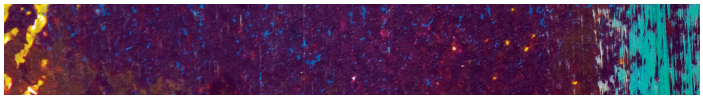
The year brought significant developments to the legal profession and caselaw. The Texas Bar Journal Board of Editors has assembled a series of articles highlighting these issues. **The topics featured are not exhaustive, and the opinions reflect only the views of the authors.**



ANTITRUST AND BUSINESS LITIGATION

By Emily Westridge Black and Carrington Giammittorio

This year, the U.S. Supreme Court issued opinions addressing the limits of the *Illinois Brick* indirect purchaser rule and the availability of class action arbitration.

The Scope of *Illinois Brick*

The Supreme Court issued a much-anticipated opinion in *Apple, Inc. v. Pepper*[1] addressing the scope of the *Illinois Brick*[2] doctrine, which limits antitrust standing to direct purchasers. The primary purpose of the doctrine is to protect defendants from multiple liability for the same conduct by barring indirect purchasers from recovering for damage inflicted on direct purchasers.

In *Apple*, consumers alleged Apple monopolized the market for iPhone apps. The district court dismissed, holding consumers do not have standing under *Illinois Brick* because they purchase from developers, who use the App Store as a virtual marketplace, rather than from Apple directly. The 9th Circuit reversed.

In a 5-4 decision, the court affirmed the 9th Circuit, holding that customers who purchased apps through Apple's App Store were direct purchasers with standing to sue Apple. The court rejected Apple's argument that iPhone users are indirect purchasers because the price they pay for an app is determined by the app developer rather than Apple. The court also held that Apple would not be exposed to multiple liability (to iPhone users and app developers) because any claim by developers "would rely on fundamentally different theories of harm."

The court explained that when a retailer violates antitrust laws and causes harm to consumers, the consumers' ability to be made whole should not depend on how the retailer chose to structure relationships with its suppliers. The court also noted that a contrary decision holding that purchasers from "electronic marketplaces" are *indirect* purchasers, could "provide a roadmap" for companies to "evade antitrust claims by consumers and thereby thwart effective antitrust enforcement."

This decision may open the door to lawsuits against companies with multi-sided business models, including companies that run similar digital marketplaces.

Class Action Arbitration

In *Lamps Plus Inc. v. Varela*, the court analyzed the availability of class-wide arbitration.[3] Reversing the 9th Circuit, the court held that, under the Federal Arbitration Act, or FAA, an ambiguous agreement cannot provide the necessary basis for concluding the parties consented to class arbitration. Instead, the court held that arbitration is only available if—*and to the extent*—that both parties to a contract expressly agree to it.

The claims in *Varela* related to a data breach that exposed employee tax information. Varela, an affected employee, filed a class action in federal court. Lamps Plus moved to compel individual arbitration based on Varela's employment agreement. The district court ruled that Varela must arbitrate his claim but could do so on a class-wide basis. The 9th Circuit affirmed, holding that under the common-law doctrine contra proferentem—which provides that ambiguities in a contract should be construed against the drafter—the ambiguous arbitration provision should be construed to allow class-wide arbitration. The 9th Circuit distinguished the case from *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*,[4] where the Supreme Court held that courts cannot compel class-wide arbitration when the agreement is silent on the availability of such arbitration. The court reversed, holding that "ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice the principal advantage of arbitration.'"

The court has made clear through a series of opinions (including *Varela*, *American Express Co. v. Italian Colors Restaurant*,[5] and *Stolt-Nielsen*) that arbitration agreements will be construed literally and enforced strictly. Accordingly, companies would be well-advised to ensure their arbitration agreements are well-considered and clearly drafted.

Notes

1. *Apple, Inc. v. Pepper*, 139 S. Ct. 1514 (2019).
2. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).
3. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).
4. 559 U.S. 662 (2010).
5. 570 U.S. 228 (2013).

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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, particularly with respect to interlocutory appeals.[1]

In *Scripps NP Operating, LLC v. Carter*, Carter sued a newspaper for defamation.[2] The newspaper moved for summary judgment.[3] The trial court denied the motion, and the newspaper unsuccessfully pursued an interlocutory appeal under Texas Civil Practice and Remedies Code, or CPRC, section 51.014(a)(6).[4] On remand, the newspaper moved for summary judgment on different grounds.[5] The court denied the motion, and the newspaper filed a second interlocutory appeal.[6] The court of appeals affirmed in part.[7] The newspaper sought review before the Texas Supreme Court.[8] Carter challenged the Supreme Court's jurisdiction, arguing that section 51.014 does not authorize successive appeals.[9] The Supreme Court disagreed, explaining "nothing in the statutory language limits a party to only one appeal."[10] Therefore, a party can pursue multiple interlocutory appeals if each appeal seeks review of "a new and distinct motion and not a mere motion to reconsider previous grounds for summary judgment."[11]

In *In re Geomet Recycling LLC*, the trial court granted EMR's request for a temporary restraining order against Geomet.[12] Geomet unsuccessfully moved to dismiss under the Texas Citizens Participation Act, or TCPA, and filed an interlocutory appeal under CPRC section 51.014(a)(12).[13] Pursuant to CPRC section 51.014(b), Geomet's appeal stayed all trial court proceedings.[14] EMR moved to lift the stay so the trial court could entertain EMR's pending request for a temporary injunction and its motion for contempt.[15] The court of appeals lifted the stay.[16] Geomet sought mandamus relief.[17] The Texas Supreme Court held that the court of appeals abused its discretion because section 51.014 contains no exception to the stay and does not authorize a court of appeals to lift the stay.[18] The Supreme Court rejected the argument that the Texas Rules of Appellate Procedure authorized the court of appeals' actions.[19] The Supreme Court further concluded that there is generally no adequate remedy by appeal for an erroneous order lifting the stay.[20]

In *Sabre Travel International, Ltd. v. Deutsche Lufthansa AG*, Sabre moved to dismiss Lufthansa's tortious interference claim.[21] The court denied the motion, but certified a permissive interlocutory appeal under CPRC section 51.014(d).[22] The court of appeals denied the permissive appeal, and Sabre filed a petition for review.[23] Lufthansa argued that the Texas Supreme Court did not have jurisdiction because the court of appeals denied the permissive appeal.[24] The Supreme Court disagreed.[25] Former Texas Government Code section 22.225(d) allowed a petition for review from an interlocutory order under section 51.014(d), and the Supreme Court concluded that the jurisdictional predicate for its review is satisfied when the trial court certifies a permissive appeal.[26] The Supreme Court emphasized that section 51.014(d) requires only the trial court's permission to appeal.[27] Further, no authority indicated that the Supreme Court lacked jurisdiction when a court of appeals declined to accept a permissive appeal.[28]

Notes

1. The Legislature also recently expanded the scope of Texas Civil Practice and Remedies Code § 51.014 to permit interlocutory appeals from orders denying motions filed by municipalities with populations of 500,000 or more in actions involving ordinances related to dangerously damaged structures and substandard buildings. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(14).
2. 573 S.W.3d 781, 784-87 (Tex. 2019).
3. *Id.* at 787, 789.
4. *Id.* at 787.
5. *Id.* at 787, 789.
6. *Id.* at 787-89.
7. *Id.* at 787-88.
8. *Id.* at 788.
9. *Id.*
10. *Id.* at 789.
11. *Id.* at 788-89.
12. 578 S.W.3d 82, 85 (Tex. 2019).
13. *Id.* at 85-86.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 86-87.
19. *Id.* at 87-89.
20. *Id.* at 91-92.
21. 567 S.W.3d 725, 728-29 (Tex. 2019).
22. *Id.*
23. *Id.* at 729.
24. *Id.*
25. *Id.* at 729-36.
26. *Id.* at 729, 733.
27. *Id.* at 733.
28. *Id.* at 733-34.

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ARBITRATION LAW

By Yolanda C. Garcia and Mason Parham

Federal Developments

In *Henry Schein, Inc. v. Archer & White Sales, Inc.*,[1] the U.S. Supreme Court rejected the 5th Circuit's "wholly groundless" exception to threshold questions of arbitrability. Under the general rule, parties may agree that an arbitrator will decide "'gateway' questions of 'arbitrability.'"[2] The exception, however, allowed courts to sidestep contractual delegation if a party's argument for arbitration appeared to be "wholly groundless." The Supreme Court held that this standard was inconsistent with the Federal Arbitration Act and that "when the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract, even if the court thinks that the arbitrability claim is wholly groundless."[3]

A week later, the court clarified that the ability to delegate arbitrability questions is not limitless. In *New Prime v. Oliveira*, the court held that courts do not have authority to compel arbitration for disputes outside the scope of the act, e.g., because they come within the exclusions set forth in the act.[4]

The Supreme Court also added to the spate of recent decisions addressing class arbitration. In *Lamps Plus, Inc. v. Varela*,[5] the court ruled that ambiguity cannot provide the necessary contractual basis for concluding that parties agreed to class arbitration. This supplements the court's 2017 decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, which held that silence does not provide a sufficient contractual basis to conclude that parties agreed to class arbitration.[6] The 9th Circuit distinguished *Stolt-Nielsen* on the ground that the agreement was ambiguous (rather than silent).[7] The Supreme Court reversed, reasoning that resolving ambiguities in favor of one of the parties "cannot substitute for the requisite affirmative contractual basis for concluding that the part[ies] *agreed* to [class arbitration]."[8]

Texas Developments

In *Robinson v. Home Owners Management Enterprises, Inc.*,[9] the Texas Supreme Court addressed whether the availability of class arbitration is a gateway question that should presumptively be decided by a court. The court previously addressed the issue in *In re Wood*, which held that an "arbitrator has the power to rule on class certification issues when the contract commits all disputes arising out of the agreement to the arbitrator."[10] The court noted, however, that the "jurisprudential landscape" had evolved since *Wood*, and that every federal circuit court to address the issue has concluded that class arbitrability should presumptively be determined by courts.[11] In light of these developments, and agreeing with the now predominate belief that class arbitration "radically alters the dispute-resolution bargain," the court overruled *Wood*, holding that whether parties agreed to class arbitration is a gateway question of arbitrability that should be decided by a court unless the parties clearly and unmistakably agreed otherwise.

Notes

1. 139 S. Ct. 524 (2019).
2. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-70 & note 1 (2010).
3. 139 S. Ct. at 526.
4. 139 S. Ct. 532, 537-38 (2019).
5. 139 S. Ct. 1407 (2019).
6. 559 U.S. 662, 684 (2010).
7. 139 S. Ct. 1413.
8. 139 S. Ct. at 1419 (quoting *Stolt-Nielsen*, 559 U.S. at 684) (internal quotation marks omitted).
9. No. 18-0504 (Tex. Nov. 22, 2019).
10. *Id.* at 11.
11. *Id.* at 14.

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BANKRUPTCY LAW

By Aaron M. Kaufman

For the first time in over a decade, the biggest development in bankruptcy news this year came *not* from the judicial branch but from the legislative branch. Last August, Congress passed (and the president signed into law) four bipartisan amendments to the U.S. Bankruptcy Code, marking the first significant amendments since 2005.

