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An Association of Personal Injury Defense, Civil Trial & Commercial Litigation Attorneys - Est. 1960

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TADC CALENDAR OF EVENTS

November 14-15, 2014	**TADC Board of Directors Meeting** Amarillo, Texas
January 21-25, 2015	**TADC Winter Seminar** Beaver Creek Lodge – Beaver Creek, Colorado Mitch Moss & Mackenzie Wallace, Co-Chairs
March 5, 2015	**TADC Board of Directors Meeting/Legislative Day** Austin, Texas
April 29-May 3, 2015	**TADC Spring Meeting** The San Luis Resort – Galveston, Texas Robert Booth & Gayla Corley, Co-Chairs Elliot Taliaferro, Young Lawyer Liaison
July 8-12, 2015	**TADC Summer Seminar** Snake River Lodge & Spa – Jackson Hole, Wyoming Christy Amuny & Pamela Madere, Co-Chairs
July 31-August 1, 2015	**TADC Budget/Nominating Committee Meeting** DoubleTree Suites – Austin, Texas
August 7-8, 2015	**West Texas Seminar** Inn of the Mountain Gods – Ruidoso, New Mexico
September 16-20, 2015	**TADC Annual Meeting** Millennium Broadway – New York, New York David Chamberlain & Keith O'Connell, Co-Chairs

PRESIDENT'S MESSAGE

by Michele Y. Smith
MehaffyWeber

WHAT'S IN IT FOR ME?

Another Annual Meeting has come and gone. This year's meeting, held at the Hyatt Hill Country in San Antonio, was particularly gratifying and special. First, it allowed those in attendance to recognize and celebrate the many, and significant, accomplishments of Junie Ledbetter. What an incredible year she had! Secondly, Junie and our awesome program chairs Mitzi Mayfield and Tom Ganucheau, assembled many past presidents who not only provided their insight and wisdom but also shared moving recollections of what makes the TADC special. Not that I needed a reminder … but it occurred to me that those who could not personally hear these amazing past presidents might be asking **– "WHAT'S IN IT FOR ME"?**

RELATIONSHIPS:

Of the many professional organizations to which I belong, the TADC stands out in providing opportunities to meet and build professional and personal relationships. Need an attorney to help out in a jurisdiction across the state? You need to look no further than the TADC roster. I find it immensely comforting to know I can use my TADC connections across the state to provide service to my clients.

As importantly, the TADC family includes your family. The member relationships in the TADC are strong and many lifelong friendships have been created at TADC events. Many of those relationships started in the TADC hospitality rooms hosted at our meetings. In a day when our profession is under attack from so many sides, the relationships the TADC provides are rock solid!

EDUCATION:

TADC has always provided exceptional programming at a reasonable cost. For instance, did you know our meeting registration fees have been constant for many years **AND** registration fees are not subsidized by your dues? Bobby Walden does an incredible job in making this happen.

We have four exciting CLE venues planned this year, and I hope you will be able to join us at one or more:

The TADC 2015 Winter Seminar will be held in beautiful Beaver Creek, Colorado – January 21-25, 2015. Mackenzie Wallace and Mitch Moss serve as program co-chairs and have assembled an incredible well-rounded program. This is our first year at this venue and the snow should be terrific for our avid skiers. Plan to stay a few extra days as the Alpine World Championship starts January 26. Our affordable room rate is guaranteed three days before and after our meeting dates! Look for fun spots to eat and visit from our meeting chairs Heather and Robert Sonnier.

Our spring meeting is moving south! The TADC 2015 Spring Meeting will be held in Galveston, Texas – April 29-May 3, 2015. Meeting chairs Kim and Fred Raschke promise a list of fun-filled water activities for the entire family and delicious Gulf Coast food. AND Fred promises no seaweed! Our CLE chairs,

Gayla Corley, Robert Booth and young lawyer liaison, Elliott Taliaferro, will assemble a knock out program for our in-state meeting. Stay tuned!

July 8-12, 2015 brings the TADC back to beautiful Jackson Hole, Wyoming, a perfect spot for CLE and a family vacation. Programs Co-Chairs Christy Amuny and Pamela Madere will put together a fantastic program. Molly and Dennis Chambers will also assemble a great visitor's guide for attendees.

We will end the year in NEW YORK CITY at the annual meeting held September 16-20, 2015. The city should be alive with excitement. You will not want to miss the program being co-chaired by David Chamberlain and Keith O'Connell. It will be a treat for everyone.

Further, we read your responses to the membership survey that was sent out last year. Our programs will continue to evolve as our practices do and will include expanded topics in areas beyond traditional insurance defense. We have three specialty programs in the works already. Stay tuned for more information on our Transportation, Commercial Litigation and Construction Defect CLE seminars.

We also plan to continue and expand our local programming. We will sponsor the New Mexico and Red River Rivalry CLE programs again in 2015 as they have proven tremendously successful. Additionally, we anticipate legislative update programs in each area of the state to keep our members apprised of developments in the state legislature as the Session progresses in 2015. Finally, our young lawyers group led by Trey Sandoval is brainstorming new and fun local programs to engage our younger members.

ADVOCACY:

The TADC leadership has been in the front line trenches for years dedicated to protecting our civil justice system. 2015 looks to be an active legislative year. The 84th Texas Legislature convenes in January and there are a number of wild cards at play – a new Governor, a new Lieutenant Governor, new Senators, new representatives in the house, different powerful committee chairs, education reform and perhaps more civil justice reform.

As the TADC is the largest state organization of defense attorneys in the country, it commands respect and credibility. State legislators listen to the TADC and seek its input on a myriad of legislative matters.

Each Session our board of directors, led by the executive and legislative committees, reviews in excess of a hundred bills which we have designated to monitor. We also serve on working groups looking at several civil justice issues.

The executive committee has completed a strategic planning meeting to develop an active and progressive plan for the future of the TADC, and the board held its first meeting of the new TADC year in Amarillo. Your board is fully engaged, committed, and ready to hit the ground running for a productive and successful year for our organization!

The TADC has long been an organization Mitch and I love. Leading the organization this year is both exciting and humbling. Following the San Antonio meeting, I came away feeling more resolved to commit myself fully to the TADC and to our profession.

SO WHAT'S IN IT FOR YOU…

Get involved and find out first hand! If you are interested in being a more active member of TADC, just let me know and I will make sure you get the opportunity. I truly look forward to serving as your President and hope to meet as many of you in person as possible!

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PAST PRESIDENT'S MESSAGE

V. Elizabeth "Junie" Ledbetter
Jay Old & Associates, PLLC, Austin

Dear TADC Friends,

As our 2013 - 2014 TADC year winds down, this is our time to reflect on TADC's activities and accomplishments, goals and plans, and its relevance to our practices through its 54 years of existence. We all have our own thoughts on these matters, but I thought you might also be interested in responses to the membership survey conducted earlier this year. Responses came from a wide variety of members ranging from lawyers licensed fewer than 5 years to lawyers licensed 36 years or more, and included lawyers focused over a wide spectrum of practice areas (including commercial, employment, construction, professional responsibility, oil and gas, first-party insurance work, personal injury litigation, and appeal work).

One member gave a short and sweet response that basically summarizes the benefits of TADC: "Networking. CLE. And Legislative Representation." Some members were more loquacious. Here's a sampling of a few positive examples of those responses:

COMMENTS: NETWORKING/CONNECTIONS:

- It's the people. You will not find a better like-minded group of people dedicated to preserving our civil justice system.
- The organization provides the opportunity to interact with fine lawyers across the state. That has allowed me to refer business to other members and have business referred to me.
- I think it's a great organization that helps me with my practice and keeps me in touch with others in the state who do what I do.
- I believe TADC generally does good work, which benefits my practice. Further, I like the members and spouses.
- For the last 5 - 10 years, I have had primarily an appellate practice, so I like to let TADC members know I offer that service.
- I have made some life-long friends in this organization.
- I like the opportunity to network and fellowship with colleagues across the state with similar interests and backgrounds.
- Comradery, shared experience, wealth of shared knowledge, business referrals, excellent CLE.
- Helping out with y'all (being active) makes me a better lawyer and restores my sanity.

COMMENTS: MEMBER SERVICES and UPDATES ON THE LAW:

- The CLE and other services often match that provided by DRI and the ABA.

- CLE, meetings and publications are all top-notch.
- Membership services are great (i.e., expert witness database, expert witness library, seminar paper database, publications, etc.)
- Meetings: I like the winter (ski) meetings and the summer (mountains/cool weather) meetings. . . .
- I think many of the current topics presented at seminars are relevant to my practice. I think we do a good job being diverse in our topics.
- The topics are generally well-considered, timely, and focused.

COMMENTS: LEGISLATIVE ISSUES:

- TADC is recognized for supporting the best parts of the law profession...support of trial by jury and we are recognized for our integrity and professionalism by legislators and the plaintiff's bar.
- I believe it is important to carefully review and comment on legislative and judicial matters important to our practice.
- I attend CLE meetings when I can and have assisted with reviewing proposed legislation in the past. . . . I believe we need the TADC to keep us informed on legislation that affects our practice.
- I am a full time defense attorney and active in talking to and corresponding with local legislative delegations.
- It is a well run organization that does an outstanding job of influencing potential legislation and has a quality Board of Directors.
- Legislative representation and being on the forefront of legislation affects my practice and clients.

Any survey worth its salt will also provide a fair number of suggestions for improvement, and this one certainly did so. Some suggestions were easier to implement than others. For instance, we asked "What would entice you to become a more active member?" Those of you who suggested "make me 30 years younger" will not be surprised that we still don't have the science to make that happen. But other constructive suggestions have been given a good deal of thought by the executive committee and board of directors.

For instance, many survey respondents suggested encouraging young lawyer involvement. It's not exactly that you're going to be 30 years younger, but you have the chance to mentor someone 30 years younger and help grow the organization. And in fact, young lawyers did participate on substantive committees, presented papers at seminars, co-chaired certain meetings, and wrote case law updates for monthly eUpdates. And they will be welcomed to do so in the future as well. If you have a young lawyer in your firm that you would like to have involved in various projects, please don't hesitate to call me or any other board member.

Many of you suggested more local programs as a way to enhance networking opportunities, recruit new members, and avoid the time and expense of distant meetings. Thanks to the work by your local directors, TADC hosted 15 different local social and CLE events this past year, with hopes of more to come. If you didn't get a chance to attend one this past year in your area, don't despair, you'll get your chance.

Some members asked for more opportunities to participate in seminars and on committees. And if you want to participate by staging a local event, or by presenting a CLE topic, there's a spot for you. Just call your local or regional board member or other officer on the executive committee and let them know how you would like to get involved.

Many members commented on the effects of tort reform and the expansion of their practices far beyond personal injury work. CLE has expanded programming aggressively over recent years to include topics such as construction and design, oil and gas, insurance, employment law, technology and social media use in discovery and trial, e-discovery, medicare protection and security of confidential information, third party purchases of medical bills, ethics, and procedure.

As for legislation, suggestions included cautionary tales on TADC involvement with any further tort reform proposed by the legislature. Of course, this past year was not a legislative year, but TADC was invited to participate on select state-wide committees and comment on such topics as the new expedited trial rules, e-filing, judicial compensation, and judicial selection. It has been a good opportunity to keep open channels for discussions about what's good and right for the preservation of the trial by jury system. Your new legislative committee is already gearing up for the more formal legislative session beginning in January 2015.

In addition to this brief rendition of survey highlights, I want to take this opportunity to say again what a pleasure and a privilege it has been to work as your TADC President this past year with such an outstanding group of lawyers and friends. Please join me in thanking those working to make TADC the one-of-a kind organization it is, including the 2013 - 2014 Executive Committee, **Michele Smith, Milton Colia, Chantel Crews**, **Mike Hendryx** and **Dan Worthington** and their display of exceptional leadership vision and ethics; the full Board of Directors; the Program Committee and Co-Chairs **Pamela Madere** and **Pat Weaver** who led the charge for varied and relevant programming both local and statewide; the Publications Committee and Co-Chairs **Mark Walker** and **Christy Amuny** who initiated a full-scale website remodel and managed publication of excellent TADC magazines, monthly case-law updates, and substantive case-law newsletters; the Membership Committee and Co-Chairs **Mark Stradley** and **Jerry Fazio** who led the charge to keep our membership numbers up; and the Legislative Committee and Co-Chairs **Clayton Devin** and **K.B. Battaglini**, who rode herd over legislative issues and maintained contact with legislators. Thanks to the TADC representative to the DRI, **Greg Curry,** who acted as liaison between DRI and TADC.

Though we have noted the efforts of our program chairpersons in the past, I want to say one more time, what a great job. Thanks again to those who searched and found meaningful topics and solid speakers for the outstanding meetings in historic Washington, D.C., **Mike Morrison** and **Doug McSwain**; for the sporty ski meeting in Crested Butte, Colorado in conjunction with the Illinois Defense Counsel Association, **Heidi Coughlin** and **Victor Vicanaiz**; for the Trial Academy in San Antonio, **Troy Glander** and **Gayla Corley**; for the summer meeting in beautiful Coeur d'Alene, Idaho, **Brad Douglas** and **Charlie Downing** ; for the annual West

Texas Seminar in Ruidosa, New Mexico in conjunction with the New Mexico Association of Defense Counsel, **Bud Grossman**; for the annual meeting in San Antonio, **Tom Ganucheau and Mitzi Mayfield**; and last but not least, for the first-ever Red River Shoot Out in Dallas in tandem with the Oklahoma Defense Counsel Association, **Jerry Fazio**. In addition, hats off to all those local board members who worked hard to put on a good local CLE/social get-togethers around the state. Great work, one and all!

Roger Hughes and the Amicus Committee are to be commended for quality briefing to the Supreme Court on thorny issues. Similarly, we are grateful to the substantive committees who are providing helpful case by case analysis regularly.

Further congratulations are in order for the recipients of the Founder's Award and the President's Award. The Founder's Award is in recognition of a member who has earned favorable attention for the organization, someone who has gone above and beyond the call of duty. This award went to **Fred Rashcke** in honor of his years of countless civic endeavors in Galveston, in Texas, and even across the United States. Fred, like Founder's Award recipients in the past, has set the bar high for the rest of us, working tirelessly to "give back" to the communities that have so richly blessed us all. The President's Award was presented to **Bud Grossman** of Lubbock and **Mitch Moss** of El Paso for their regular and repeated organization of local seminars. Bud, for many years, has been responsible for organizing regional West Texas programming for both Texas and New Mexico lawyers. **Mitch Moss**, has organized multiple local CLE programs each year for El Paso lawyers for some time. TADC also presented **Supreme Court Justice Phil Johnson,** former TADC member, with the Preservation of Justice Award after his Supreme Court Update at the Washington, D.C. meeting. His award read "For his lifetime achievements defending the Constitutions of the United States and the State of Teas, and protecting and preserving the civil justice system".

An additional shout-out is in order for Fred Raschke who was named President Elect of the national American Defense Trial Association, and for Dan Worthington, who was elected to the DRI board of directors at its annual meeting in San Francisco in October. In addition, **Allan DuBois** was chosen as President-Elect of the State Bar. And **Tom Ganucheau** was named to the board of directors of the National Federation of Judicial Excellence. Congratulations, Fred, Dan, Allan, Tom. We're proud of you all.

Of course, TADC projects and programs are shepherded from start to finish by the attentive staff of TADC, **Bobby Walden** who is finishing up his 21st year with TADC, **Debbie Hutchinson**, and **Regina Anaejionu.**

Of course, there are many more unsung heroes who have contributed "above and beyond". Thank you. Before closing, I also want to thank Jay and the folks I work with for their encouragement during the year. To my dear husband, Gaston, offering support and under-standing, I offer a simple and heartfelt thank you. Now, we look forward to the coming year with confidence in the leadership of the ever capable and enthusiastic Michele Smith and the new Board of Directors. And so it begins. . . .

