation, even if the insured does not submit a separate breach-of-contract claim.”

The court instructed in new language that “the [trial] court should ensure that the jury answers the entitlement-to-benefits question only once,” noting that separate submission of contract and statutory claims and damages begged for a conflict. The court suggested an initial question as to entitlement to policy benefits with contract and/or statutory questions predicated on the finding to that first question.³

The court continued its commitment to the “Benefits-Lost Rule,” under which an insured “can recover benefits as actual damages” if the insurer’s conduct caused the insured to lose legal entitlement to those benefits. As examples, the court noted: (a) policy misrepresentations; (b) waiver and/or estoppel; or (c) the carrier “caused the insured to lose a contractual right to benefits that it otherwise would have had,” discussing *JAW the Pointe v. Lexington Ins.*⁴

Discussing its decision in *Ulico Cas. v. Allied Pilots*,⁵ the court attempted to explain:

[I]f the insurer’s statutory violations prejudice the insured, the insurer may be estopped “from denying benefits that would be payable under its policy as if the risk had been covered.” . . . [T]he insured may recover “any damages it sustains because of the insurer’s actions,” even though the policy does not cover the loss.

Some urge that the first sentence indicates a rebirth of pre-*Ulico* waiver and estoppel. But, the court made clear it was following *Ulico*, noting that waiver and estoppel cannot

create coverage. The second sentence above makes clear that the *Menchaca II* court is talking about a damages claim, not equitable theories.

Under the “Independent-Injury Rule,” injuries other than lost benefits may be recovered if caused by the statutory violation, but policy benefits may not be recovered if they are not owed under the contract. Discussing *Twin City Fire Ins. v. Davis*,⁶ the court noted that “an insured who prevails on a statutory claim cannot recover punitive damages for bad-faith conduct in the absence of independent actual damages arising from that conduct.”

Some suggest this means that policy benefits cannot be trebled absent an independent injury. Others urge that this belies the context of the court’s statement, a claim where there is no entitlement to contract benefits and independent injuries are the only thing that could be recovered. It also ignores, some say, the court’s continued commitment to *Vail*, which itself affirmed an award of policy benefits trebled.

Notes

1. *USAA Texas Lloyds v. Menchaca*, 545 S.W.3d 479 (Tex. 2018).
2. *Menchaca*, (citing *Vail v. Texas Farm Bureau*, 754 S.W.2d 129 (Tex. 1988) (emphasis added)).
3. *Id.* at 503.
4. *JAW the Pointe v. Lexington Ins.*, 460 S.W.3d 597, 599, 602 (Tex. 2015).
5. *Ulico Cas. v. Allied Pilots*, 262 S.W.3d 773, 778 (Tex. 2008).
6. *Twin City Fire Ins. v. Davis*, 904 S.W.2d 663, 666 (Tex. 1995).



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LABOR AND EMPLOYMENT LAW

By Michael P. Maslanka

Seemingly modest opinions sometimes pack the biggest punch. Let’s look at two: One from the Texas Supreme Court, and the other from the U.S. Supreme Court. While a commercial case, the Texas court’s decision in *Lujan v. Navistar* impacts employment law. Prior to *Lujan*, an illustrative and typical scenario would be something like this: A plaintiff in an age discrimination case testifies that she never heard an age animus comment from her managers. The defendant files a motion for summary judgment relying on her testimony. The plaintiff responds with a “Now That I Think About It” affidavit listing age animus comments told to her by her manager. Motion denied. Not so any longer. In *Lujan*, the court declared that if an affidavit contradicts earlier sworn testimony, it cannot be used to defeat a properly filed motion for summary judgment. Now to *Mount Lemmon Fire District v. Guido*, in which the high court decided that small

public employers (less than 20 employees) are subject to the Age Discrimination in Employment Act, or ADEA. Local governments and special districts created by those governments (as in this case) are now subject to an entirely new class of lawsuits. And, in dicta, the court flirted with the idea that, given the language of the ADEA, a manager (for either a public or a private employer) who decided upon an adverse employment action for an ADEA plaintiff could be sued individually.

A trio of cases from the 5th Circuit Court of Appeals delivered good news to employees. In *Stokes v. Nielsen*, the court reaffirmed its adherence to an earlier precedent under the Americans with Disabilities Act. The question, Need an employer only provide a reasonable accommodation to a disabled employee’s essential job functions or must an employer provide a reasonable accommodation to all of the disabled employee’s job functions? The correct answer is the second. The visually impaired employee in *Stokes* was entitled to memos in large font for off-site meetings. Because a prevailing plaintiff automatically recovers attorneys’ fees, this holding could trigger a cottage industry.

In *Gardner v. CLC of Pascagoula*, the 5th Circuit continued to guard an employee’s right to oppose unlawful conduct without fear of retaliation. An employee worked in a facility for patients with diminished capacity. A patient allegedly sexually harassed the employee. The employee refused to continue treating the patient and was fired for insubordination. The 5th Circuit said the self-help of refusing to work with the patient is a form of protected opposition under the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964.