The Small Business Reorganization Act, or SBRA, will add new Subchapter V (11 U.S.C. §§ 1181-1195) to the U.S. Bankruptcy Code. While the definition of a "small business debtor" will not change,[1] the new law is intended to make access to bankruptcy courts less expensive, and a bankruptcy plan more feasible. Under the new law, a small business seeking bankruptcy relief will have more flexibility to negotiate a consensual plan of reorganization. Many provisions applicable to large commercial Chapter 11 cases will not apply to small business cases under the new law. Perhaps most notably, the "absolute priority rule"—which generally requires full payment of creditors, absent their consent—will be replaced by a requirement that the debtor

commits "projected disposable income" toward the Chapter 11 plan for a defined period of time, mimicking provisions from Chapter 13 of the U.S. Bankruptcy Code.

The new law also borrowed the concept of a "standing trustee" from Chapter 13. Under the new law, which will take effect in mid-February, a standing "small business" trustee will perform new specialized duties, such as facilitating the development of a consensual plan, ensuring that plan payments are made timely, reporting fraud or mismanagement to the court and, if the debtor ceases operations, performing certain of the duties sometimes required of a Chapter 7 or 11 trustee. A final change to the U.S. Bankruptcy Code under the new law is that attorneys owed less than $10,000 will not be disqualified from representing the debtor in its bankruptcy case.

The other bills signed into law on the same date included: (1) the Family Farmer Relief Act of 2019 (HR 2336; S 897), which increases the debt eligibility limit for Chapter 12 family farmers to $10 million; (2) the National Guard and Reservists Debt Relief Extension Act of 2019 (HR 3304), which exempts certain debtors serving in the armed forces from means-testing requirements when seeking bankruptcy relief; and (3) the Honoring American Veterans in Extreme Need Act of 2019 (HR 2938), which excludes certain Department of Veterans Affairs and Department of Defense benefits from the calculation of "current monthly income" in the means-test calculation.

While Congress was busy amending the U.S. Bankruptcy Code, the U.S. Supreme Court was equally busy resolving two separate bankruptcy-related issues. First, in its *Mission Products* decision, the Supreme Court ruled that there was nothing particular about a "trademark" license that warranted special treatment of the license upon its rejection by the debtor.[2] Rejection of such licenses under section 365 of the U.S. Bankruptcy Code, as with any other executory contract, did not terminate the agreement. The Supreme Court held that whatever rights the non-debtor counterparty would have under applicable state, federal, or other non-bankruptcy law in the event of a breach would apply in bankruptcy, following the debtor's rejection.

Then, two weeks later, in *Taggart v. Lorenzen*, the Supreme Court clarified the legal standards for a bankruptcy court to hold a creditor in civil contempt for violating a debtor's bankruptcy discharge order. Rather than employing a strict liability or subjective standard, the Supreme Court held that "civil contempt may be appropriate if there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful."[3]

Notes

1. A "small business debtor" is defined in 11 U.S.C. § 101(51D) as a person engaged in commercial or business activities with aggregate noncontingent liquidated debts below $2,725,625 (subject to adjustment every three years), although there remains significant debate among legal experts about whether that number should be adjusted upward to allow more businesses to qualify for relief as small businesses.
2. *See Mission Prod. Holdings v. Tempnology, LLC*, ___ U.S. ___, 139 S. Ct. 1652, 203 L. Ed. 2d 876 (2019).
3. *See Taggart v. Lorenzen*, ___ U.S. ___, 139 S. Ct. 1795, 1799, 204 L. Ed. 2d 129 (2019).

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CONSTRUCTION LAW

By Gregory M. Cokinos and Anthony T. Golz

The Texas Supreme Court issued numerous opinions this year impacting construction law, addressing subjects varying from waiver of Texas Civil Practice and Remedies Code, or CPRC, § 150.002's certificate-of-merit requirement to the standard for proving reasonable and necessary attorneys' fees in a fee-shifting situation. Several are noted below.

In *LaLonde v. Gosnell*,[1] a divided Texas Supreme Court held that engineers engaged in litigation conduct that impliedly waived their right to dismissal under CPRC § 150.002 for the plaintiffs' failure to file a certificate of merit. The engineers did not move for dismissal until one month before trial, after discovery had closed and limitations had expired on the plaintiffs' claims, having first propounded and responded to discovery; designated experts and responsible third parties; amended their answer; and participated in two mediations. According to the majority, "*all* of the Engineers' conduct in this case was inconsistent with their rights under section 150.002."

In *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*,[2] the Texas Supreme Court held that the lodestar method applies for determining the reasonableness and necessity of attorneys' fees in a fee-shifting situation. This method involves two steps. First, the fact finder must determine a base lodestar figure by multiplying the reasonable hours worked by a reasonable hourly rate—that figure is presumed to represent reasonable and necessary attorneys' fees. Second, the fact finder may then adjust the base lodestar figure up or down if relevant factors indicate an adjustment is necessary to reach a reasonable fee. The court further held that a defendant is a "prevailing party" for the purpose of a contractual fee-shifting provision when the defendant successfully defends against a claim and secures a take-nothing judgment on the main issue(s) in the case.

In *Nghiem v. Sajib*,[3] the Texas Supreme Court held that a claim for breach of the implied warranty of good and workmanlike repairs can be brought under the common law, as

well as under the Texas Deceptive Trade Practices-Consumer Protection Act, or DTPA. If such a claim is brought under the common law, it is not subject to the DTPA's two-year statute of limitations.

In *Endeavor Energy Resources, L.P. v. Cuevas*,[4] the Texas Supreme Court held that CPRC Chapter 95 applied to a contractor's employee's negligent-hiring claim against a property owner. According to the court, "[t]he statute's plain language requires only that the claim arise from the use of an improvement to the property, not that the property owner's negligence involve the use of the improvement, or that the use of the improvement be the *only* cause of the injury." Thus, when a negligent-hiring claim depends, in part, on proof that the employee's contemporaneous use of an improvement caused the plaintiff's injury, "[t]he claim therefore arises from the use of the improvement, and chapter 95 applies."

In *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*,[5] the Texas Supreme Court held that contractual limitation-of-liability clauses were effective to preclude recovery of exemplary damages. Based upon its prior holding that "a damages-limitation clause is a limited warranty that is the basis of the bargain and will limit recovery to the limited damages," and its "strongly held principles of freedom to contract," the court concluded, "we believe parties can bargain to limit exemplary damages."

Finally, in *Godoy v. Wells Fargo Bank, N.A.*,[6] the Texas Supreme Court held that parties may contractually waive a statute of limitations if the waiver is "specific and for a reasonable time." The court explained, "[b]lanket pre-dispute waivers of all statutes of limitations are unenforceable, but waivers of a particular limitations period for a defined and reasonable amount of time may be enforced."

Notes

1. No. 16-0966, 2019 WL 2479172 (Tex. June 14, 2019).
2. 578 S.W.3d 469 (Tex. 2019).
3. 567 S.W.3d 718 (Tex. 2019).
4. No. 17-0925, 2019 WL 1966625 (Tex. May 3, 2019).
5. 572 S.W.3d 213 (Tex. 2019).
6. 575 S.W.3d 531 (Tex. 2019).

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CONSUMER LAW

By Dana Karni

Breach of Warranty as DTPA or Common Law Claims

In *Nghiem v. Sajib*,[1] the Texas Supreme Court held the Deceptive Trade Practices and Consumer Protection Act[2] is not an exclusive remedy for breach of warranty cases, which can also be asserted in common-law actions. Where an intervenor's implied warranty claim would have been time-barred under the DTPA's two-year statute of limitations, "[the] claim of breach can be brought under the common law as well as the DTPA."

Personal Jurisdiction to Vacate Consumer Arbitration Award

In *Conn Appliances, Inc. v. Williams*,[3] the 5th U.S. Circuit Court of Appeals affirmed the Southern District of Texas' dismissal of a suit to vacate an arbitration award for lack of personal jurisdiction. Johnnie F. Williams, a Tennessee consumer, entered into a retail installment sales contract with Conn Appliances at one of its Tennessee locations that provided for arbitration "near [the buyer's] residence."[4] When the arbitrator entered an award in favor of the consumer, Conn filed suit in Texas to vacate the award.[5] The 5th Circuit held that simply entering into a contract with a Texas entity does not establish minimum contacts. Without additional evidence that the consumer "'purposely availed himself' of the Texas forum," the Texas court has no personal jurisdiction to vacate an arbitration award.[6]

Fair Debt Collection

In a unanimous opinion of *Obduskey v. McCarthy & Holthus LLP,* the U.S. Supreme Court held that "but for § 1692f(6),[7] those who engage in only nonjudicial foreclosure proceedings are not debt collectors within the meaning of the [Fair Debt Collection Practices] Act."[8] Justice Stephen Breyer's opinion interprets entities whose principal purpose is security-interest enforcement as falling outside of the scope of "debt collector" as defined by the FDPCA.[9]

In *Reyes v. Steeg Law, LLC*,[10] the 5th Circuit studied the number of debt collection letters sent and the percentage of time spent by a law firm to hold that it is not a "debt collector" as defined by the FDPCA.[11] The 5th Circuit declined to adopt any bright-line rule to determine when a law firm qualifies as a debt collector under the FDPCA and instead continues to consider several factors.[12]

Notes

1. 567 S.W.3d 718, 720-721 (Tex. 2019).
2. *Id.* at 719 citing Tex. Bus. & Com. Code §§ 17.41-17.63.
3. *Conn Appliances, Inc. v. Williams*, No. 19-20139, Summary Calendar (5th Cir. Sept. 4, 2019).
4. *Id.*
5. *Id.*
6. *Id.* citing *Sangha v. Navig8 ShipMgmt. Private Ltd.*, 882 F.3d 96, 103 (5th Cir. 2018).

7. 15 U.S.C. § 1692f(6) prohibits taking or threatening to take any non-judicial action to effect dispossession or disablement of property if—
   (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;
   (B) there is no present intention to take possession of the property; or
   (C) the property is exempt by law from such dispossession or disablement.
8. 139 S.Ct. 1029, 1038 (2019).
9. *Id.* at 1033.
10. *Reyes v. Steeg Law, LLC*, No. 17-30849 (5th Cir. Jan. 17, 2019).
11. 15 U.S.C. § 1692a(6).
12. *Reyes* citing *Kirkpatrick v. Dover & Fox, P.C.*, No. 4:13-cv-00123, 2013 WL 5723077, at *5 (S.D. Tex. Oct. 21, 2013).

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CRIMINAL LAW

By Kerry FitzGerald

Significant blood draw and cellphone record cases dominate this review.

In *State v. Ruiz*,[1] the defendant, Jose Ruiz, fled the scene of a car wreck. Police found Ruiz unresponsive in a nearby field and carried him to a patrol car. When emergency medical responders could not revive him, they took him to a hospital. After police read warnings to the unconscious defendant, a warrantless blood draw was ordered.

Regardless of statutory provision[2] related to implied consent of a driver to alcohol testing, the blood draw was an unreasonable application of the Fourth Amendment consent exception to warrant requirement. The court, citing *Mitchell*,[3] remanded for the lower court to address the question of whether exigent circumstances justified the blood draw.

In *Mitchell*, the plurality opinion recognized an officer may conduct a blood alcohol content, or BAC, test if facts show exigency exception or the officer may conduct a breath test (not blood test) incident to an arrest if he or she has probable cause to arrest a motorist for drunk driving.

Facts showed police received a report that the defendant, Gerald P. Mitchell, appeared very drunk and had driven off in a van. He was found wandering near a lake. Stumbling and slurring his words, Mitchell could hardly stand without officers' support. Field sobriety tests were hopeless so police gave a preliminary breath test, which registered a BAC level of 0.24%—triple Wisconsin's legal limit. Police arrested Miller and headed for the station, but when his condition became too lethargic for a breath test, the police drove him to a hospital, read required warnings to him, and ordered a blood test that showed BAC as 0.222% (90 minutes after his arrest). The defendant claimed unreasonable search; the state relied on the implied consent law.