2014 SUMMER SEMINAR

Coeur d'Alene Resort & Spa ~ July 16 -20, 2014 ~ Coeur d'Alene, ID

The 2014 TADC Summer Seminar was held in the cool mountains of Coeur d'Alene, July 16-20, 2014. Program Co-Chairs, Brad Douglas, with Naman, Howell, Smith & Lee, P.C. in Waco and Charlie Downing with Atlas, Hall & Rodriguez, L.L.P. in McAllen, assembled an outstanding cast of lawyers to present over 9.5 hours of CLE. Social Media and the Law, Third Party Practice, Supreme Court Update and the list goes on and on. No topic was off limits!

The TADC Summer Seminar has become a great event for not only the education, but as a family-oriented meeting.

Michael Ancell with Karen and Bud Grossman

Chantel Crews, Margaret Ann and Milton Colia with Sofia Ramon

Nick Zito and Laura Kemp

2014 Summer Seminar

Sterling, Sierra, Sarene and Harrison Smith

Betty & Joe Crawford with David and Mary Ledyard

Monica and Greg Wilkins

Fred Raschke with Junie Ledbetter and her grandchildren

Think "Outside the Border" Strategies for Defending Claims filed by Illegal Aliens

By Carlos Rincon
Rincon Law Group, P.C., El Paso

If your serious motor carrier accident case involves primarily or exclusively Mexican parties, issues, or interests, we implore you: *consider seeking the application of Mexican law*. "Are you insane?" Frankly, this is the reaction we expect from at least some of our audience. But as some of you already know, and as the patient and open-minded will soon see, there are scores of reasons why you should at least explore the issue. Perhaps the most practical reason to gain a working knowledge of relevant Mexican law is the evolving integration of the U.S. and Mexican economies—like it or not, Mexican legal issues will become more and more prevalent in our courts. But the *shrewd* reason to study Mexican law is that it is incredibly tight-fisted as to damages. If you can convince the court to apply Mexican law as it pertains to damages, your motor carrier clients will be pleased, to say the least. Admittedly, such rulings are rare and hard to get. But that is precisely why we urge you to try. Courts need to hear these arguments in order for the initial flabbergast to erode. After all, the application of foreign law has been recognized as appropriate in one situation or another in every jurisdiction in the United States. The time is right for such applications in trucking accident cases involving Mexican parties and concerns.

Procedures for Advancing Foreign Law

The procedural vehicle used to advance the application of foreign law will, of course, vary by jurisdiction. Nonetheless, a look at Texas's procedure may at least help you identify matters relevant to our own. In Texas, a party who intends to raise an issue concerning the law of a foreign country **shall:**

(1) give written, reasonable notice in the pleadings or otherwise of his or her intention to do so;

(2) provide copies to opposing counsel of any foreign law and/or written materials or sources upon which the party will rely upon in advancing foreign law at least 30 days prior to trial; and

(3) If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish all parties both a copy of the foreign language text and an English translation.

See TEX R. EVID. 203. In determining the law of the foreign nation, the court "may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises." *Id*. Thus, it is typical for parties asserting foreign law in Texas to designate an expert witness who, as an expert, will offer an opinion as to the proper interpretation and application of the foreign law at issue. *See Ahumada v. Dow Chemical Co.,* 992 S.W.2d 555, 559 (Tex. App.—Houston [14th Dist.] 1999). Indeed, "when the only evidence before the court is the uncontroverted opinion of a foreign law expert, a court generally will accept those opinions as true as long as they are reasonable and consistent with the text of the law." *Id.* Finally, "the court, and not a jury, shall determine the laws of foreign countries.

The court's determination shall be subject to review as a ruling on a question of law." TEX R. EVID. 203.[1]

A similar rule exists in federal procedure—specifically, Rule 44.1. *See* F.R. CIV. P. 44.1. *See also Access Telecom, Inc. v. MCI Telecommunications Corp*., 197 F.3d 694, 713 (5th Cir. 1999) (noting that under Rule 44.1, expert testimony accompanied by extracts from foreign legal material is the preferred method by which foreign law is determined); *Universe Sales Co., Ltd. v. Silver Castle, Ltd.,* 182 F.3d 1036, 1039 (9th Cir. 1999)(same). Similar rules are likely applicable or controlling in your particular jurisdiction.

Forum Non Conveniens

Another remedy/procedure available in a case involving primarily or exclusively Mexican parties, issues, or interests is the doctrine of *forum non conveniens*. Through this equitable doctrine, a suit can be dismissed in favor of the jurisdiction of a foreign court.

Legal Standards Governing *Forum Non Conveniens*

In determining whether to dismiss a case under the doctrine of *forum non conveniens*, the trial court must weigh a number of factors. In Texas, these factors are set out by statute:

> (1) an alternate forum exists in which the claim or action may be tried;
>
> (2) the alternate forum provides an adequate remedy;
>
> (3) maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;
>
> (4) the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;
>
> (5) the balance of the *private interests* of the parties and the *public interest* of the state predominate in favor of the claim or action being brought in an alternate forum, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state; and
>
> (6) the stay or dismissal would not result in an unreasonable duplication or proliferation of litigation.

TEX. CIV. PRAC. & REM. CODE § 71.051(b). However, the analysis in Texas does not necessarily end with the consideration of these express factors, because, as the fifth factor suggests, additional private and public interests weigh into the analysis. *Id.* In Texas, as in many jurisdictions, these public and private factors are found in what are commonly known as the "*Gilbert* factors," which were set out by the United States Supreme Court in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947). *See In re Williams Gas Processing Co*., 2008 Tex. App. LEXIS 701 (Tex. App.—Houston [14th Dist.] Jan. 31, 2008).

The private factors under *Gilbert* are:

> (1) the relative ease of access to sources of proof;
>
> (2) the availability of compulsory process for attendance of unwilling witnesses;
>
> (4) the enforceability of a judgment if one is obtained; and
>
> (5) all other practical problems that make trial of a case easy, expeditious, and inexpensive.

[1] Yet another procedural consideration: A choice of-laws determination in favor of foreign law may be dispositive of a cause of action based on American law. In the *Vasquez* case, the Fifth Circuit noted that such was the case in maritime law. *Vasquez,* 325 F.3d at 680 n.26 (citing *Quintero v. Klaveness Ship Lines,* 914 F.2d 717, 721 (5th Cir. 1990)). The Court then indicated that the same result would likely be applicable in a personal injury or wrongful death action: "No reason comes to mind for limiting this principle to maritime cases." *Id.*

Gilbert, 330 U.S. at 508.

The public factors, which consider the interests of the two competing jurisdictions, are:

> (1) administrative difficulties caused by litigation not handled at its origin;
>
> (2) jury duty imposed upon people of a community that has no relation to the litigation;
>
> (3) local interest in having localized controversies decided at home; and
>
> (4) appropriateness of having a trial in a diversity case in a forum that is familiar with the law that must govern the case, rather than having a court in another forum untangle problems in conflict of law and in law that is foreign.

Id. at 508-09.

Many of the considerations in a choice-of-law determination are relevant and similar—if not identical—to the considerations that must be made in determining *forum non conveniens*. Most notably, the fourth public factor to be considered under *Gilbert* encompasses a choice-of-law determination: "It is more appropriate to hold a trial 'in a forum that is at home *with the . . . law that must govern the case*, rather than having a court in some other forum untangle problems in conflicts of laws, and in law foreign to itself.'" *Tjontveit v. Den Norske Bank ASA*, 1998 U.S. Dist. LEXIS 11929 *43 (S.D. Tex. 1998). Likewise, *Gilbert's* public factors generally consider the relevant policies, needs, and interests of the competing forums, as do the Restatement's Section 6 factors. *Id.*, *see also* Restatement, *supra* § 6. Further, the comity concerns that are inherent to Section 6 are likewise required by Texas's statutorily-mandated consideration of whether "the alternate forum provides an adequate remedy." TEX. CIV. PRAC. & REM. CODE § 71.051(b)(2). In making this determination, the amount of damages available in one forum versus another is simply not relevant: "A foreign forum is adequate when the parties will not be deprived of all remedies or be treated unfairly, *even though they may not enjoy the same benefits as they might receive in an American court*." *Taylor,* 196 F. Supp. 2d at 432 (emphasis added). "We nonetheless are unwilling to hold as a legal principle that Mexico offers an inadequate forum simply because it does not make economic sense for [plaintiff] to file this lawsuit in Mexico." *Gonzalez,* 301 F.3d at 383.

Finally, pursuant to *Gilbert's* private factors, the fact that an accident occurred in Mexico can strongly favor the granting of a *forum non conveniens* motion. *Gilbert*, 330 U.S. at 508. Nearly all of the cases considering the occurrence of an accident in Mexico for purposes of *forum non conveniens* have been products liability cases. *See, e.g., Gonzalez,* 301 F.3d at 383; *In re Pirelli Tire, L.L.C.,* 2007 Tex. LEXIS 980 *7 (Tex. 2007); *Taylor,* 196 F. Supp. 2d at 432; and *Vasquez*, 325 F.3d at 674. Nonetheless, the reasoning of these cases would be directly applicable to a motor carrier accident occurring in Mexico.

> All of the events leading to this action took place in Mexico. The decedent was a Mexican citizen; the plaintiffs are all Mexican citizens or Mexican governmental agencies; the accident occurred in Mexico in a vehicle which was maintained in Mexico. All medical and law enforcement personnel and physical evidence are in Mexico. It would be difficult and expensive to produce those witnesses and transport that evidence to a court in Texas. Under these circumstances, Mexico is the most appropriate available forum.

Taylor, 196 F. Supp. 2d at 433 (citing *Aguilar v. Boeing Co*., 806 F. Supp. 139, 144 (E.D. Tex. 1992)).

The one distinction that could be made is if the trailer, for example, was maintained in the U.S. This obviously would entail some maintenance-related documents that would be located in the U.S. A similar situation was found insufficient to keep an airline accident case in the U.S. in *Aguilar v. Boeing*, where records regarding the manufacture of the airplane were located in the U.S.:

> Some evidence concerning the aircraft's design and manufacture might have been

> located in the United States. However, because the bulk of the evidence and witnesses were in Mexico, and the fact that the crash occurred in Mexico and involved mainly Mexican citizens, the invocation of *forum non conveniens* was appropriate.

Taylor, 196 F. Supp. 2d at 433 (citing *Aguilar,* 806 F. Supp. at 144). Likewise, assume all other evidence is in Mexico, and would thus be beyond a Texas court's subpoena power. As the *Aguilar* court pointed out, this would leave us with several problems:

> The testimony of unwilling nonparty witnesses in Mexico can only be obtained to aid in a United States litigation through letters rogatory pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No 7444, 847 U.N.T.S. 231. This procedure poses difficulties in obtaining adequate deposition testimony. For example, this procedure is expensive and time-consuming. In addition, conducting a substantial portion of a trial on deposition testimony precludes the trier of fact from its most important role; evaluating the credibility of the witnesses. All of these problems can be avoided by trial in Mexico.

Aguilar, 806 F. Supp. at 144.

Along similar lines, it would be wise for us to try to pin down the availability of the nonparty witnesses. Specifically, if the case were to be tried in Texas, would anyone *personally guarantee* the attendance of nonparty Mexican national witnesses? In at least two cases, a plaintiff's refusal to do so has weighed in favor of trying the case in the foreign forum. "It is telling that the Plaintiffs do not in any fashion obligate themselves to ensure that the persons in question will be available for trial in the United States." *Morales v. Ford Motor Co*., 313 F. Supp. 2d 672, 681 (S.D. Tex. 2004). "[P]laintiffs have asserted that they, the plaintiffs, will be available and present in a U.S. court. However, they cannot guarantee the availability of any of the necessary witnesses who might be unwilling to appear . . . this factor strongly favors dismissal to allow the plaintiffs to proceed in Mexico." *Taylor,* 196 F. Supp. 2d at 433. This argument should offset the significance of the trailer's maintenance in the U.S.[2]

Finally, we acknowledge that these will almost always be tough arguments to make. Many courts will be totally unwilling to consider them, and *most* will be reluctant. But that does not relieve us of our burden to try. As zealous advocates for our motor carrier clients, we *must* push the envelope. Keep in mind that nearly all of the arguments contained herein already exist as established principles of law within our collective jurisdictions, and that ***all*** of the arguments contained herein represent, at a bare minimum, good faith reasons for the extension of existing law. As the former Prime Minister of Great Britain, Tony Blair, once said: "Ideals survive through change. They die through inertia in the face of challenge." We encourage you, just as we constantly encourage ourselves, to *be* the change in the law that we all hope to see.

This is an excerpt from the paper republished for the TADC 2014 Annual Meeting and previously published for the DRI Trucking Law Seminar 2008.

[2] Admittedly, federal courts seem much more willing than state courts to dismiss for *forum non conveniens*—at least in Texas. *See, e.g., Sanchez v. Brownsville Sports Ctr., Inc.,* 51 S.W.3d 643, 667-68 (Tex. App.—Corpus Christi 2001) (wherein a Mexican plaintiff was permitted to sue a Japanese corporation in Texas courts despite the fact that the only connection to Texas was that the involved vehicle had first entered the stream of commerce in Texas—although the *decedent did not buy it in Texas*). As such, it is fortunate that removal to federal court can be premised upon diversity between parties based upon differing national citizenship. *See* 28 U.S.C. § 1332(a)(2). This should be considered and analyzed in any case where it might be appropriate. Note that generally, if there are aliens on *both sides* of the litigation, complete diversity of jurisdiction will not exist, and the case will not be removable. *Giannakos v. M/V Bravo Trader*, 762 F.2d 1295, 1296 (5th Cir. 1985) (holding that "diversity does not exist where aliens are on both sides of the litigation")).

TADC Legislative Update

By George S. Christian,
TADC Legislative Consultant

Pre-filing of legislation for the 84th Regular Session of the Texas Legislature begins on Monday, November 10. The Legislature convenes at noon on Tuesday, January 13. Following two relatively quiet sessions on civil justice issues (with the exception of TWIA reform, that is), the 84th session appears on track to return to a more normal level of activity, with numerous potential issues looming over the horizon. This update discusses a few of these.

Property & Casualty: Hailstorm Claims

Perhaps the most prominent of these issues is the alarming escalation of first-party insurance litigation arising from hailstorm claims. This problem stretches from the Panhandle to the Valley and may trigger legislative interest in revisiting Chapters 541 and 542 of the Insurance Code, extending regulation of public adjusters, and strengthening barratry laws. Some of the possible solutions under discussion include:

- expanding the dispute resolution process established for windstorm claims against TWIA (Chapter 2210, Subchapter L-1, Insurance Code) to claims against private insurers for wind, hail, and other natural disaster-related damage (mandatory pre-suit ADR; limitation of damages in subsequent suit; heightened burden of proof for enhanced damages);
- raising the current 80% floor in the offer of settlement rule (TRCP 167);
- limiting discovery of policy limits;
- codifying the unreasonable demand defense;
- prohibiting direct causes of action against adjusters;
- requiring public adjusters to negotiate claims in order to receive fees; and
- extending barratry prohibitions to certain relationships between attorneys and public adjusters.

You may recall that some of these ideas made their way into proposed legislation last session but did not advance beyond the committee stage. We anticipate a more concerted effort this spring, as the number of claims has risen dramatically across the state over the past two years.

