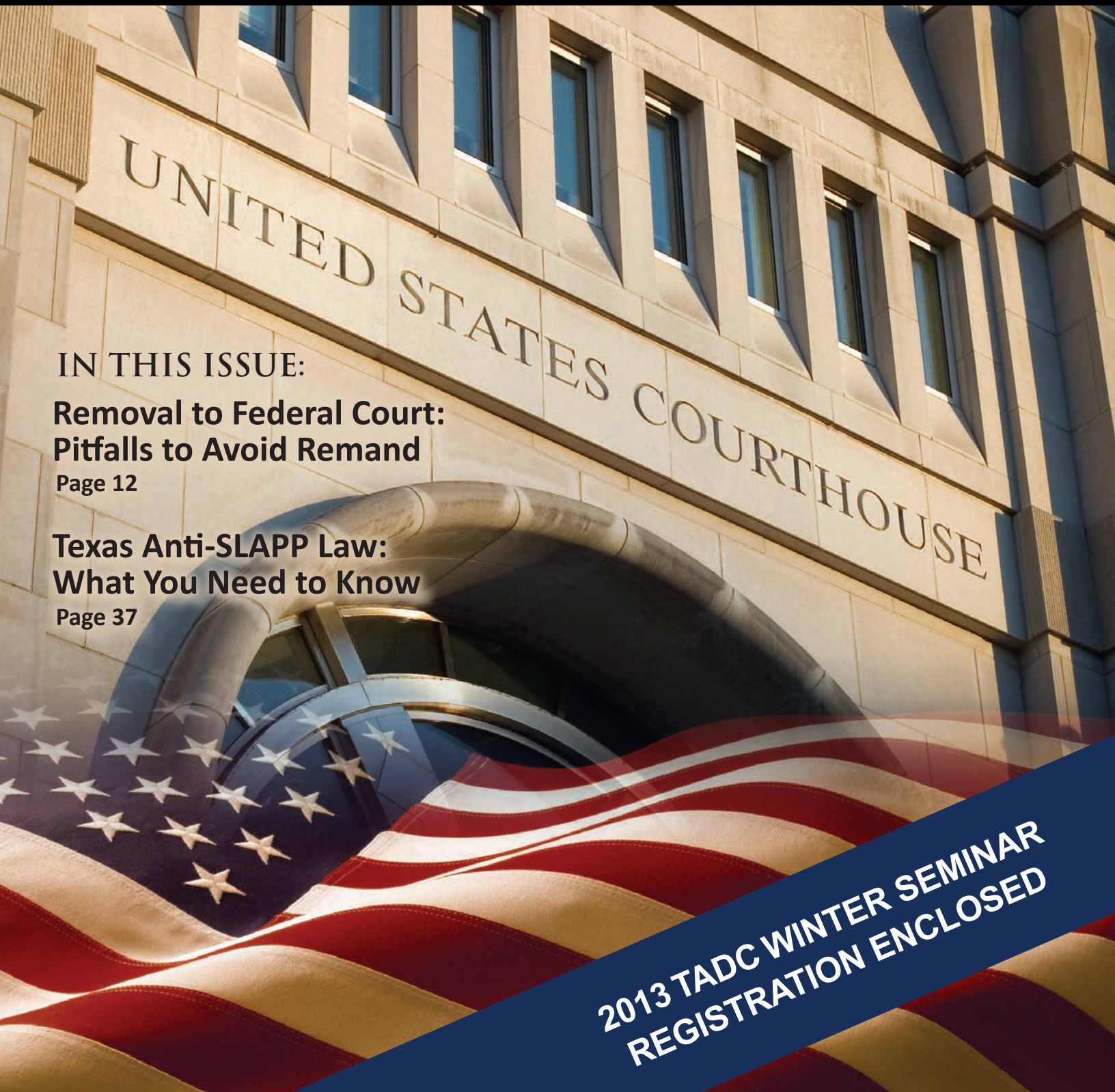
TADC

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

FALL 2012



IN THIS ISSUE:

2013 TADC WINTER SEMINAR REGISTRATION ENCLOSED

A thousand things can go wrong out here. We can tell you which one actually did.

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Table of Contents

TADC CALENDAR OF EVENTS

January 18-19, 2013	**TADC Board of Directors Meeting** San Antonio, Texas
January 24, 2013	**Austin Legislative Luncheon** Headliner's Club – McBee Room
February 6-10, 2013	**TADC Winter Seminar** Sheraton Steamboat –Steamboat Springs, Colorado Greg Curry & Randy Walters, Co-Chairs *Registration material available at www.tadc.org*
April 3-5, 2013	**TADC Spring Meeting and Legislative Day** Doubletree Suites – Austin, Texas Robert Sonnier & Ross Pringle, Co-Chairs
April 26-27, 2013	**31st Annual TADC Trial Academy** Sheraton Dallas North – Dallas, Texas Clayton Devin & Mike Shipman, Co-Chairs
July 17-21, 2013	**TADC Summer Seminar** Westin Whistler – Whistler, Vancouver David Chamberlain & Greg Binns, Co-Chairs
August 2-3, 2013	**TADC Budget/Nominating Committee** Austin, Texas
September 18-22, 2013	**TADC Annual Meeting** W Hotel – Boston, Massachusetts Mitch Smith & John Weber, Co-Chairs

PRESIDENT'S MESSAGE

by Dan K. Worthington, President
Atlas, Hall & Rodriguez, L.L.P.; McAllen

Ever Been to Punxsutawney?

Though not old quite enough to have heard the song when originally released, I can recognize the Sonny and Cher hit "I got you babe." It was the song playing on the clock radio each morning Bill Murray woke up in the movie *Groundhog Day*. For those of you who have not seen the movie (which may be most of you), Murray plays a weatherman who, while attending the annual Groundhog Day event in Punxsutawney, finds himself in a time loop, repeating the same day over and over. With each repeated day, Murray uses his experiences from the prior (and repeated) day to better tackle each challenge.

Over the last few weeks, I have received emails from friends around the Valley and State virtually all of whom, after congratulating me on being sworn in as President of the TADC, ask a variation of, "What are they going to try and do to us this year?" I start each response the same way, "[E]ver been to Punxsutawney?" If you want to know what to expect, pull up our legislative updates from 2007, 2009 and 2011. While the specifics may vary, we fully expect that the ongoing efforts by a small minority to foreclose a claimant's access to the Courthouse, without regard to the merits of the claim, will continue. We are just as determined and we will continue to resist these efforts by helping those legislators who share our vision of an accessible, efficient and effective civil jury system to make sure that the voice of the defense bar (our voice) is heard in Austin.