The U.S. Supreme Court reasoned highway safety was a vital public concern, specified BAC limits are important and require accurate and prompt tests before alcohol dissipation (which prompted state implied consent laws to be established), and stated that when a breath test is unavailable, a blood test becomes necessary. Thus, there is a compelling need to blood test drunk driving suspects whose condition deprives officials of a reasonable opportunity to conduct a breath test.

The court then addressed whether there was time to secure a warrant. "An exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when drunk-driving suspect is unconscious." Thus, *Schmerber*[4] controls and police may almost always order a warrantless blood draw to measure a driver's BAC without offending the Fourth Amendment. However, the court remanded to determine if this could be the rare and unusual case in which the defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that "police could not have reasonably judged that a warrant application would interfere with other pressing needs and duties."

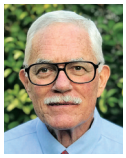
In *Ruiz v. State* (school principal looked through a teacher's cell, then gave cell to police),[5] the court held the Texas Code of Criminal Procedure Article 38.23 and the Fourth Amendment do not apply to actions of a private citizen acting in a private capacity. The court distinguished alleged violations of the Constitution from alleged violations of criminal laws (not claimed by defendant).

In *Hankston*,[6] the court, citing *Carpenter*[7] on remand, held the defendant had an expectation of privacy under the Fourth Amendment in third-party cellphone business records.

But in *Sims*,[8] the court upheld admission of evidence of real-time location information used to track a murder suspect by "pinging" a cellphone without a warrant. The court emphasized "less than three hours of real-time CSLI records accessed by police by pinging his phone less than five times." State did not argue lack of standing (defendant's father was named a subscriber on the account).

Notes

1. *State v. Ruiz*, 2019 WL 4308658, PD-0176-18 (Sept. 11, 2019).
2. Tex. Transp. Code § 724.014.
3. *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (June 27, 2019).
4. *Schmerber v. California*, 384 U.S. 757 (1966).
5. *Ruiz v. State*, 577 S.W.3d 543 (Tex. Crim. App. 2019).
6. *Hankston v. State*, 2019 WL 4309685, PD-0887-15 (Sept. 11, 2019).
7. *Carpenter v. United States*, 138 S.Ct. 2206 (2018).
8. *Sims v. State*, 569 S.W.3d 634 (Tex. Crim. App. 2019).



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CYBERSECURITY AND DATA PRIVACY LAW

By Shawn E. Tuma

New Data Breach Notification Requirements

Texas law requires a person who conducts business in Texas and collects or stores computerized data that includes sensitive personal information, or SPI, to notify any individual whose electronic SPI was or is reasonably believed to have been acquired by an unauthorized person.[1] Failing to comply with this notification requirement can result in civil penalties of up to $100 per person per day for the delayed time up to a maximum amount of $250,000 per breach.[2]

Effective January 1, 2020, HB 4390 amends this law to require that such notifications be made "without unreasonable delay and in each case not later than the 60th day after the date on which the person determines that the breach occurred" instead of "as quickly as possible."[3] This amendment brings more certainty because it not only adds the specific 60-day timing requirement but also clarifies that the time period begins to run when the determination of *breach* is made, which sometimes only occurs after an investigation into a cyber-related *incident* that may not immediately have been known or reasonably believed to have been a *breach*. HB 4390 also adds the requirement for notifying the Texas attorney general during that same 60-day time period if the breach involves at least 250 Texas residents. The AG notice must include five specific categories of information identified in the statute.[4]

Website Scraping Allegations Sufficient to Invoke Texas and Federal "Hacking" Laws

A website owner whose terms of use agreement prohibited the use of page-scraping and automated tools to access or monitor its website and content adequately stated a claim for violation of the Texas Harmful Access by Computer Act[5] and federal Computer Fraud and Abuse Act[6] against a defendant accused of using such tools to collect data for its website.[7] These laws prohibit accessing a computer without authorization. The agreement established the parameters for the authorization.

Viewing Pictures on Another's Cellphone: Violation of Texas Hacking Law?

A school principal who viewed improper pictures taken of female students on a substitute teacher's cellphone without his consent did not violate Texas' Breach of Computer Security[8] law. It was a valid defense that the principal accessed and looked through the phone for the purpose of giving it to the police for investigation.[9]

Cyber Insurance: Specific Policy Needed to Cover Data Breaches

General liability insurance policies that cover "personal and advertising injury" that includes publication of material "that violates a person's right to privacy" do not apply to assessments imposed by payment card brands for fraud loss from a data breach. "Plaintiff could have sought coverage that would unambiguously include coverage of a data breach but chose not to do so."[10]

The CCPA: A Non-Texas Law Impacting Texas Businesses

While outside of Texas, Texas businesses should pay close attention to the California Consumer Privacy Act, a strong consumer data privacy law that may apply to those doing business in California that collect personal information from individuals in California. The CCPA goes into effect in January 2020.

Notes

1. Tex. Bus. & Com. Code § 521.053(b).
2. Tex. Bus. & Com. Code § 521.151(a-1).
3. Tex. Bus. & Com. Code § 521.053(b).
4. Tex. Bus. & Com. Code § 521.053(b)(i).
5. Tex. Civ. Prac. & Rem. Code § 143.001, et seq.
6. 18 U.S.C. § 1030.
7. *Southwest Airlines Co. v. Roundpipe, LLC*, 375 F. Supp. 3d 687, 706 (N.D. Tex. 2019).
8. Tex. Penal Code § 33.02, et seq.
9. *Ruiz v. State*, 577 S.W.3d 543, 547-48 (Tex. Crim. App. 2019).
10. *Landry's, Inc. v. Ins. Co. of Penn.*, 2019 WL 3080917 (S.D. Tex. May 22, 2019).

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ENERGY LAW

By Brian C. Boyle

Despite growing financial challenges for shale drillers, Texas maintained its unprecedented level of oil and gas production in 2019. Given the thriving market, it's no surprise that Texas courts continued to resolve important issues in the energy space over the past year.

Revisiting the overarching question addressed in its 2016 *Hyder* opinion, the Texas Supreme Court made clear that when it comes to calculating royalties, the specific language of the written agreement controls. In *Burlington Resources Oil & Gas Company LP v. Texas Crude Energy, LLC*, the Texas Supreme Court held that post-production costs could be deducted from an overriding royalty interest where the agreement stated that the royalty interest "shall be delivered … into the pipelines, tanks or other receptacles with which the wells may be connected."[1] Even though the agreement also called for payment of the royalty based on the "amount

realized" from the sale, the court found that the agreement required valuation at the wellhead or nearby—i.e., "into the pipeline"—thereby allowing post-production costs to be subtracted from the "amount realized" in the downstream sales price.[2] In grappling with "an opaquely worded oil and gas agreement," the court reiterated "the decisive factor in each case is the language chosen by the parties to express their agreement."[3] Unlike the lease in *Hyder*, the agreement in this case did not provide for a "cost-free" royalty, thus reaching a different result.

In *Barrow-Shaver Resources Company v. Carrizo Oil & Gas, Inc.*, the Texas Supreme Court did not stray from its commitment to construing agreements as written, holding that a party did not breach a farmout agreement when refusing consent to an assignment because, even if the refusal to consent was unreasonable, the agreement did not expressly provide that consent could not be unreasonably withheld.[4] Given the plain language of the agreement, the court explained that expert testimony on industry custom for consent-to-assign provisions could not be considered.[5] Taking a cue from the Texas Supreme Court, in *Bell v. Chesapeake Energy Corporation*, the 4th Court of Appeals in San Antonio carefully reviewed the language of lease agreements in finding that "clear, direct, and mandatory" provisions created specific conditions for drilling offset wells.[6] Importantly, the court found that incorporating a reasonably prudent operator standard would improperly create conditions not expressed in the agreements.[7]

And in another notable case, *Texas Outfitters Limited LLC v. Nicholson*, the Texas Supreme Court addressed the duties of an executive mineral owner.[8] The court found that a hunting company that owned the surface estate and executive mineral rights shirked its duty of good faith and fair dealing to nonexecutive mineral owners when it refused an oil and gas lease in an effort to secure unburdened use of the land to operate its deer hunting business.[9]

Finally, cases playing out in other jurisdictions could have broad policy implications on the industry. Chief among those issues is the scope of climate change litigation, which has included children bringing claims against the federal government for failing to combat global warming[10] and suits by states and municipalities against energy companies alleging infrastructure damages from climate change.[11] Regardless of the outcome of such cases, the coming years are likely to involve legal challenges surrounding global warming policies and renewable energy targets.

Notes

1. 573 S.W.3d 198, 205-09 (Tex. 2019).
2. *Id.* at 211-12.
3. *Id.* at 200, 211-12.
4. No. 17-0332, 2019 WL 2668317 (Tex. June 28, 2019).
5. *Id.* at *10-12.
6. No. 04-18-00129-CV, 2019 WL 1139584, at *6-8 (Tex. App.—San Antonio, Mar. 13, 2019).
7. *Id.*
8. 572 S.W.3d 647 (Tex. 2019).
9. *Id.* at 656-57.
10. *See, e.g., Juliana v. U.S.*, Case No. 6:15-CV-01517 (D. Or.).
11. *See, e.g., City of Oakland v. BP PLC.*, Case No. C 17-06011 (N.D. Cal.).

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ENVIRONMENTAL LAW

By Jean M. Flores

The past year was full of significant caselaw holdings as well as legislative, regulatory, and policy changes, some of which are highlighted below.

U.S. Supreme Court

The U.S. Supreme Court heard oral arguments November 6, 2019, in *County of Maui v. Hawaii Wildlife Fund*[1] to address a circuit court split regarding whether the Clean Water Act requires a permit when point source pollutants are conveyed to navigable waters by a nonpoint source.

Circuit Courts

In *Air Alliance Houston v. EPA*,[2] the court vacated the Environmental Protection Agency's delay of the effectiveness of Obama-era changes to the Clean Air Act, or CAA, Risk Management Program, or RMP, rules. But, *see* "Regulatory Changes" below.

In *Southwestern Elec. Power Co. v. EPA*,[3] the court consolidated four separate lawsuits challenging the EPA's 2015 power plant effluent limitation guidelines and vacated the rule's wastewater and "combustion residual leachate" best available technology economically achievable standards.

In *Clean Water Action v. EPA*,[4] the court upheld the EPA's authority to delay beyond the compliance deadlines for two provisions in a significant 2015 Clean Water Act effluent regulation.

In *Gao v. Blue Ridge Landfill TX, L.P.*,[5] the court held that odor from a landfill was a permanent nuisance and a claim accrues when the injury first occurs.

Federal District Court

In *Texas v. United States*,[6] the court granted Texas' motion for summary disposition, sending EPA's 2015 Waters of the United States rule back to the administrative agencies to proceed with repealing and replacing the rule.