Patent Trolling

Those practicing in the intellectual property field are no doubt aware of the growing reputation of the Eastern District of Texas for patent litigation. The problem has become so pronounced that the Senate State Affairs Committee is conducting an interim study of the effect of so-called "patent trolling" on Texas businesses. Patent trolling involves threatening businesses with patent infringement lawsuits unless they pay a specified sum to "settle" the claim. Given the enormous time and expense associated with patent litigation, many businesses feel compelled to pay up rather than contest these frequently unsubstantiated demands. Though the committee has not yet released its findings and recommendations, members have shown a significant level of interest in addressing the practice. Last year, Vermont became the first state in the nation to enact legislation giving state courts the power to sanction bad faith assertions of patent infringement,

enhancing the attorney general's authority to pursue patent trolling operations under the state's Consumer Protection Act, and creating a private cause of action against persons who engage in abusive patent trolling practices.

***Forum Non Conveniens* (again)**

Legislation to address the recent Texas Supreme Court decision in *In Re Ford Motor Company* may be offered this session. In this case, a divided court held that wrongful-death beneficiaries are distinct plaintiffs that can invoke the Texas-resident exception to the *forum non conveniens* rule (§71.051(e), Civil Practice & Remedies Code). *Forum non conveniens* has troubled the Legislature since the 1990 SCOT decision in *Dow Chemical Co. v. Castro Alfaro*, which found that the Legislature had statutorily abolished the common law doctrine of *forum non conveniens*. After an unsuccessful effort to reverse the Court's decision during the 1991 session, the Legislature partially restored the doctrine in 1993 while creating the Texas resident exception. The Legislature revisited FNC in 1997, 2003 and 2007, generally bringing it more in line with the federal FNC test, which does not contain a resident exception (though residency is a factor in the court's determination). If this issue does arise in the next session, we can expect it to be just as hotly contested as it has been in the past.

Letters of Protection

An evolving new issue that may receive legislative attention in the spring involves the use of so-called "letters of protection." In 2003, Texas became one of the first states in the nation to enact a statutory limitation on the amount of medical or health care expenses that a claimant may recover in a personal injury lawsuit. Under the statute (§41.0105, Civil Practice & Remedies Code), a claimant is only entitled to recover the amount of medical or health care expenses actually paid or incurred by or on behalf of the claimant. In other words, if the defendant can show that the plaintiff's medical expenses have been discounted by, for example, Medicare, Medicaid, or private insurance contract rates, the claimant cannot recover the total amount billed, but only the "incurred" amount.

The limitation provides a more realistic measure of the claimant's real out-of-pocket costs than the old law standard of "reasonable and customary charges" for medical care. Indeed, as the Texas Supreme Court recognized in *Haywood v. Escabedo*, 357 S.W.3d 390 (Tex. 2011)(a case in which TADC participated as *amicus*), health care providers may bill a "list" or "full" rate that is substantially higher than the reimbursement rate for patients covered by government or private insurance policies. This difference is precisely why the paid or incurred statute is so important to ascertaining the true value of a claim.

Presumably in an attempt to raise the settlement value of claims for medical expenses, some plaintiff's lawyers use "letters of protection" (LOP) that purport to guarantee payment to health care providers from the proceeds of a future settlement or judgment. LOPs may also be used in cases where a claimant has no insurance and no reimbursement limits or contract rates apply. Often, the providers have not solicited these letters or had any contact with the plaintiff's attorney, and a few Texas appellate court opinions have found that unsolicited LOPs do not constitute enforceable contracts. The Fourteenth Court of Appeals in Houston has twice considered whether a health care provider could enforce an LOP against the plaintiff's lawyer who sent the unsolicited letter. In *Advantage Physical Therapy, Inc. v. Cruse*, 165 S.W.3d 21 (Tex.App.—Houston [14th District] 2005), for example, the Court held that in the absence of the provider's affirmative acceptance of the LOP, the letter is not an enforceable contract, even if the provider subsequently called the attorney's office seeking information about the case and decided not to sue the claimant for unpaid bills.

The Fifth Court of Appeals, however, upheld a trial court decision enforcing an LOP in *Hays & Martin, LLP v. Ubinas-Brache, M.D.,* 192 S.W.3d 631 (Tex.App.—Dallas 2006). In this case, the surgeon contacted the plaintiff's lawyer seeking an LOP in exchange for the surgeon's cooperation in the lawsuit. The plaintiff's firm duly sent the LOP, constituting acceptance of the surgeon's offer. The Court further held that even though the surgeon unsuccessfully attempted to obtain reimbursement from the plaintiff's employer's workers' compensation carrier prior to learning about the plaintiff's settlement, this attempt did not indicate the surgeon's lack of assent to the LOP. Thus, the parties had a meeting of the minds that the LOP would protect the surgeon's medical bills in the event of a settlement.

It is apparent from these cases that an LOP may constitute an enforceable contract under specific conditions: there must be an offer and an acceptance, either by a clear and contemporaneous communication to accept an unsolicited LOP or by an express solicitation followed by the LOP.

LOPs have become an ethical issue in at least one state. The West Virginia Board of Medicine issued an opinion that a physician who solicits an LOP before agreeing to treat an established patient who has health insurance previously accepted by the physician may violate the physician's duty to place the patient's health care needs above the physician's financial interest. An "established patient" may include a patient whom the physician treated in an emergency and to whom the physician owes a duty of continuing care. The Board went further to say that a physician who dismisses an established patient with pre-existing insurance coverage for failing to execute an LOP may run afoul of the physician's contractual obligations with the insurance provider. The Board thus counsels physicians to be wary of LOPs, particularly when they have an established relationship with the patient in question.

Consumer Lawsuit Lending

In 2013, legislation regulating consumer lawsuit lending was introduced in both houses but did not advance beyond committee. Though there were significant differences between the bills, one backed by the lawsuit lending industry and the other by the U.S. Chamber of Commerce, the points of contention between the parties involve the interest rates and fees that may be charged on lawsuit loans and the discoverability of lawsuit lending agreements.

Judicial Elections

A joint House-Senate committee established last session is completing a study of the state's method of electing judges. Past efforts to replace the current partisan election of judges with a hybrid system of appointment/retention/election have failed in face of opposition from both political parties, and those dynamics have not changed. Nevertheless, there may be more limited efforts to improve the current system by raising minimum qualifications for judicial candidates, removing judges from the partisan ballot, or allowing designation of incumbents on the ballot. Recent federal court decisions in response to the *Citizens United* decision have also significantly eroded the Judicial Campaign Fairness Act, which prescribes contribution and expenditure limits for judicial campaigns. Under *Citizens United* and its progeny, corporate entities and independent expenditure-only "Super PACs" may now make unlimited expenditures in campaigns, undermining the original purpose of the Judicial Campaign Finance Act.

Asbestos Bankruptcy Trust Disclosure

For the last two sessions, legislation requiring asbestos claimants to disclose any claims filed with bankruptcy trusts prior to trial and to stay trial pending the filing of additional trust claims have failed to clear committee in either house. Earlier this year, though, a federal bankruptcy judge

uncovered evidence of fraudulent non-disclosure of bankruptcy trust claims in a sample of 15 cases out of several thousand pending claims involving Garlock Sealing Technologies. The judge concluded that the practice was so widespread that he reduced Garlock's estimated liability for mesothelioma claims from $1.4 billion to $125 million. We expect that in light of these developments, bankruptcy trust disclosure legislation will be on the legislative agenda this spring.

Election Results: Few Surprises, But Much Uncertainty

To no one's surprise, GOP candidates easily carried the statewide offices, continuing a trend that began in 1998. But for the first time in 12 years, Texas will see a reshuffling of all of the major statewide offices. Attorney General Greg Abbott won the big prize, the Governor's office, winning 59% of the vote in a big victory over State Senator Wendy Davis (D-Fort Worth). Senator Dan Patrick (R-Houston) likewise won big over Senator Leticia Van de Putte (D-San Antonio) to become Lieutenant Governor. Other GOP winners include Sen. Ken Paxton (R-McKinney) for Attorney General, Sen. Glen Hegar for Comptroller, attorney George P. Bush for Land Commissioner, former Rep. Sid Miller for Agriculture Commissioner, and businessman Ryan Sitton for a seat on the Texas Railroad Commission. Justices Phil Johnson, Jeff Brown, and Jeff Boyd likewise won re-election by large margins.

The GOP strengthened its hold on the Texas Senate and House as well when the Fort Worth Senate seat vacated by Wendy Davis went for GOP candidate Konni Burton. Republicans now hold a 20-11 majority in the Texas Senate, one short of the two-thirds needed to bring legislation to the floor for debate. Lieutenant Governor-elect Patrick has indicated that he will try to persuade the Senate to abolish the two-thirds rule in favor of a lower 60% requirement for suspension, though whether he has the votes to accomplish this remains to be seen. If the two-thirds rule is changed, it not only will substantially reduce the influence of Democrats in the Senate, but will likely diminish the ability of senators with rural districts to protect agricultural and other rural interests. The new Lieutenant Governor has also said publicly that he will not appoint any Democratic committee chairs, though he has also indicated that he will consider retaining some of them, such as Dean of the Senate John Whitmire, who currently chairs the Senate Criminal Justice Committee.

The House will see little change as well. Though Republicans picked up three seats, they are still short of the 100-vote threshold needed to pass constitutional amendments or suspend certain constitutional rules. TADC members Sarah Davis (R-Houston), Travis Clardy (R-Nacogdoches), Kenneth Sheets (R-Dallas), and Rene Oliveira (D-Brownsville) all won re-election. Speaker Joe Straus (R-San Antonio) appears on track to win election to his fourth term in the hot seat. Rep. Scott Turner (R-Rockwall), a Tea Party favorite, has indicated that he will challenge the incumbent speaker, but it seems unlikely that he will mount a serious challenge.

TADC monitors several hundred bills during a typical legislative session, but we focus the vast majority of our attention on four committees: Senate State Affairs, Senate Jurisprudence, House Judiciary & Civil Jurisprudence, and House Insurance. Two of these committees, State Affairs and HJCJ, will have new chairs this session and other changes of personnel. The other two committees are currently chaired by Sen. Royce West (D-Dallas) and Rep. John Smithee (R-Amarillo), respectively, with whom TADC has enjoyed excellent working relationships in the past many sessions. While it is far too early to tell who the committee chairs will be (this usually happens in the last week of January or first week of February), we look forward to working with both the incumbent and new chairs and their committees on behalf of the jury system and the legal profession.

2014 Annual Meeting

Hyatt Hill Country Resort – September 24 -28, 2014 – San Antonio, Texas

The Hyatt Hill Country Resort was the perfect setting for the TADC 2014 Annual Meeting. Program Co-Chairs Tom Ganucheau with Beck/Redden in Houston and Mitzi Mayfield with Riney & Mayfield, L.L.P. in Amarillo put together a top shelf cast of presenters for a program containing 11 hours of CLE including 1.5 hours of ethics credit. Presentations ranged from "Dealing with the Media: When your case is up front and center" to "Use or Mis-Use of Social Media by those in the Jury Box."

Federal Judge and former TADC member Xavier Rodriguez presented on the "New Amendments to the Federal Rules" and Texas Supreme Court Justice Jeff Brown gave the Supreme Court Update.
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Past Presidents Keith O'Connell, John Martin, Executive Vice President Mike Hendryx, Past Presidents Dennis Chambers, Tom Henson, Dan Worthington, President-Elect Michele Smith, Past President Tom Ganucheau, Treasurer Clayton Devin, (front row) President Junie Ledbetter, Past Presidents Dewey Gonsoulin, Judge Pat Kerrigan and Jay Old

Kim Askew talks Employmet Law

David Beck talks Media and your Case

2014 Annual Meeting

Christy Amuny and Craig Wolcott

Fred Raschke and Carlos Rincon

Gaston Broyles with Barry and Tisha Peterson and Mitzi Mayfield

Bud Grossman receives the 2014 Presidents Award

Mitch Moss receives the 2014 Presidents Award

Tom Ganucheau with Karynn and Keith O'Connell and Jane and Rusty Beard

2014 Annual Meeting

Pam and State Bar President-Elect Allan Dubois with Chantel Crews

State Bar President-Elect Allan DuBois and Judge Xavier Rodriguez

Rebecca Kieschnick and Jim Hunter with Victor and Ileana Vicinaiz

Fred Raschke receives the 2014 Founders Award

President Junie Ledbetter passes the gavel to President-Elect Michele Smith

Peggy Brenner, Wade Wilson, Nancy Morrison and Ken Tekell, Jr.

2014 Annual Meeting

DRI Southwest Region Vice President Mark Neal and Dan Worthington

Jenni Shipman, Milton Colia and Mike Shipman

Hard at work in CLE

Scott and Lori Stolley with Tom Henson

Mike Hendryx, Don Kent and Dennis Chambers

Resolution of Medicare Secondary Payer Compliance Concerns in Liability Settlements

By Clayton E. Devin, Macdonald Devin, P.C., Dallas, TX & Daniel Anders, MedAllocators, Inc., Lawrenceville, GA

According to the 2013 Medicare Trustees' report, since 2008 the Medicare Hospital Insurance Trust Fund has been paying out more than it takes in with projected fund depletion by 2026. This combined with the Baby Boomers entering the Medicare system and increases in life expectancy has put great strain on the Medicare system in its commitment to fund medical benefits for the elderly and disabled. Consequently, over the past decade the federal government has taken increased measures, such as cracking down on Medicare fraud and improper payments to medical providers, to address the dwindling Medicare Trust Fund. These efforts also include an increased use of the Medicare Secondary Payer Act.

The Medicare Secondary Payer Act (MSP Act) was enacted on December 5, 1980 as 42 U.S.C. 1395y(b) and prohibits Medicare from making payment if payment has been made or can reasonably be expected to be made by a "primary plan." A primary plan is either group health plans or non-group health plans, including a workmen's compensation law or plan, an automobile or liability insurance policy or plan (including a self-insured plan) or no fault insurance. Medicare expects these primary plans to pay prior to Medicare paying for any injury related treatment. However, the MSP Act further provides that when a primary plan:

> . . . has not made or cannot reasonably be expected to make payment with respect to such item or service promptly (as determined in accordance with regulations). Any such payment by the Secretary shall be conditioned on reimbursement to the appropriate Trust Fund in accordance with the succeeding provisions of this subsection.

Medicare defines promptly as 120 days. (42 C.F.R. 411.21). Thus, when Medicare steps in to make payment for services which it learns may be related to an injury, it is considered a conditional payment.

The Centers for Medicare and Medicaid Services (CMS), the agency which oversees the Medicare program, has put into place three enforcement mechanisms to ensure compliance with the MSP Act. These enforcement mechanisms consist of a mandatory reporting program to identify primary plans which are obligated to pay rather than Medicare, a dedicated contractor to recover payments made by Medicare where responsibility for payment was with a primary plan, and a program for addressing Medicare's interests in post-settlement or future injury-related medical care.

This article addresses these enforcement mechanisms in the context of liability settlements. Specifically, it will first address the process of identifying Medicare beneficiaries, investigating conditional payments and resolving these payments. Second, it will consider how the more recently added mandatory

reporting provisions of the MSP Act have resulted in a heightened awareness by insurers of their responsibilities to Medicare. Finally, a thorough discussion will be provided of what, if any, responsibilities settling parties have to protect Medicare's interest in injury-related medical occurring post-settlement.

Identification of Medicare Eligible Plaintiffs

Assessing whether you have a Medicare compliance concern starts with identifying whether the plaintiff is Medicare eligible or will shortly become Medicare eligible.

Who are possible Medicare eligible plaintiffs?:

- Plaintiffs 65 or older are in most cases Medicare eligible.
- Plaintiffs who were working at the time of the injury, but have not returned to work are possibly Medicare eligible if they have been receiving Social Security Disability benefits for 24 months.
- Plaintiffs with end-stage renal disease.