Identify:

We have highlighted some of the items on our radar in the legislative e-blasts which you have already received. However, the legislative process is dynamic. As a result, we will continue to monitor hearings on items of note which are scheduled this year and to track the new bills filed beginning on November 8 as we progress through the session. However, no amount of review by our legislative committee, our entire board of directors or our legislative consultant can replace the collective eyes and ears of our membership. So, here's my request: If you identify something you think we should be tracking, please give us a call or shoot us an email. My email and phone number is set out at the end of this "message" and I encourage your feedback and help.

Review:

Each session, our board of directors reviews in excess of a hundred bills which we have designated to monitor. In addition, we review any other bill a legislator asks for help with without regard to its subject matter. We are always looking for additional help, and you are encouraged to participate in this process as well.

Address:

Thanks to the TADC leadership who worked with the legislature over the past number of years (David Chamberlain, Jay Old and Keith O'Connell to name only a few) the TADC now has both a "seat at the table" and the

credibility to express their position explaining why a particular bill should be opposed, changed, supported, etc. When opposing a bill, we are given a meaningful opportunity to lay out the basis for our position as well as an alternative, if any, to the stated goal of the proposal. This opportunity is invaluable and was earned as a direct result of the many prior years of stalwart and quality participation by TADC members.

Expectations:

You can expect we will make every effort to continue the first rate work of those who came before and to continue improving our efforts to keep you better informed as to what is going on.

As we have noted in an eblast to you several weeks ago, the proposed rules on expedited jury trials were released by the Texas Supreme Court on November 13, 2012. As expected, these proposed rules are "mandatory" only to the defendant with the plaintiff given the unilateral option as to whether or not a defendant should be subjected to the expedited process. This approach was rejected by the TADC in favor of a voluntary system and we will continue to oppose any rules which are designed to force a defendant into limited discovery based solely upon the amount in controversy. The TADC position has been echoed by the Supreme Court Advisory Committee, Tex-AOTA and the TTLA. The philosophical flaw in these rules is that they presume that every case is only as complex as the amount in controversy and gives no consideration to the right of a Defendant to give everything to a jury necessary to a fair and correct verdict. Should the accountant or veterinarian accused of malpractice be given the opportunity to defend his or her reputation? Should the school teacher sued in a civil case for assault be given a full defense? Apparently, if the amount sought is less than $100,000, the answer is no. The professional judgment of the attorney hired to represent a defendant in Texas on what discovery or trial presentation is required for a complete defense has been replaced by a "one size fits all" trial in name only. If you want to be heard on this issue, please review our detailed comments which each of you will receive and consider sending your thoughts on this issue to the Court. Our deadline is February 1, 2013.

In addition, we expect to see an effort to reform the margin tax system in Texas, another effort to implement a "loser pays" system, efforts to prohibit litigation funding companies, a tweak to the inactive MDL-Asbestos docket, worker's compensation reform and a potential review of "no fault" insurance. If and when these proposals are filed, we will make sure that you are timely advised so that we can better jointly participate in advocating for the civil justice system. We have an active Linkedin site that you should seriously consider joining (if you haven't already) and we are developing an app for tablets and smart phones as a method to allow you better access to all we have to offer whenever and wherever the need arises. Look for updates on the app in the coming months .

Finally, in an effort to add even more value to our meetings, we are integrating other State organizations where possible as a networking tool to help us better market who we are and what we do. For starters, we we will be having a joint meeting with the Washington State Defense Bar at our meeting in July in Whistler, B.C., Canada. Our other TADC meetings include Steamboat Springs in February, Austin in April and Boston in September. Beyond the outstanding locations and high quality CLE is the social component as the members (and their families) who attend these meetings are outstanding individuals with whom you will enjoy spending time.

If you have any questions or comments for me, my office number is (956) 632-8293 and my email is dkw@atlashall.com. As always, Bobby Walden, TADC's Executive Director and our full-time staff are available at TADC@tadc.org and (512) 476-5225

Past President's Message

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

Thank you for the honor of allowing me to serve as your President. It has truly been a privilege to serve the TADC and its members over the past year. The TADC is the largest and most well-respected organization of its kind in the country. Other state and local defense organizations look to the TADC as a model of what such an organization can become. Our members are what set us apart. Your TADC Board of Directors is a working board, and we have been busy over the last year. Although I cannot recognize everyone for their service, I would like to highlight the work of our committees and some of our board members and thank them for their contributions over the last year.

Although this was not a "legislative year," it was not without legislative activities. The TADC provided its input into various interim studies and your Legislative Committee (chaired by **Jackie Robinson** and **Pamela Madere**) has been hard at work preparing for the upcoming legislative session. The TADC is well respected in the State Legislature as an independent voice and is recognized as an organization that can be called upon to provide a thorough and unbiased analysis of how proposed legislation will affect your Texas civil justice system. We will need your help next year with legislative activities, not only in analysis of the thousands of bills which will be filed, but also in communicating with your legislators and community on the impact that proposed legislation will have on our civil justice system. Please volunteer.

Over the past year the TADC stepped up its social media presence and updated its technology to meet the needs of its membership. First, I encourage you to log on to the revamped TADC interactive website (www.tadc.org). The TADC also joined Facebook this year, and we encourage you to join us on Facebook and look at the social side of our organization. Finally, the TADC has its own LinkedIn page, limited to TADC members, where we can candidly discuss issues and ideas affecting our practice. Your Publications Committee (chaired by **Don Kent** and **Mike Hendryx**) not only oversaw these activities, but they continued to oversee the publication of the TADC Magazine (now with more substantive articles), and regular e-updates advising of important events and recent cases of importance to your practice. A special thanks also to some of our unsung heroes, the substantive law newsletter editors and writers, for continuing to provide our members timely summaries of the most recent and relevant decisions in over a dozen practice areas.

I hope that you have noticed an increase in local activities, which has been a focus over the past year. If you haven't participated in these social events, get-togethers, and local CLEs, I encourage you to participate during the coming year. These are not only a great way to get together and catch up with other members, but also to meet your local judges and elected officials as well. Additionally, these events are the ideal vehicle for spreading the word about TADC and for recruiting new members. Please contact your local district directors for information on upcoming activities in your area or if you would like to assist in hosting an event. A special thanks to your local directors and the Programs Committee for making these events happen.