Regulatory Changes

The EPA has continued to roll back various Obama-era

regulations. One high-profile climate policy rollback is the EPA's new Affordable Clean Energy rule limiting greenhouse gas targets for power plants and eliminating the Obama administration's Clean Power Plan framework.[7] In another well-watched saga, EPA signed a final rule on November 20, 2019, that rescinds most of the changes to the CAA RMP Rule that became effective after *Air Alliance Houston*.[8]

Policy

On August 21, 2019, the U.S. Department of Justice announced that it would no longer utilize Supplemental Environmental Projects in settlements with state and local governments.[9]

Legislative

The 86th Texas Legislature resulted in many new environmental laws that largely became effective September 1, 2019. Among the highlights are:

1) HB 3224, which amends the Solid Waste Disposal Act to exempt from cleanup liability a person engaged in certain recycling activities if the person qualifies for an analogous Superfund exemption;
2) HB 2726, which concerns amended air quality permit applications and provides that in most air permit amendments, construction may proceed, at the applicant's own risk, after the Texas Commission on Environmental Quality, or TCEQ, has issued a draft permit that includes the amendment; and
3) HB 2771, which gives TCEQ permitting authority for discharges of "produced" water from oil and gas drilling.

Notes

1. *County of Maui v. Hawaii Wildlife Fund*, 2019 U.S. LEXIS 1103 (2019).
2. *Air Alliance Houston, et al. v. EPA*, 906 F.3d 1049 (D.C. Cir. 2018).
3. *Southwestern Elec. Power Co. v. EPA*, 920 F.3d 999 (5th Cir. 2019).
4. *Clean Water Action, et al., v. EPA*, No. 18-60079 (5th Cir. 2019).
5. *Gao v. Blue Ridge Landfill TX., L.P.*, No. 19-40062 (5th Cir. Oct. 30, 2019).
6. *Texas v. United States*, 2019 U.S. Dist. LEXIS 89113 (S.D. Tex. 2019).
7. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520 (July 8, 2019).
8. *Prepublication Copy Notice of Final Rule*, Docket No.: EPA-HQ-OEM=2015-0725 (Nov. 20, 2019).
9. Memorandum, "Using Supplemental Environmental Projects in Settlements with State and Local Governments," from Jeffrey Bossert Clark, Assistant Attorney General, to Chiefs of All Remaining ENRD Sections (Aug. 21, 2019).

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ESTATE PLANNING AND PROBATE LAW

By Gerry W. Beyer

The 2019 Texas Legislature and the courts were very active in the estate planning and probate law area over the past year. Below is a summary of some of the most important developments. For more detailed coverage of legislative developments, *see* William D. Pargaman & Craig Hopper, *Is There Meat in Those Beans? The 2019 Texas Estate and Trust Legislative Update*, available at snpalaw.com/resources/2019LegislativeUpdate and judicial developments, *see* Gerry W. Beyer, *Recent Cases: Intestacy, Wills, Probate, and Trusts*, available at papers.ssrn.com/sol3/papers.cfm?abstract_id=3443141.

Late Probate

Normally, a will must be probated within four years of the testator's death unless the applicant is not in default under Texas Estates Code § 256.003. There existed a split in authority among the Texas appellate courts regarding whether a default by a will beneficiary is attributed to that beneficiary's successors in interest (heirs or will beneficiaries). The Texas Supreme Court in *Ferreira v. Butler*[1] resolved this split by holding that the court may consider only the applicant's default and not whether someone else, even the person through whom the applicant is claiming, was in default.

Notice by Publication

When notice by publication is required, the notice must also be posted on the public information internet website maintained by the Office of Court Administration under newly enacted Texas Government Code § 72.034. The date of service is the earlier of the date posted on this website or published in a newspaper.[2]

Funeral and Last Illness Expenses

The amount of funeral and last illness expenses given Class 1 priority treatment was doubled from a combined total of $15,000 to a maximum of $15,000 for each type of expense.[3]

Residential Leases

If a decedent enters into a residential lease on or after January 1, 2020, was the sole occupant, and later dies, the personal representative may now terminate the lease early and avoid liability for future rent regardless of the terms of the lease upon satisfying statutorily provided conditions.[4]

Conversion of Muniment of Title to Estate Administration

The fact that a will has already been admitted to probate as a muniment of title will not preclude a later estate administration as long as either (1) four years have not elapsed

since the testator died, or (2) the court determines that estate administration is needed under Texas Estates Code § 301.002(b) (e.g., to recover property due a decedent's estate).[5]

Will Construction and Interpretation Rule Applicable to Revocable Trusts

If a trust is created and amendable or revocable by the settlor (or the settlor and the settlor's spouse), the construction and interpretation rules of Texas Estates Code Chapter 255 will apply as if the settlor is the testator and the beneficiaries upon the settlor's death are devisees unless the settlor provided otherwise. Settlors will need to consider these issues when drafting trusts and include appropriate provisions addressing these issues in the same manner as they do in their wills. These rules include contents of specific gifts, pretermitted children, satisfaction, anti-lapse, gifts of securities, exoneration of specific gifts, exercise of power of appointment, class gifts, judicial modification or reformation, and Texas Estates Code § 355.109 dealing with abatement.[6]

Transfer on Death Deeds

The 2019 Legislature repealed the statutory suggested forms for creating and revoking transfer on death deeds. Instead, the Texas Supreme Court must promulgate new sample forms.[7]

A memorandum of conveyance recorded prior to the grantor's death will now void an otherwise valid transfer on death deed.[8]

Notes

1. 575 S.W.3d 331 (Tex. 2019).
2. Tex. Est. Code § 51.054.
3. *Id.* at § 355.102(b).
4. Tex. Prop. Code § 92.0162.
5. Tex. Est. Code §§ 257.151, 257.152.
6. Tex. Prop. Code § 112.0335 (applicable only if the settlor dies on or after Sept. 1, 2019).
7. Tex. Gov't Code § 22.020(b)(2-a).
8. Tex. Est. Code § 114.102.

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FAMILY LAW

By Georganna L. Simpson and Beth M. Johnson

A mediated settlement agreement, or MSA, can satisfy the Texas Family Code before a suit is pending.[1] In *Highsmith*, the husband and wife went to a mediator without attorneys before filing for divorce. The mediation resulted in an MSA—the husband initiated a suit and obtained a final order incorporating the MSA. The wife argued the MSA was not binding under the Texas Family Code because no suit was pending when they signed it. Although the appellate court agreed with the wife, the Texas Supreme Court held there was no such requirement in the code.

If there is any chance that the relationship between an attorney and arbitrator might extend beyond "purely professional," it is better to err on the side of disclosure.[2] In *In re Marriage of Piske and Lange*, a property division was reversed because the arbitrator and lawyer failed to disclose that they were friends, which raised questions regarding the arbitrator's impartiality.

A claim of domicile can be controverted by a party's averment to the federal government that she intends to stay in the U.S. *temporarily*.[3] In *In re Peter Swart*, because a wife was in Texas based on a temporary visa, her divorce suit could not be maintained in Texas.

Texas Family Code § 156.006(b) was recently amended to apply to temporary orders that change, remove, or add a geographic restriction to the exclusive right to designate a child's primary residence.[4] Under the former version of the statute, parties had to first establish that temporary orders "had the effect of changing" the *person* with that exclusive right. In *In re Lee and In re J.W.*, the person with the right was not changed but the geographic restriction was modified, and without evidence of significant impairment to the child's physical health or emotional development, the change via temporary orders was unauthorized.

The 5th Court of Appeals in Dallas recently held that a parent with an expanded standard possession order can be a "custodial parent" for the purposes of determining child support and noted that the goal of child support is to provide the child with "adequate resources."[5] Because the mother had possession for roughly 20% to 30% of the time, she was a custodial parent entitled to support, calculated by offsetting the statutory guideline amounts that would be imposed on each parent.

After a 2013 amendment to the Texas Penal Code, a party need not show fear of bodily injury or death to prove stalking.[6] Mere harassment will suffice.

Notes

1. *Highsmith v. Highsmith*, __ S.W.3d __, No. 18-0262, 2019 WL 5482657 (Tex. 2019).
2. *In re Marriage of Piske and Lange*, 578 S.W.3d 624 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

3. *In re Peter Swart*, __ S.W.3d __, No. 05-19-00015-CV, 2019 WL 3212143 (Tex. App.—Dallas 2019, orig. proceeding).
4. *In re Lee*, No. 04-19-00440-CV, 2019 WL 3642640 (Tex. App.—San Antonio 2019, orig. proceeding) (mem. op.) (restriction removed); *In re J.W.*, No. 02-18-00419-CV, 2019 WL 2223216, at *3 (Tex. App.—Fort Worth May 23, 2019, orig. proceeding) (mem. op.) (restriction imposed).
5. *In re A.R.W.*, No. 05-18-00201-CV, 2019 WL 6317870 (Tex. App.—Dallas 2019, no pet. h.) (mem. op. on rehearing).
6. *Lopez v. Crisanto*, __ S.W.3d __, No. 08-17-00252-CV, 2019 WL 4058589 (Tex. App.—El Paso 2019, no pet.); *Wargocz v. Brewer*, No. 02-17-00178-CV, 2018 WL 494755 (Tex. App.—Fort Worth 2018, no pet.) (mem. op.); *In re M.M.W.*, No. 06-18-00082-CV, 2019 WL 1757897 (Tex. App.—Texarkana 2019, no pet.) (mem. op.).

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GOVERNMENT LAW

By Victor A. Flores

Last year was an active year with sweeping legislative changes, including among others HB 1325 (authorizing framework to grow industrial hemp) and HB 347 (ending most unilateral annexations by any city, regardless of population or location). Additionally, the following is a summary of three court decisions that impacted governmental entities.

Governmental Immunity in Breach of Contract Cases: *Hays Street Bridge Restoration Group v. City of San Antonio*

In 2018, the Texas Supreme Court listed four factors under *Wasson II*[1] for reviewing the governmental/proprietary dichotomy in breach of contract cases. *Hays Street Bridge Restoration Group v. City of San Antonio*[2] was the first case since *Wasson II* to raise these factors during oral arguments before the court. Originally, the city of San Antonio and the Hays Street Restoration Group entered into a memorandum of understanding, or MOU, to preserve and restore the 1880s Hays Street Bridge for community use.[3] The city obtained a state administered grant for 80% of the project's funding and the Restoration Group raised and transferred to the city more than $189,000 in matching funds.[4] The city finished the bridge restoration but then decided to sell the adjacent property to a private company.[5] The Restoration Group sued the city, alleging that the transfer of the property to the private company was a breach of the MOU.[6]

Applying the *Wasson II* factors, the court held that despite the city's discretionary act of entering the contract, (1) the restoration of the bridge was intended to benefit the general public, (2) 80% of the project was funded by a grant administered by the Texas Department of Transportation thereby benefiting the state, and (3) the purpose of the project was sufficiently related to governmental functions.[7] On this issue, the Texas Supreme Court held that the city satisfied the *Wasson II* factors and was entitled to governmental immunity.

Economic Development Corporations and Governmental Immunity: *Rosenberg Development Corporation v. Imperial Performing Arts, Inc.*

In 2012, Rosenberg Development Corporation, a Type B economic development corporation, executed a contract with Imperial Performing Arts, Inc.[8] Under the contract, RDC's board of directors held sole discretion to grant an extension of time for each performance.[9] The projects were more time-consuming and expensive than contemplated.[10] As a result of the delays, counterclaims for breach of contract were filed by RDC and Imperial.

