



***IN THIS ISSUE: Meetings, Legislative & Election Update, Case Law Update***

## **FROM THE PRESIDENT**

Thomas E. Ganucheau,  
Beck, Redden & Secrest, L.L.P.; Houston



*As TADC prepares for a brand new year, I would like to take a moment to reflect on the great successes we had in 2011, beginning with the 82<sup>nd</sup> Legislature. Session 2011 proved to be a challenge for even the most seasoned groups. The TADC reviewed and actively monitored the progress of hundreds of pieces of legislation that would have an impact on the civil justice system. Your Officers, Directors and members of the Legislative Committee spent countless hours reviewing and analyzing bills, testifying before Senate and House Committees and re-drafting bills at the request of legislators. TADC's heavy involvement in negotiations on HB 274 (loser pays), barratry and other issues of significance produced an end result that ultimately did not harm the civil justice system and protected the right to trial by jury. Work continues on HB 274 as the TADC, TEX ABOTA and other groups are drafting rules recommendations to provide to the Supreme Court for implementation next year.*

*The TADC hosted over two dozen CLE activities during 2011 ranging from local legislative luncheons and one- and two-day events like the inaugural West Texas Seminar in Ruidoso, to very successful family-oriented seminars like the Summer Meeting held in Jackson Hole, Wyoming. The TADC will continue these great member education programs next year!*

*Looking ahead to 2012, there is still time to register for the TADC Winter*

*Seminar! The Association returns to Crested Butte, Colorado on February 1-5, 2012 in a joint meeting with the Alabama Defense Counsel. Programming for this seminar is outstanding and the topics are relevant, timely and hands-on for the practicing trial lawyer. The Elevation Hotel is a new, ski-in, ski-out facility and will provide the perfect venue for this seminar. Register with TADC and secure your hotel reservations as soon as possible as space is limited and rooms won't last long! [2012 Winter Registration](#).*

*In addition to the Winter Seminar, programs have already been scheduled for the 2012 Spring Meeting in Santa Fe, New Mexico, the 2012 Summer Seminar in Sandestin, Florida and the 2012 Annual Meeting in San Francisco, California.*

*The 30<sup>th</sup> installment of the TADC Trial Academy will be held in Houston at the South Texas College of Law on March 30-31. The Trial Academy is one of TADC's premier education programs specifically designed for lawyers practicing from 1-6 years. The Trial Academy provides practical courtroom experience for your young lawyers. Academy Co-Chairs Michele Smith ([michelesmith@mehaffyweber.com](mailto:michelesmith@mehaffyweber.com)) and Chad Gerke ([cgerke@strongpipkin.com](mailto:cgerke@strongpipkin.com)) are currently assembling breakout room faculty. If you would like to volunteer as an instructor at next year's Trial Academy, please contact Michele or Chad.*

*There will be a major effort in 2012 to provide more local programming and lunchtime and one-day seminars. If you would like a program to be held in your area, contact the TADC office ([tadc@tadc.org](mailto:tadc@tadc.org)) and we will do our best to accommodate your request.*

*If you or a member of your firm are looking for speaking opportunities, please contact me ([tganucheau@brsfirm.com](mailto:tganucheau@brsfirm.com)) or our Program Vice Presidents Christy Amuny ([christy@bainlaw.com](mailto:christy@bainlaw.com)) and Jerry Fazio ([fazio@owenfazio.com](mailto:fazio@owenfazio.com)).*

*The TADC website is a great membership resource, containing a searchable member roster, a searchable listing of CLE papers available for order, and an archive of past magazines and professional newsletters. The website is constantly undergoing modifications to keep up with the needs of the membership and to continue to provide the level of service to which members have become accustomed. Join the TADC on Facebook at [TADC on Facebook](http://www.facebook.com/tadclawyers) (<http://www.facebook.com/tadclawyers>), and look for other social media expansions soon such as TADC on LinkedIn.*

*Legislatively, the TADC remains very active. Your TADC Legislative Committee meets monthly via teleconference in preparation for interim committee hearings which will begin in earnest next spring. The TADC will provide testimony and tactical support to the committees, as needed, as they make their way through the charges. House Interim Charges were issued by the Speaker in late October and Senate charges are slowly trickling out by committee and will continue to do so throughout the remainder of December and into January of next year. Potential issues for the 2013 Legislative Session have begun to surface and some of those mentioned include a revisitation of the*

*margins tax on corporations, No-Fault insurance and judicial selection. The TADC legislative team will be ready to address these and any other issues in order to protect and preserve the civil justice system.*

*I encourage everyone to sign up a new member in the TADC. The education is beyond compare, the services are top notch, and the business contact and friendships are only a few of the reasons to join. Talk to your law partners, colleagues and friends about the benefits of membership. The TADC is the largest state organization of its kind in the United States and the ONLY voice of the defense bar in Texas. [TADC Membership Application](#)*