And *D’Onofrio v. Vacation Publications* saw the court strike down an invalid non-compete. Recall that a non-compete can be an invalid restraint on trade. In other words, if the non-compete’s breadth is too expansive, it essentially stops the departing employee from making a living. In *D’Onofrio*, the non-compete was for 18 months, with no geographic restriction, and prohibited the departing employee from working in the vacation travel industry entirely even though all she did for her former employer was sell cruises.

Speaking of non-competes, Texas appeals courts tangled yet again with the interplay between non-competes and the Texas Citizens Participation Act, or TCPA. Suffice it to say that the TCPA is being used to dismiss claims against employees who violate their non-competes because the TCPA forbids lawsuits that seek to stifle a citizen’s right to free speech and to association. Yes, there are ways to combat TCPA arguments, but that road is long and tortured. Check out *Grant v. Pivot Technology Solutions* from the 3rd Court of Appeals in Austin. We’ll see more litigation in this area in 2019.



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LEGAL EDUCATION

By John G. Browning

The past year featured some genuine highs for legal education in Texas, such as surging enrollment at law schools in the Lone Star State. But it was also marked by the lowest of lows in areas like bar passage rates. And just like the weather in Texas, don't get too used to those leading Texas law schools, because there were changes at the dean's suite for several.

Let's begin with the good. Enrollment at Texas law schools rose by 4 percent in 2017, as 2,199 first-year law students enrolled at Texas' 10 law schools in the fall of 2017. This was a dramatic difference from the bleak national law school landscape, in which there was just a 0.8 percent increase from the previous year. The three schools experiencing the largest increases were St. Mary's (with a 20 percent increase), Baylor (which had a 19 percent bump), and Texas Southern University Thurgood Marshall School of Law (which saw a 13 percent increase). But the picture wasn't a rosy one for all law schools. UNT Dallas College of Law saw a drop off of 28 percent in first-year enrollment from the previous year (even though the school's overall enrollment

rose by 9 percent). Texas Tech University School of Law and SMU Dedman School of Law also saw first-year enrollment decline, with drops of 13 percent and 5 percent respectively. For overall enrollment, about half of Texas law schools saw decreases, while the other half experienced increases. This comes at a time when the number of those taking the LSAT is surging nationally—up 8 percent, the biggest annual increase since 2010.

And while the affordability of law school remains a national concern, several Texas law schools have been recognized nationally as “best value” schools. Texas Tech, the University of Houston Law Center, and the University of Texas School of Law all made the top 40 of *National Jurist* magazine's 2017 list of “Best Value Law Schools.” UH and UT also came in at numbers 5 and 6, respectively, on Student Loan Hero's list of most affordable law schools.

Yet despite increasing enrollments and decent affordability ratings for some Texas law schools, Texas bar passage rates for the February 2018 bar exam sunk to an all-time low, with only 45 percent of the test takers passing (60 percent of first-time test takers passed). Baylor and SMU law grads had the highest bar passage rates, with 88 percent and 76 percent respectively. UNT Dallas College of Law and Thurgood Marshall School of Law brought up the rear, with rates of 40 percent and 28 percent respectively. On the July 2018 bar exam, 77.87 percent of first-time test takers passed the bar, a decline of more than 3 percent from the previous year. Baylor and UT had the highest pass rates (92.7 percent and 91.9 percent, respectively) while Thurgood Marshall School of Law had the lowest, with only 44.5 percent passing.

In addition, change was afoot at the top of several Texas law schools over the past year. In November 2017, Gary L. Bledsoe, a former member of the TSU Board of Regents, was named acting dean of Thurgood Marshall School of Law. Meanwhile, Texas A&M University School of Law appointed Bobby Ahdieh to take the helm in June 2018. A Yale Law graduate whose scholarly interests include regulatory and international law, Ahdieh most recently taught at Emory University School of Law. And the UNT Dallas College of Law bade farewell to its founding dean, Royal Furgeson, in June and welcomed Felecia Epps as its new dean. Epps, a graduate of Creighton Law School, had been dean at Florida A&M University College of Law.

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OIL, GAS, AND ENERGY LAW

By T. C. Turner

2018 saw continued litigation in familiar areas, including the characterization of royalty interests and the interpretation of retained acreage clauses. Additionally, controversies in the use of surface resources, such as groundwater usage and sand mining, have increasingly become more prominent.

The ongoing “fixed vs. floating” royalty debate continues to be fertile ground for Texas litigators. Recent seminal cases continue to reject mechanical rules of interpretation and reinforce the “four corners” approach, which seeks to harmonize all provisions of an instrument.¹ In *Laborde Properties*,² the Texas Supreme Court determined that the reservation of a “... (1/2) interest in and to the Oil Royalty, Gas Royalty ... the same being a one-sixteenth interest...” created a floating interest. The majority reasoned that a reservation of 1/2 of the royalty estate equaled reservation of 1/2 of 1/8, as 1/8 was widely understood to be 100 percent of the royalty estate at the time (c. 1951). Practitioners should expect more of these cases as the fixed $1/2 \times 1/8 = 1/16$ interpretation is falling out of favor, shifting to a more nuanced approach underpinned by the Estate Misconception Theory.