As a matter of first impression, the Texas Supreme Court reviewed whether RDC was immune from suit under the common law even though RDC was neither a sovereign entity nor a political subdivision of the state.[11]

The court ultimately held, "Governmental immunity does not extend like ripples from a pebble tossed into a pond but, instead, is limited to those entities acting as an arm of state government. Despite fulfilling public purposes, economic development corporations do not exist quite like an arm of the state government, imbued with aspects of sovereignty such as immunity from suit."[12, 13]

Circumventing the Texas Open Meetings Act: *State v. Doyal* and SB 1640

The Montgomery County judge was indicted for violating the Texas Open Meetings Act, or TOMA, for knowingly conspiring to have secret deliberations related to the planning of a county bond project.[14] The county judge filed a motion to dismiss on the basis that the act was overbroad and unconstitutionally vague. The trial court granted the judge's motion to dismiss but the 9th Court of Appeals in Beaumont reversed and held that the statute was not unconstitutionally vague.[15] Upon further review by the Texas Court of Criminal Appeals, the court held that the statute was unconstitutionally vague on its face.[16]

In response to the *Doyal* decision, the Texas Legislature passed SB 1640, amending the act to establish language that was more clear and instructive. With the passage of the bill, it remains a crime to use walking quorums to circumvent TOMA.

Notes

1. *Wasson Interests, Ltd. v. City of Jacksonville*, 559 S.W.3d 142 (Tex. 2018) (*Wasson II*).
2. *Hays Street Bridge Restoration Group v. City of San Antonio*, 570 S.W.3d 697 (Tex. 2019).
3. *Id.* at 700.
4. *Id.*
5. *Id.* at 701.
6. *Id.*
7. *Id.* at 706.
8. *Rosenberg Development Corporation v. Imperial Performing Arts, Inc.*, 571 S.W.3d 738, 741 (Tex. 2019).
9. *Id.* at 741-42.
10. *Id.* at 742.
11. *Id.* at 747.
12. *Id.* at 752.
13. *Id.* at 753. Chief Justice Nathan L. Hecht wrote the court's concurring opinion, including a significant note, "[A]n EDC has immunity from suit and liability in tort except as waived by the TTCA … and while it has no immunity from suit in contract, it is not liable for damages when acting in its governmental capacity."
14. *State v. Doyal*,--S.W.3d--, 2019 WL 944022 at *1 (Tex. Crim. App. Feb. 27, 2019).
15. *Id.* at 1-2.
16. *Id.* at 2.

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IMMIGRATION LAW

By Paul S. Zoltan

In 2019, the Trump administration continued to pursue policies intended to achieve border security and to more carefully screen applicants for lawful status in the United States.

The Department of Homeland Security, or DHS, announced in September the end of "catch and release"—the practice of releasing into the U.S. asylum applicants found to have a "credible fear" of persecution. The "Migrant Protection Protocols," or MPP, now require most asylum seekers arriving at the southern border to await their hearings before an immigration judge in Mexico.

Throughout 2019, substantive limits on asylum eligibility worked in tandem with the MPP to curtail the number of individuals seeking refuge. In September, the U.S. Supreme Court lifted a lower court's injunction and allowed DHS to deny asylum to anyone entering the U.S. from Mexico between ports of entry. Those who would skirt this ban by walking up to a port of entry are subject to "metering": initial asylum screenings are so limited in number that many wait months in Mexico before seeing an asylum officer. In July and

September 2019, the nations of Guatemala, Honduras, and El Salvador signed "safe third country" agreements with the U.S., effectively disqualifying for asylum any individual who passes through any of the three en route to the U.S. The Department of Justice, or DOJ, has likewise narrowed asylum eligibility by redefining "refugee." Policies such as these have so discouraged asylum seekers that after DHS established in El Paso the "rapid asylum review" pilot program in October, the 1,500-bed facility to house participants remained virtually empty.

Fewer asylum claims have slowed the growth of the backlog of removal cases—now more than one million—pending before the nation's immigration courts. Texas' immigration courts must hear roughly 170,000 of these, and so are scheduling hearings as far out as 2023. The accretion in cases owes less to increased interior enforcement (which peaked in 2011) than to policies limiting prosecutorial discretion and immigration judges' authority to close or dismiss removal proceedings.

Article III courts enjoined regulations that would have expanded DHS' authority to detain children; made it harder for intending immigrants to show they are unlikely to become a "public charge"; and expanded the ambit of "expedited removal"—automatic deportation without judicial oversight—to individuals unable to prove two years' residence in the U.S. Courts have likewise enjoined DHS' proposed expansion of the definition of "unlawful presence" and termination of Temporary Protected Status for nationals of seven qualifying countries.

In business immigration, DHS narrowed its definition of "specialty occupation" under the popular H-1B category and implemented policies making it more difficult for companies operating internationally to transfer personnel under the L-1 category. DHS nearly doubled, to $900,000, the minimum investment required under the EB-5 green card program.

Immigration enforcement in the workplace saw an uptick in activity with the government increasing the fines levied on companies that employ undocumented workers or have I-9 paperwork violations. The Social Security Administration did its part by dispatching over half a million "no-match" letters to employers alerting them of discrepancies between employees' names and Social Security numbers.

Regarding refugees, the 30,000 cap was the lowest since the Refugee Act of 1980. In August, DHS announced it would no longer accept requests for "deferred action" from individuals with serious medical conditions, then recanted a month later amid public outcry.

The author thanks colleague Brent Huddleston for his assistance.

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INSURANCE LAW

By Michael W. Huddleston

In 2019, the Texas Legislature took a shot at the Restatement of the Law of Liability Insurance, approved by the American Law Institute in May 2018. The restatement was highly controversial as it was developed, with policyholders and insurers complaining and criticizing the various drafts. The final approved version drew the focused wrath of the insurance industry, particularly regarding the notion that liability in excess of policy limits could be based on a failure of the insurance company to initiate and pursue settlement, not just as a result of a failure to accept an offer to settle within policy limits.

The Legislature amended the "Rule of Decision Act," Section 5.001 of the Texas Civil Practice and Remedies Code, to provide that "[i]n any action governed by the laws of this state concerning rights and obligations under the law, the American Law Institute's Restatements of the Law are *not controlling*."[1] This appears to simply restate the Texas Supreme Court's approach to consideration of restatements generally. Earlier legislative offerings were much more severe. For example, SB 2303 proposed barring *any consideration* of any Restatement of the Law.

The duty to defend under liability insurance policies is the focus of Texas Supreme Court review of the certified question in *State Farm Lloyds v. Richards*:[2] "Is the policy-language exception to the eight-corners rule articulated in *B. Hall Contr. Inc. v. Evanston Ins. Co.*, 447 F. Supp. 2d 634 (N.D. Tex. 2006), a permissible exception under Texas law?" The duty to defend is determined by examining the four corners of the underlying pleadings against the insured and the four corners of the policy. *Hall* holds that the eight-corners rule does not exist if the policy does not state that the duty to defend applies to groundless, false, or fraudulent claims; thus, extrinsic evidence may be used to determine the duty to defend under such policies. Adoption of *Hall* would dramatically rewrite Texas duty to defend law and replace it with detailed coverage trials on extrinsic facts, thus altering the utility of declaratory actions.

The *Hall* exception was urged in *Zurich Am. Ins. Co. v. Nokia, Inc.*[3] The *Nokia* court did not adopt this exception and concluded that the eight-corners rule controlled, refusing to recognize an extrinsic evidence exception in that case. Indeed, the 5th Circuit has flatly rejected the *Hall* reasoning in *Guideone Spec. Mut. Ins. Co. v. Missionary Church*,[4] finding no authority to support the notion that the "false or fraudulent" language controlled application of the duty to defend and the eight-corners rule.[5] "[The Supreme Court] has not written . . . that the eight-corners rule applies only to policies containing such language."[6] The court concluded that the *Hall* reasoning improperly conflated the determination of the duty to defend with the duty to indemnify.

In *Barbara Techs. Corp. v. State Farm Lloyds*,[7] the court held that neither an insurer's invocation of appraisal nor its payment of an appraisal award exempted it from the Texas Prompt Payment of Claims Act, or TPPCA. The insurer in that case initially denied the claim. Appraisal was invoked and the carrier paid promptly after the award was made. The court held that payment is "neither an acknowledgment of liability nor a determination of liability under the policy for purposes of TPPCA damages." Thus, absent a judgment imposing liability or actual acknowledgement, the "liability" requirement of the TPPCA is not satisfied and recovery not permitted.

Notes

1. Tex. Civ. Prac. & Rem. Code § 5.001 (emphasis added).
2. 2019 U.S. App. LEXIS 27221 (5th Cir. Sept. 9, 2019).
3. 268 S.W.3d 487 (Tex. 2008).
4. 687 F.3d 676, 683 (5th Cir. 2012).
5. *Id.* at 682, 683.
6. *Id.* at note 5.
7. 2019 Tex. LEXIS 687 (Tex. 2019).

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LABOR AND EMPLOYMENT LAW

By Michael P. Maslanka

Was 2019 the start of a seismic change in federal employment law? Two questions were teed up in 2019 for decision at the U.S. Supreme Court. Will sexual orientation as well as transgender status be drafted into the existing roster of protected categories under Title VII? *Altitude Express v. Zarda* will answer this scenario. A male employee is married to a man. He is repeatedly harassed at work because of this status. Does he have a claim for sexual harassment? Some courts say yes because if he were a woman the harassment would not have occurred. Thus, he was harassed because of his sex. Transgender status? If a person changes religion from Jewish to Buddhist and is fired as a result then the termination was because of religion. Is a person whose gender identity differs from the sex they were assigned at birth any different? The Equal Employment Opportunity Commission doesn't think so. Watch for the decision in *EEOC v. R.G. & G.R Funeral Homes*. Both opinions will be out by June 2020.

And, the Supreme Court may consider whether the 5th Circuit will be stripped of its attachment to the "ultimate employment action" doctrine that legally sanctions discrimination under Title VII unless the discrimination involves an action such as termination, demotion, or promotion denial. The solicitor general has been asked by the court to weigh in on whether it should grant the cert petition.[1]

2019 also saw Family and Medical Leave Act developments. An employer is off the hook for FMLA liability if it counsels an employee for performance shortcomings, the employee takes FMLA leave, and the employee is later terminated for the same deficiencies. No FMLA animus. Also no animus if an employee previously took FMLA leave without any adverse consequences.[2]

Also *Gomez v. Office Ally, Inc.* rejected the "discouragement theory" (i.e., employer hostility to FMLA leave being taken) in establishing an FMLA interference claim.[3] Unless the employee is harmed by not taking leave or cutting leave short, there is no claim. No harm, no foul.

Texas appeals courts are busy. The decision in *Stage Stores, Inc. v. Eufraciois* is the latest to again remind a lower court that the Texas Labor Code specifically approves of arbitration of employment discrimination disputes.[4] Look to *Texas Department of Transportation v. Lara*[5] for two pro-employee rulings: indefinite leave can be a reasonable accommodation to an employee's disability, and asking for a reasonable accommodation is a protected activity and thus prohibits retaliation for the request. (There is a growing split of authority on the latter.)

2020? Who knows what will happen, but it will be interesting.

Notes

1. *Peterson v. Linear Controls, Inc.* (5th Cir. 2019).
2. *Tatum v. Southern Company Services, Inc.*, 930 F.3d 709 (5th Cir. 2019).
3. W.D. Tex. 2019.
4. Tex. App. Corpus Christi (Edinburg) 2019.
5. Tex. App. Austin 2019.