*Best wishes for happy and safe holidays and I look forward to seeing you at an event or meeting in 2012!*

***\*\* Reminder \*\****

**Your TADC Dues statement was mailed in early November and are due by January 1, 2012. If you've not yet paid your dues, drop your payment in the mail today! If you have questions or require a duplicate dues statement, contact the TADC office at [tadc@tadc.org](mailto:tadc@tadc.org) or 512/476-5225.**

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***An Excellent Seminar***

***Register Now for***

***2012 TADC Winter Meeting***

***The TADC Returns to Crested Butte!***

***Elevation Hotel & Spa ~ Crested Butte, Colorado***

***February 1-5, 2012***

***A program for the practicing trial lawyer:***

***~ Our Responsibility to Protect the Right to Trial by Jury ~***

***~ Technology and Your Litigation Practice ~***

*~ The Top Ten Mistakes Lawyers Make in Summary Judgements ~  
~Developing Non-Compete Law in Texas ~  
...and more!*

***8.5 hours of CLE including 1.75 hours ethics***

*The Elevation Hotel & Spa has extended the  
TADC an excellent Winter rate!*

*The Elevation Hotel & Spa is a fantastic four-star, five-diamond  
ski-in ski-out facility located at the base of Mt. Crested Butte.  
The complex is virtually brand new with restaurants and shopping  
throughout. Non-stop flights operate daily from Dallas and Houston on  
American and Continental Airlines respectively and multiple times daily  
from Denver on United.*

*Secure your accommodations now - [Hotel Reservation cut-off](#)  
[is December 27, 2011](#)*

***[Registration Materials Here](#)***

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## **CALENDAR OF EVENTS**

[January 20-21, 2012](#)  
*TADC Board of Directors Meeting*  
*San Antonio, Texas*

[February 1-5, 2012](#)

***Joint TADC/ADC (Alabama) Winter Seminar***  
*Elevation Resort & Spa – Crested Butte, Colorado*  
*Max Wright & Mark Bennett, Co-Chairs*

**REGISTRATION MATERIAL**

**March 30-31, 2012**

***2012 TADC Trial Academy***  
*South Texas College of Law*  
*Michele Smith & Chad Gerke, Co-Chairs*

**April 25-29, 2012**

***TADC Spring Meeting***  
*Inn & Spa at Loretto – Santa Fe, New Mexico*  
*Sofia Ramon & Randy Grambling, Co-Chairs*

**July 18-22, 2012**

***TADC Summer Seminar***  
*The Grand Sandestin Resort – Sandestin, Florida*  
*Darin Brooks & Greg Binns, Co-Chairs*

**August 3-4, 2012**

***Budget/Nominating Committee***  
*Austin, Texas*

**September 26-30, 2012**

***2012 Annual Meeting***  
*Westin St. Francis – San Francisco, California*  
*Gayla Corley & Mike Hendryx, Co-Chairs*

## **LEGISLATIVE/ELECTION UPDATE**

The U.S. Supreme Court's decision to intervene in the Texas redistricting litigation has overturned the early March party primaries. The Court stayed the interim maps ordered by the San Antonio federal district court so that the D.C. district court could try the state's pre-clearance case. That trial is scheduled for mid- to late January. Meanwhile, the San Antonio court maintains jurisdiction over the voter dilution claims brought by the plaintiffs. In other words, next year's elections are up in the air.

The Texas Democratic and Republican Parties have ostensibly agreed to hold their primaries on April 3. Under the agreement, which the San Antonio court has approved, a unified primary will be held on April 3. This deals a significant blow to the presidential hopes of Governor Perry, who had banked on the early Texas primary to keep him in the race. Moreover, ESPN broadcaster and former SMU football star Craig James is using the extra month to mount a U.S. Senate campaign, challenging frontrunner Lt. Governor David

Dewhurst. Although James is controversial in his own right for his role in the firing of Texas Tech football coach Mike Leach, he is a board member of the conservative think tank Texas Public Policy Foundation and could tap into a substantial fundraising base and the grassroots network of Michael Quinn Sullivan and Empower Texas. On the Democratic side, former State Rep. Paul Sadler has announced that he will seek the seat. While the thought of a Democrat winning a statewide election in Texas seems Quixotic at best, Sadler's expected focus on public education could make things interesting. The plot thickens.