Confirming Medicare eligibility

Typical methods to confirm whether plaintiff is Medicare eligible are as follows:

1. Ask them: If the plaintiff is receiving Medicare benefits then ask them for a copy of their red, white and blue Medicare card.
2. MSP compliance company check: With the plaintiff's name, date of birth and Social Security number a Medicare compliance company, such as MedAllocators, can check with CMS as to whether the plaintiff is a Medicare beneficiary.
3. Section 111 Mandatory Insurer Reporting: The insurer itself or through its reporting agent has access to a query function allowing them to check on whether a particular claimant is or was a Medicare beneficiary.

The following information must be obtained to be able to do so:

- Social Security Number (SSN)
  And at least three of these four data elements:
- First initial of the first name
- Last name
- Date of birth
- Gender

If it is learned the claimant is or was a Medicare beneficiary then Medicare conditional payments should be investigated. On the other hand, if the claimant is not a Medicare beneficiary, but settlement is not imminent, then it may be advisable to check again prior to settlement to ensure the claimant did not become Medicare eligible in the interim. Note, through the Section 111 Mandatory Insurer Reporting query process once the claimant-specific information is entered that information will be regularly checked with Medicare to determine whether the claimant has become a Medicare beneficiary.

Investigating Medicare Conditional Payments

As typically a liability carrier is not paying for injury related medical treatment at the time it occurs, Medicare steps in and pays for the treatment while the case is pending. However, if the case settles or a judgment is entered, Medicare will seek recovery for conditional payments. Medicare's right to reimbursement requires a specific triggering event defined as follows under the MSP Act:

> Repayment required: A primary plan, and an entity that receives payment from a primary plan, shall reimburse the appropriate Trust Fund for any payment made by the Secretary under this subchapter with

> respect to an item or service if it is demonstrated that such primary plan has or had a responsibility to make payment with respect to such item or service. A primary plan's responsibility for such payment may be demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means.

Accordingly, Medicare cannot assert a demand for recovery of conditional payments until such time as a settlement obligating the primary plan to make payment to the claimant becomes final. Once this obligation takes effect, then Medicare's right of recovery comes into effect as well.

It is important then that if at all possible, conditional payments are investigated prior to the settlement being effectuated. The following is an abbreviated version of the steps in contacting the Medicare contractor to investigate and resolve conditional payments. The full breakdown can be found here: http://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Coordination-of-Benefits-and-Recovery-Overview/Non-Group-Health-Plan-Recovery/Non-Group-Health-Plan-Recovery.html

1. Report the case to CMS's Benefits Coordination & Recover Contractor (BCRC). Note, as of February 1, 2014, CMS consolidated the functions of the former Coordination of Benefits Contractor and the Medicare Secondary Payer Recovery Contractor into the BCRC. The BCRC requires attorneys or other representatives to submit either a Consent to Release form or a Proof of Representation form executed by the Medicare beneficiary to receive communication from the BCRC. The Proof of Representation form is preferred as it allows back and forth communication with the BCRC.
2. The BCRC issues a Rights and Responsibilities letter. This is a form letter that confirms the case has been entered into their system and that conditional payments are being investigated.
3. Within 65 days of the Rights and Responsibilities letter being issued, the BCRC will issue a Conditional Payment Letter which itemizes charges Medicare claims to be related to the alleged injury. Note, Medicare considers this an interim conditional payment amount as charges can continue to be added until the settlement becomes final.
4. Review the Conditional Payment Letter and identify any charges that may be unrelated to the claimed injury. Submit a dispute to BCRC of these unrelated charges. BCRC will respond usually within 45 days with a letter either agreeing or disagreeing with the disputed charges.
5. Upon there occurring a settlement, judgment, award, or other payment the BCRC must be advised of the following: 1) the date of settlement, 2) the settlement amount, and 3) the amount of any attorney's fees and other procurement costs borne by the beneficiary. A Final Settlement Detail Document can be found on the CMS website for this purpose.
6. In response to receiving the final settlement information the BCRC will add any additional charges since the prior Conditional Payment Letter was issued and then issue a Final Demand Letter.

7. Upon receipt of the Final Demand Letter the amount listed must be paid within 60 days of the date on the letter or interest begins to accrue.
8. If Medicare is not paid within 60 days, then the BCRC will issue an Intent to Refer Letter advising that the debt is now considered delinquent and will be referred to the Treasury Department for further collection action if not repaid with 60 days.

Note, the BCRC has available a web-based tool, the Medicare Secondary Payer Recovery Portal (MSPRP), which can be utilized to complete some of the above steps. Information on registering to use this portal can be found on the CMS website.

The above steps are to be utilized when conditional payments are investigated prior to settlement. If, on the other hand, conditional payments are not investigated prior to settlement and the BCRC learns that a settlement, judgment, award or other payment has already occurred, then a Conditional Payment Notice letter will be issued instead. This notice provides for only 30 days in which proper authorizations must be filed with the BCRC, any disputes to unrelated payments on the itemization submitted to the BCRC and providing attorney's fees and other procurement costs to the BCRC. After the expiration of the 30 days, the BCRC will issue the Final Demand Letter.

Remember that the Medicare Secondary Payer Act provides Medicare with the following potent tool:

> (iii) Action by United States
> In order to recover payment made under this subchapter for an item or service, the United States may bring an action against any or all entities that are or were required or responsible (directly, as an insurer or self-insurer, as a third-party administrator, as an employer that sponsors or contributes to a group health plan, or large group health plan, or otherwise) to make payment with respect to the same item or service (or any portion thereof) under a primary plan. The United States may, in accordance with paragraph (3)(A), collect double damages against any such entity. In addition, the United States may recover under this clause from any entity that has received payment from a primary plan or from the proceeds of a primary plan's payment to any entity.

While CMS rarely files suit to recover conditional payments, the threat is there. Consequently, resolution of a liability case involving a Medicare beneficiary plaintiff is not complete without properly investigating and resolving Medicare conditional payments.

Low-value Settlement Options

CMS has provided for what may be called low-value settlement options for the resolution of conditional payments. First, Medicare will not recover in most liability settlements of $1,000 or less. Second, if the settlement is $5,000 or less, Medicare may agree to accept 25% of the settlement in full resolution of conditional payments. Third, if the settlement is $25,000, there is an option to obtain the final amount of Medicare's conditional payment recovery claim prior to finalizing settlement. More details on these options can be found on the CMS website here: http://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Coordination-of-Benefits-and-Recovery-Overview/Reimbursing-Medicare/Reimbursing-Medicare-.html

SMART Act Changes to Conditional Payment Process

As stated above, Medicare will in most cases not recover on liability settlements of $1,000 or less. This is one of the benefits of the Strengthening Medicare and Repaying Taxpayers Act, or SMART Act, which was signed into law in January of 2013. The SMART Act, which was supported by both the plaintiffs' bar and the insurance industry, makes some significant changes to the resolution of conditional payments as delineated below:

- **Pre-Settlement Final Conditional Payment Determination**: Process by which the Final Demand from Medicare can be obtained shortly before final settlement rather than after.
- **Quicker Turnaround Time on Conditional Payment Challenges**: CMS has 11 business days to review challenges to conditional payments, i.e. payments unrelated to injury.
- **Minimum Thresholds for Conditional Payment Recovery**: With some exceptions, CMS must annually set a minimum threshold for conditional payment recovery in liability cases.
- **3 Year Statute of Limitations**: Puts in place a 3 year statute of limitations on Medicare conditional payment recovery.
- **Appeal right for carriers**: Providing regulations which would allow carriers to have the same or similar appeal rights as Medicare beneficiaries.

As of the date of this article, these provisions are at various stages of implementation. In regard to obtaining the final conditional payment amount prior to settlement, while CMS has issued regulations, CMS has nonetheless given themselves until January 1, 2016 to put the actual web-based process in place that would allow this to be done. The quicker turnaround time for conditional payment dispute also awaits this process being put in place. As for the statute of limitations, this became effective as of cases settling on or after July 10, 2013. Finally, in regard to an appeal right for carriers, CMS has issued proposed regulations, but no final regulations. Once fully implemented, the SMART Act provisions will provide both plaintiff as well as defendant additional options in resolving conditional payments.

Section 111 Insurer Reporting and Conditional Payment Resolution

While traditionally conditional payment resolution has been left to the plaintiff and their attorney in a liability settlement, the implementation of the provisions of the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA Section 111) has brought the defendant carrier much more into the realm of Medicare Secondary Payer resolution than it had previously.

MMSEA Section 111 requires both group and non-group health plans (workers' compensation, liability and no-fault plans, including self-insureds) to report to Medicare claims involving Medicare beneficiaries. In response to this statutory requirement, CMS set-up an extensive web-based system for these plans to report claimants who are Medicare beneficiaries. The plan itself does the reporting or hires an agent to do the reporting on its behalf. This article will not detail all the technical issues involved with reporting, but it is important to understand that when one of two triggers occur, a claim must be reported to Medicare. First, if the carrier accepts Ongoing Responsibility for Medical, or ORM, for a clamant who is a Medicare beneficiary, the claim must be reported. This is typical in a workers' compensation or no-fault case. Second, when a Total Payment Obligation to the Claimant, TPOC, occurs, for a claimant who is a Medicare beneficiary the claim must be reported. A TPOC is defined as a

settlement, judgment, award or other payment that closes out medicals or has the effect of closing out medicals. This is typically found in a workers' compensation or liability case.

While MMSEA Section 111 did not create any new provisions pertaining to the resolution of conditional payments or consideration of future medical, it was a catalyst for non-group health plans to become more aware of their potential liability to Medicare. For example, in regard to mandatory reporting Section 1862(b)(8) of the Social Security Act (42 U.S.C. 1395y(b)(8)) states:

> *In general an applicable plan that fails to comply with the requirements under subparagraph (A) with respect to any claimant may be subject to a civil money penalty of up to $1,000 for each day of noncompliance with respect to each claimant.*

Further, in regard to conditional payments it should be understood that no amount of hold harmless language can protect the primary plan from Medicare since pursuant to 42 CFR 411.24(h) and (i) –

> RECOVERY OF CONDITIONAL PAYMENTS:
>
> *(h) Reimbursement to Medicare. If the beneficiary or other party receives a primary payment, the beneficiary or other party must reimburse Medicare within 60 days.*
>
> *(i) Special rules.*
>
> *(1) In the case of liability insurance settlements and disputed claims under employer group health plans, workers' compensation insurance or plan, and no-fault insurance, the following rule applies:* ***If Medicare is not reimbursed as required by paragraph (h) of this section, the primary payer must reimburse Medicare even though it has already reimbursed the beneficiary or other party (emphasis added).***
>
> *(2) The provisions of paragraph (i)(1) of this section also apply if a primary payer makes its payment to an entity other than Medicare when it is, or should be, aware that Medicare has made a conditional primary payment.*

As a result of this provision, defendant carriers and self-insured companies are now taking additional steps to ensure their interests are protected at the time of settlement. More commonly seen now as part of settlement/release agreements is a stipulation that a certain amount of settlement funds be held back by the defendant or that plaintiff attorney hold all or a portion of the settlement in his or her trust account until such time as a Final Demand letter is received from Medicare. Once that letter is received, then either the plaintiff or defendant, depending on the agreement, will issue a check to Medicare and release any remaining settlement funds to the plaintiff. In this way all parties can be assured of the proper resolution of conditional payments post-settlement.

Medicare and Future Medical in Liability Settlements

For over a decade now CMS has had available for workers' compensation cases a formalized review process to assess whether or not the settlement amount includes sufficient funds to pay for

the plaintiff's future medical care that Medicare would otherwise cover. This process usually entails the workers' compensation carrier obtaining a Medicare Set-Aside (MSA) report from a MSP compliance company, such as MedAllocators, that is submitted to a CMS contractor for review and approval. This MSA report provides a detailed projection of reasonably probable future medical treatment and medications that the plaintiff will require over his or her life expectancy. If CMS reviews, then the MSA amount outlined in the report will be approved as is, increased, and in a few cases decreased. The amount allocated in the MSA then is funded as a lump-sum or annuity and is either self-administered by the plaintiff or professionally administered by a third-party. (Details on the CMS workers' compensation MSA program can be found on the CMS website here: http://www.cms.gov/Medicare/Coordination-of-Benefits-and-Recovery/Workers-Compensation-Medicare-Set-Aside-Arrangements/WCMSA-Overview.html)

CMS has no similar MSA review program in place for liability cases. However, CMS by no means has indicated that parties to a liability settlement can take the lack of a review process to mean that Medicare's interests can be ignored. The problem to date though has been that while Medicare has stated that their interests must be considered, they have failed to provide specific guidance on how that is to be accomplished.

CMS released what is called an Advanced Notice of Proposed Rulemaking (ANPRM) on June 15, 2012 (CMS-6047-ANPRM) in which they solicited comment on options that would be available to Medicare beneficiaries and their representatives to meet their obligations under the Medicare Secondary Payer Act when future medical care is claimed or the settlement has the effect of releasing claims for future medical care. In particular, CMS states as follows within this ANPRM:

> Under its rights of subrogation and direct right of action, Medicare recovers for conditional payments related to the ''settlement,'' regardless of when the items and services are provided. Further, Medicare is prohibited from making payment when payment has been made (that is, if the beneficiary obtains a ''settlement''). Medicare remains the secondary payer until the ''settlement'' proceeds are appropriately exhausted. It is important to note that the designation future medical care (''future medicals'') is a term specifically used to reference medical items and services provided after the date of ''settlement.''

The implication of this statement is that in terms of post-settlement injury-related medical care, CMS can either deny payment for injury related treatment or, if it does pay for post-settlement injury-related medical care, that it can seek to recover against the primary plan (insurer or self-insurer) or seek recovery against entities receiving payment from the primary plan, most notably the plaintiff and their attorney.

To address the above concerns as part of the ANPRM, CMS suggested some potential options to demonstrate Medicare's interests had been properly addressed as part of settlement:

1. The individual/beneficiary pays for all related future medical care until his/her settlement is exhausted and documents it accordingly.
2. Medicare would not pursue "future medicals" if the individual/bene-

ficiary's case met certain conditions, such as the underlying claim not involving a chronic illness/condition.
3. The individual/beneficiary acquires/provides an attestation regarding the Date of Care Completion from his/her treating physician.
4. The individual/beneficiary submits proposed Medicare Set-Aside Arrangement (MSA) amounts for CMS' review and obtains approval.
5. The beneficiary participates in one of Medicare's low-value settlement recovery options, such as the option that provides the Medicare beneficiary may elect to resolve Medicare's recovery claim by paying 25% of the gross settlement amount when the settlement amount is $5,000 or less.
6. The beneficiary makes an upfront payment to Medicare of a certain percentage of the settlement for future medicals.
7. The beneficiary obtains a compromise or waiver of recovery in resolution of Medicare conditional payments and Medicare would then agree to not pursue the issue of future medicals as well.

CMS received 107 comments in response to the ANRPM. Many of the comments from the defense bar highlighted the lack of statutory or regulatory grounds for Medicare to claim it has a right of recovery against a primary plan for payments Medicare makes post-settlement. The assertion is that if Medicare has any rights post-settlement these would be directed at the individual claimant/Medicare beneficiary either by way of denying medical care or recovering against the claimants. Along these lines then, comments from the plaintiffs' bar highlighted that the overwhelming majority of liability settlements are negotiated settlements which take into account equitable considerations such as policy limits, comparative negligence, statutory limits as well as other lien holders. In short, they correctly asserted that in most settlements the plaintiff is not receiving the full value of his or her claim.

