TADC e-Update
The Texas Association of Defense Counsel, Inc.

FROM THE PRESIDENT

Michele Smith,
MehaffyWeber, PC, Beaumont

It has been a great summer so far. With all TADC has going on, there is a lot to report so let's get to it!

CONGRATULATIONS AND KUDOS!

AMICUS COMMITTEE: Our amicus committee has done great things this year under the leadership of veteran committee chair, Roger Hughes. These unsung heroes of the TADC do yeoman's work in analyzing complex cases and legal issues in order to make recommendations of how best to protect our civil justice system. The quality of brief writing, analysis and research is incomparable and something of which all TADC members should be proud. Please take a moment to recognize and thank these stars of the TADC.

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NEWSLETTERS: TADC offers high quality newsletters generated from experienced and diligent lawyers across the state. Take a moment to look at the well written and informative newsletters on our website. Thank you to these editors for their time and commitment to excellence.

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CONGRATULATIONS

Congratulations are in order for past TADC and DRI President, John Martin. John was honored by the National Foundation for Judicial Excellence ("NFJE") with the Richard T. Boyette Award for outstanding contributions to the NFJE. The award is presented annually to an individual or corporation that has 1) demonstrated a commitment to excellence in judicial education; 2) shown exceptional creativity and dedication in program development; 3) excelled in fundraising activities on behalf of NFJE; and 4); exemplified professionalism in promoting the case for a well-educated, independent judiciary. John, you continue to make TADC proud!

PROGRAMS

Jackson Hole, Wyoming played a wonderful host to our summer meeting. The program was extraordinary and received very favorable reviews. Thank you to Christy Amuny, Pam Madere and Jason McLaurin for assembling an all-star cast of presenters. Meeting attendees had a fabulous time enjoying the breathtaking scenery in Jackson Hole, even with the rain showers. Thank you to meeting chairs Molly and Dennis Chambers for assembling such a great travel guide.

By now, you should have received the program registration for the annual meeting in New York. Not to be outdone by Jackson Hole, David Chamberlain and Keith O'Connell have likewise put together an amazing group of topics and presenters and a whopping 11.25 hours of CLE credit. New York will be the back drop for a fun annual meeting that celebrates our incoming president, Milton Colia, and board. Be sure to look in your registration for the subway series baseball game between the Yankees and Mets. The TADC has secured a block of tickets but they are first come-first serve! Act fast! **REGISTRATION MATERIAL HERE**

Our Programs Committee, led by Pam Madere and Bud Grossman, has worked tirelessly with the Board of Directors in scheduling local programming. So far, TADC has had **14** programs this year. Great job! Additional upcoming programs include:

- The 2015 West Texas Seminar held in conjunction with the New Mexico Defense Lawyers Association – August 7-8 in Ruidoso (Chair, Bud Grossman)
- The half-day Commercial Litigation Seminar in Houston, October 1 (Chairs, Tom Ganucheau and Sam Houston)
- The Red River Showdown CLE held in conjunction with the Oklahoma Association of Defense Counsel—October 8-9 in Frisco (Chair, Jerry Fazio)**.**

PUBLICATIONS

In case you had not heard, you may now register for meetings and pay your dues online. We added this feature to our upgraded website in late spring and members have already started taking advantage of the convenience.

Before the end of the year, look for online programming and the new segment called "Minute Mentor." Minute Mentor will provide an opportunity for some of our more veteran and experienced attorneys across the state to offer short video sessions we hope our young lawyers will find useful. Our first Minute Mentor section should be live sometime in early September.

As time comes for renewing your membership in TADC and updating your roster information, please be advised we are giving members an option of how they would like to receive their rosters, electronically or in printed form. Please note the question on your roster verification form that will be mailed later this month. **If no preference is given, you will receive your roster electronically.**

The Publications Committee members are responsible each month for providing the case summaries attached to our E-Blasts. This month, pay particular attention to a trial court opinion on a Motion to Remand. It includes a nice discussion on Removal and Improper Joinder for those members whose practice involves removing cases. Thanks to Dan Worthington for passing it along.

MEMBERSHIP

Please welcome these new members to the TADC:

Mr. Clint Cox, Fee, Smith, Sharp & Vitullo, LLP, Dallas; Recruited by Peggy Brenner
Ms. Jessica Collins, The Collins Law Firm, Humble; Recruited by Elizabeth O'Connell
Mr. George R. Diaz-Arrastia, Schirrmeister Diaz-Arrastia Brem LLP, Houston; Recruited by Peggy Brenner
Mr. James W. Goldsmith, Jr., O'Connell & Avery, LLP, San Antonio; Recruited by Elizabeth O'Connell
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Mrs. Lorna McMillion, Mullin Hoard & Brown LLP, Lubbock; Recruited by Lawrence M. Doss
Mr. Robert N. Hancock, Jr., Coats, Rose, Yale, Ryman & Lee, P.C., Houston; Recruited by Doug Rees

It is not too late to add to our membership ranks. Discounted dues are in effect for new members added between now and November 1, 2015. ***See the membership application for details.***

Stay safe and cool this summer and I hope to see you in New York!