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LEGAL EDUCATION

By John G. Browning

For Texas law schools in 2019, the theme was change. In the case of the University of North Texas Dallas College of Law, it was a change in location, as the school officially moved across the street this summer to its new home in the newly renovated historic Dallas Municipal Building. The unique space has great historical significance as the former headquarters of the Dallas Police Department and the site of JFK assassin Lee Harvey Oswald's fatal shooting by Jack

Ruby in 1963. For schools like South Texas College of Law Houston and Texas Southern University Thurgood Marshall School of Law, it was new faces in the dean's suite. Thurgood Marshall welcomed its first female dean in July, as Joan R. M. Bullock took over the reins from acting dean Gary Bledsoe. Bullock, a graduate of Michigan State University and the University of Toledo School of Law, brings more than 30 years of experience as a legal educator and administrator. Having served most recently as dean of the troubled Thomas Jefferson School of Law in California, Bullock is no stranger to the American Bar Association compliance challenges facing Thurgood Marshall School of Law. Meanwhile, South Texas College of Law Houston named Michael F. Barry to succeed Don Guter as dean. Barry, a Yale Law School graduate, had a lengthy in-house career at United Services Automobile Association and Capital One before joining the faculty at St. Mary's University School of Law for four years. At St. Mary's, Barry had implemented the school's innovative "Law Success" program.

Yet even with change in the dean's suite, some things remain the same, like concern over bar passage rates. Nationally, bar passage rates rose for the July 2019 bar exam, after many states reported historically low scores in 2018 and last year's Multistate Bar Examination scores sank to a 34-year low. Texas was no exception to this trend as 81.47% of first-time takers of the July 2019 Texas Bar Examination passed—an increase of 3.6% from July 2018. A total of 1,249 of the 1,533 first-time test takers in July passed; the overall passing rate (reflecting out-of-state test-takers and repeat test-takers) was 68.47%—still an improvement over last year's 64.65%. Leading the pack for Texas schools were Baylor Law School with a 93.48% bar passage rate and the University of Texas with 93.27%, followed by Texas A&M University School of Law (90.65%); SMU Dedman School of Law (88.66%); University of Houston Law Center (85.33%); Texas Tech University School of Law (82.76%); and South Texas College of Law Houston (76.38%). At the bottom of Texas' 10 law schools were St. Mary's University School of Law (69.81%), UNT Dallas College of Law (67.61%), and Texas Southern University Thurgood Marshall School of Law (57.64%, which was nevertheless an improvement over 2018's 44.52% passage rate).

Job prospects remain another prominent concern for Texas law schools. Nationally, the class of 2018 saw the strongest entry-level job market in a decade, with 78.6% landing positions requiring a J.D. (or for which a J.D. offers an advantage) within 10 months of graduation. Among Texas schools, the University of Texas reported that 259 out of 279 members of the class of 2018 were employed in J.D./J.D. advantage jobs; for Baylor that figure was 105 out of 118, while for SMU the figure was 216 out of 240 graduates. The University of Houston reported 205 out of the 216 2018 graduates so employed. Texas A&M clocked in with 120 out of 138, while Texas Tech's results reflect 136 out of 155 graduates in such positions. Among other Texas schools, St. Mary's reported 160 graduates out of 224 in J.D./J.D. advantage jobs, while UNT Dallas reported 91 out of 145 graduates so employed, and Thurgood Marshall School of Law placed 115 out of 181 graduates in such jobs.

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OIL AND GAS LAW

By T.C. Turner

2019 saw the 86th Legislature tackle numerous oil and gas issues. Litigation continued to revolve around familiar disputes among the executive and non-executive, instrument interpretations, and lease disputes. Additional hot topics included flaring and parent/child wells.

Railroad Commission of Texas Chairman Wayne Christian recently dissented during a routine flaring permit hearing, citing concerns that Texas flared too much gas out of convenience and not necessity. If his comments are a harbinger of changes to come, permits could be much more difficult to obtain.

In this sub-$60 per barrel average West Texas Intermediate price environment, operators are laser focused on the parent/child well phenomenon. Subsequent (child) wells are vastly underperforming expectations based on initial (parent) well results. Solutions include amended well spacing, simultaneous fracking, and technology applications. Results have been mixed to positive.

The following are two (of numerous) bills passed in the 86th Legislature (effective September 1, 2019):

HB 3226 updates the Mineral Interest Pooling Act to the realities of the horizontal era by allowing for off-unit drilling locations as well as an extended two-year term to begin drilling.

HB 3838 effectively ends the royalty lease scam in Texas by requiring the following statement to be included in all instruments purporting to "lease" a non-participating royalty interest: "This is not an oil and gas lease. You are selling all or a portion of your mineral or royalty interests"; includes other requirements and penalties.

Texas law remains clear that an executive rights owner must not engage in self-dealing. *Tex. Outfitters Ltd., LLC v. Nicholson*[1] validated an executive's refusal to sign a first lease offer in hopes of a higher bonus. However, after an operator obtained poor well results in the area, the executive violated his duty to the non-executive by refusing to sign an addi-

tional lease offer at a higher bonus, presumably to preserve his use of the surface for his dwelling and hunting operations (the "self-dealing").

The *Duhig* doctrine remains a constant, so long as it applies within your branch in a chain of title. In *Trial v. Dragon*,[2] Leo Trial conveyed a portion of blackacre to Ruth Trial as her separate property. Subsequently, Leo Trial and his siblings conveyed blackacre to the Dragons and reserved the minerals for 15 years. Leo and Ruth Trial died, and their two sons inherited Ruth's interest via intestacy. At the end of the term reservation, the Dragons sought new division orders for all production from blackacre. The Texas Supreme Court refused to apply the *Duhig* doctrine to Ruth's interest because the two Trial sons were not parties to the original conveyances of blackacre to the Dragons and their chain of title was wholly separate from Leo's chain of title.

Courts continue to apply the plain meaning approach to lease interpretation. In *Bell v. Chesapeake Energy Corp.*,[3] the lease language made specific compensatory royalty requirements of the lessee in the event an adjacent well came online. Chesapeake argued the compensatory royalty language only applied *if* the requirements were deemed profitable under the reasonably prudent operator standard. The court disagreed, ruling that the unambiguous lease language (*shall*) required Chesapeake to drill an offset well, release acreage, or pay compensatory royalty.

Mineral co-tenants continue to owe no duties to one another, save an accounting for production, and may produce the mineral estate without the permission or participation of the other co-tenants. In *Cimarex Energy Co. v. Anadarko Petroleum Corp.*,[4] a non-producing co-tenant's payment of royalties based on the producing co-tenant's production during the primary and secondary terms did not extend the lease. The court noted the secondary term did not include a cash consideration, unlike the paid up primary term. Accordingly, the lease automatically terminated at the end of the primary term, absent a joint operating agreement with Cimarex's co-tenant or actual production (drilling and production).

Finally, it seems the fight over allocation wells may be over. A recent order of dismissal[5] quoted an article by oil and gas specialist Ernest Smith verbatim to conclude that "*Browning* does not hold that, where a lease is silent on pooling, a lessee is required to obtain pooling authority before the lessee can drill a horizontal well that crosses lease lines…" However, the torch still burns as the decision is on appeal.

Notes

1. *Tex. Outfitters, Ltd., LLC v. Nicholson*, 572 S.W.3d 647 (Tex. 2019).
2. *Trial v. Dragon*, 2019 Tex. LEXIS 637; 62 Tex. Sup. J. 1292; 2019 WL 2554130 (June 21, 2019).
3. *Bell v. Chesapeake Energy Corp.*, No. 04-18-00129-CV, 2019 Tex. App. Lexis 1978 (Tex. App.—San Antonio Mar. 13, 2019).
4. *Cimarex Energy Co. v. Anadarko Petroleum Corp.*, 574 S.W.3d 73 (Tex. App.—El Paso 2019).
5. *Complaint of Monroe Properties, Inc., That Devon Energy Production Co, L.P. Does Not Have A Good Faith Claim to Operate the N I Helped 120 (ALLOC) Lease, Well No. 6H, Phantom (Wolfcamp) Field, Ward County, Texas*, Oil & Gas Docket No. 08-0305330, Hearings Division, Railroad Commission of Texas.

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PATENT LITIGATION

By Michael C. Smith

The most significant development for Texas patent practitioners in 2019 was the emergence of the patent infringement docket in the Waco Division of the Western District of Texas. There were no significant cases from the U.S. Supreme Court in 2019, but the Federal Circuit issued several significant opinions, and Congress began actively looking into legislation addressing concerns over the current standards for patentable subject matter.

Administrative Patent Judge Appointment Procedure Ruled Unconstitutional

In *Arthrex, Inc. v. Smith & Nephew, Inc.*,[1] the Federal Circuit held the current statutory scheme for appointing administrative patent judges to the Patent Trial and Appeal Board, or PTAB, unconstitutional. It is likely that this holding will be the subject of petitions for en banc and U.S. Supreme Court review in the coming months.

Federal Circuit Requests Guidance on Patentable Subject Matter Jurisprudence

On July 3, the Federal Circuit denied en banc rehearing in *Athena Diagnostics v. Mayo Collaborative Services*[2] in an order that included eight separate opinions. The opinions reflect a Federal Circuit that is divided on how to apply the Supreme Court's Section 101 jurisprudence and is calling for intervention or clarification from the Supreme Court or Congress.

Patentable Subject Matter Defense Developments

In 2018, the Federal Circuit held that factual questions can underlie the question of whether claims involve unpatentable subject matter and are therefore invalid under 35 U.S.C. 101 and as a result make summary judgment inappropriate.[3] On September 12, 2019, an Eastern District of Texas jury found in favor of the defendant on its defenses of invalidity for lack of patentable subject matter as well as noninfringement. The verdict marks the first time that a jury has invalidated a patent under Section 101 under *Berkheimer*.

Venue in Patent Cases

The most significant patent venue case during the year was the Federal Circuit's denial of en banc review of the question whether servers are a regular and established place of business, such that venue is proper under 35 U.S.C. § 1400(b) in *In re Google*.[4]

New Senate Committee on Intellectual Property

In an effort to address perceived issues with existing Section 101 jurisprudence, on February 7, 2019, the U.S. Senate reinstated the Subcommittee on Intellectual Property within the Senate Judiciary Committee to search for a potential legislative solution to patent eligibility concerns. The new subcommittee has prepared draft legislation and conducted hearings on the subject, but to date no legislative action has occurred.

STRONGER Patents Act

The STRONGER Patents Act was reintroduced in both houses of Congress this session. The act would restore the ability of patent owners to obtain an injunction stopping an adjudged infringer from continuing to use or sell an invention, and would limit certain types of challenges in the post-grant review proceedings at the PTAB.

Patent Case Filings

Patent case filings continued to decrease nationwide in 2019 but at a reduced rate. While filings in 2018 and 2017 were down double digits from prior years, filings in the third quarter of 2019 were down only 5.5% compared to the same period in 2018. Filings were still down 43% from the peak in 2015.

In the first 10 months of 2019, approximately 28% of patent suits were filed in the District of Delaware, followed by the Central District of California and the Eastern District of Texas at 9% each, the Western District of Texas at 7%, and the Northern District of California at 6%. The principal change in patent filings in 2019 was the substantial increase in patent infringement filings in the Western District of Texas, with approximately 90% of its filings through the end of October being in the Waco Division before U.S. District Judge Alan Albright.

Notes

1. No. 2018-2140 (Fed.Cir. Oct. 31, 2019).
2. 927 F. 3d 1333 (Fed. Cir. 2019).
3. *See Berkheimer v. HP Inc.*, 881 F.3d 1360 (Fed. Cir. 2018).
4. 914 F.3d 1377 (Fed. Cir. 2019).

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PERSONAL INJURY LAW

By Melanie L. Fry and Charles D. Carter II

In 2019, the Texas Supreme Court focused to a great extent on statutory and rule interpretation in personal injury cases. The Texas Medical Liability Act's expert report requirement struck again, as did the sovereign immunity statutes. The court also gave a refresher on the proper use of requests for admissions and clarified the gross negligence standard in car accidents.