It is now two years since CMS first published this ANPRM and as of the date of this article, CMS has yet to take the next step and issue what is called a Notice of Proposed Rulemaking (NPRM) in which it would release more formalized proposed rules for comment. As a result, parties to a liability settlement are left in limbo. On the one hand, being aware that CMS has asserted that Medicare has an interest in future medicals as part of the liability settlement, but on the other hand being unsure of whether CMS is taking an appropriate position under the Medicare and Secondary Payer Act. And even if CMS is taking an appropriate position, there remains the lack of specific guidance as to how liability parties are to consider Medicare's interests when settling a case.

What then are settling parties to do when it comes to Medicare's interest in future medical? Or put another way, when are Medicare's interests in play? Reference to CMS's guidelines for Workers' Compensation MSAs is instructive here. CMS will review and approve Workers' Compensation MSAs when the claimant is Medicare eligible and the total settlement exceeds $25,000 or when the claimant has a reasonable expectation of Medicare eligibility within 30 months and the total settlement exceeds $250,000. Reasonable expectation of eligibility within 30 months is defined as a person who is 62 ½ years old or older, or has applied for Social Security Disability benefits or is receiving these benefits. In our opinion, this would be anytime you have a plaintiff who is a Medicare beneficiary. If the plaintiff is not a Medicare beneficiary then this is a bit more difficult to discern. CMS states that Medicare's interests should always be considered and thus provides no threshold under which Medicare's interests are not implicated. Nonetheless, some line must be drawn otherwise the result would be considering Medicare's interests in cases where the plaintiff will

not be Medicare eligible for years if not decades.

In general, CMS considers its interest implicated when parties must decide whether Medicare has the right to regulate future medicals in liability settlements such that Medicare's interests must be considered and protected at the time of settlement. Second, if the parties agree Medicare's interests must be considered and protected, assess whether the plaintiff even has a need for future medical care that would potentially be covered by Medicare. In a memo of 9/30/2011, CMS stated that Medicare's interests could be satisfied with a statement from the plaintiff's treating physician in which it is certified that injury-related treatment has been completed and that future medical items and/or services for the injury will not be required. Third, if the plaintiff will in-deed require future medical care, then determine how Medicare's interests will be considered. Unless the parties are ad-dressing a plaintiff with minor needs for future medical care, then the most com-mon choice is to obtain a Medicare Set-Aside allocation from a company that pro-vides Medicare Secondary Payer com-pliance services, such as MedAllocators.

MedAllocators utilizes medical pro-fessionals, who hold the Medicare Set-Aside Consultant Certification credential, to prepare the Medicare Set-Aside report. The MSA is a projection of reasonably probable Medicare-covered future medical treatment and prescription medication related to the injury. It is priced out over the claimant's life expectancy and utilizes usual and customary charges to price medical treatment and using the lowest Average Wholesale Price to price prescription medications. Note, a common question is why MSAs are priced at usual and customary rates rather than the Medicare rate. The answer comes from the next characteristic of an MSA, namely that they are either self-administered by the plaintiff or professional administered by a third-party. As Medicare will not hold these funds and pay medical providers from these funds, the medical providers have no obligation to charge the plaintiff at the Medicare rate. The third characteristic of an MSA is it is either funded by was of a lump sum or an annuity.

Consider then a case that involves a 55 year-old Medicare eligible claimant who has a serious injury to his knee resulting in total knee replacement. An MSA allocation for this person will include physician visits, MRIs and x-rays, a total knee revision surgery, post-op physical therapy and potentially some medications for ongoing pain. Let's say that MSA allocation is $50,000 which will be self-administered by the claimant (most MSAs are self-administered) and will be a lump-sum. The claimant's obligation then will be to take $50,000 of his settlement and place those funds in a separate bank account from his personal account and use the funds to pay for injury related medical care in the future. What this specially entails is the claimant advising the medical provider that he, rather than Medicare, should be billed.

Another question that arises is whether CMS approval of an MSA allocation should be obtained. CMS has no centralized review process for liability MSAs as they do with Workers' Compensation MSAs. Rather, CMS leaves it to the 10 CMS Regional Offices to decide whether they want to review liability MSAs. The Regional Offices have various policies in this regard but all reviews are strictly voluntarily. None of these offices mandates CMS approval of an MSA. The CMS Dallas Regional Office, which has jurisdiction over Arkansas, Louisiana, New Mexico, Oklahoma and Texas previously voluntarily reviewed MSAs. However, more recently they have ceased these reviews. Nonetheless, if an MSA is submitted to the Dallas office to review they will respond with a letter advising that they will not review. Also, keep in mind that the appropriate CMS Regional Office

for MSA review is based upon the plaintiff's state of residence, which may not be where the litigation is proceeding. Consequently, while the litigation may proceed in Texas, if the claimant is an Illinois resident, CMS approval of an MSA may be available as the CMS Chicago Regional Office will review and approve liability MSAs.

Given the lack of availability of CMS review of an MSA, some parties have sought approval from the courts. The U.S. District Court for the Western District of Louisiana is notable for this where several cases have been heard in the past few years: *Schexnayder v. Scottsdale Ins. Co.*, No. 6:09-CV-1390, 2011 WL 3273547 (W.D. La. July 29, 2011); *Bessard v. Superior Energy Serv.'s LLC*, No. 6:11-CV-0941, 2012 WL 3779162 (W.D. La. Aug. 30, 2012); *Bertrand vs. Talen's Marine & Fuel*: No.6:10CV1257, 2012 WL 2026998(W.D. La. June 4, 2012); *Benoit vs. Neustrom*: (Civil Action No. 10-cv-1110 April 7, 2013).

MedAllocators MSAs were used in two of these cases, *Bertrand* and *Benoit*. *Bertrand* was straightforward in the sense that the parties agreed an MSA was appropriate and the MSA amount of $64,866.88 was to be incorporated into the settlement. The Court reviewed the MedAllocators MSA report and found the amount to adequately protect Medicare's interests.

Benoit, on the other hand, involved a MedAllocators MSA report in which the MSA amount ranged from at least $277,758.62 and $333,267.02, but the total settlement amount was only $100,000. Given the entire MSA could not be funded out of the settlement, the court agreed to an equitable reduction. The Court deducted from the $100,000 settlement, claimant attorneys' fees and costs and amounts for repayment of Medicare/Medicaid liens to arrive at $55,707.98. The Court then determined the mid-point between the MSA projections of $277,258.62 and $333,267.02, which came to $305,512.50., Next, it took $55,707,98, the net settlement proceeds, and divided it by $305,512.50, the mid-point MSA amount, to arrive at the percentage of the net settlement proceeds attributable to future medical. The resulting 18.2% was then applied to the net settlement proceeds of $55,707.98 resulting in $10,138.00 as an amount to be placed in an MSA account to adequately protect Medicare's interests.

Was the Court's equitable reduction in *Benoit* appropriate? CMS would be the only entity to say it is inappropriate, but how could they say so when they have failed to provide guidance on protecting Medicare's interests in future medicals in liability settlements?

Another case that is a good reference for understanding under what circumstances courts have become involved in addressing MSAs in liability settlements is *Susan Early vs. Carnival Corp.* 2013 U.S. Dist Lexis 16711 (S.D.FL. February 7, 2013). In *Early,* the parties in a liability case disagreed as to whether an LMSA was needed. They agreed then to submit the question to the Court. The Court responded that it cannot provide advisory opinions. In so doing it provides an overview of the federal cases that had until that time addressed the MSA issue.

Conclusion

Creation and interpretations of statutes, regulations, policies, procedures, and case law addressing compliance with the Medicare Secondary Payer Act are constantly evolving. This is particularly true when defining obligations of claimants, defendants, insurance carriers, and their respective counsel, as they negotiate and define settlements of personal injury liability cases. This paper is intended to provide practical guidance in identifying and addressing common issues.

TADC PAC REPORT

By: **Milton C. Colia, Trustee Chairman**
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In preparing this report I looked at the TADC PAC Reports for the last three years. It is hard for me to say it better than Dan Worthington, Junie Ledbetter or Michele Smith. The bottom line is that in looking at all three of those reports, the defense bar is still faced with continuing challenges in the legislature.

There were things that were said by Dan, Junie and Michele that still apply. For example, Dan Worthington pointed out that "The TADC PAC is the only voice bringing the defense bar perspective. The TADC is not a trade organization mindlessly advancing a self-interested agenda to the exclusion of everyone else; we are the only voice speaking for the 'defense bar'." He also noted "We are credible because the TADC isn't pushing some agenda. We have good relationships on each side of the aisle and are not affiliated with any political party. Because of our credibility, we are called upon early – invited to the table early, while legislation is still being drafted – to offer straight-up advice. The TADC has been doing this for legislators even on bills in which TADC has no compelling interest."

Here are some of the issues that are expected to be raised in the next session.

Insurance litigation (Chapters 541 and 542, Insurance Code):

- Expansion of the dispute resolution process established for windstorm claims against TWIA (Chapter 2210, Subchapter L-1, Insurance Code) to claims against private insurers for wind, hail, and other natural disaster-related damage (mandatory pre-suit ADR; limitation of damages in subsequent suit; heightened burden of proof for enhanced damages)
- Limit/prohibit discovery of policy limits
- Prohibit direct causes of action against adjusters

Consumer Lawsuit Lending:

- Regulate consumer lawsuit lenders and lending practices
- Limit interest rates that may be charged on lawsuit loans
- Allow discovery of lawsuit lending agreements

Trucking Litigation:

- Protect voluntary safety investigation reports from discovery in a subsequent suit
- Bar disclosure of policy limits

The same question is asked every year, "Why should I contribute money?" Without TADC's involvement, the civil justice system would be different. TADC has provided the "voice of reason at the Capitol" and has "actively provided a steady hand to keep Austin in check and keep the system balanced." Those comments by Michele Smith have applied for years. We are fortunate to have members such as Dan Worthington, Pamela Madere, Junie Ledbetter, Clayton Devin, David Chamberlain, Keith O'Connell and others volunteer to present our perspective to the legislature. I would be remiss if I didn't mention George Scott Christian for the invaluable guidance that he has given TADC regarding pending bills.

Why are contributions important? To quote Junie Ledbetter "You make it possible for TADC, as a representative institution, to help elect qualified candidates dedicated to a fair and balanced trial system through meaningful contributions. Your contribution to the PAC fund counts."

Remember this is our profession. It is important to have a balanced civil justice system for the citizens of Texas. It has always been suggested that each member of TADC contribute the equivalent of one billable hour. A contribution of $200.00 or more will earn you the "PAC gift." Thanks for your support.

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DISMISSAL ON THE PLEADINGS: RULE 91a OF THE TEXAS RULES OF CIVIL PROCEDURE

BY: "TREY" B.G. SANDOVAL, MEHAFFYWEBER, HOUSTON

I. INTRODUCTION

In 2013, whether for good or bad, Texas added a dismissal on the pleadings to the repertoire of the defense attorney. Rule 91a of the Texas Rules of Civil Procedure not only enables an advocate an opportunity to dispose of a case at the outset, but also provides to the prevailing party with the opportunity to recover attorneys fees. The following is a brief review of Rule 91a and its application.

II. DISMISSAL MOTIONS PRACTICE

A. TRCP 91a – Dismissal of Baseless Causes of Action

1. Section 91a.1 – Motion and Grounds

> Except in a case brought under the Family Code or a case governed by Chapter 14 of the Texas Civil Practice and Remedies Code, a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.[1]

a. No Basis in Law

Utilizing Rule 91a.1's expressed wording, the defendant is entitled to prevail, whether pursuing special exceptions, a motion for summary judgment, or a Rule 91a motion to dismiss, if the taken-as-true allegations "do not entitle the claimant to the relief sought."[2] In other words – so what?

Until the introduction of Rule 91a, special exceptions were the proper method to determine whether the plaintiff stated an actionable cause of action.[3] When deciding whether special exceptions should be sustained, the trial judge must accept the plaintiff's allegations and reasonable inferences from those allegations as true[4] — just as the judge must when evaluating the plaintiff's allegations under Rule 91a.[5]

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[1] *See* TEX. R. CIV. P. 91.
[2] *Id.*
[3] *See, e.g.*, *Gatten v. McClarley*, 391 S.W.3d 669, 673 (Tex. App.—Dallas 2013, no pet.); *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *Buecher v. Centex Homes*, 18 S.W.3d 807, 809 (Tex. App.--San Antonio 2000), aff'd on other grounds, 95 S.W.3d 266 (Tex. 2002).
[4] *See, e.g., Gatten*, 391 S.W.3d at 674; *James v. Easton*, 368 S.W.3d 799, 803 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *Martin v. Clinical Pathology Labs., Inc.*, 343 S.W.3d 885, 891 (Tex. App.—Dallas 2011, pet. denied).
[5] TEX. R. CIV. P. 91a.1.

After sustaining special exceptions but before dismissing the plaintiff's claims, the trial judge is generally required to first give the plaintiff an opportunity to amend the pleading to state a viable cause of action.[6] If the plaintiff still has not stated a cause of action after amendment and the remaining portions of the petition also fail to state a viable claim, the trial court may dismiss the case.[7]

b. No Basis in Fact

Whether a cause of action has no basis in law under Rule 91a appears to be a reasonably clear-cut inquiry. However, evaluating whether a cause of action has no basis in fact has the potential to be more challenging.

When deciding whether a cause of action has no basis in law, the court is required to take the pleader's allegations and inferences from those allegations as true.[8] In contrast, when determining whether a challenged cause of action has any basis in fact, the court is required to question the *believability* of the pleader's allegations.[9]

c. Application of the federal standards in *Twombly* and *Iqbal*

Other than its loser-pays provision, many view Rule 91a as the functional equivalent of a federal Rule 12(b)(6), concluding that federal dismissal standards may be relied on when construing and litigating Rule 91a motions to dismiss.[10] However, others question whether the federal pleading and dismissal concepts can be reconciled into Texas practice with this state's long-accepted "fair notice" approach to pleadings.[11]

Federal courts take a very different approach in light of *Twombly* and *Iqbal* in reviewing the sufficiency of a pleading that contains conclusory or general allegations when determining whether that pleading states a claim upon which relief can be granted. Consequently, a federal judge deciding a motion to dismiss under Rule 12(b)(6) is entitled to ignore general or broadly stated allegations that a Texas judge, deciding a motion under Rule 91a, is arguably required to construe liberally.

2. 91a.2 Contents of Motion.

> A motion to dismiss must state that it is made pursuant to this rule, must identify each cause of action to which it is addressed, and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both.

As the rule makes clear, the defendant's motion to dismiss must merely state that the motion to dismiss is filed pursuant to Rule 91a of the Texas Rules of Civil Procedure. The second point requires the movant to specifically identify each cause of action being challenged as baseless, similar to a no evidence motion for summary judgment under Rule 166(a).

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[6] ***See Parker v. Barefield*, 206 S.W.3d 119, 120-21 (Tex. 2006); *Gatten*, 391 S.W.3d at 673.**

[7] ***See Tex. Dep't of Corr. v. Herring*, 513 S.W.2d 6, 10 (Tex. 1974); *Gatten*, 391 S.W.3d at 673-74; *Alpert*, 178 S.W.3d at 405.**

[8] **TEX. R. CIV. P. 91a.1.**

[9] ***See* TEX. R. CIV. P. 91a.1 ("A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.").**

[10] **Timothy Patton, *Motions to Dismiss Under Texas Rule 91A: Practice, Procedure and Review,* 33 Rev. Litig. at 493.**

[11] ***Id.***

The third point – the reasons why a challenged cause of action is baseless – is the most important part of the motion to dismiss. The movant should clearly and concisely state the reasons why each challenged cause of action is baseless as a matter of law, baseless as a matter of fact, or baseless as a matter of both law and fact.[12]

3. 91a.3 Time for Motion and Ruling.