Our Programs Committee (chaired by **Christy Amuny** and **Jerry Fazio**) had a busy year. In addition to the local events, the TADC participated in events with the

State Bar, TEX-ABOTA, and TTLA. Our webcast with the State Bar was ***free*** to TADC members. Our four CLE seminars/meetings were a resounding success thanks to the hard work and dedication of our various program chairs who organized the events and our speakers who presented timely and substantive CLE for the betterment of our practice. A special thank you goes to **Max Wright** and **Mark Bennett** (program chairs for our winter meeting in Crested Butte, CO), **Sofia Ramon** and **Randy Grambling** (program chairs for our spring meeting in Santa Fe, NM), **Greg Binns** and **Darin Brooks** (program chairs for our summer meeting in Sandestin, FL), and **Gayla Corley** and **Mike Hendryx** (program chairs for our annual meeting in San Francisco, CA) for putting on great programs this year. I also want to thank **Michele Smith** and **Chad Gerke** for chairing this year's TADC Trial Academy, as well as the TADC members and Harris County Judges who gave their time and talents to train our young lawyers. With fewer opportunities for our young lawyers to get to trial, the trial academy is a wonderful opportunity for young lawyers to get first-rate experience. I also want to thank our West Texas leadership for again hosting their West Texas Seminar at the Inn of the Mountain Gods in Ruidoso, New Mexico.

One of the hardest jobs in the organization is maintaining and growing our membership. I offer a special thank you to our Membership Committee (chaired by **Chantel Crews** and **Clayton Devin**) for their continued dedication throughout the year to not only retaining our current members, but also extolling the benefits of membership and bringing in new members throughout the year.

I also want to thank our Young Lawyer Committee (chaired by **Jas Brar**) for their time and support throughout the year. Your young lawyers were actively involved in the TADC efforts regarding Facebook and our website updates. Moreover, they volunteered and assisted with the substantive law newsletters and in organizing and hosting local events. Our young lawyers are the future of this organization, and I cannot encourage you enough to get your young lawyers involved.

Finally, a special thanks goes to **Keith O'Connell, Dan Worthington,** and **David Chamberlain** for their continued time and dedication throughout the year regarding the proposed rules on expedited jury trials and their continued efforts at putting the TADC at the forefront on efforts to protect our civil justice system.

Additional unsung heroes who need special thanks are the members of our Amicus Curiae Committee (chaired by **Roger Hughes**) for their tremendous support and service over the past year. Finally, I want to thank the members of the Nominating Committee, who met in Austin on August 3-4, 2012, and also did a fantastic job of nominating the new slate of officers and directors of the TADC. Your organization is in great hands.

Congratulations to **Don Kent** for his receipt of the TADC Founders' Award, which recognizes a member whose service to and for the Association has not only earned favorable attention for the Association, but has effected positive changes for the Association.

Congratulations to **Jerry Fazio**, recipient of the TADC's President's Award, which recognizes a member for the meritorious service and his leadership and continuing dedication during the year has resulted in raising standards and achieving goals representing the ideals and objectives of the TADC.

Thank you to all members of our Board of Directors for their continued support throughout the year, but more importantly for their time and dedication to the TADC in supporting and sponsoring its many activities and publications throughout the year.

Finally, a special thanks to our TADC staff, including Executive Director **Bobby Walden**, **Debbie Hutchinson** and **Regina Anaejionu** for their continued dedication to our organization.

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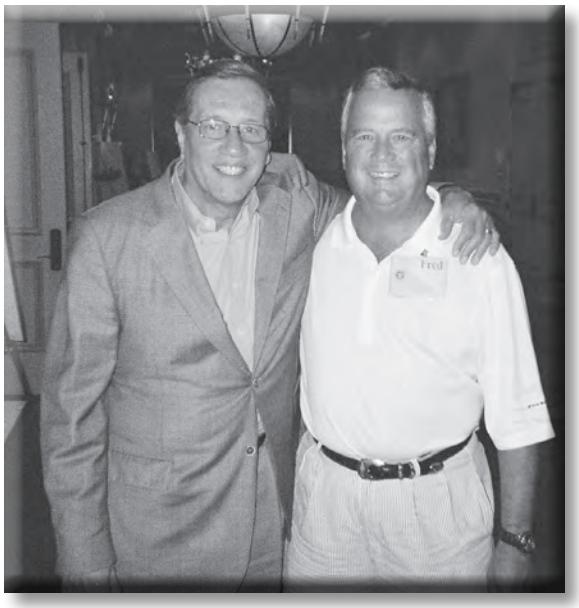
2012 Summer Seminar

Sandestin Golf & Beach Resort ~ July 18-22, 2012 ~ Sandestin, FL

The 2012 TADC Summer Seminar was held at the magnificent Sandestin Golf & Beach Resort in sunny Sandestin, Florida, July 18-22, 2012. Program Co-Chairs Russell Smith, with Fairchild, Price, Haley & Smith, L.L.P. in Nacogdoghes and Greg Binns with Thompson & Knight, L.L.P. in Dallas assembled an outstanding cast of lawyers to present over 9 hours of CLE. The seminar was a great success with TADC Past President Russell Serafin, Judge R.K. Sandill and Richard Collins, Past President of the Florida Defense Lawyers Association, giving presentations. Topics included "Switching Sides, a Plaintiff Lawyer's Guide to Being a Better Defense Lawyer", "New Technologies in Electronic Discovery" and "Effective Techniques for Bench Trials" to name but a few.

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



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STRANGE BEDFELLOWS: HOW THE U.S. CONGRESS AND THE TEXAS SUPREME COURT HAVE CHANGED REMOVAL TO FEDERAL COURTS IN TEXAS, AND OTHER PITFALLS TO AVOID REMAND*

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I. Introduction

In December 2011, two unrelated events altered the landscape for removal of cases from state to federal court in Texas. The actors—the U.S. Congress and the Texas Supreme Court—can hardly be deemed to have acted "in concert." But their actions, less than two weeks apart, changed both the process and substance of removal, which is generally slow to change due in part to the un-reviewability of most federal remand orders and congressional inaction.

First, on December 7, 2011, the Federal Courts Jurisdiction and Venue Clarification Act of 2011 ("the Clarification Act") was enacted. The Clarification Act introduced the first changes in almost a decade to federal court jurisdiction and general removal procedures not involving class actions. It contains significant changes to 28 U.S.C. § 1441, generally known as the removal statute, and will affect nearly every case removed to federal court invoking diversity of citizenship jurisdiction. It seeks to clarify the rules affecting the timing of removal in cases with multiple defendants, determinations of amount in controversy, and venue. The Clarification Act went into effect on January 6, 2012. Whether the Clarification Act will live up to its namesake is yet to be determined.