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REGISTER NOW!
For the 2015 TADC Annual Meeting in New

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September 16-20, 2015

A program for the practicing trial lawyer offering 11.25 hours CLE, with 2.5 hours ethics

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Hotel Reservation cut-off is August 26, 2015

REGISTRATION HERE OR ONLINE AT www.tadc.org

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CALENDAR OF EVENTS

August 7-8, 2015
West Texas Seminar
Inn of the Mountain Gods – Ruidoso, New Mexico
Bud Grossman, Program Chair
Register Online at www.tadc.org

August 18, 2015
Beaumont Legislative Luncheon
Beaumont Country Club – Beaumont, Texas
Registration material HERE

September 16-20, 2015
TADC Annual Meeting
Millennium Broadway – New York, New York
David Chamberlain & Keith O'Connell, Program Co-Chairs
Registration material HERE or register online at www.tadc.org

October 1, 2015
TADC Commercial Litigation Seminar
Downtown Club at Houston Center - Houston, Texas
Tom Ganucheau & Sam Houston, Program Co-Chairs
Registration material will be mailed in mid-August

October 8-9, 2015
TADC/OADC Red River Showdown
Westin Stonebriar – Frisco, Texas
Jerry Fazio, Program Chair
Registration material HERE

October 7-11, 2015
DRI Annual Meeting
Marriott Wardman Park – Washington, D.C.
Register at www.dri.org

LEGAL NEWS - CASE UPDATES

Case Summaries Prepared by Russell C. "Rusty" Beard, Beard Law Firm, Abilene

McGinnes Industrial Maintenance Corp. v. Phoenix Ins. Co. and Travelers Indem. Co. (Tex. 7.20.15)

McGinnes Industrial Waste Corporation ("**McGinnes**") dumped pulp and paper mill waste sludge into disposal pits near the San Jacinto River in Pasadena, Texas ("**the Site**"). After environmental contamination was discovered at the Site, the Environmental Protection Agency ("**the EPA**") instituted superfund cleanup proceedings under the federal Comprehensive Environmental Response, Compensation, and Liability Act ("**CERCLA**").

During the dumping period, McGinnes was covered by standard-form commercial general liability insurance policies (collectively "**the Policies**") issued by Phoenix Insurance Company and Travelers Indemnity Company (collectively "**the Carriers**"). The standard-form commercial general liability insurance policies at issue in this case give the insurer "the right *and duty* to defend any suit against the insured seeking damages" (emphasis added).

McGinnes requested a defense from the Carriers concerning the EPA proceedings. The Carriers refused, claiming the proceedings were not a "suit" under the Policies. McGinnes sued the Carriers in federal court seeking a declaration that the Policies obligated them to defend the CERCLA proceedings. The district court granted the Carriers' motion for partial summary judgment on the duty-to-defend issue.

On appeal, the 5th Circuit certified a question to the Texas Supreme Court regarding the issue. The Supreme Court answered that "suit" as used in the Policies also included CERCLA enforcement proceedings by the EPA. **READ THE OPINION HERE**

Chesapeake Exploration, L.L.C. v. Hyder (Tex. 6.12.15)

As a general matter, an overriding royalty on oil and gas production is free of *production* costs, but must bear its share of *postproduction* costs *unless* the parties agree otherwise.

The Hyder family ("**the Royalty Owners**") leased 948 mineral acres. Chesapeake Exploration, LLC ("**Chesapeake**") acquired the lessee's interest. The Royalty Owners and Chesapeake agreed that the overriding royalty was free of production costs under the lease, but disputed whether it was also free of postproduction costs.

The trial court rendered judgment for the Royalty Owners, awarding them $575,359 in postproduction costs that Chesapeake had deducted from the Royalty Owners' overriding royalty. The court of appeals affirmed.

The Supreme Court also affirmed, noting that *Heritage Resources* holds merely that a lease is governed by

a fair reading of its text. However, the court emphasized that *Heritage Resources* does *not* hold that a royalty can't be made free of postproduction costs.

Because the "cost-free" language in the overriding royalty provision included postproduction costs, the Supreme Court held that the lease clearly freed the royalty *and* the overriding royalty of postproduction costs. **READ THE OPINION HERE**

BP America Production Company v. Red Deer Resources, LLC (Amarillo, motion for rehearing overruled 7.9.15)

The trial court signed a judgment terminating an oil, gas and mineral lease held by BP America Production Company.