> A motion to dismiss must be:
>
> (a) filed within 60 days after the first pleading containing the challenged cause of action is served on the movant;
> (b) filed at least 21 days before the motion is heard; and
> (c) granted or denied within 45 days after the motion is filed.

The movant under Rule 91a initially faces two filing deadlines. One deadline is tied to the first time the allegedly baseless claim appears in a pleading while the second is tied to the date of the hearing.

The motion to dismiss "must be filed within 60 days" after the movant is served with the first pleading containing the challenged cause of action.[13] Although Rule 91a does not address what happens if a litigant files its motion to dismiss after the expiration of the sixty-day deadline, a litigant most likely waives its right unless the trial court grants leave to file the untimely pleading or enlarges the rule's sixty-day time period.[14] Note that Texas courts construing other rules and statutes have concluded a deadline requiring a filing "within 60 days" of a designated event means that a filing on the sixtieth day is timely.[15] Therefore, a Rule 91a motion filed on or before Day 60 should be timely filed.

Secondly, the motion to dismiss "must be . . . filed at least 21 days" before the hearing on the motion.[16] Rule 91a.3's requirement for the motion to be on file for at least twenty-one days before the hearing is identical to the deadline imposed by the summary judgment rule.[17] Rule 166a(c) states "the motion . . . shall be filed . . . at least twenty-one days before the time specified for hearing."[18] Because these two rules impose an identical filing deadline on the movant, computing the twenty-one-day period under Rule 91a should be no different than under 166a(c). Under Rule 166a(c), the day of filing service is not included in the minimum twenty-one-day period, but the date of the hearing is.[19] Therefore, the hearing on a Rule 91a motion could be properly set as early as the twenty-first day after filing.[20]

There is, however, one difference between Rule 91a's twenty-one-day language and Rule 166a. Rule 91a requires only that the motion to dismiss be filed at least twenty-one days before

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[12] ***Id.*** **at 517.**
[13] **TEX. R. CIV. P.91a.3(a).**
[14] **TEX. R. CIV. P. 91a.**
[15] **TEX. R. CIV. P. 4.** ***E.g., Angelina Cnty. v. McFarland*****, 374 S.W.3d 417, 421 (Tex. 1964);** ***Myers v. State*****, 527 S.W.2d 307, 308 (Tex. Crim. App. 1975);** ***Jain v. Cambridge Petrol. Grp., Inc.*****, 395 S.W.3d 394, 396 (Tex. App.—Dallas 2013, no pet.)**
[16] **TEX. R. CIV. P.91a.3(b).** ***See also*****TEX. R. CIV. P. 5 (providing an enlargement of time for filing by mail).**
[17] ***Compare*** **Tex. R. Civ. P. 91a.3, with Tex. R. Civ. P. 166a.**
[18] **TEX. R. CIV. P. 166a(c).**
[19] ***Lewis v. Blake*****, 876 S.W.2d 314, 315-16 (Tex. 1994).**
[20] ***Id.***

the hearing.[21] It says nothing about the timing of service of that motion on the non-movant.[22] In contrast, Rule 166a requires the motion for summary judgment to be "filed and served" at least twenty-one days prior to the hearing.[23] A summary judgment motion filed outside twenty-one days but served inside twenty-one days on the non-movant is objectionable.[24] That contemporaneous service requirement is not expressly incorporated into Rule 91a's twenty-one-day deadline,[25] so a late-served motion to dismiss is not per se objectionable under Rule 91a.[26]

4. 91a.4 Time for Response.

> Any response to the motion must be filed no later than 7 days before the date of the hearing.[27]

The seven-day deadline in Rule 91a.4 is identical to the filing deadline for a response under the summary judgment rule. Rule 166a(c) provides that "the adverse party, not later than seven days prior to the day of hearing may file…[a] written response."[28] Texas case law construing the seven-day response deadline in summary judgment litigation should therefore apply to Rule 91a litigation.

When calculating the deadline for a response to a motion for summary judgment, there need not be a full seven days between the filing of the response and the date of the hearing.[29] It is well-established that a response to a motion for summary judgment that is filed on the seventh day before a hearing is timely.[30] Accordingly, a response to a Rule 91a motion filed on the Monday before a Monday hearing would be timely.[31]

Similarly to the motion, Rule 91a only imposes a deadline for filing the response but not for serving the response.[32] This differs from Rule 166a(c), creates a seven-day deadline for filing and serving both the summary judgment response and motion.[33]

5. 91a.5 Effect of Nonsuit or Amendment; Withdrawal of Motion.

> (a) The court may not rule on a motion to dismiss if, at least 3 days before the date of the

[21] TEX. R. CIV. P.91a(3)(b).
[22] *Id.*
[23] TEX. R. CIV. P. 166a(c) (emphasis added).
[24] *See Texas Dep't of Aging & Disability Servs. v. Mersch*, 418 S.W.3d 736, 738-39, 742 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (holding that summary judgment response filed electronically before deadline but served electronically after deadline violated Rule 166a).
[25] Rule 21 states that when a motion is filed, a copy of that motion shall be served on all other parties "at the same time." See Tex. R. Civ. P. 21(a). A motion to dismiss filed outside twenty-one days but served inside twenty-one days therefore does not technically violate Rule 91a but does violate Rule 21. *See* Tex. R. Civ. P. 21 (implicitly requiring service of the motion to dismiss at the time of filing).
[26] Tex. R. Civ. P. 91a.
[27] TEX. R. CIV. P. 91a4.
[28] TEX. R. CIV. P. 166a(c).
[29] *Id.*
[30] *E.g.*, *K-Six T.V., Inc. v. Santiago*, 75 S.W.3d 91, 96 (Tex. App.—San Antonio 2002, no pet.); *Geiselman v. Cramer Fin. Grp.*, 965 S.W.2d 532, 535 (Tex. App.—Houston [14th Dist.] 1993, no writ); *Wright v. Lewis*, 777 S.W.2d 520, 521 (Tex. App.--Corpus Christi 1989, writ denied); *City of Coppell v. Gen. Homes Corp.*, 763 S.W.2d 448, 451 (Tex. App.—Dallas 1988, writ denied).
[31] *Volvo Petrol., Inc. v. Getty Oil Co.*, 717 S.W.2d 134, 137-38 (Tex. App.—Houston [14th] 1986) (response to summary judgment filed on Monday preceding Monday hearing held timely), disapproved on other grounds, 909 S.W.2d 893 (Tex. 1995); *see also Geiselman*, 965 S.W.2d at 535 (summary judgment response filed by mail on Tuesday before Tuesday hearing was timely).
[32] TEX. R. CIV. P. 91a.
[33] Compare TEX. R. CIV. P. 91a.4, with TEX.R. CIV. P. 166a(c).

> hearing, the respondent files a nonsuit of the challenged cause of action, or the movant files a withdrawal of the motion.
> (b) If the respondent amends the challenged cause of action at least 3 days before the date of the hearing, the movant may, before the date of the hearing, file a withdrawal of the motion or an amended motion directed to the amended cause of action.
> (c) Except by agreement of the parties, the court must rule on a motion unless it has been withdrawn or the cause of action has been nonsuited in accordance with (a) or (b). In ruling on the motion, the court must not consider a nonsuit or amendment not filed as permitted by paragraphs (a) or (b).
> (d) An amended motion filed in accordance with (b) restarts the time periods in this rule.[34]

If the non-movant files a nonsuit of the challenged cause of action "at least 3 days before the date of hearing," the court is prohibited from ruling on the motion to dismiss.[35] Conversely, if the nonsuit is filed untimely, the trial court "must rule" on the motion.[36] The dilemma faced by movant's counsel when deciding whether or not to withdraw a borderline or not-so-borderline motion to dismiss is being designated as the "loser" under Rule 91a's loser-pays provision. Moreover, being hit with fees and costs makes this a particular important provision for both the movant and non-movant.

Instead of nonsuiting, the non-movant also has the option of amending the challenged cause of action so long as the amended pleading is filed "at least 3 days before the date of hearing."[37] As is the case with an untimely nonsuit, the trial judge, when deciding the merits of the motion to dismiss, cannot consider a late amendment by the non-movant.[38]

6. 91a.6 Hearing; No Evidence Considered.

> Each party is entitled to at least 14 days' notice of the hearing on the motion to dismiss. The court may, but is not required to, conduct an oral hearing on the motion. Except as required by 91a.7, the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59.[39]

When providing that the trial judge "may but is not required to, conduct an oral hearing on the motion,"[40] Rule 91a.6 tracks summary judgment practice.[41] Texas courts have uniformly concluded that litigants do not have a right to an oral hearing on a

[34] TEX. R. CIV. P. 91a.5.
[35] TEX. R. CIV. P.91a.5(a).
[36] TEX. R. CIV. P. 91a.5(c).
[37] TEX. R. CIV. P.91a.5(a).
[38] TEX. R. CIV. P. 91a.5(c).
[39] TEX. R. CIV. P. 91a.6.
[40] *Id.*
[41] *Id.*

motion for summary judgment.[42] In other words, Texas does not require a trial court to provide a party with its "day in court" even on a potentially dispositive pre-trial motion.[43] Rather, whether to allow the parties and their counsel an oral hearing on a summary judgment motion is viewed as a matter within the trial judge's discretion,[44] which would appear to be the same discretion that a trial judge has under Rule 91a.

If the trial court decides to rule on the motion to dismiss without providing the parties with an oral hearing, however, the court must notify the parties of the submission date.[45] The filing deadlines for the motion, response, non-suit and withdrawal of the motion are all specifically tied to "the date of the hearing."[46] Unless the parties receive notice of the hearing date, they will be unaware that they have an approaching filing deadline under Rule 91a, and they will not be able to determine the actual deadlines.

Rule 91a.6 additionally states: "Except as required by 91a.7 [attorney's fees and costs], the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59."[47] This limitation on matters properly considered by the trial court at the hearing on a Rule 91a motion seems straightforward.

Finally, even though a hearing on a Rule 91a motion is non-evidentiary and parties should be precluded from raising arguments and objections not already included in written submissions, it will often be advisable for counsel to ask for the hearing to be conducted on the record. A ruling by the trial judge from the bench sustaining timely, written objections or granting leave to file an untimely response or amendment or a stipulation by the parties made in open court – not otherwise reduced to writing – could preserve that issue for appellate review if there is a reporter's record for the Rule 91a hearing.[48]

7. 91a.7 Award of Costs and Attorney Fees Required.

Except in an action by or against a governmental

[42] ***See Martin v. Martin, Martin & Richards, Inc.,*** **989 S.W.2d 357, 359 (Tex. 1998) (holding that oral hearings on motions for summary judgment are not mandatory);** ***Gordon v. Ward*****, 822 S.W.2d 90, 92 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (recognizing that oral hearings on motions for summary judgment are discretionary);** ***Dillard v. Patel*****, 809 S.W.2d 509, 512 (Tex. App.—San Antonio 1991, writ denied) (explaining that the summary judgment rule itself does not extend to counsel a right to present oral argument).**

[43] ***SeeMartin*****, 989 S.W.2d at 359 ("[N]ot every hearing called for under every rule of civil procedure necessarily requires an oral hearing.");** ***Thomas v. Graham Mortg. Corp.*****, 408 S.W.3d 581, 595 (Tex. App.—Austin 2013, pet. denied) (due process does not require an oral hearing on a summary judgment motion);** ***see also Adamo v. State Farm Lloyds Co.*****, 864 S.W.2d 491, 491 (Tex. 1993).**

[44] ***Adamo v. State Farm Lloyds Co.*****, 853 S.W.2d 673, 677 (Tex. App.—Houston [14th Dist.] 1993, writ denied);** ***Givens v. Midland Mortg.Co.*****, 393 S.W.3d 876, 884 (Tex. App.—Dallas 2012, no pet.).**

[45] **Under Rule 91a, "'hearing' ... includes both submission and an oral hearing." Tex. R. Civ. P. 91acmt. 2013.**

[46] **See Tex. R. Civ. P. 91a.3, 91a.4, 91a.5.**

[47] **Tex. R. Civ. P. 91a.6.**

[48] ***SeeHoly Cross Church of God in Christ v. Wolf*****, 44 S.W.3d 562, 568 (Tex. 2001) (relying on party's summary judgment filings and argument at hearing when holding that party judicially admitted date of acceleration of note);** ***Pipkin v. Kroger Tex., LP*****, 383 S.W.3d 655, 662 (Tex. App.--San Antonio 2012, pet. denied) (reporter's record reflected that trial judge granted leave to party to file untimely affidavit);** ***Envtl. Procedures, Inc. v. Guidry*****, 282 S.W.3d 602, 620 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (permission to file late response may be shown by "oral ruling contained in the reporter's record of the summary-judgment hearing");** ***see also*** **Tex. R. App. P. 33.1(a) (preserving error for appeal requires record showing that objection, motion, or request was presented to and ruled on by trial judge).**

> entity or a public official acting in his or her official capacity or under color of law, the court must award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court. The court must consider evidence regarding costs and fees in determining the award.[49]

In most cases, identifying the prevailing party should be easy. The movant files a motion to dismiss challenging one cause of action. The trial court grants the motion and dismisses the non-movant's challenged cause of action as baseless. The trial court then orders the non-movant to pay to the movant all fees and expenses incurred in successfully pursuing its motion.[50]

However, as many litigators know from personal experience, Texas courts have struggled in a variety of contexts with identifying who, precisely, "prevailed" in a particular lawsuit so as to be entitled to attorney's fees.[51] For that reason, a trial court will likely have the discretion under Rule 91a to assess fees and costs based on its evaluation of the relative success achieved by the movant and the non-movant.[52]

Rule 91a.7 is silent on whether fees and costs may be proven or disproven by affidavit and whether oral testimony is required or optional and once again seems like a discretionary case management decision for the trial judge.[53]

Finally, and this is potentially an important question for contingent fee attorneys: What does "incurred" mean? Under Rule 91a.7, the prevailing party is limited to an award of "all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action."[54] In several decisions, the Texas Supreme Court has focused on the meaning of "incurred" as it relates to an award of attorney's fees.[55] According to the court, (1) "'incurred…act[s] to limit the amount of attorney's fees the trial court may award'"[56] and (2) "'[a] fee is incurred when one becomes liable for it.'"[57] Based on this reasoning, the Texas Supreme Court has held that a party representing himself pro se did "not incur attorney's fees as that term is used in its ordinary meaning because he did not at any time become liable for attorney's fees."[58] Other courts have similarly concluded that if a party did not owe his attorney payment for legal services performed on his behalf, then he did not "incur" and was not entitled to recover attorney's fees.[59] In other

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[49] **Tex. R. Civ. P. 91a.7.**

[50] ***Id.***

[51] **Timothy Patton, *Motions to Dismiss Under Texas Rule 91A: Practice, Procedure and Review,* 33 Rev. Litig. at 567.**

[52] ***Id.* at 568.**

[53] ***In re Doe*, 19 S.W.3d 249, 253 (Tex. 2000); *see also Olivas*, 370 S.W.3d at 761 (discussing cases allowing affidavit testimony as proof supporting awards of attorney's fees).**

[54] **TEX. R. CIV. P. 91a.7 (emphasis added).**

[55] ***See Jackson v. State Office of Admin. Hearings*, 351 S.W.3d 290, 299 (Tex. 2011); *Aviles v. Aguirre*, 292 S.W.3d 648, 649 (Tex. 2009).**

[56] ***Jackson*, 351 S.W.3d at 299.**

[57] ***See id.***

[58] ***See id.***

[59] ***See Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.) (holding that the plaintiff "did not incur attorney's fees" and no evidence supported award of fees because the plaintiff was represented by own law firm and admitted that firm was not "billing for time spent representing him"); *Keever v. Finlan*, 988 S.W.2d 300, 306-08 (Tex. App.—Dallas 1999, pet. dism'd) (stating that the trial court did not abuse its**

contexts – most notably the much-litigated statute limiting medical expenses recoverable in personal injury actions to only those "paid or incurred"[60] – the word "incurred" has likewise been construed as requiring the claimant to have paid or be obligated to pay the expenses in question.[61]

8. 91a.8 Effect on Venue and Personal Jurisdiction.