Second, on December 16, 2011, the Texas Supreme Court issued its opinion in *Minton v. Gunn*, 355 S.W.3d 634 (Tex. 2011), which held that, where a plaintiff asserts a state legal malpractice claim based on alleged mishandling of an underlying patent claim, over which the federal courts possess exclusive jurisdiction, Texas state courts lack jurisdiction over the state legal malpractice claim. *Minton* followed the reasoning of the Federal Circuit Court of Appeals in holding that because an element of the plaintiff's legal malpractice claim requires proof that, but for the alleged negligence, he would have been successful in the underlying patent claim, the malpractice action necessarily arises under federal law, and Texas courts lack subject matter jurisdiction over it.

Part II of this article sets out the nuts and bolts of removal to federal court. Part III discusses the changes implemented by the Clarification Act. Part IV discusses the Texas Supreme Court's opinion in *Minton*. Part V provides a few helpful tips for removing a case to federal courts in Texas, including some of the local rules governing removal.

II. The Basics of Removal

The mechanics and jurisprudence of removal fill entire textbooks. This section provides a high-level overview on the basics of removal to set the stage for the sections that follow.

The right to remove a case to federal court is based in 28 U.S.C. § 1441, which

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provides in part that to be removable, an action must be (1) a civil action; (2) brought in a state court; and (3) one over which a federal district court would have original jurisdiction. A federal court has original jurisdiction over an action if the claim is one that "arises under" federal law ("federal question jurisdiction" *e.g.*, 28 U.S.C. §§ 1331, 1338) or if the requirements for diversity jurisdiction are met (28 U.S.C. § 1332).

Federal courts are courts of limited subject-matter jurisdiction.[2] Original subject-matter jurisdiction "can neither be conferred nor destroyed by the parties' waiver or agreement."[3] In fact, both federal district and appellate courts must examine the bases for their jurisdiction, *sua sponte* if necessary.[4] "The burden of establishing federal jurisdiction rests on the party seeking the federal forum."[5]

Federal Question Jurisdiction

To determine whether the claim arises under federal law, courts examine the "well pleaded" allegations of the complaint, ignoring potential defenses.[6] "The presence or absence of federal question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face on the plaintiff's properly pleaded complaint."[7] "[T]he federal question must be presented by plaintiff's complaint as it stands at the time the petition for removal is filed and the case seeks entry into the federal system. It is insufficient that a federal question has been raised as a matter of defense or as a counterclaim."[8] Thus, where a plaintiff could maintain claims under both federal and state law, the plaintiff can typically prevent removal by ignoring the federal claim and alleging only state law claims. "The party who brings the suit is master to decide what law he will rely upon."[9]

Exceptions to this general rule include complete preemption or where a specific statute provides for removal of a specific type of claim. Also, "arising under" jurisdiction may exist "over state-law claims that implicate significant federal issues."[10] In such cases, federal jurisdiction exists where "a state-law claim [1] necessarily raise[s] a stated federal issue, [2] actually disputed and [3] substantial, [4] which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities."[11] More will be said in Part IV about this aspect of "arising under" jurisdiction.

Diversity Jurisdiction

Diversity of citizenship jurisdiction exists where "the matter in controversy

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[2] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

[3] *Adair v. Lease Partners, Inc.*, 587 F.3d 238, 241 (5th Cir. 2009).

[4] *Arena v. Graybar Elec. Co.*, 669 F.3d 214, 223 (5th Cir. 2012); *EEOC v. Agro Distrib., LLC*, 555 F.3d 462, 467 (5th Cir. 2009); *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 919 (5th Cir. 2001).

[5] *Arena*, 669 F.3d at 223 (citing *Howery*, 243 F.3d at 919).

[6] *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003).

[7] *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987).

[8] *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 326-27 (5th Cir. 1998).

[9] *Caterpillar*, 482 U.S. at 392.

[10] *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005).

[11] *Id.* at 314.

exceeds the sum or value of $75,000, exclusive of interest and costs, and is between (1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States."[12] Diversity requires that all of the defendants (served or not) be citizens of different states than any of the plaintiffs.[13]

A corporation is a "citizen" of both the state or foreign state of its incorporation and of the state or foreign state where it has its principal place of business.[14] The Supreme Court has recently clarified that a corporation's principal place of business is where it has its "nerve center"—where the company's officers "direct, control, and coordinate the corporation's activities."[15] As discussed in Part V, the citizenship of each member of an unincorporated association or partnership must be considered for determining diversity.[16] Finally, for purposes of removal based on diversity jurisdiction, "none of the parties in interest properly joined and served as defendants" may be a citizen of the forum state—the forum-defendant rule.[17]

Removal Procedure

The right to remove a case from state to federal court is vested exclusively in "the defendant or the defendants."[18] Because the right of removal is vested exclusively in defendants, a plaintiff who has chosen to commence the action in state court cannot later remove to federal court, even to defend against a counterclaim.[19] The "well-established rule is that the plaintiff, who chose the forum, is bound by that choice and may not remove the case."[20]

A written "notice of removal" must be filed in the federal court and signed by the attorney for the removing party or by the party himself.[21] The removing defendant must also file a copy of all process, pleadings, and orders served on the defendant in the state court action.[22] The Clarification Act has tinkered with the 30-day period for removal, which will be addressed in Part III below. But the basic rule still governs: a defendant has 30-days after receipt of service of the initial pleading "or other paper from which it may first

[12] 28 U.S.C. § 1332(a).

[13] *Id.*

[14] *Id.* § 1332(c)(1).

[15] *Hertz Corp. v. Friend*, 130 S.Ct. 1181, 1192 (2010).

[16] *See Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990).

[17] 28 U.S.C. § 1441(b)(2); *see also In re 1994 Exxon Chemical Fire*, 558 F.3d 378 (5th Cir. 2009) (citing this as the "forum defendant rule").

[18] 28 U.S.C. § 1441(a); 28 U.S.C. § 1446(a); *see also Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).

[19] *See* 14C Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction 3d § 3731 (1998).

[20] *Scott v. Commc'ns Servs., Inc.*, 762 F. Supp. 147, 150 (S.D. Tex. 1991).

[21] 28 U.S.C. § 1446(a).