Texas Medical Liability Act

In *Scott v. Weems*,[1] the plaintiff was indicted after a nurse who examined a crime victim described the victim's injury as a "point-blank" "gunshot wound" to the head. The plaintiff sued the hospital for intentional infliction of emotional distress, alleging that the nurse's medical records were false. Resolving a split in the appellate courts, the court held that claims against a hospital alleging that a nurse fraudulently recorded medical records is a health care liability claim subject to the expert report requirements of Texas Civil Practice and Remedies Code § 74.351(a). A claim against a health care provider involving medical records made during the course of treatment necessarily relates to standards of professional or administrative health care services. Failure to timely serve an expert report required dismissal with prejudice.

Sovereign Immunity

In *Univ. of Tex. M.D. Anderson Cancer Ctr. v. McKenzie*,[2] a patient undergoing treatment for a rare form of cancer died following a reaction to a carrier agent used to administer chemotherapy. The patient's family sued for negligence, arguing that the use of the carrier agent brought the claim within the "use of tangible personal property" sovereign immunity exception in the Texas Tort Claims Act. The court determined that administering the carrier agent was not solely a matter of medical judgment; the plaintiff's allegation that the hospital used property (the carrier agent) that should not have been used and that the carrier agent is what harmed the patient was sufficient to waive immunity.

In *Tarrant Cnty. v. Bonner*,[3] a detention officer damaged the leg of a chair at the jail and placed it in the jail's multipurpose room for disposal. The multipurpose room, however, is also occasionally the location where inmates with diabetes receive treatment. Plaintiff sued Tarrant County for injuries allegedly sustained when he fell out of the broken chair during such treatment. The court determined that two immunity statutes—Texas Code of Criminal Procedure Article 42.20 and Texas Government Code § 497.096, which protect governmental actors from liability for their own negligence in connection with certain inmate activities, unless a heightened standard of culpability is met—applied to the plaintiff's claims. Finding no evidence of conscious indifference and thus no basis to negate statutory immunity, the court rendered judgment for the county.

Discovery Sanctions and Gross Negligence

In *Medina v. Zuniga*,[4] a driver struck a pedestrian with his vehicle and ultimately made the "strategic decision" to concede ordinary negligence at trial. Plaintiff moved for sanctions under Rule 215 because the driver denied requests for admissions regarding the driver's negligence. The court held that such conduct is not sanctionable. The court rejected the use of requests for admissions to litigate the merits of the case instead of narrowing issues—"[t]hat is not how our system works." The court further held that a high school student's thoughtless, careless, and risky driving, including antics in a parking lot, provided no evidence of gross negligence. The court opined "[w]hatever the threshold for gross negligence, it must be higher than that" in an auto accident case.

Notes

1. 575 S.W.3d 357 (Tex. 2019).
2. 578 S.W.3d 506 (Tex. 2019).
3. 574 S.W.3d 893 (Tex. 2019).
4. No. 17-0498, 2019 Tex. LEXIS 387 (Tex. Apr. 26, 2019).

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TAX LAW

By Bruce A. McGovern and Christi Mondrik

During 2019, Congress enacted the Taxpayer First Act.[1] The Treasury Department and IRS issued significant administrative guidance interpreting the 2017 Tax Cuts and Jobs Act, or 2017 TCJA.[2]

Taxpayer First Act

The Taxpayer First Act codifies and renames IRS Appeals as the IRS Independent Office of Appeals, requires the IRS to develop a comprehensive customer service strategy, requires Treasury to develop a comprehensive written plan to reorganize the IRS, and makes several significant changes to procedural tax rules.

Regulations Reducing Federal Charitable Contribution Deductions for State Tax Credits

Final regulations generally require taxpayers to reduce federal income tax charitable contribution deductions by any state or local tax credits received for making contributions.[3] These regulations address rules some states adopted granting individuals credits against state tax liabilities for contributions made to state-designated charitable funds with the objective of allowing their citizens to deduct charitable contributions on their federal income tax returns (not subject to a fixed dollar limit), in lieu of state taxes (limited to $10,000 under 2017 TCJA). These regulations affect individuals receiving state tax credits from charitable contributions even under programs pre-dating the 2017 TCJA.

Regulations Interpreting the Deduction for 20% of Qualified Business Income

Final regulations address the 2017 TCJA provision generally allowing individuals to deduct 20% of "qualified business income," or QBI.[4] This is the mechanism Congress used to reduce tax rates on qualifying income. QBI is income individuals earn from business activities conducted as sole proprietors, partners, or S-corporation shareholders. Employees and many professional service providers (including attorneys and CPAs with higher incomes) are ineligible for this deduction.

Proposed Regulations on Qualified Opportunity Funds

Additional proposed regulations address 2017 TCJA provisions designed to encourage investment in designated economically distressed communities known as "qualified opportunity zones," or QOZ, by providing federal income tax benefits to investors in "qualified opportunity funds," or QOF, that in turn invest in businesses in QOZs.[5] QOZs offer three main tax incentives: First, those realizing capital gains from selling or exchanging assets can defer taxation by investing in a QOF. This incentive aims to encourage investors to redeploy capital and invest in economically distressed areas. Second, those who defer capital gains by investing in QOFs can permanently avoid taxation of some of their gains by holding their QOF interests for a sufficient duration. Third, those investing in QOFs and holding their interests for at least 10 years can permanently avoid taxation of any post-acquisition gain from selling QOF interests.

Regulations on 100% First Year "Bonus" Depreciation

Final regulations address taxpayers' ability under the 2017 TCJA to deduct 100% of the cost of new or used qualifying property as additional first-year depreciation ("bonus depreciation").[6]

Texas Highlights

Legislative enactments and comptroller rules implemented *South Dakota v. Wayfair, Inc*,[7] which overturned precedent requiring physical presence before a state taxing authority could require out-of-state taxpayers to collect and remit sales and use tax. Effective October 1, 2019, remote sellers without physical presence in Texas making sales to Texas customers exceeding $500,000 over a 12-month period were

required to begin collecting and remitting Texas sales and use tax.[8] HB 2153 provides a new, optional single local tax rate remote sellers can elect.[9] HB 1525 establishes tax collection responsibilities for marketplace providers owning or operating physical or online marketplaces and processing sales or payments for marketplace sellers.[10] Proposed amendments to Rule 3.586 require franchise tax reporting for businesses generating over $500,000 of gross receipts from Texas during a federal income tax accounting period starting January 1, 2020.[11]

The Legislature also made many changes related to property tax, the most significant being the Texas Property Tax Reform and Transparency Act of 2019, which made sweeping changes to terminology, rate elections, and other provisions.[12]

The Legislature replaced the constitutional prohibition on individual state income taxes ("Bullock" amendment) with a revised prohibition, which voters ratified in November 2019.[13]

Notes

1. Taxpayer First Act, Pub. L. No. 116-25, 133 Stat. 981 (2019).
2. "Tax Cuts and Jobs Act," Pub. L. No. 115-97, 131 Stat. 2054 (2017).
3. Contributions in Exchange for State or Local Tax Credits, T.D. 9864, 84 Fed. Reg. 27,513 (Jun. 13, 2019).
4. I.R.C. § 199A; Qualified Business Income Deduction, T.D. 9847, 84 Fed. Reg. 2,952 (Feb. 8, 2019).
5. I.R.C. §§ 1400Z-1, 1400Z-2; Investing in Qualified Opportunity Funds, 84 Fed. Reg. 18,652 (May 1, 2019).
6. I.R.C. § 168(K); T.D. 9874, Additional First Year Depreciation Deduction, 84 Fed. Reg. 50,108 (Sept. 24, 2019).
7. 138 S. Ct. 2080 (2018).
8. 34 Tex. Admin. Code § 3.286 Seller's and Purchaser's Responsibilities (amended to be effective Jan. 1, 2019, 43 TexReg 8133).
9. Tex. H.B 2153, 86th Leg., R.S. (2019)(adding Tax Code § 151.0595 ("Single Local Tax Rate for Remote Sellers"), repealing Tax Code §§ 151.059 (fee imposed in lieu of local sales and use taxes) and 151.107(c) (Retailer Engaged in Business in This State), and amending Gov't Code § 403.107 (local sales and use tax fees)).
10. Tex. H.B. 1525, 86th Leg., R.S. (2019)(adding Tax Code § 151.0242 ("Marketplace Providers and Marketplace Sellers"), and amending Tax Code §§ 151.008 ("Seller" or "Retailer"), 321.203 (consummation of sale), and 323.203 (Consummation of Sale)).
11. 34 Tex. Admin. Code § 3.586 Margin: Nexus (proposed amendments published Sept. 27, 2019, 44 TexReg 5605).
12. Tex. S.B. 2, 86th Leg., R.S. (2019).
13. Tex. H.J.R. 38, 86th Leg., R.S. (2019). *See also* HB 4542, which defined "individuals" as "natural persons."

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TEXAS ACCESS TO JUSTICE

By Harry M. Reasoner and Trish McAllister

Gov. Greg Abbott and the leadership of the 86th Legislature have given strong support to access to justice with allocations for the biennium of $6 million for veterans civil legal services, $20 million for basic civil legal services, and $10 million for legal aid for survivors of sexual assault. Additionally, a change to the Pope Act increased the amount of civil penalties obtained by the state to $50 million per year that can be used for civil legal aid.

Representatives from the Texas Supreme Court, the State Bar, the Texas Access to Justice Foundation, and the Texas Access to Justice Commission have regularly visited the Texas Congressional Delegation in the spring to update them on the vital work that legal aid programs, including disaster relief efforts funded by the Legal Services Corporation, are doing in their districts, and urge support of LSC's current budget request of $593 million. The Texas Supreme Court's leadership under Chief Justice Nathan L. Hecht has been a critical factor in the increase of funding at the state and federal levels.

State Bar members have given some 2.82 million pro bono hours, worth $564 million, and financial contributions of $13.2 million.

The Texas Access to Justice Commission's annual Champions of Justice Gala Benefiting Veterans has sought to increase awareness of veterans' critical need for legal assistance and has raised over $3.5 million for legal aid to veterans.

Much good has come from these fundraising efforts. Texas leads the nation in providing legal aid to more than 10,000 veterans' households. It also leads the nation with over 6,000 cases closed pro bono for low-income individuals.

However, the need for assistance in obtaining access to justice remains so great that we are still in a triage situation. Over 5.6 million Texans qualify for legal aid under federal poverty guidelines. Only 10% of those who qualify receive needed assistance. Millions more living above poverty guidelines cannot afford lawyers in matters of any magnitude. In 70% of Texas civil cases, there is at least one party appearing pro se. There are simply not enough lawyers to assist all who need help and cannot afford it.

It is clear that the efforts of lawyers alone cannot provide access to justice for all. We must educate all citizens to the importance of and need to support access to justice. Justice for all will require the support of Chambers of Commerce, civic organizations, and contributions from our country's charitable foundations and corporations. H-E-B, for example, which makes many civic contributions, made a significant contribution to Houston Volunteer Lawyers, which enabled many veterans to get legal assistance they would have otherwise not had.

Broader fundraising can help fund critical legal assistance. We need also to find ways that technology can be used to increase access to justice or new approaches that increase

access to justice without requiring additional ongoing funding. New approaches might include:

(1) Statutes that simplify legal processes to permit people of modest means to handle matters without hiring a lawyer. For example, transferring a home, a bank account, and a car without the necessity of probate.
(2) Court approved plain language forms that laymen can understand and fill in with a minimum of assistance or with software that guides users via a series of questions. Forms dealing with eviction, wills, and name changes await Texas Supreme Court approval, and forms to address requests for repairs and lockouts in landlord-tenant matters and probate forms for filing a small estate affidavit and muniment of title are in the works.
(3) Establishing standard rules that clarify how judges and court personnel can properly assist pro se litigants in presenting their cases.