The dramatic acceleration of leasehold acreage prices has put retained acreage clauses in the crosshairs. In *XOG*,³ the Texas Supreme Court determined that the size of the Railroad Commission of Texas’ *prescribed* proration unit in its special field rules determined the amount of acreage retained, regardless of the acreage *assigned* by the operator to the proration unit. The court emphasized the plain meaning of the parties’ definition of proration unit, limiting it to “the area within the surface boundaries of the proration unit then established or prescribed by field rules...” *XOG*’s sister case, *Endeavor Energy*,⁴ similarly turned on the plain meaning of its clause, which provided for retention of acreage “...located within a governmental proration unit assigned to a well.” The two cases reinforce the Supreme Court’s reliance on the plain meaning of words within their regulatory context, to be reviewed on a case-by-case basis. Ultimately, as a preeminent Austin attorney recently quipped, “You gotta read the lease!”⁵

The use of surface resources is quickly becoming a hot issue of contention due to their demand in the age of horizontal production. In Texas, groundwater rights are attendant to the surface and, following the English rule, a surface owner may use so much of the water as he or she can capture, subject to the police power of the state to regulate via local conservation districts. The 2016 decision in *Coyote Lake Ranch v. City of Lubbock*⁶ applied the accommodation doctrine to ground water development and confirmed the severability of water rights. In this context, the 8th Court of Appeals in El Paso recently ruled in *Harrison*⁷ that the accommodation doctrine could not be used to force an oil and gas company to pur-

chase groundwater from a lessor for use in operations on the leased premises. The scarcity of groundwater in the Permian Basin should lead to numerous accommodation doctrine cases in the coming years.

Previously worthless, West Texas sand is now a billion-dollar industry. The sand estate may be severed from the surface estate, is subject to previous conveyance and reservation in a chain of title, and is claimed by the state on all mineral classified and Relinquishment Act Lands. Although there were no Texas cases on sand use in 2018, practitioners should anticipate accommodation doctrine cases to become more prevalent as feverish development in the Permian Basin conflicts with expansive sand mining operations. Since there is no Texas governmental agency that currently regulates sand mining activities, a glimpse toward the future might see the Texas Commission on Environmental Quality, or a newly created administrative entity, filling this void.

Finally, the hot topic of the past few years, allocation wells, has garnered little, if any attention in 2018. Ernest Smith’s recent article⁸ appears to have ended the debate by determining a horizontal wellbore may cross lease lines absent express pooling permission. However, while the academic debate may be settled, the real world has yet to give up the fight as seen in recently filed litigation.⁹

Notes

1. *Wenske v. Ealy*, 60 Tex. Sup. Ct. J. 1433, 521 S.W.3d 369 (Tex. 2018).
2. *U.S. Shale Energy II v. LaBorde Properties*, 61 Tex. Sup. Ct. J. 1727, 533 S.W.3d 447 (Tex. 2018).
3. *XOG Operating v. Chesapeake Exploration*, 61 Tex. Sup. Ct. J. 802, 480 S.W.3d 22 (Tex. 2018).
4. *Endeavor Energy Resources v. Discovery Operating*, 61 Tex. Sup. Ct. J. 787, 448 S.W.3d 169 (Tex. 2018).
5. Skip Watson, *Retained Acreage After XOG and Endeavor: Read the Lease*, in State Bar of Texas 36th Annual Advanced Oil, Gas, and Energy Resources Law CLE, Chapter 8 (2018).
6. *Coyote Lake Ranch v. City of Lubbock*, 498 S.W.3d 53 (Tex. 2016).
7. *Harrison v. Rosetta Resources Operating*, 2018 WL 3751740 (Tex. App.—El Paso Aug. 8, 2018).
8. Ernest E. Smith, *Applying Familiar Concepts To New Technology: Under The Traditional Oil And Gas Lease, A Lessee Does Not Need Pooling Authority To Drill A Horizontal Well That Crosses Lease Lines*, <http://texasbar.informz.net/texasbar/data/images/OGE%20Applying%20Familiar%20Concepts%20to%20New%20Technology.pdf> (last visited Nov. 6, 2018).
9. *Monroe Properties v. Railroad Commission of Texas*, No. D-1-GN-18-001111 (53rd Dist. Ct., Travis County, Tex. Mar. 2, 2018); for a discussion of the case, see John B. McFarland, *Challenge to Devon Allocation Well*, Oil and Gas Lawyer Blog (Mar. 13, 2018), <https://www.oilandgaslawyerblog.com/challenge-devon-allocation-well/>.



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PATENT LITIGATION

By Michael C. Smith

The most significant development for Texas patent practitioners in 2018 was two cases from the U.S. Supreme Court dealing with proceedings at the Patent Trial and Appeal Board, or PTAB. Other decisions from that court and the U.S. Court of Appeals for the Federal Circuit provided additional clarification on damages and venue in patent cases, while the U.S. Patent and Trademark Office, or PTO, announced substantive changes in its procedures for examining patents.