[22] *Id.*

be ascertained that the case is one which is or has become removable" to file the notice of removal.[23] Once the notice of removal is filed in the federal court, the removing defendant has to give notice to all adverse parties and must file its copy with the state court. [24]

Cases are removed to the "federal district court for the district and division embracing the place where such action is pending."[25] The federal removal statute fixes the venue of the removed action in the district within which the state court where the original action was brought sits, irrespective of whether venue would be proper in that district under the federal venue provisions of 28 U.S.C. § 1391.[26]

Once a case has been removed from state court, it is subject to the Federal Rules of Civil Procedure.[27] Following removal, if a defendant has not yet answered or otherwise appeared, it must answer or present other defenses within the longest of: "(A) 21 days after receiving--through service or otherwise--a copy of the initial pleading stating the claim for relief; (B) 21 days after being served with the summons for an initial pleading on file at the time of service; or (C) 7 days after the notice of removal is filed."[28]

Finally, once a case is removed, a plaintiff has 30 days to move to remand on the basis of any defect in the removal other than lack of subject matter jurisdiction.[29] As noted above, defects in a federal court's subject matter jurisdiction may be raised at any time.[30] Under Section 1447(d), "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise."[31] The Fifth Circuit has "construed the 28 U.S.C. § 1447(d) prohibition against appellate review of remand orders as being limited to those situations where the district court's remand order is grounded upon either subject matter jurisdiction or a timely filed § 1447(c) motion asserting a defect in removal."[32] However, a remand order may be appealed where the district court based its decision on an affirmative exercise of discretion rather than on a finding of lack of jurisdiction.[33] In those limited instances where an appeal is permitted, a district court's remand order is considered final for appeal purposes.[34] Section 1447(c) provides district courts the discretion to award fees where "the

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[23] *Id.* § 1446(b)(2)(B).

[24] *Id.* § 1446(d).

[25] *Id.* § 1441(a).

[26] *See Collin County v. Siemens Business Servs., Inc.*, 250 F. App'x 45, 51-52 (5th Cir. 2007).

[27] Fed. R. Civ. P. 81(c)(1) ("These rules apply to a civil action after it is removed from a state court.").

[28] Fed. R. Civ. P. 81(c)(2).

[29] 28 U.S.C. § 1447(c).

[30] *Id.*; *EEOC v. Agro Distrib., LLC*, 555 F.3d 462, 467 (5th Cir. 2009).

[31] 28 U.S.C. § 1447(d).

[32] *Albarado v. S. Pac. Transp. Co.*, 199 F.3d 762, 764 (5th Cir. 1999).

[33] *See Regan v. Starcraft Marine, LLC*, 524 F.3d 627, 631 (5th Cir. 2008).

[34] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 713 (1996) (holding that remand order puts litigants "effectively out of court").

removing party lacked an objectively reasonable basis for seeking removal."[35]

III. Federal Courts Jurisdiction and Venue Clarification Act of 2011

The Clarification Act seeks to bring "more clarity to the operation of the Federal jurisdictional statute and facilitate the identification of the appropriate State or Federal court where actions should be brought."[36] It makes the most impact on the standards governing removal of diversity actions to federal court. It applies to all actions commenced after January 6, 2012. This article will address the Clarification Act's effect on the 30-day removal window and the codification of the "rule of unanimity," revisions to the "separate and independent" claims provision, the addition of a bad faith exception to the one-year limit on removal, clarification of the process for determining the amount in controversy, and clarification of the diversity jurisdiction rules with respect to resident aliens, corporations with foreign contacts, and insurers.

Removal in Multiple-Defendant Cases

Perhaps the most notable change is the clarification that each defendant in a multi-defendant suit now has its own 30-day window to remove. Because the old statute only referenced a single defendant, courts disagreed on how to interpret it in cases with multiple defendants.[37] Importantly for litigators in Texas, until enactment of the Clarification Act, the Fifth Circuit required removal within 30 days of service upon the first-served defendant.[38] This rule effectively meant that a later-served defendant's rights to remove could be eliminated if the first-served defendant chose not to remove the case.

To resolve the dispute, Congress adopted the later-served defendant rule, under which each defendant, no matter when they are added to the lawsuit, has its own 30-day period to seek removal. "Fairness to later-served defendants, whether they are brought in by the initial complaint or an amended complaint, necessitates that they be given their own opportunity to remove, even if the

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[35] *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005); 28 U.S.C. § 1447(c).

[36] H.R. Rep. No. 112-10, at 1 (2011).

[37] *Compare Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202 (11th Cir. 2008) (concluding that the 30-day period runs from the date of service on the last-served defendant and permitting earlier-served defendants who failed to act during their own 30-day period to join in, or consent to, the last served defendant's timely removal); *Marano Enterprises v. Z-Teca Restaurants, LP*, 254 F.3d 753 (8th Cir. 2001) (holding that each defendant has 30 days to effect removal, regardless of when or if other defendants had sought to remove); and *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527 (6th Cir. 1999) (holding that time for removal in a case involving multiple defendants runs from the date of service on the last-served defendant, and permitting defendants who failed to remove within their own 30-day period to join the timely removal petition of a later-served defendant), *with Getty Oil Corp. v. Ins. Co. of North America*, 841 F.2d 1254 (5th Cir. 1988) (holding that the first-served defendant and all then served defendants must join in the notice of removal within 30 days after service upon the first-served defendant); *but cf. McKinney v. Board of Trustees of Mayland Community College*, 955 F.2d 924 (4th Cir. 1992) (holding that each defendant may have 30 days to file notice of removal, and rejecting the *Getty Oil* argument that served defendants must join a petition for removal within the time specified for the first-served defendant).

[38] *Getty Oil Corp.*, 841 F.2d at 1254 .

earlier-served defendants chose not to remove initially."[39]

The Clarification Act also codifies in new subparagraph (b)(2)(A) the judicially created "rule of unanimity" for removal in cases involving multiple defendants.[40] Under that rule, which is generally traced to the Supreme Court decision in *Chicago, Rock Island & Pac. Ry. v. Martin*, 178 U.S. 245, 251 (1900), all defendants who have been properly joined and served must join in or consent to removal.[41] To accompany the later-served defendant rule, the Clarification Act allows earlier-served defendants to join in or consent to removal by a later-served defendant. This rule applies only to cases removed under Section 1441(a).

Joinder of Federal- and State-Law Claims and the "Sever-and-Remand" Rule

The Clarification Act revises the "separate and independent" claim provision of § 1441(c), dealing with the removal of civil actions that include both federal and *unrelated* state claims. Previously, a defendant could remove the entire case whenever a "separate and independent" federal question claim was joined with one or more non-removable claims. To protect the defendant's right to remove the federal claims – and to avoid constitutional problems that some courts have perceived[42] – the new provision requires severance and remand of claims not within the original or supplemental jurisdiction of the district court. The revised Section 1441(c) now provides as follows:

> (1) If a civil action includes--
>
> (A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and
>
> (B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute, the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).
>
> (2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in

[39] H.R. Rep. No. 112-10, at 14 (2011).