> This rule is not an exception to the pleading requirements of Rules 86 and 120a, but a party does not, by filing a motion to dismiss pursuant to this rule or obtaining a ruling on it, waive a special appearance or a motion to transfer venue. By filing a motion to dismiss, a party submits to the Court's jurisdiction only in proceedings on the motion and is bound by the court's ruling, including an award of attorney fees and costs against the party.[62]

Under Texas' due-order-of-pleading requirements, if a party intends to challenge personal jurisdiction, it must do so by filing a special appearance under Rule 120a "prior to motion to transfer venue or any other plea, pleading or motion."[63] If a party wants to contest venue, it must file a motion to transfer venue under Rule 86 after the special appearance (assuming a party is also contesting personal jurisdiction) and before any other pleading.[64] Pleas, allegations, and motions unrelated to the special appearance and the motion to transfer venue, however, may be included in the same pleading or in a later-filed pleading without waiving jurisdiction or venue.[65] Failing to comply with these due-order-of-pleading requirements results in the waiver of any objection to personal jurisdiction and venue.[66]

It is unclear whether Rule 91a changes due-order-of-pleading in Texas because the rule appears to be internally inconsistent. On one hand, Rule 91a.8 begins: "This rule is not an exception to the pleading requirements of Rules 86 and 120a . . . ."[67] If Rule 91a "is not an exception" to due-order-of-pleading under Rules 86 and 120a, then filing a motion to dismiss before filing a special appearance and motion to

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discretion by failing to award claimant attorney's fees because, despite testimony by claimant's counsel and expert about reasonableness and necessity of $75,000 in legal fees for services expended on claimant's behalf, there was no proof that claimant was obligated to pay or had paid any attorney's fees). *ButseeAMX Enters., L.L.P. v. Master Realty Corp.*, 283 S.W.3d 506, 520 (Tex. App.—Fort Worth 2009, no pet.) (predating supreme court holdings in Jackson, Garcia and Aviles).

[60]TEX. CIV. PRAC. & REM. CODE ANN. §41.0105 (West 2013); *see also* Timothy Patton, *Motions to Dismiss Under Texas Rule 91A: Practice, Procedure and Review,* 33 Rev. Litig. at 571.

[61]*See Haygood v. De Escobedo*, 356 S.W.3d 390, 398 (Tex. 2011).

[62]TEX. R. CIV. P. 91a.8.

[63]TEX. R. CIV. P. 120a(1); *see also Exito Elecs., Co., Ltd. v. Trejo*, 142 S.W.3d 302, 305 (Tex. 2004); *First Oil PLC v. ATP Oil & Gas Corp.*, 264 S.W.3d 767, 776-77 (Tex. App.—Houston [1st Dist.] 2008, pet. denied).

[64]Tex. R. Civ. P. 86(1); *seealsoGordon v. Jones*, 196 S.W.3d 376, 384 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *McGrede v. Coursey*, 131 S.W.3d 189, 196 (Tex. App.—San Antonio 2004, no pet.).

[65]Tex. R. Civ. P. 86 (objection to improper venue waived if not made by written motion prior to or concurrently with any other plea, pleading, or motion other than special appearance); Tex. R. Civ. P. 120a(1).

[66]Tex. R. Civ. P. 120a(1) ("Every appearance, prior to judgment, not in compliance with this rule is a general appearance."); *see also Grynberg v. M-I L.L.C.*, 398 S.W.3d 864, 876 (Tex. App.—Corpus Christi 2012, pet. filed).

[67] Tex. R. Civ. P. 91a.8.

transfer venue should waive any objection to personal jurisdiction and venue. On the other hand, that same sentence concludes, ". . . but a party does not, by filing a motion to dismiss . . . waive a special appearance or a motion to transfer venue."[68] If filing a motion to dismiss does not waive a special appearance or motion to transfer venue, then a Rule 91a motion may be filed before filing those pleadings which, in turn, means that Rule 91a is, indeed, an "exception" to due-order-of-pleading requirements. Not surprisingly, commentators have offered precisely opposite opinions on the impact of Rule 91a on jurisdiction and venue. Some say Rule 91a creates an exception to due-order-of-pleading[69] while others believe that it does not.[70]

Until the Texas Supreme Court addresses the effect of Rule 91a.8, the safer course for counsel is to assume that the rule does not create an exception to due-order-of-pleading requirements.[71] The proper course appears to be to file a special appearance motion and motion to transfer venue before filing a Rule 91a motion to dismiss or include all three motions in a single pleading with the motion to dismiss asserted subject to the challenges to personal jurisdiction and venue.[72]

Rule 91a definitely changes due-order-of-hearing requirements, flatly stating that obtaining a ruling on a motion to dismiss does not waive a special appearance or motion to transfer venue.[73] This is a major change. Under Rule 91a, the movant does not waive a special appearance or motion to transfer venue by "obtaining a ruling" on its motion to dismiss.[74] The movant submits to the jurisdiction of the trial court only in proceedings on the motion, including being bound by the court's ruling on fees and costs.[75]

9. 91a.9 Dismissal Procedure Cumulative.

> This rule is in addition to, and does not supersede or affect, other procedures that authorize dismissal. Comment to 2013 change: Rule 91a is a new rule implementing section 22.004(g) of the Texas Government Code, which was added in 2011 and calls for rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence. A motion to dismiss filed under this rule must be ruled on by the court within 45 days unless the motion, pleading, or cause of action is withdrawn, amended, or nonsuited as specified in

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[68] ***Id.*** **(emphasis added).**

[69] ***See*** **Timothy Patton,** ***Motions to Dismiss Under Texas Rule 91A: Practice, Procedure and Review,*** **33 Rev. Litig. at 526.**

[70] ***See*** **Chamberlain & Parker, Rule 91a Motions to Dismiss, in Ultimate Motions Practice 5 (State Bar Tex. 2013);** ***see also*** **Timothy Patton,** ***Motions to Dismiss Under Texas Rule 91A: Practice, Procedure and Review,*** **33 Rev. Litig. at 526-527.**

[71] ***Id.***

[72] ***See Bristol v. Placid Oil Co.*****, 74 S.W.3d 156, 159-60 (Tex. App.—Amarillo 2002, no pet.) (holding that the defendant did not waive venue by filing motion for summary judgment subject to motion to transfer venue);** ***General Motors Corp. v. Castañeda*****, 980 S.W.2d 777, 783 (Tex. App.—San Antonio 1998, pet. denied) (holding that the defendant did not waive venue because answers and motions were subject to venue motion).**

[73] **Tex. R. Civ. P. 91a.8.**

[74] **Tex. R. Civ. P. 91a.8.**

[75] ***Id.***

> 91a.5. If an amended motion is filed in response to an amended cause of action in accordance with 91a.5(b), the court must rule on the motion within 45 days of the filing of the amended motion and the respondent must be given an opportunity to respond to the amended motion. The term "hearing" in the rule includes both submission and an oral hearing. Attorney fees awarded under 91a.7 are limited to those associated with challenged cause of action, including fees for preparing or responding to the motion to dismiss.[76]

Prior to adopting Rule 91a, Texas did not have a procedure in place authorizing the trial court to grant a party's motion and dismiss a cause of action as meritless early in the lawsuit based on the pleadings alone.[77] Rather, Texas courts rejected the use of a "motion to dismiss" as a plea in bar or as a state counterpart to the federal dismissal rule, Rule 12(b)(6).[78] A "motion to dismiss" asking the court to dismiss all or part of a lawsuit as allegedly failing to state a cause of action was viewed as "the functional equivalent of a general demurrer" expressly prohibited by Rule 90 of the Texas Rules of Civil Procedure.[79] When encountering a "motion to dismiss," Texas courts generally disregarded the pleading as attempting to invoke a procedure unrecognized in Texas or reviewed the merits of the order granting the "motion" under standards governing motions for summary judgment.[80]

Finally, under Rule 91a's cumulative remedies provision,[81] a defendant would be free to first seek relief under Rule 91a and, if unsuccessful, to then seek dismissal under any other applicable dismissal procedure. Or, the defendant could pursue dismissal under the statutory procedure and, if unsuccessful, request relief under Rule 91a. Indeed, if a defendant has a strong argument for dismissing a plaintiff's lawsuit as baseless, it might be advisable to pursue relief under Rule 91a first due to its loser-pays mandate because not all statutory dismissal procedures provide for the prevailing party to recover attorney's fees and costs. If lacking access to a statutory dismissal mechanism and disinclined to risk loser-pays, a defendant can always rely on special exceptions or a motion for summary judgment to attempt to establish that the plaintiff's cause of action is meritless as a matter of law.[82]

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[76] Tex. R. Civ. P. 91a.9.

[77] *See, e.g., Roberts v. Titus Cnty Mem'l Hosp.*, 159 S.W.3d 764, 768 (Tex. App.—Texarkana 2005, pet. denied) ("[T]he motion was intended as a federal 12(b)(6) motion seeking dismissal for failure to state a cause of action, which is not a viable claim for relief in Texas state courts.").

[78] *See, e.g.,Tex. Underground, Inc. v. Tex. Workforce Comm'n*, 335 S.W.3d 670, 675-76 (Tex. App.—Dallas 2011, no pet.); *Rodriguez v. U.S. Sec. Assocs., Inc.*, 162 S.W.3d 868, 872-74 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *Roberts*, 159 S.W.3d at 769; F*ort Bend Cnty. v. Wilson*, 825 S.W.2d 251, 253 (Tex. App.—Houston [14th Dist.] 1992, no writ); *Centennial Ins.*, 803 S.W.2d at 483.

[79] *Centennial Ins.*, 803 S.W.2d at 482; *see also* Tex. R. Civ. P. 90 ("General demurrers shall not be used. Every defect ... not specifically pointed out by exception in writing ... shall be deemed to have been waived.").

[80] *E.g.*, *Texas Underground*, 335 S.W.3d at 675-76; *Rodriguez*, 162 S.W.3d at 872-74; *Roberts*, 159 S.W.3d at 769; Wilson, 825 S.W.2d at 253.

[81] *See* TEX. R. CIV. P. 91a.9.

[82] *See* Timothy Patton, *Motions to Dismiss Under Texas Rule 91A: Practice, Procedure and Review,* 33 Rev. Litig. at 594.

MEMORIALS

Hi Pal! Remembering Blackie Holmes

BY AL ELLIS

This article was reprinted with the permission of the Dallas Bar Association. The article originally appeared in the November 2014 issue of Headnotes by the DBA.

It was 1972 when I first became a young trial lawyer and was privileged to have **Robert P. Woodruff**, an outstanding trial lawyer and professional in his own right, as my first mentor. Through Mr. Woodruff, I was able to connect with some of the finest trial lawyers in our legal community: **Carlisle DeHay, Morris Harrell, Judge Bobby Hill, Hon. L.A. Bedford, Jr., Aldefa Callejo, Louis Raggio, Jim Coleman, Judge Barefoot Sanders, Jim Cowles** and **Louis Weber, Jr.**, to name a few. Of course, one of the best was **Blackie Holmes**.

Since Blackie's death on October 8, 2014, much has been said and written about this great trial lawyer and the many awards and accolades he received during his 54-year career. This tribute will focus on Blackie Holmes, the human being, the friend and the ultimate professional.

If there is one word which correctly describes Blackie Holmes, it is RESPECT. Blackie had respect for just about everyone with whom he came in contact. Martin Luther King, Jr. said, "All labor that uplifts humanity has dignity and importance." Dr. King's statement could easily have come from Blackie.

While Blackie represented defendants large and small in his civil trial practice, he was never disrespectful to the individual plaintiff who was suing his client whether he believed the plaintiff's claim to be valid or not. As Mayor of University Park, he demonstrated respect for all the citizens and employees of the City, no matter their stature in the community. He had the highest respect for our justice system, most importantly, for every citizen's right to a trial by jury. He respected the decision of the jury in his cases-win, lose or draw. He was the ultimate professional.

In the early 80s, our profession began to experience the "take no prisoners" conduct of the so-called "Rambo litigators." In 1987, DBA President **George Chapman** appointed Blackie as Chair of a Task Force on Professionalism with the ultimate goal of developing the Dallas Lawyers Creed. Putting Blackie in charge of this Task Force was pure genius and the ultimate common sense decision. Blackie Holmes did not need a formal written creed to guide him in the manner in which he practiced law. Blackie Holmes was the living epitome of the lawyers creed.

Drawing upon aspirational creeds developed by a few other associations, but primarily relying upon the way he practiced law, Blackie and the DBA Task Force developed the Dallas Bar Association Lawyers Creed and Guidelines for Professionalism. In 1989, Blackie was appointed to the Texas Supreme Court Task Force with the same mission and co-authored the Texas Lawyers Creed.

In the last few months of his life, Blackie took the time to write special handwritten notes to some of his friends and colleagues. Once again demonstrating his respect and love for his fellow man, Blackie wrote, "Friends will pass on, but their remembrance will live. Thanks for everything. With warmest regards and the love of a friend." Classic Blackie Holmes!!

In its order promulgating the Texas Lawyers Creed, the Texas Supreme Court and the Texas Criminal Court of Appeals stated: "We must always be mindful that the practice of law is a profession. As members of a learned art, we pursue a common calling in the spirit of public service. We have a proud tradition. Throughout the history of our nation, the members of our citizenry have looked to the ranks of our profession for leadership and guidance. Let us now as a profession each rededicate ourselves to practice law so that we can restore public confidence in our profession, faithfully serve our clients, and fulfill our responsibility to the legal system." This statement, more than anything, reflects the personality, the attitude, and the ultimate professionalism of James H. "Blackie" Holmes.

So long, pal. You set the bar high for us to follow. We will do our best to follow your example. Rest in peace friend.

Al Ellis is past president of the DBA and is Of Counsel of Sommerman & Quesada, LLP. He can be reached at al@textrial.com

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Carl Victor "Vic" Anderson Jr., 72, passed away Wednesday, Oct. 15, 2014. Vic was born in Waco. He played football and golf at Waco High School and continued to letter in both sports at Rice University in Houston. During his college football career, he played in the 1961 Sugar Bowl game. He was also an excellent skier and enjoyed many trips to Colorado. He attended law school at the University of Texas at Austin. After law school, Vic became an FBI agent, working in both Philadelphia, Pa., and Kentucky. When he settled in Fort Worth, he joined the downtown law firm of Shannon, Gracey, Ratliff, and Miller. In his 40-year career as a trial lawyer, he worked up from associate to managing partner before retiring from the firm in 2008. Vic had been a member of the TADC from 1974 until his retirement, serving many years on the Board of Directors.

PAPERS AVAILABLE

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The Father's Day Massacre Aftermath – More Billing Restrictions, Audits, and Staff Counsel – E. Thomas Bishop – 123 pgs.

Update on New Rules for Dismissals, Expedited Actions, and Then Some – Charles W. Downing – 14 pgs.

Eminent Domain – How to Respond to a Lawsuit and Not Look Like an Idiot – Slater C. Elza – 14 pgs.