Supreme Court Upholds Constitutionality of PTAB Proceedings

The court's highly anticipated decision in *Oil States Energy v. Greene's Energy Group*¹ upheld the constitutionality of inter partes review, or IPR, proceedings at the PTAB. In a related case, *SAS Institute v. Iancu*,² the court rejected the PTO's practice of conducting only partial review of a patent in reexamination proceedings.

And in *WesternGeco v. ION Geophysical*,³ the court held that patent owners may recover lost foreign profits when the infringing party exports parts from the United States for assembly in foreign countries, so long as the relevant infringing conduct occurred in the United States.

Venue in Patent Cases

Following 2017's landmark Supreme Court holding in *TC Heartland v. Kraft Foods Group Brands*⁴ that a domestic corporation may only be sued for patent infringement in its state of incorporation, or where it commits infringing acts and has a "regular and established place of business," the Federal Circuit issued three opinions in 2018 that further clarified a patent plaintiff's venue options.

In *In re BigCommerce*,⁵ the court held that if a company is incorporated in a state that has multiple districts, such as Texas, only the district where the company has its principal place of business or registered office is a proper venue. In *In re HTC*,⁶ the court held that nothing in *TC Heartland* changed the longstanding rule that foreign companies can be sued in any federal district court. Finally, in *In re ZTE (USA)*,⁷ the court held that the burden of proof to show that venue is proper is on the plaintiff.

Patent Office Developments

Under its new director, Andrei Iancu, the PTO began changing its procedures to respond to complaints that it was conducting IPR proceedings in a way that unfairly penalized patent holders.

On October 10, 2018, the agency published a final rule changing the claim construction standard applied during IPR and other post-grant review proceedings before the PTAB from the "broadest reasonable interpretation" standard it had been using to the *Phillips* standard used to construe

patent claims in patent litigation.⁸

The PTO has also announced its intent to propose new rules aimed at making it easier to amend patents in review proceedings and is also evaluating changes to the guidance it gives its examiners on how to approach the determination of subject matter eligibility under 35 U.S.C. § 101.⁹

Patent Case Filings

Patent case filings continued to decrease nationwide in 2018. Following 2017's decrease of 10.3 percent from 2016 levels, which resulted in the lowest level of filings since 2011,¹⁰ filings in the first half of 2018 were down 16 percent from the first half of 2017.¹¹

The geographical distribution of patent filings in 2018 continued to follow the distribution of 2017 filings after *TC Heartland* was issued, with over 25 percent of patent suits being filed in the District of Delaware, with the Eastern District of Texas in second place at approximately 15 percent, followed by the Central District of California (8 percent) and the Northern District of California (7 percent).¹²

Notes

1. 138 S.Ct. 1365 (2018).
2. 138 S.Ct. 1348 (2018).
3. 138 S.Ct. 2129 (2018).
4. 137 S.Ct. 1514 (2017).
5. 890 F.3d 978 (Fed. Cir. 2018).
6. 889 F.3d 1349 (Fed. Cir. 2018).
7. 890 F.3d 1008 (Fed. Cir. 2018).
8. <https://www.bigmoleculewatch.com/2018/10/10/pto-replaces-broadest-reasonable-interpretation-claim-construction-standard-in-ipr-pgr-cbm-proceedings/>.
9. <https://www.ipwatchdog.com/2018/09/25/director-iancu-proposing-uspto-101-analysis/id=101682/>.
10. <https://lexmachina.com/lex-machina-q4-litigation-update/>.
11. <https://www.unifiedpatents.com/news/2018/6/28/1st-half-2018-patent-dispute-report>.
12. <https://www.unifiedpatents.com/news/2018/6/28/1st-half-2018-patent-dispute-report>.



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PERSONAL INJURY LAW

By Melanie L. Fry and Josué J. Galván

A high-speed chase, road rage, and a corpse—here are the personal injury cases that got the Texas Supreme Court’s attention in 2018.

Vicarious Liability

In *Painter v. Amerimex Drilling I*,¹ a driller was driving his coworkers from a drilling site back to their housing when he struck another vehicle. The court confirmed that the “coming-and-going rule” (employees do not act within the scope of employment when traveling to and from work) applies when evaluating vicarious liability, but it recognized an exception when such travel involves performing “regular or specifically assigned duties” for the employer’s benefit. The majority rejected the dissent’s “task-based control analysis,” holding that to the extent transporting crew members was part of the driller’s job—he received a daily bonus to drive his crew to the well—it fell within the company’s power of supervision.

Sovereign Immunity

*City of San Antonio v. Tenorio*² concerned a head-on collision between a motorcycle and a vehicle involved in a high-speed chase with San Antonio police. The surviving motorcycle rider sued the city. The city claimed immunity from suit because it did not have actual notice of fault as required by the Texas Tort Claims Act, or TTCA. Applying *Cathey v. Booth*,³ where the court declared that actual notice requires subjective awareness of fault, the court concluded that evidence that a vehicle pursued by police was involved in a collision was insufficient, without more, for actual notice. In her dissent, Justice Eva Guzman opined that the evidence raised a fact issue regarding the city’s actual knowledge of potential fault. Justice Jeffrey Boyd, joined by Justices Debra Lehrmann and James Blacklock, also dissented and made a case for reconsidering *Cathey*, which they argue “rewrote” the TTCA’s waiver provision.