[40] 28 U.S.C. § 1446(b)(2)(A).

[41] H.R. Rep. No. 112-10, at 13 (2011).

[42] *See* H.R. Rep. No. 112-10, at 12 (2011) (noting that "[s]ome Federal district courts have declared the provision unconstitutional or raised constitutional concerns because, on its face, subsection 1441(c) purports to give courts authority to decide state law claims for which the Federal courts do not have original jurisdiction (*e.g.*, *Salei v. Boardwalk Regency Corp.*, 913 F. Supp. 993, 1007 (E.D. Mich. 1996)). Other courts have chosen simply to remand the entire case to state court, thereby defeating access to Federal court (*e.g.*, *Moralez v. Meat Cutters Local 539*, 778 F. Supp. 368 (E.D. Mich. 1991)).").

> paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).[43]

In so doing, it strips federal courts of discretion to hear unrelated state law claims in cases removed based on federal question jurisdiction. The revisions clarify that the inclusion of an unrelated state law claim does not defeat the defendant's ability to remove an otherwise properly removable action based on federal law claims. However, the revisions require the court to sever the claims over which it does not have original or supplemental jurisdiction and "remand the severed claims to the State court from which the action was removed."[44]

The "Bad Faith" Exception to the 1-Year Removal Window

District courts are now authorized to allow removal — even after the statutory one year limit on removal petitions – if the court finds that the plaintiff acted in "bad faith" to prevent removal based on diversity of citizenship. As a result, a plaintiff can no longer safely use the common tactic of adding a non-diverse party to prevent removal from the state court, wait for the one-year removal period to end and then voluntarily drop the non-diverse party. It adopts a carefully crafted "bad faith" exception to the statutory provision prohibiting removal of a diversity case more than one year after filing:

> (1) A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.[45]

Importantly, if a plaintiff deliberately fails to disclose the amount in controversy to prevent removal, such act would constitute bad faith.[46] It is unclear what effect this change will have on the number of cases removed to federal court. One possibility is that plaintiffs' lawyers may attempt to keep all defendants in the case through trial. Another possibility is that defendants will feel emboldened to remove more cases and challenge the plaintiff's pleadings as "bad faith." Aside from the example provided in subsection (c)(3)(B), the Clarification Act does not define "bad faith."

Amount in Controversy

The Clarification Act also modifies the amount in controversy rules in cases in which the initial pleading seeks nonmonetary relief or state practice does not allow a specific monetary demand or permits recovery of damages in excess of the amount demanded. In such cases, defendants may now assert the amount in controversy in the notice of removal. "The removal will succeed if the district court finds by a preponderance of the evidence that the amount in controversy exceeds the amount specified in 28 U.S.C. § 1332(a), presently $75,000."[47]

Moreover, it allows removal after the 30-day removal period if defendants later discover that there is a sufficient amount in controversy. "If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in

[43] 28 U.S.C. § 1441(c).

[44] *Id.*

[45] 28 U.S.C. § 1446(c).

[46] *Id.*, § 1446(c)(3)(B).

[47] H.R. Rep. No. 112-10, at 16 (2011).

controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an 'other paper' under subsection (b)(3)."[48] This provision could lead to more cases being removed outside of the initial 30-day removal period if defendants believe the damage amount has increased or been clarified.

Congress included this provision because "many defendants faced with uncertainty regarding the amount in controversy remove immediately—rather than waiting until future developments provide needed clarification—out of a concern that waiting and removing later will result in the removal's being deemed untimely. In these cases, Federal judges often have difficulty ascertaining the true amount in controversy, particularly when removal is sought before discovery occurs. As a result, judicial resources may be wasted and the proceedings delayed when little or no objective information accompanies the notice to remove."[49] New subparagraph 1446(c)(3)(A) clarifies that the defendant has the right to take discovery in the state court to help determine the amount in controversy without the risk of waiving removal.

Citizenship of Resident Aliens, Corporations, and Insurers

In the single provision affecting original jurisdiction, the Clarification Act narrows the resident-alien provision at the end of § 1332(a) by removing language by which resident aliens were "deemed" citizens of the states in which they resided. The new provision provides that district courts shall not have diversity of citizenship jurisdiction under paragraph 1332(a)(2) of a claim between a citizen of a state and a citizen or subject of a foreign state admitted to the United States for permanent residence and domiciled in the same state.[50] Accordingly, resident aliens are no longer "deemed" citizens of their states of residence, and thus diversity jurisdiction is not available in a suit between two resident aliens even if they are domiciled in different states.[51]

With respect to foreign corporations, the Clarification Act provides that all corporations, foreign or domestic, are regarded as citizens of both their place of incorporation and their principal place of business. The new amendment to Section 1332(c) provides, in part, that "a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business."[52] The addition of "foreign state" in two places was made to clarify that suits between "two aliens do not satisfy the jurisdictional requirements of subsection 1332(a)."[53] The practical implication here is the "denial of diversity jurisdiction in two situations: (1) where a foreign corporation with its principal place of business in a state sues or is sued by a citizen of that same state, and (2) where a citizen of a foreign country (alien) sues a U.S. corporation with its principal place of business abroad."[54]

Finally, for those who practice in Louisiana and similar states that allow for direct actions against insurance companies, the Clarification Act amends Section 1332(c)(1) to provide the same broadened definition of citizenship for an insurance company engaged in direct-action litigation. Formerly, section 1332(c)(1) deemed an

[48] 28 U.S.C. § 1446(c)(3)(A).

[49] H.R. Rep. No. 112-10, at 15 (2011).

[50] 28 U.S.C. § 1332(a)(2); H.R. Rep. No. 112-10, at 7 (2011).

[51] H.R. Rep. No. 112-10, at 7 (2011).

[52] 28 U.S.C. § 1332(c)(1).

[53] H.R. Rep. No. 112-10, at 9-10 (2011).