On appeal, the court focused on proof of the well's steady decline in production, the evidence of its projected steep decline beginning January 1, 2012, and the evidence of its relatively small remaining reserves. The Court of Appeals noted that the combination of those elements of proof reasonably permitted the jury to conclude it was unlikely the well would return to profitable production.

Further, the appellate court held that the trial court did not err in refusing to submit a definition of the term "speculation" to the jury because it's not an abuse of discretion to refuse to define a word which has a clear and common meaning. **READ THE OPINION HERE**

Duncan v. Woodlawn Manufacturing, Ltd. (El Paso 6.17.15)

Duncan ("**the Employee**") was President, CEO, and self-appointed satyr of Woodlawn Manufacturing, Ltd. ("**the Employer**").

The Employer terminated the Employee's employment because the Employee had a number of sexual liaisons with *several* subordinate employees, "which reflected adversely on the workplace" and exposed the Employer to potential sexual harassment liability. (In firing the Employee, the Employer's representative emphasized that the Employee's "actions were not furthering the best interests of the company"!) Therefore, the Employee sued the Employer for breach of his employment contract.

In a monumental display of chutzpah, the Employee *took the witness stand at trial and* ***admitted***: (1) the sexual encounters; (2) promoting employees who had sex with him; (3) he was old enough to be the father of each of the women he'd had sex with; (4) using the company email system to brag about his sexual conquests; (5) borrowing money from his family to pay off at least one blackmail threat; (6) hiring a prostitute while on a company business trip; (7) being arrested for public intoxication; (8) missing work because he was at home drunk; (9) drinking so much at lunch that he was unable to go back to work; (10) his wife was concerned about his drinking; (11) his mother, who worked in the company office, covered up his sexual affairs and his drinking problems; and (12) suggesting to his wife that they engage in a "threesome" with one of his office love muffins.

In spite of his foregoing admissions, the Employee claimed (1) his sexual exploits didn't affect his job performance and (2) he didn't give preferential job treatment to any of his paramours.

In fact, the Employee's retort at trial and throughout the appeal was that "each of the [foregoing] allegations noted above, even if true, [were] not valid contractual reasons for his termination because he was never given *written notice and an opportunity to cure* as contemplated by … his employment agreement," that his conduct "was *not precluded* by his contract or company policy," and that his conduct "did not impair his work performance" (emphasis added).

The jury found that both the Employee and the Employer breached the employment agreement, but the Employee did so first. Further, the jury found no damages resulted from the Employer's breach. Therefore, the trial court signed a take nothing judgment.

On appeal, the Employee cited out-of-state case law, claiming that none of his conduct amounted to a "vital breach" of his employment agreement.

The Court of Appeals held that injecting the idea of a "vital breach" into a contract that already comprehensively addressed reasons for termination would only add uncertainty to the parties' dealings. Further, the appellate court noted there were tub loads of legally and factually sufficient evidence which the jury easily could have believed made the notice and cure provision futile. In addition, the court noted that futility of curing the defect can defeat strict enforcement of a notice and cure clause. Finally, the provisions of the employee handbook also provided the jury a path to find a material breach where no notice and cure provisions would apply. Therefore, the trial court's judgment was affirmed. **READ THE OPINION HERE**

Rodriguez v. Metropolitan Lloyds Ins. Co. of Texas and Keith Etzel (N.D. Tex. 7.27.15)

Rodriguez ("**the Plaintiff**") sued her carrier, Metropolitan Lloyds Insurance Company of Texas ("**Metropolitan**"), and Metropolitan's adjuster, Keith Etzel ("**Etzel**"), in state district court regarding a hail damage claim.

The Plaintiff and Etzel are citizens of Texas. Metropolitan is an association of underwriters, whose individual underwriters are citizens of Rhode Island and Wisconsin.

Metropolitan removed the case to federal court on the basis of diversity jurisdiction. The Plaintiff requested that the case be remanded because the Plaintiff and Etzel are citizens of Texas (i.e. complete diversity was lacking). Metropolitan asserted that Etzel was improperly joined; therefore, Etzel's citizenship should be disregarded for the purpose of establishing diversity jurisdiction.

The federal court noted that the petition failed to allege that Etzel made any false or misleading representations to Plaintiff. Further, the court emphasized that "Plaintiff's only alleged injury is that Metropolitan has refused to pay a sufficient amount for the alleged damages."

Improper joinder may be proven by showing the plaintiff's inability to establish a cause of action against the non-diverse defendant in state court. Therefore, the court conducted a Rule 12(b)(6)-type analysis regarding the Plaintiff's claims against Etzel.

In doing so, the court found the Plaintiff's petition failed to assert that Etzel misrepresented any specific policy terms. Absent such allegations, the court held there could be no claim against Etzel for violating the Texas Insurance Code. Further, the court found that the Plaintiff failed to plead any facts which would support a fraud claim against Etzel.

As a result, the court denied the Plaintiff's motion to remand. **READ THE OPINION HERE**

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