In *Harris Cty. v. Annab*,⁴ a woman shot by an off-duty constable during a road rage incident sued Harris County, alleging that the county used tangible personal property—the constable’s personal firearm—to injure her. The court held that the woman’s allegation that the county enabled, authorized, or approved the constable’s use of the firearm did not amount to an allegation that the county actually used the firearm, so the TTCA’s waiver provision was not triggered.

Discovery Rule

In *Schlumberger Tech. v. Pasko*,⁵ the court held that cancer was not a latent injury under the facts because the respondent was diagnosed with cancer a few months after he knew he was exposed to toxic chemicals at work. The court clarified

that application of the discovery rule does not turn on whether an injured person knows who committed the tort, all the ways that the tortfeasor was at fault, or when the full effects of the injury are known. Rather, it turns on whether a person is aware of his or her injury and that it was likely caused by another’s wrongful acts.

Recovering Mental Anguish Damages

In *SCI Tex. Funeral Servs. v. Nelson*,⁶ the court held that a contractual relationship between plaintiff and defendant is not required to recover mental anguish damages for mishandling a corpse. However, the court clarified that a special relationship (not necessarily a contractual one) is required as the basis for mental anguish damages when a defendant has negligently mishandled a corpse. The court further held that the relationship between a person disposing of a decedent and the decedent’s next of kin is a special relationship.

Notes

1. No. 16-0120, 2018 Tex. LEXIS 310 (Tex. Apr. 13, 2018).
2. 543 S.W.3d 772 (Tex. 2018).
3. 900 S.W.2d 339, 341 (Tex. 1995).
4. 547 S.W.3d 609 (Tex. 2018).
5. 544 S.W.3d 830 (Tex. 2018).
6. 540 S.W.3d 539 (Tex. 2018).



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TAX LAW

By Bruce A. McGovern

In December 2017, Congress passed significant tax legislation commonly known as the 2017 Tax Cuts and Jobs Act,¹ most provisions of which became effective in 2018.

Individuals

For individuals, the act reduced tax rates, disallowed or limited many common deductions, and significantly increased the standard deduction. Consequently, most individuals should have a lower federal income tax liability compared to 2017, more individuals will take the standard deduction, and a dramatically lower number of individuals will be subject to the alternative minimum tax, or the AMT.

For 2018 through 2025, Congress:

- Reduced tax rates by adjusting the individual rate brackets (e.g., reducing the top rate from 39.6 percent to 37 percent).
- Created a new 20 percent deduction for “qualified business income,” which generally is income an individual earns from business activities conducted as a sole proprietor, a partner, or an S corporation shareholder. Employees and many professional service providers (including attorneys and CPAs with higher incomes) are not eligible for this deduction.
- Disallowed the personal exemption deduction.
- Disallowed “miscellaneous itemized deductions,” which include investment-related expenses, unreimbursed employee business expenses, and tax preparation fees.
- Limited to \$10,000 the deduction for state and local taxes.
- Increased the 2018 standard deduction for married couples filing jointly to \$24,000 (compared to \$12,700 in 2017).
- Increased the child tax credit from \$1,000 to \$2,000 per child and increased the income threshold above which the credit phases out for joint filers from \$110,000 to \$400,000, which will make the credit available to many more individuals.

Corporations

One centerpiece of the Tax Cuts and Jobs Act was the reduction of corporate tax rates from graduated rates ranging from 15 percent to 35 percent to a flat rate of 21 percent. Congress also repealed the corporate AMT and reduced the corporate dividends-received deduction. For S corporations, the legislation changes prior law by permitting a nonresident alien as a beneficiary of an electing small business trust, or ESBT. An ESBT is a permissible S corporation shareholder.

Partnerships

Congress enacted a new requirement that income of partners holding carried interests (generally partnership interests received in exchange for investment management

services) cannot be characterized as long-term capital gain unless a three-year holding period requirement (rather than the normal one year) is met. Congress also enacted a provision making foreign persons holding interests in partnerships engaged in a U.S. trade or business potentially subject to U.S. tax on gain from the disposition of such interests. This change legislatively overrules *Grecian Magnesite Mining, Industrial & Shipping Co., S.A. v. Commissioner of Internal Revenue*.² The legislation also eliminated “technical terminations” of partnerships, i.e., the rule that treated a partnership as terminated if, within any 12-month period, there was a sale or exchange of 50 percent or more of the total interests in partnership capital and profits.

Tax-Exempt Organizations and Charitable Giving

The act imposed new excise taxes on certain tax-exempt organizations paying compensation over \$1 million to “covered employees,” a category that includes coaches at some private colleges and universities, and on the net investment income of certain private colleges and universities with endowments worth \$500,000 or more per full-time student. The legislation increased the limit on charitable contributions by individuals for cash contributions to public charities and eliminated the charitable contribution deduction for payments to colleges and universities in exchange for rights to purchase preferred seating at athletic events.