[54] *Id.*, at 9.

insurer in such a lawsuit a citizen of (1) any state by which the insurer had been incorporated and (2) of the state in which it had its principal place of business. Now, under Section 1332(c)(1), an insurer in a direct action is also deemed a citizen of the state and *foreign state* (1) in which it is incorporated, (2) has its principal place of business, and (3) in which the *insured* is a citizen.[55] "The provision was enacted primarily in response to a surge in diversity case filings against insurance companies in Federal courts in Louisiana."[56]

IV. How the Texas Supreme Court's Decision in *Minton v. Gunn* Affects Removal

Although *Minton* did not directly address federal removal jurisdiction or procedure, the case may have a lasting impact on the types of cases that defendants may remove to federal court. The issue in *Minton* was whether "federal courts possess exclusive subject-matter jurisdiction over state-based legal malpractice claims that require the application of federal patent law."[57] Stated differently, *Minton* considered whether *Texas state courts* have jurisdiction to hear state legal malpractice claims in which the case-within-a-case arose out of federal patent law, over which federal courts exercise exclusive jurisdiction under 28 U.S.C. § 1338. The answer, according to *Minton*, is "No," at least for those cases in which federal issues are substantial and do not upset the federal/state balance of judicial responsibilities.

In *Minton*, the state malpractice action followed dismissal of a federal suit filed by Minton alleging patent infringement.[58] The defendant in the federal suit moved for summary judgment on grounds that Minton's patent was invalid under the "on-sale bar" rule.[59] Under that rule, a patent is invalid when the claimed invention is sold more than a year prior to the patent application date. The federal district court granted the defendants' motion for summary judgment and declared the patent invalid.[60] Minton then retained new counsel to file a motion to reconsider based on the experimental use exception to the on-sale bar rule. The district court denied the motion to reconsider and the Federal Circuit affirmed.[61]

After losing his federal infringement suit, Minton sued his original attorneys in state court alleging that they committed malpractice by not timely raising the experimental use exception.[62] Minton claimed that the attorneys' negligence had cost him the opportunity to win his infringement suit or alternatively had cost him a potential settlement of his $100,000,000.00 claim.[63] The attorneys moved for summary judgment alleging that the experimental use exception

[55] 28 U.S.C. § 1332(c)(1).

[56] H.R. Rep. No. 112-10, at 10 (2011) ("Because of the broad review of jury verdicts that the Louisiana practice permits, lawyers for plaintiffs in that state greatly preferred to be in Federal court rather than in state court. They were able to convert what otherwise would have been a routine automobile-accident case between two Louisiana citizens into a diversity action by taking advantage of the state statute permitting suit directly against the insurer without joinder of the insured." (internal quotations omitted)).

[57] *Minton v. Gunn*, 355 S.W.3d 634, 636 (Tex. 2011).

[58] *Id.* at 637-38.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 638.

[62] *Id.*

[63] *Id.*

was neither a legally nor a factually viable defense and, therefore, Minton could not win his malpractice claim. The state district court granted the motion and Minton appealed.[64]

While the appeal was pending, the Federal Circuit Court of Appeals decided two cases involving attorney malpractice claims in Texas: *Air Measurement Technologies, Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P.*, 504 F.3d 1262 (Fed. Cir. 2007), and *Immunocept, LLC v. Fulbright & Jaworski, LLP*, 504 F.3d 1281 (Fed. Cir. 2007). In both cases, the Federal Circuit found that the state-law claims arose under the federal Patent Act and, therefore, were subject to exclusive federal jurisdiction.[65] Based on these decisions, Minton moved to dismiss his appeal. The Fort Worth Court of Appeals declined to follow the federal decisions, denied the motion to dismiss, and affirmed the judgment.[66] The Texas Supreme Court granted Minton's petition for review.

Before considering the merits of the appeal, the Supreme Court considered whether the claim arose under a federal statute and, therefore, whether the federal courts had exclusive jurisdiction to hear the malpractice claim. The Court applied a four-part test derived from *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005) in determining that the federal courts had exclusive jurisdiction over Minton's malpractice claim. "[F]ederal question jurisdiction exists where (1) resolving a federal issue in necessary to the resolution of the state-law claim; (2) the federal issue is actually disputed; (3) the federal issue is substantial; and (4) federal jurisdiction will not disturb the balance of federal and state judicial responsibilities."[67] The Supreme Court held that Minton's claim fit within this analytical framework and dismissed the case because the Texas court lacked subject matter jurisdiction to hear Minton's legal malpractice claim.

Central to the court's reasoning on the first element was the fact that under Texas law, "[w]hen a legal malpractice case arises from prior litigation, the plaintiff has the burden to prove that, 'but for' the attorney's breach of duty, he or she would have prevailed on the underlying cause of action and would have been entitled to judgment."[68] "This aspect of the plaintiff's burden is commonly referred to as the 'suit within a suit' requirement."[69] In *Minton*, to resolve the legal malpractice claim, the plaintiff had to show that his patent claim would have been successful but for his lawyer's failure to plead timely the experimental use exception.[70] Thus, the federal issue was a necessary element of the state legal malpractice claim.[71]

The second *Grable* element was easily satisfied because the parties disputed whether the experimental use exception would have been a viable defense in the underlying patent claim.[72]

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[64] *Id.* at 638-39.

[65] *Id.* at 639.

[66] *Id.*

[67] *Id.* at 640.

[68] *Greathouse v. McConnell*, 982 S.W.2d 165, 172-73 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

[69] *Id.*

[70] *Minton*, 355 S.W.3d at 642("[A] determination of whether Minton would have won his underlying federal patent infringement action necessarily requires a consideration of the legal and factual viability of the experimental use defense.").

[71] *Id.*

[72] *Id.* at 642-43.

With respect to the third element, *Minton* reasoned that because the success or failure of the state-law malpractice claim depended upon the resolution of the underlying patent issues, the embedded federal issue was substantial under the *Grable* test.[73] In analyzing this element, the Texas Supreme Court reasoned that because Minton's malpractice claim was dependent upon his ability to prove the viability of the exception to the on-sale bar, and that the failure to plead that exception proximately caused him to lose the infringement action, the federal issues in the malpractice action were substantial.[74] In reaching its holding, the Court looked to the court the reasoning in *USPPS, Ltd. v. Avery Dennison Corp.*, 647 F.3d 274, 280-82 (5th Cir. 2011), and several cases from the Federal Circuit, including *Warrior Sports, Inc. v. Dickinson Wright, P.L.L.C.*, 631 F.3d 1367, 1372 (Fed. Cir. 2011), *Davis v. Brouse McDowell, LPA*, 596 F.3d 1355 (Fed. Cir. 2010), *cert. denied*, 131 S.Ct. 118 (2010), and *Immunocept LLC v. Fulbright & Jaworski, LLP*, 504 F.3d 1281, 1285 (Fed. Cir. 2007). Based on these authorities, the *Minton* court held that "because the success of Minton's malpractice claim is reliant upon the viability of the experimental use exception as a defense to the on-sale bar, we hold that it is a substantial federal issue satisfying the third prong of the Grable inquiry."[75]