Over the past 10 years, the number of people representing themselves has grown exponentially. We need to think more creatively and look to the efforts of other states and countries on how to best address this human crisis in ways that increase not only access but also justice. We welcome your thoughts. Please send them to Trish McAllister, executive director of the Texas Access to Justice Commission, at tmcallister@texasatj.org.

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TEXAS SUPREME COURT

By Scott P. Stolley

In the 2018-2019 term, the Texas Supreme Court issued some significant opinions that directly affect lawyers or the practice of law.

First, the court issued a blockbuster opinion about calculating attorneys' fees in *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*.[1] Among other things, the court explained that the lodestar method is not a separate test from the eight-factor test in *Arthur Andersen*. The court explained in another case that attorneys' fees awarded as a sanction must be shown to be reasonable.[2]

Wading into disciplinary and disqualification issues, the court held that a bankruptcy judge who referred a lawyer for discipline could testify at the disciplinary hearing.[3] And the court held that a party seeking disqualification of opposing counsel waived that claim by pursuing disqualification under the wrong standard.[4] In *Hillman v. Nueces County*,[5] a former assistant district attorney claimed he was wrongfully fired for refusing an order to withhold evidence. The court held that *Sabine Pilot* did not apply and that the plaintiff could not defeat governmental immunity.

Regarding discovery, the court held that communications between counsel and a city representative were privileged, even though the representative was also designated as an expert.[6] Further, the city was entitled to a snapback of inadvertently produced privileged documents.

In another discovery case, the court held that a Texas Rule of Civil Procedure 202 deposition should not proceed when the anticipated claim is time-barred.[7] In *Medina v. Zuniga*,[8] the court reversed a sanctions award against a party who had refused to admit liability during discovery but then admitted liability during opening statements.

In business cases, the court enforced contract disclaimers that barred claims for misrepresentations outside the contract,[9] as well as a contractual bar of punitive damages.[10] The court also rejected fraud claims that were based on alleged oral agreements that were directly contradicted by the written contract.[11]

Regarding tort claims, the court held in *Endeavor Energy Resources, L.P. v. Cuevas* that a negligent-hiring claim brought against a property owner by a contractor's employee was barred, since it fell under Texas Civil Practice and Remedies Code Chapter 95.[12] In *Agar Corp. v. Electro Circuits International, LLC*,[13] the court held that a civil-conspiracy claim is subject to the same statute of limitations as the underlying tort.

As for upcoming decisions, look for the court to decide two cases about the *Hughes* tolling rule as applicable to malpractice claims against lawyers—*Gray v. Skelton* and *Erikson v. Renda*. And in *In re Murrin Brothers 1885 Ltd.*, the court will address whether a law firm hired by a majority ownership faction should be disqualified from representing the company in a case against a minority faction.

In *Brewer v. Lennox Hearth Products, LLC*, the court will address a large monetary sanction against a lawyer who is accused of conducting a "push poll" designed to taint the jury pool.

Finally, the court had two personnel changes in the past year. Justice Brett Busby replaced Justice Phil Johnson, who retired. And Justice Jane Bland replaced Justice Jeff Brown, who became a federal district judge for the U.S. District Court for the Southern District of Texas.

Notes

1. 578 S.W.3d 469, 483-505 (Tex. 2019).
2. *Nath v. Texas Children's Hosp.*, 576 S.W.3d 707, 709 (Tex. 2019).
3. *Comm'n for Lawyer Discipline v. Cantu*, No. 18-0879, 2019 WL 5482830, at *2-5 (Tex. Oct. 25, 2019).
4. *In re RSR Corp.*, 568 S.W.3d 663, 666-67 (Tex. 2019).
5. 579 S.W.3d 354, 357-63 (Tex. 2019).
6. *In re City of Dickinson*, 568 S.W.3d 642, 646-49 (Tex. 2019).
7. *Glassdoor, Inc. v. Andra Group, LP*, 575 S.W.3d 523, 527-30 (Tex. 2019).
8. No. 17-0498, 2019 WL 1868012, at *4-5 (Tex. Apr. 26, 2019).
9. *Int'l Bus. Machs. Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 226 (Tex. 2019).
10. *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 217 (Tex. 2019).
11. *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 583 S.W.3d 553, 557-59 (Tex. 2019).
12. No. 17-0925, 2019 WL 1966625, at *2-4 (Tex. May 3, 2019).
13. 580 S.W.3d 136, 138 (Tex. 2019).

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TRADEMARK LITIGATION

By Katherine A. Compton

Iancu v. Brunetti

In a landmark decision, the U.S. Supreme Court in *Iancu v. Brunetti*[1] allowed for the registration of trademarks that are "immoral or scandalous" by invalidating 15 U.S.C. § 1052(a) on the basis that the "immoral or scandalous" bar under 15 U.S.C. § 1052(a) violates the First Amendment because it discriminated on the basis of viewpoint.

In this case, Erik Brunetti, an artist and entrepreneur, founded a clothing line that uses the trademark "FUCT" for which he sought federal registration. The Patent Trademark Office, or PTO, denied his application under the Lanham Act 15 U.S.C. § 1052(a) in that it was "immoral or scandalous."[2]

The PTO determines whether a trademark is "immoral or scandalous" by looking at whether a "substantial composite of the general public" would find the mark "shocking to the sense of truth, decency, or propriety"; "giving offense to the conscience or moral feelings"; "calling out for condemnation"; "disgraceful"; "offensive"; "disreputable"; or "vulgar."[3]

In this case, the PTO's Trademark Trial and Appeal Board determined that "FUCT" was "vulgar" and therefore unregistrable. On review, the board concluded the mark was "highly offensive," "vulgar," and had "decidedly negative sexual connotations."[4] The board also looked at Brunetti's website and felt that the website and products contained imagery, near the mark, of "extreme nihilism" and "'anti-social' behavior" communicating "misogyny, depravity, [and] violence."[5]

Expressive material is considered "immoral" if it is "inconsistent with rectitude, purity, or good morals"; "wicked"; or "vicious." Material is "scandalous" when it "giv[es] offense to the conscience or moral feelings"; "excite[s] reprobation"; or "calls[s] out condemnation."[6] Thus, the Lanham Act did not allow registration of marks when their messages defy "society's sense of decency or priority."[7]

After the PTO denied Brunetti's trademark registration, he brought a First Amendment challenge in the Federal Circuit based upon the "immoral or scandalous" bar to registration of trademarks. The Federal Circuit held that the Lanham Act's prohibition on registration of "immoral or scandalous" trademarks violates the First Amendment. The Supreme Court granted certiorari.[8]

The Supreme Court noted that the Lanham Act, on its face, distinguishes between ideas that are aligned with conventional moral standards and those contrary to conventional moral standards, such as those related to drug use, religion, and terrorism, and that such distinction was facial viewpoint bias resulting in viewpoint-discriminatory application.[9]

The government (Iancu) argued that although the Lanham Act disfavors some ideas, it argued that the statute was "susceptible of" a limiting construction that would remove viewpoint biases, essentially reinterpreting the statute to refuse marks that are "lewd, sexually explicit, or profane."[10]

However, the Supreme Court could not accept the government's proposal because the plain language of the statute stated otherwise and no ambiguity existed. The court stated "we will not rewrite a law to conform it to constitutional requirements."[11]

The Supreme Court held that the "immoral or scandalous" bar stretches way beyond the government's proposed construction and therefore, must be invalidated. Therefore, the Supreme Court affirmed the judgment of the court of appeals.

Notes

1. *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019).
2. *Id.* at 2296.
3. *In re Brunetti*, 877 F.3d 1330, 1336 (CA Fed. 2017).
4. *Iancu*, at 2298.
5. *Id.*
6. *Id.* at 2296.
7. *Id.*
8. 586 U.S. ___, 139 S. Ct. 782 (2019).
9. *Iancu*, at 2296.
10. *Id.* at 2301.
11. *Id.*

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U.S. SUPREME COURT

By Hon. Dustin M. Howell

The U.S. Supreme Court's October 2018 term decisions did not dominate the headlines as in terms past. The cases addressed below (including one by the court's newest justice), though not necessarily blockbusters, could significantly affect Texas and Texans.

Rucho v. Common Cause[1] addressed voters' constitutional challenges to partisan congressional-district line-drawing. The lower court held that the challenged redistricting efforts unconstitutionally favored one political party over the other. The Supreme Court reversed, concluding that questions of alleged "partisan gerrymandering claims present political questions beyond the reach of the federal courts." The court distinguished partisan gerrymandering from cases addressing other forms of gerrymandering (e.g., racial), which the court has found to be unconstitutional. This decision will certainly have implications for the Texas Legislature when it convenes in January 2021 to take up its own redistricting plan.

In *Gamble v. United States*,[2] the court again considered whether prosecution by state and federal authorities for offenses arising out of the same conduct violates the double jeopardy clause of the Fifth Amendment. The state of Alabama convicted Terance Gamble for possessing a firearm as a felon; the United States then prosecuted him under a similar federal law. Gamble challenged his federal prosecution, arguing it violated the double jeopardy clause. The lower courts disagreed, citing the longstanding "dual sovereignty" doctrine. Gamble urged the Supreme Court to overrule this doctrine, but the court (over dissents from Justices Ruth Bader Ginsburg and Neil Gorsuch) declined to do so.

In *Apple Inc. v. Pepper*,[3] the court decided an antitrust question that could have significant ramifications for e-commerce retailers. The plaintiffs complained about Apple's App Store's pricing model: the price charged included the app developer's charge (paid to the developer) plus a 30% commission paid to Apple. The plaintiffs argued this was an anticompetitive exercise of Apple's monopoly power. The Supreme Court did not reach the merits of this argument but instead addressed the threshold question of whether Apple could be sued for this alleged violation in the first place. Apple argued "no," pointing to precedent holding that only "direct purchasers" may sue alleged monopolizers and that Apple was a mere intermediary facilitating the app purchase from the developer. The Supreme Court disagreed, concluding the consumers here did directly purchase from Apple, thereby exposing Apple to antitrust liability. This decision potentially gives rise to antitrust liability for retailers like Amazon, Walmart, eBay, and others that operate "marketplaces" for third-party sellers. It remains to be seen how this liability exposure changes the way these massive e-commerce retailers do business.

The last case addressed is here less for its holding than for what its concurrences portend. The plaintiff in *Kisor v. Wilkie*[4] challenged a denial of disability benefits by the Department of Veterans Affairs. The Supreme Court considered whether to defer to the VA's interpretation of its own ambiguous regulation. This flavor of agency deference, known as *Auer* deference, states that courts should defer to an agency's construction of its own regulation unless it is plainly erroneous or inconsistent with the agency's regulatory framework. Kisor urged the court to overrule this doctrine and abandon agency deference. And while a plurality of the court cited various policy reasons for declining to overrule the agency-deference doctrine, the majority's opinion rested solely on stare decisis. As Justice Gorsuch noted in his concurring opinion, the court's "decision is more a stay of execution [of agency deference] than a pardon" and, more colorfully, that "the doctrine emerges maimed and enfeebled—in truth, zombified."

Notes

1. 139 S. Ct. 2484 (2019).
2. 139 S. Ct. 1960 (2019).
3. 139 S. Ct. 1514 (2019).
4. 139 S. Ct. 2400 (2019).

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