Other Significant Changes

The Tax Cuts and Jobs Act also:

- Doubled (to \$11.2 million for 2018) the basic exclusion amount for federal estate tax purposes.
- Created the ability to invest in low-income areas designated as “qualified opportunity zones” and defer or permanently exclude gains with respect to such investments.
- Significantly revised the U.S. rules for taxing international transactions.

Notes

1. Pub. L. No. 115-97 (2017).
2. 149 T.C. No. 3 (2017).

The author would like to thank Chris M. Goodrich, of Crady Jewett McCulley & Houren, for comments on this article.



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TEXAS ACCESS TO JUSTICE

By Harry M. Reasoner

2018 was hard for both those in desperate need of access to justice and those seeking to help provide it.

The aftermath of Hurricane Harvey left thousands in need of legal aid, seeking Federal Emergency Management Agency assistance and disaster relief, finding new residences after they were destroyed, and dealing with the myriad hardships the disaster caused.

The federally funded Legal Services Corporation, the State Bar of Texas, and local bars have responded magnificently to the full extent their limited resources permitted. Many law firms contributed substantial sums of money and pro bono hours.

Of course, the needs for legal aid continued, for example: domestic violence, veterans wrongly deprived of medical assistance and earned benefits, and various scams designed to prey on the poor.

In a situation where nine of 10 seeking legal aid were already turned away for lack of resources, the needs of Harvey victims strained resources further.

The Texas Access to Justice Commission, the State Bar, and the Texas Access to Justice Foundation—under the leadership of the Texas Supreme Court—continue to seek adequate funding from the Legislature, Congress, and Texas attorneys. The commission has begun to participate in the effort to seek the support of philanthropic foundations for access to justice. The commission believes if it can make the costs of lack of access clear, many foundations would find access to justice worth supporting.

Texas attorneys contributed pro bono hours estimated to be worth \$564 million. Through membership in the Champion of Justice Society and the 2018 Access to Justice Campaign, Texas attorneys contributed \$1.39 million to be distributed through the Texas Bar Foundation and the Access to Justice Foundation. Funds raised from the Champions of Justice Gala Benefiting Veterans exceeded \$404,000.

With the limited funding available, the commission continues to seek legislative and rule reforms that facilitate the ability of those who cannot afford lawyers to represent themselves. Dedicated volunteers from the bar continue to develop plain language forms. Forms for simple wills for small estates and an “eviction kit” will be sent to the Texas Supreme Court by year’s end. Simple name change forms and updated protective order forms have also been sent to the court for review.

The commission is working with the Supreme Court Advisory Committee of the Texas Supreme Court on a proposed change to the Texas Code of Judicial Conduct to clarify the appropriate role for a judge when a self-represented litigant is party to a suit and on policies to clarify what court clerks and personnel can appropriately do to assist self-represented litigants. The commission is also working to give an understanding of the cost of lack of access to justice to law students.

The commission puts on a poverty simulation project to help Texas law students gain a better understanding of how a low-income family navigates life. The simulation dispels stereotypes and shows how a lack of legal representation can directly trigger the cycle of poverty and repeatedly reinforce it. The commission staff presented the simulation to every first-year student at SMU Dedman School of Law (a leader in pro bono efforts) in August. The number of students interested in pro bono work after these events increased, and the feedback from future lawyers is powerful and positive.

The commission’s aspiration for access to justice to truly be available for all requires a culture within the bar that inspires lawyers to seek to make access to justice a reality by contributing personally and by giving the public an understanding of the terrible and tragic costs of not having access to justice.



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TEXAS SUPREME COURT

By Scott P. Stolley

In the 2017-2018 term, the Texas Supreme Court issued a number of opinions that directly affect lawyers or influence the practice of law.

In *In re Turner*,¹ a law firm was disqualified after failing to instruct a new legal assistant not to work on matters she had worked on at prior firms. In *Hill v. Shamoun & Norman*,² the court held that a law firm’s oral contingent-fee agreement was unenforceable, that the firm could nevertheless recover a fee in quantum meruit, and that the firm’s expert witness could not base his opinion on the fee agreement. In *Starwood Mgmt. v. Swaim*,³ an expert affidavit filed to support a legal-malpractice claim was not conclusory.

In cases of note regarding discovery, the court held that client communications with a patent agent could be protected by the attorney-client privilege,⁴ contracts and negotiated reimbursement rates with insurers and governmental entities were discoverable when challenging a hospital’s charges,⁵ and “mere skepticism” that responsive documents remained on the opposing party’s computer was insufficient to compel forensic examination of the computer.⁶

In cases regarding affidavits, the court held that a subrogation agent could sign an affidavit to prove past medical expenses⁷ and that a trial court may disregard a “sham affidavit” filed solely to create a fact issue precluding summary judgment.⁸ A “sham affidavit” is one that directly contradicts previous testimony without explanation.