At this point, no one is sure what the maps will be or who will run. James's entry into the Senate race throws the expected succession in the Senate into further confusion. While most observers expected a Dewhurst victory over insurgent candidate Ted Cruz and former Dallas Mayor Tom Leppart, the new lineup almost assures a May runoff election with unpredictable results. It is unlikely that the Senate committees will broach any unpopular subjects while its president is engaged in mortal hand-to-hand combat. On the House side, the extension of the election season will slow down the interim process. The Speaker's office will begin a series of meetings in the coming months with various groups to discuss potential changes to the tax system, but the uncertainty over the composition of the 2013 House will likely act as a drag on the process as well. Things will go slowly and cautiously until the primary elections are over, and maybe even into the fall, if any significant number of districts are still in play.

It is fair to say that no one has ever seen an election cycle quite like this one. The bitter partisanship that afflicts Washington is now firmly ensconced in Texas. Moreover, the partisan struggles will now be played out in the Republican primary, where ideological struggles will mark the spring primary. A key Senate race in San Antonio pits longtime incumbent Sen. Jeff Wentworth (R-San Antonio) against Railroad Commissioner Elizabeth Ames Jones, a former House member. Primary battles are also on tap in seats opened up by the retirements of Senators Mike Jackson, Florence Shapiro, and Chris Harris. The Fort Worth seat held by Democrat Wendy Davis now depends on the outcome of the litigation.

In any event, your TADC legislative team remains on the job, and the TADC PAC will meet after the first of the year to chart a course through these murky waters. One thing is certain: TADC's public policy objectives are clear. Candidates who favor a strong, well-resourced, and independent judiciary and a robust jury system will earn our support. The more things change, the more they stay the same.

***LEGAL NEWS***

*\* Case Summaries prepared by Michael Hendryx, with Strong Pipkin Bissell & Ledyard, L.L.P. in Houston*

## **TORTS**

### **Medlen v. Strickland (Tex.App Dist.2 11/03/2011)**

An owner may be awarded damages based on the sentimental value of lost personal property, including pets. The Medlens' dog, Avery, escaped from their backyard and was picked up by animal control. Jeremy went to the animal shelter to retrieve Avery but did not have enough money with him to pay the fees. He was told that he could return for the dog on June 10, and a "hold for owner" tag was placed on Avery's cage, notifying employees that the dog was not to be euthanized. Contrary to the "hold for owner" tag, the dog was euthanized.

The Medlens sued for Avery's "sentimental or intrinsic value" because he had little or no market value and was irreplaceable. Their sole issue on appeal is whether a party can recover intrinsic or sentimental damages for the loss of a dog. The Supreme Court held "Because of the special position pets hold in their family, we see no reason why existing law should not be interpreted to allow recovery in the loss of a pet at least to the same extent as any other personal property." "Dogs are unconditionally devoted to their owners. Today, we interpret timeworn supreme court law in light of subsequent supreme court law to acknowledge that the special value of 'Man's best friend' should be protected."

Because an owner may be awarded damages based on the sentimental value of lost personal property, and because dogs are personal property, the trial court erred in dismissing the Medlens' action against Strickland. [\*\*Read this opinion HERE\*\*](#)

## **TORTS**

### **Jenkins v. Occidental Chemical Corp. (Tex.App. Dist.1 11/17/2011)**

Jason Jenkins was injured at a chemical plant, and a jury awarded him damages. Occidental performed its own design work. The trial court entered judgment in favor of Occidental on the grounds that the plaintiff's claims were barred by two statutes of repose. The appellate court found that the property owner performed its own design work for an improvement to real property. Section 16.008 is the statute of repose that would typically apply to a defendant in Occidental's position, but Occidental is not entitled to that defense because the jury found that it allowed an unlicensed, unregistered engineer to design the acid addition system. Further, Occidental was not entitled to invoke. (See Section 16.009 as the plaintiff's claim was not based on its status as a property owner and plaintiff's claim was not a strict liability products claim.) [\*\*Read this opinion HERE\*\*](#)

## **ALTERNATIVE DISPUTE RESOLUTION**

**Serna v. International Bank of Commerce** (Tex.App. Dist.4 10/12/2011)

Appellant, Dora Serna, and appellee, International Bank of Commerce (“IBC”) entered into negotiations involving Serna’s purchase of three properties pursuant to an earnest money contract. When the negotiations failed, Serna sued IBC for fraud and for violations of the Texas Deceptive Trade Practices Act. The trial court granted IBC’s motion to compel arbitration. A petition for writ of mandamus seeking to overturn the trial court’s order, Serna filed a “Demand for Arbitration with the American Arbitration Association.” A hearing before the arbitration panel commenced on April 7, 2010, and on June 11, 2010, the panel denied all relief sought by Serna. Serna later moved to vacate the arbitration award, while IBC moved to confirm the award. The trial court affirmed the award. On appeal, Serna asserted the trial court erred in sending the case to arbitration and her constitutional right to a jury trial was violated.

In her first issue, Serna argued the arbitration provision contained in the earnest money contract was not mandatory. Serna relied on a single sentence in the arbitration provision that she contended allows the parties to seek either arbitration or judicial proceedings to resolve their disputes.