Texas Supreme Court Update 2014 – Roger W. Hughes – 21 pgs.

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and a *Special Thank You* to all the Members who completed and returned the Expert Witness Follow-up Forms

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The Texas Association of Defense Counsel, Inc. maintains an Expert Witness Index which is open only to TADC members or member firms. This index includes thousands of experts by name and topic or areas of specialty ranging from abdomen to zoology. Please visit the TADC website (www.tadc.org) or call the office at 512/476-5225 or FAX 512/476-5384 for additional information. To contribute material to the Expert Witness Library, mail to TADC Expert Witness Service, 400 West 15th St, Suite 420 Austin, TX 78701 or email **tadcews@tadc.org.**

There is a minimum charge of $15.00, with the average billing being approximately $25.00, depending upon research time. You can specify geographical locations, in or out of state. Note that out-of-state attorneys may only access the Expert Witness Index upon referral from a TADC member.

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The TADC office has added a Deposition/Trial Transcript Library to the Expert Witness service. TADC members using the Expert Witness Index may also obtain deposition and trial transcripts of experts when available. There is a nominal charge for this service. Depositions are available in both printed and electronic form and can be sent overnight for an additional charge.

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- Complete the TADC Expert Witness Research Service Request Form. Multiple name/specialty requests can be put on one form.
- If the request is for a given named expert, please include as much information as possible (there are 15 James Jones in the database).
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- Approximately three months after the request, an Expert Witness Research Service Follow-up Form will be sent. Please complete it so that we can keep the Expert Witness Database up-to-date, and better serve all members.

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Cause #: _____ Court: _____

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Describe type of expert, qualifications, and geographical area, if required (i.e., DFW metro, South TX, etc). Give as many key words as possible; for example, 'oil/gas rig expert' could include economics (present value), construction, engineering, offshore drilling, OSHA, etc. A detailed description of the case will help match requirements.

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AMICUS CURIAE COMMITTEE NEWS

Roger Hughes (Adams & Graham) filed an amicus brief to support the petition for mandamus in *In re National Lloyds Ins. Co.*, __ S.W.3d __ (Tex. Oct. 31, 2014). This is a bad-faith claim against National for hail damage caused by two storms a year apart. Plaintiff claimed the adjusters undervalued her damages. The trial court ordered National to produce every claims file adjusted by the same two independent adjusting companies that handled the plaintiff's policy claims for National, but only for claims from the same city for those two storms. The Supreme Court granted mandamus, holding the discovery request was overbroad. National's payments on the other claims was not probative of its conduct for valuing Plaintiff's claims; scouring all the other claims files to find a similar case handled differently was a "fishing expedition."

Brent Cooper (Cooper and Scully) filed an amicus brief in support of Petitioner in *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014). This is a landmark spoliation case. The trial court gave a spoliation instruction because the storeowner preserved only eight minutes of security video preceding the fall; plaintiff argued that Brookshire should have preserved the entire day so as to show how long the spill had been there. The Supreme Court held that spoliation of evidence is a discovery issue that the court decides as a question of law; the spoliation instruction is akin to a death penalty sanction and will be reviewed for excessiveness. Evidence of spoliation is admissible if the party is on notice the evidence is material to a claim and intentionally destroys it; negligence is insufficient, unless the missing evidence was the sole support for a claim or defense.

Roger Hughes (Adams & Graham) filed an amicus brief to support the petition for review for G*enie Ind., Inc. v. Matak,* 2012 WL 6061779 (Tex. App.--Corpus Christi Dec. 6, 2012, pet. granted)(memo. opin.). This is a product liability design defect death case in which the court of appeals affirmed a $1.3 million verdict for plaintiff. The basic issues are (a) is a proposed alternative safer design legally adequate if it violates industry and OSHA standards, and (b) is the product defective if the accident can happen only if the product is intentionally misused and the warnings against that misuse are adequate? The Texas Supreme Court has granted review. Oral Argument was held on September 17, 2014.

Ruth Malinas (Plunkett & Griesenbeck) filed amicus briefs in support of the petitions for review in *Loera v. Fuentes*, 408 S.W.3d 46 (Tex. App.-- El Paso Jan. 30, 2013, pet. filed), and *Nabors Wells Services Ltd. v. Romero*, 408 S.W.3d 39 (Tex. App.--El Paso Jan. 30, 2013, pet. granted). These are companion cases on the admissibility of the plaintiff's failure to wear seat belts. In both cases, a collision ejected the claimant. In one case the evidence was admitted; in the other it was excluded. The El Paso Court concluded such evidence was inadmissible. The Texas Supreme Court has granted review in the *Romero* case. Oral argument is set for October 9, 2014.

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January 21-25, 2015 | Beaver Creek Lodge | Beaver Creek, Colorado

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Mitchell Moss, ScottHulse P.C., El Paso – Program Co-Chairs

CLE Approved for: 8.5 hours, including 1.25 hours ethics

Wednesday, January 21, 2015

6pm-8pm TADC Welcome Reception

Thursday, January 22, 2015

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Michele Smith, TADC President
Mehaffy Weber PC, Beaumont
Mackenzie S. Wallace, Thompson & Knight, LLP, Dallas – Program Co-Chair
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Program Co-Chair

7:30-8:15am *FROM THE DEFENSE: APPELLATE ISSUES (.25 ethics)*
Michelle E. Robberson
Cooper & Scully, P.C., Dallas

8:15-8:50am *BATTEN DOWN THE HATCHES: TIPS FOR PREPARING A PROACTIVE PRE-SUIT DEFENSE IN AN EMPLOYMENT CASE*
Diana Valdez
Law Offices of Diana M. Valdez, El Paso

8:50-9:35am *DIGITAL FORENSICS*
Warren Kruse
Altep, Inc., El Paso

9:35-10:15am *TEXAS SUPREME COURT UPDATE (.25 ethics)*
Nathan Aduddell
Thompson & Knight, LLP, Dallas

Friday, January 23, 2015

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Michele Smith, TADC President
Mackenzie S. Wallace, Program Co-Chair
Mitchell Moss, Program Co-Chair

7:30-8:15am *VOIR DIRE: A DEFENSE PERSPECTIVE*
Jeff Ray
Ray, McChristian & Jeans, El Paso

8:15-8:50am *VOIR DIRE: A PLAINTIFF'S PERSPECTIVE*
Kevin Glasheen
Glasheen, Valles & Inderman, LLP, Lubbock

8:50-9:25am *VOIR DIRE: A JURY CONSULTANT'S PERSPECTIVE*
Richard Waites, PhD
The Advocates, Houston

9:25-10:15am *USING COURTS FOR DISCOVERY IN ARBITRATION (.5 ethics)*
Andrew Melsheimer
Thompson & Knight, LLP, Dallas

Saturday, January 24, 2015

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Michele Smith, TADC President
Mackenzie S. Wallace, Program Co-Chair
Mitchell Moss, Program Co-Chair

7:30-8:05am *DEFENDING OIL AND GAS LITIGATION*
Gregory D. Binns
Thompson & Knight, LLP, Dallas

8:05-8:35am *BUDGET FOR YOUR DEFENSE*
Whitney L. Mack
Thompson, Coe, Cousins & Irons, L.L.P., Austin

8:35-9:10am *DEFENSE STRATEGY: CAUSATION AND DAMAGES*
Christy Amuny
Bain & Barkley, L.L.P., Beaumont

9:10-9:55am *OBTAINING A TEMPORARY INJUNCTION FOR BREACH OF EMPLOYMENT AGREEMENTS*
R. Edward Perkins
Sheehy, Ware & Pappas, P.C., Houston

9:55-10:30am *HOW TO DEFEND TOXIC TORT LITIGATION (.25 ethics)*
Arturo M. Aviles
Segal McCambridge Singer & Mahoney, Austin
Patrick W. Stufflebeam
HeplerBoom LLP, Edwardsville, IL

Sunday, January 25, 2015

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Registration fees include Wednesday evening through Saturday group activities, including the Wednesday evening welcome reception, all breakfasts, CLE Program each day and related expenses and hospitality room.

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Registration for Member & Spouse/Guest (2 people)	$725.00

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Registration fee for children includes Wednesday evening welcome reception, Thursday, Friday & Saturday breakfast

Children Age 12 and Older	$130.00
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If your spouse/guest is also an attorney and would like to attend the Winter Seminar for CLE credit, there is an additional charge to cover written materials, meeting materials, and coffee breaks.

Spouse/Guest CLE credit for Winter Meeting	$75.00

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For hotel reservations, **CONTACT THE BEAVER CREEK LODGE DIRECTLY AT 800/525-7280 and reference the TADC Winter Seminar.** The TADC has secured a block of rooms at an EXTREMELY reasonable rate. It is **IMPORTANT** that you make your reservations as soon as possible ***as the room block will most likely fill quickly***. Any room requests after the deadline date, or after the room block is filled, will be on a wait list basis.

DEADLINE F0R HOTEL RESERVATIONS IS DECEMBER 20, 2014

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- ☐ **$ 130.00 Children 12 & Older _____**
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☐ *Check if your spouse/guest is a TADC member*

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In order to ensure that we have adequate materials available for all registrants, it is suggested that meeting registrations be submitted to TADC by December 20, 2014.

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Access to Justice

Pamela Madere, Chair – TADC Pro-Bono Committee

The Supreme Court Task Force to Expand Legal Services Delivery is working to increase pro bono activity and reporting among State Bar members. By reporting your qualifying pro bono and financial contributions, pro bono attorneys are helping to highlight the importance of pro bono in meeting the legal needs of indigent Texans while also providing much needed support for funding requests for legal services programs and improving the public perception of lawyers overall. To that end, pro bono reporting has now been made easier for attorneys. The State Bar has a new feature on the State Bar's website called "My Pro Bono" page, which is part of an attorney's "My Bar Page." Attorneys may now log onto www.texasbar.com/mybarpage, using their bar number and PIN or password, to report their pro bono hours. Similar to MCLE reporting, attorneys will now be able to report and track their pro bono hours and contributions cumulatively throughout the calendar year. Attorneys who report 75 hours or more of pro bono service a year will be invited to join the State Bar's Pro Bono College, which is an honorary society for legal professionals committed to pro bono. Please report your hours on "My Pro Bono" after completing a pro bono matter!

TEXAS ASSOCIATION OF DEFENSE COUNSEL, INC.

An Association of Personal Injury Defense, Civil Trial & Commercial Litigation Attorneys ~ Est. 1960

400 West 15th Street, Suite 420, Austin, Texas 78701 512/476/5225 Fax 512/476-5384 Email: tadc@tadc.org

Mr.
Mrs.
I Ms. _____ hereby apply for membership in the Association and certify that I am
(circle one) Please print
a member in good standing of the State Bar of Texas, engaged in private practice; that I devote a substantial amount of my professional time to the practice of Civil Trial Law, Personal Injury Defense and Commercial Litigation. I am not now a member of any plaintiff or claimant oriented association, group, or firm. I further agree to support the Texas Association of Defense Counsel's aim to promote improvements in the administration of justice, to increase the quality of service and contribution which the legal profession renders to the community, state and nation, and to maintain the TADC's commitment to the goal of racial and ethnic diversity in its membership.

Preferred Name (if Different from above): _____

Firm: _____

Office Address: _____ City: _____ Zip: _____

Main Office Phone: / Direct Dial: / Office Fax: /

Email Address: _____ Cell Phone: /

Home Address: _____ City: _____ Zip: _____

Spouse Name: _____ Home Phone: /

Bar Card No.: _____ Year Licensed: _____ Birth Date: _____ ☐ DRI Member?

Dues Categories:

***If joining November – July:**	**$185.00 Licensed less than five years (from date of license)**	**$295.00 Licensed five years or more**
If joining August:	$ 50.00 Licensed less than five years (from date of license)	$100.00 Licensed five years or more
If joining September:	$ 35.00 Licensed less than five years (from date of license)	$ 50.00 Licensed five years or more
If joining October:	$ 25.00 Licensed less than five years (from date of license)	$ 35.00 Licensed five years or more

*If joining in November or December, your Membership Dues will be considered paid for the following year. However, New Members joining after October 1 will not have their names printed in the following year's roster because of printing deadlines.

Applicant's signature: _____ Date: _____

Signature of Applicant's Sponsor:

_____
(TADC member) Please print name under signature

I agree to abide by the Bylaws of the Association and attach hereto my check for $_____ ***-OR-***

Please charge $_____ to my ☐ Visa ☐ MasterCard ☐ American Express

Card #: _____ Exp. Date: /

Please return this application with payment to:
Texas Association of Defense Counsel, Inc.
400 West 15th Street, Suite 420
Austin, Texas 78701

Referring TADC Member: _____
(print name)

For Office Use

Date: _____

Check # and type: _____

Approved: _____

SUBSTANTIVE LAW NEWSLETTERS

TADC FALL 2014 EDITIONS

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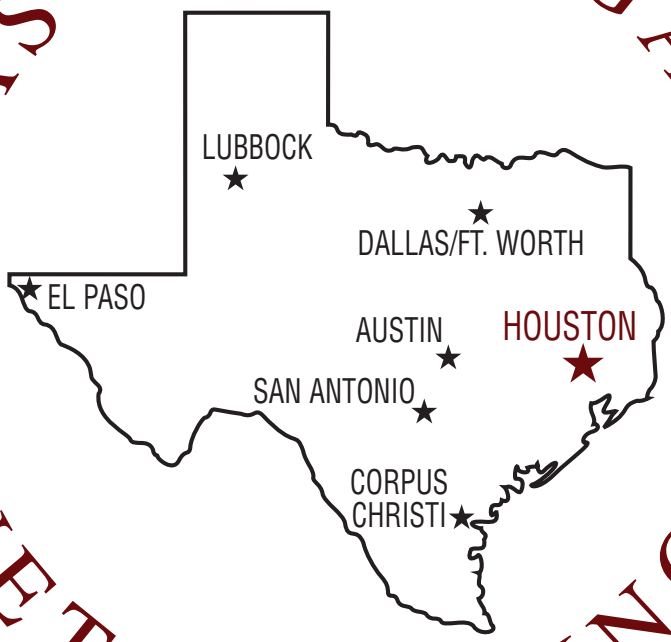
Where's the CD with the Newsletters?

In an effort to be more efficient and address the needs of the TADC membership, a link to the TADC Professional Newsletters (in PDF format) was emailed to all members ahead of the TADC Magazine. The Newsletters are also available in the members' section of the TADC website, along with past editions, available for viewing or download at **www.tadc.org**

TEXAS INVESTIGATIVE NETWORK, INC.



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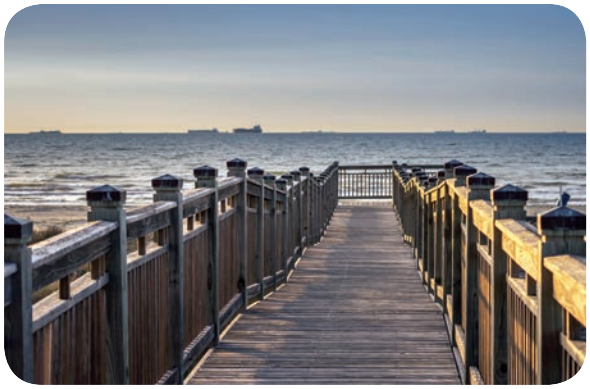

April 29-May 3, 2015
2015 TADC Spring Meeting
San Luis Hotel - Galveston, Texas

July 8-12, 2015
2015 TADC Summer Seminar
Snake River Lodge & Spa - Jackson Hole, Wyoming

Mark Your
CALENDARS

September 16-20, 2015
2015 TADC Annual Meeting
Millennium Broadway - New York, New York

www.tadc.org