In summary-judgment cases, the court held that objections to evidence were not preserved since the objector did not obtain an express ruling and an implied ruling was not clearly shown,⁹ a summary judgment containing a Mother Hubbard clause was final even though the clause was erroneously included,¹⁰ and the movant could rely on evidence that the nonmovant filed less than 21 days before the hearing.¹¹ The court also held that documents offered at an earlier hearing were proper evidence in a later summary-judgment proceeding, where the documents were referenced in the summary-judgment motion.¹²

In cases regarding designation of a responsible third party, or RTP, the court held that the requirement to designate the RTP by the 60th day before trial was not tethered to the first trial setting¹³ and that a designation was faulty where the claim against the RTP was time-barred and the designating party had not timely disclosed the RTP in discovery.¹⁴

The court continued its interest in the anti-SLAPP statute, deciding four cases. The court ruled in one case that an attorney sued by the opposing party was entitled to dismissal under the statute,¹⁵ in another case that statements about an HOA related to a “matter of public concern,”¹⁶ and in another that the statute applied to a claim to remove a public board member and that sovereign immunity did not bar recovery of attorneys’ fees against the governmental entity.¹⁷ In the fourth case, the court explained the intricacies of the “commercial speech” exemption.¹⁸

Finally, the court had two personnel changes in the past year. Justice James Blacklock replaced Justice Don Willett, who was appointed to a seat on the 5th Circuit Court of Appeals. And Justice Phil Johnson, who retired after 13 years on the court, will be replaced by a new justice to be named by the governor.

Notes

1. *In re Turner*, No. 17-0099 (Tex. Dec. 22, 2017) (orig. proceeding).
2. *Hill v. Shamoun & Norman*, 544 S.W.3d 724 (Tex. 2018).
3. *Starwood Mgmt. v. Swaim*, 530 S.W.3d 673 (Tex. 2017).
4. *In re Silver*, 540 S.W.3d 530 (Tex. 2018).
5. *In re N. Cypress Med. Ctr. Operating*, No. 16-0851 (Tex. Nov. 9, 2017).
6. *In re Shipman*, 540 S.W.3d 564 (Tex. 2018).
7. *Gunn v. McCoy*, No. 16-0125 (Tex. June 15, 2018).
8. *Lujan v. Navistar*, No. 16-0588 (Tex. April 27, 2018).
9. *Seim v. Allstate Tex. Lloyds*, No. 17-0488 (Tex. June 29, 2018).
10. *In re Elizondo*, 544 S.W.3d 824 (Tex. 2018).
11. *Schlumberger Tech. v. Pasko*, 544 S.W.3d 830 (Tex. 2018).
12. *Lance v. Robinson*, 543 S.W.3d 723 (Tex. 2018).
13. *In re Coppola*, 535 S.W.3d 506 (Tex. 2017).
14. *In re Dawson*, No. 17-0122 (Tex. June 22, 2018).
15. *Youngkin v. Hines*, 546 S.W.3d 675 (Tex. 2018).
16. *Adams v. Starside Custom Builders*, 547 S.W.3d 890 (Tex. 2018).
17. *State v. Harper*, No. 16-0647 (Tex. June 29, 2018).
18. *Castleman v. Internet Money*, 546 S.W.3d 684 (Tex. 2018).



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TRADEMARK LITIGATION

By Katherine A. Compton

In January 2016, Viacom International sued IJR Capital Investments for infringing its common law trademark of the Krusty Krab, a fictional restaurant from the animated television show *SpongeBob SquarePants* in which SpongeBob, the animated chef, makes his delicious hamburgers.¹ Notably, this show has been the most-watched animated television show for 15 years in a row, with over 73 million viewers, prompting two movies grossing over \$460 million and inspiring a Broadway show.²

Viacom learned that IJR was planning to open seafood restaurants in Los Angeles and Houston called the Krusty Krab, and the U.S. Patent and Trademark Office had approved its application to use the name. IJR contended that it got the name from the crust that sticks to crabs when they are put in a seafood boil. IJR’s owner claimed that the idea was originally to name the restaurants Crusted Crab, which then became the Krusty Krab.³ He admitted to seeing the Krusty Krab on *SpongeBob SquarePants* while performing a Google search before filing a trademark application but felt that since there was no trademark registered for the name he could use it.⁴

Viacom filed for summary judgment, which was granted, establishing that the Krusty Krab had acquired distinctiveness and that every likelihood-of-confusion factor indicated in IJR’s proposed use would probably cause confusion.⁵ In May 2018, the U.S. Court of Appeals for the 5th Circuit affirmed the Southern District of Texas, holding that the Krusty Krab had acquired distinctiveness through secondary meaning as a matter of law.