On appeal, Serna asserted the statement that “[t]he Parties agree that legal action regarding this agreement and any liabilities hereunder shall either be brought by arbitration, as described herein, or by judicial proceedings” indicated arbitration was not mandatory and either party could elect to resolve their dispute in a judicial proceeding. Alternatively, Serna contended this sentence renders the arbitration provision ambiguous, and therefore, unenforceable. The appellate court rejected both arguments.

Serna also asserted the trial court erred in compelling arbitration because she did not agree to mandatory arbitration and she did not waive her constitutional right to trial by jury.

The court held the arbitration provision contained in the earnest money contract was mandatory.

When a party agrees to have a dispute resolved through arbitration rather than a judicial proceeding, that party has waived its right to a jury trial and therefore no constitutional right was violated. **[Read this opinion HERE](#)**



## **CIVIL PRACTICE**

**BenMac's Arrowheads Dot Com LLC v. Williams** (Tex.App. Dist 11 11/10/2011)

Sam Williams sued BenMac's Arrowheads Dot Com LLC, John McCurdy and Jim Bennett for breach of contract. BenMac's, McCurdy and Bennett filed a special appearance, which the trial court overruled. Williams demonstrated that more than 20 percent of the companies that obtain advertising space on the dealer page of the website from appellants do so for the purpose of advertising their businesses in Texas. This evidence, which appellants did not dispute or negate, is sufficient to establish that appellants purposefully availed themselves of all the benefits, advantages and profits that Texas had to offer and that appellants have maintained continuous and systematic contacts with Texas necessary for general jurisdiction. The trial court's order overruling the special appearance is affirmed.

The court held personal jurisdiction over nonresident defendants is constitutional when two conditions are met: (1) the defendant has established minimum contacts with the forum state and (2) the exercise of jurisdiction comports with traditional notions of fair play and substantial justice.

Determining whether, through the website itself, appellants established sufficient contacts with Texas but, rather, the Court saw its analysis was to whether the website is evidence of sufficient contacts between appellants and the Texas advertisers that would provide the continuous and systematic contacts necessary to establish personal jurisdiction in Texas. Because Williams demonstrated that over twenty percent of the companies that obtain advertising space on the dealer page of the website from appellants do so for the purpose of advertising their businesses in Texas, the Court held that this evidence, was sufficient to establish that appellants purposefully availed themselves of all the benefits, advantages, and profits that Texas had to offer and that appellants have maintained continuous and systematic contacts with Texas necessary for general jurisdiction. As there was evidence in the record to indicate how the advertisers came to be customers of appellants, the Court concluded it would infer that the trial court found that appellants solicited the Texas advertisers.

As the defendant had not negated general jurisdiction, the Court did not need to reach specific jurisdiction. [\*\*Read this opinion HERE\*\*](#)

## **CIVIL PRACTICE**

**Specht v. Dunavant** (Tex.App. Dist. 14 11/29/2011)

Appellants Richard Specht and Rene Hamouth appeal the trial court's denial of their special appearances. Utah resident William R. Dunavant and his Florida corporation,

William R. Dunavant Family Holdings, Inc. (collectively, —Dunavant), filed suit in district court against five defendants, including appellants Specht and Hamouth, who reside in Canada. Dunavant asserted various claims arising from a “Stop Transfer Resolution” that prevented Dunavant from transferring his shares of stock in Versa Card Inc. Versa Card is a Delaware corporation with its sole place of business in Texas, and Dunavant received the stock as compensation for his work as the company's CEO. The sole jurisdictional allegation in Dunavant's petition is the assertion that “[j]urisdiction and venue are proper in Harris County because all or a substantial part of the events or omissions giving rise to the claim occurred in Harris County, Texas and Harris County is the county of the defendant's [sic] principal office in this state.”

In support of their joint special appearance, Specht and Hamouth produced ample evidence that they reside in Canada and had never (a) owned, leased, or controlled personal or real property in Texas; (b) maintained Texas offices, addresses, or telephone numbers; (c) been parties to or witnesses in any other Texas litigation; (d) advertised, marketed, or solicited business in Texas; (e) employed agents or employees in Texas; (f) maintained a Texas bank account, brokerage account, or investment account; or (g) been parties to a contract between Dunavant and Versa Card.

Evidence in evaluating general jurisdiction must be based on the defendant's contacts with the forum state before the suit was filed. The fiduciary-shield doctrine protects nonresident corporate officers from general jurisdiction based on their Texas contacts on the corporation's behalf. The fact that the corporation's stock-transfer agent was located in Texas was merely fortuitous and thus is not a basis for the exercise of personal jurisdiction [\*\*Read this opinion HERE\*\*](#)

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