The court held that common law trademark actions were analyzed in the same manner as Lanham Act claims.⁶ The court assessed whether the Krusty Krab establishes ownership by demonstrating that it uses its name as a source identifier.⁷ The court determined that although never decided by this court, specific elements within the television show, as opposed to the title of the show itself, received trademark protection.^{8,9} The court cited 5th Circuit precedent that “ownership of a trademark is established by use, not by registration,” and found IJR’s use of the name “creates a likelihood of confusion” that consumers would believe Viacom had licensed it to IJR. The court stated that “trademark protection may be granted to certain characters, places, and elements of a broader entertainment entity,”¹⁰ and “have extended this protection to fictional elements of entertainment franchises.”¹¹

In addition, to prove that it is a source identifier, the plaintiff had to show that the Krusty Krab was distinctive. The court found that it had acquired distinctiveness through secondary meaning, i.e., “when, in the minds of the public, the primary significance of a [mark] is to identify the source of the product rather than the product itself.”¹²

The court found that Viacom proved there was a likelihood of confusion as to source, affiliation, or sponsorship. The court upheld summary judgment in favor of Viacom, holding that third parties cannot appropriate the goodwill and reputation of the Krusty Krab by naming a restaurant the Krusty Krab

absent a showing that the restaurant was developed in a context that is sufficient to avoid the likelihood of confusion.

Notes

1. *Viacom Int'l v. IJR Capital Invs.*, 891 F.3d 178 (2018 U.S. App. LEXIS 13331 (May 22, 2018) at *2.
2. *Id.*
3. *Id.* at 4.
4. *Id.* at 5.
5. *Id.* at *6.
6. *Id.* at *8.
7. *Id.* at *8.
8. *Warner Bros. v. Gay Toys, Inc.*, 658 F.2d 76 (2d Cir. 1981).
9. *Id.* at *9.
10. *Id.* at *9.
11. *Id.*
12. *Id.* 16.



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U.S. SUPREME COURT

By Dustin M. Howell

Anticipation was high for several potential blockbuster decisions in the U.S. Supreme Court's 2017-2018 term. The biggest fireworks, however, came shortly after the last bang of the gavel in June when Justice Anthony Kennedy announced his retirement after 30 years of service to the court. His former clerk, Brett Kavanaugh, was nominated and eventually confirmed to take his place. Kavanaugh's arrival may usher in a new conservative era on the court, but only time will tell if these predictions hold true. In the meantime, here are a few cases of interest from last term.

The court in *Carpenter v. United States*¹ considered the warrantless search and seizure of cellphone records providing a "comprehensive chronicle of the user's past movements." At his trial for robberies of various Radio Shacks and (coincidentally) cellphone stores, prosecutors introduced evidence of Timothy Carpenter's location obtained from a warrantless search of cellphone records. The district court denied his request to suppress this evidence, and the 6th Circuit Court of Appeals affirmed his conviction, concluding Carpenter did not enjoy an expectation of privacy in this information. The Supreme Court reversed, relying in part on the fact that the records were obtained over a span of 127 days. The court noted that its decision was "a narrow one," detailing examples of data acquisition that were not at issue in this case. Future cases will certainly test these limits.

*Masterpiece Cakeshop v. Colorado Civil Rights Commission*² presented the court with the opportunity to decide the First Amendment implications of a state's punishment of a baker who refused, on religious grounds, to provide services to a same-sex wedding. Instead, the court decided the case on the much

narrower, case-specific ground of the state commission's handling of the complaint filed. The court did not consider the broader question of whether the government could ever constitutionally reprimand a baker for refusing to offer services on the basis of sincerely held religious reasons. Several cases involving florists, photographers, and other wedding-adjacent services are percolating through the lower courts and may eventually require the court to answer this question.

*Abbott v. Perez*³ is a long-percolating Texas redistricting case. The main takeaways—without diving too deep into the weeds of the 93-page slip opinion—are that (1) the record did not establish that the 2013 Texas Legislature acted in bad faith or engaged in intentional discrimination; and (2) of the four districts invalidated by the lower court on alternative grounds, only one (Texas House District 90) had been drawn in such a way to dilute the votes of members of a minority group. The court remanded the case to the three-judge panel to reconsider the District 90 lines in light of the court's analysis.

*South Dakota v. Wayfair*⁴ addressed a challenge to a South Dakota law requiring online retailers to collect and remit sales tax "as if the seller had a physical presence in the state." Wayfair and other online retailers challenged the law, pointing to court precedent holding that a retailer must have a physical presence in the state before it could be required to collect a local sales tax. The court overruled this precedent, concluding it rested on a flawed reading of the Commerce Clause. The court thus held that South Dakota's law was constitutional, paving the way for numerous states, including Texas, to pass similar legislation.

*Epix Systems Corp. v. Lewis*⁵ considered whether employees whose contracts provide for individualized arbitration for employment disputes may nonetheless pursue their claims in federal court under the National Labor Relations Act, or NLRA. The employees argued that the NLRA superseded provisions in the Federal Arbitration Act, or FAA, supporting such arbitration agreements. The court concluded that the FAA controlled and that the NLRA did not repeal the operative provisions of the FAA by implication. In reaching this conclusion, the court also declined to apply *Chevron*⁶ deference to a contrary reading offered by the National Labor Relations Board, perhaps signaling a trend away from *Chevron* deference, one that will likely continue under the current makeup of the court. **TBJ**

Notes

1. 138 S. Ct. 2206 (2018).
2. 138 S. Ct. 1719 (2018).
3. 138 S. Ct. 2305 (2018).
4. 138 S. Ct. 2080 (2018).
5. 138 S. Ct. 1612 (2018).
6. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778 (1984).



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