With respect to the fourth *Grable* element—the federal/state balancing test—the court reasoned that "[a]lthough we recognize that legal malpractice claims traditionally fall under the domain of state courts, we conclude that federal courts may decide this malpractice case without upsetting the jurisdictional balance between federal and state courts."[76] The court reasoned that because Congress vested federal courts with exclusive jurisdiction to hear patent disputes, the federal/state balance is not upset.[77] The court reasoned that litigants and the federal government have an interest in the uniform application of the patent laws by courts well-versed in that subject matter.[78] The court also allayed concerns of a rash of state malpractice cases being dismissed or removed to federal court by instructing that each case satisfy the *Grable* test.[79]

Minton presents defense counsel in professional negligence cases with important strategy decisions about whether removal may be appropriate. At a minimum, *Minton* instructs counsel to carefully examine the claims in the underlying lawsuit immediately upon service to determine whether a basis for removal may exist.

Only time will tell what impact *Minton* will have on which courts will hear state legal malpractice cases based on underlying federal claims. On October 5, 2012, the U.S.

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[73] *Id.* at 643-44.

[74] *Id.*

[75] *Id.* at 644.

[76] *Id.* at 644-45.

[77] *Id.* (comparing *USPPS*, 647 F.3d at 282 (finding federal-question jurisdiction in a state-based tort claim where the underlying proceedings involved substantial questions of patent law), *with Singh v. Duane Morris LLP*, 538 F.3d 334, 338 (5th Cir. 2008) (recognizing the importance of federalism considerations and holding a state-based legal malpractice resulting from an underlying trademark dispute did not meet the standard for federal jurisdiction)). Cases involving trademark are not subject to exclusive federal jurisdiction. *See* 28 U.S.C. § 1338(b).

[78] *Id.* at 646.

[79] *Id.*

Supreme Court granted certiorari in *Minton*. Accordingly, it will soon be determined whether *Minton* and the Federal Circuit have departed from the Supreme Court's "arising under" jurisdiction, or whether removal of certain professional negligence cases to federal court still exists.

V. Tips to Avoid Remand

For the unwary and unaware, a procedural defect in the removal of a case to federal court can result in a swift remand. Careful review of the applicable removal statutes, Federal Rules, and local rules is always advisable. And for removal based on diversity jurisdiction in cases involving businesses or non-profit organizations, pay close attention to the types of entities involved and understand the rules for determining citizenship of those parties.

Local Rules

Three of the four federal districts in Texas have their own local rules governing removal procedure. The Western District has no local rule pertaining to removed actions. The Southern, Northern, and Eastern Districts each has its own nuanced filing requirements that, if not followed, may result in remand. In the Southern District, Local Rule 81 provides as follows:

Notices for removal shall have attached ***only*** the following documents:

1. All executed process in the case;

2. Pleadings asserting causes of action, e.g., petitions, counterclaims, cross actions, third-party actions, interventions and all answers to such pleadings;

3. All orders signed by the state judge;

4. The docket sheet;

5. An index of matters being filed; and

6. A list of all counsel of record, including addresses, telephone numbers and parties represented.[80]

In the Northern District, Local Rule 81.1 provides as follows:

> (a) The party or parties that remove a civil action from state court must provide the following to the clerk for filing:
>
> (1)a completed civil cover sheet;
> (2) a supplemental civil cover sheet; and
> (3) if there is a "related case," as defined by LR 3.3(b)(3) or (b)(4), a notice of related case that complies with LR 3.3(a); and
> (4) a notice of removal with a copy of each of the following attached to both the original and the judge's copy—
>
> (A) an index of all documents that clearly identifies each document and indicates the date the document was filed in state court;

[80] *Available at* http://www.txs.uscourts.gov/district/rulesproc/dclclrl2009.pdf (emphasis added).

> (B) a copy of the docket sheet in the state court action;
> (C) each document filed in the state court action, except discovery material (if filed on paper, each document must be individually tabbed and arranged in chronological order according to the state court file date; if filed by electronic means, each document must be filed as a separate attachment); and
> (D) a separately signed certificate of interested persons that complies with LR 3.1(c) or 3.2(e).
>
> (b) If the documents listed in subsection (a) of this rule are filed on paper, they must be two-hole punched at the top, and either stapled in the upper, left-hand corner or secured at the top with durable fasteners if too thick to staple. If these documents are too voluminous to be filed as a single unit, each unit must be secured in the manner required by this subsection (b) and must contain a cover sheet that identifies the case by its caption and by the civil action number assigned by the clerk.[81]

In addition, Northern District Local Rule 83.10 requires that local counsel appear in all cases.

> Unless exempted by LR 83.11 [which applies only to lawyers from the U.S. Department of Justice and the Texas Attorney General's Office], local counsel is 'required in all cases where an attorney appearing in a case does not reside or maintain an office in this district'. 'Local counsel' means a member of the bar of this court who resides or maintains an office within 50 miles of the division in which the case is pending. Attorneys desiring to proceed without local counsel must obtain leave from the presiding judge. If the request for leave is denied, written designation of local counsel must be filed within 14 days of the denial.[82]

In the Eastern District, Local Rule 81 governs removed actions:

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[81] *Available at* http://www.txnd.uscourts.gov/pdf/CIVRULES.pdf .

[82] *Id.* Neither the Southern District nor the Eastern District has a similar local counsel requirement. *See* So. Dist. Tex. Loc. R. 83.1(K) (governing practice without admission), *available at* http://www.txs.uscourts.gov/district/rulesproc/dclclrl2009.pdf; E. Dist. Tex. Loc. R. AT-1 (governing Admission to Practice), *available at* http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=1164.

Parties removing cases from state court to federal court shall comply with the following:

(a) File with the clerk a notice of removal which reflects the style of the case exactly as it was styled in state court;

(b) If a jury was requested in state court, the removed action will be placed on the jury docket of this court provided the removing party or parties includes the word "jury" at the top of the notice for removal, immediately below the case number (see LOCAL RULE CV-38(a));

(c) The removing party or parties shall furnish to the clerk the following information at the time of removal:

(1) a list of all parties in the case, their party type (e.g., plaintiff, defendant, intervenor, receiver, etc.) and current status of the removed case (e.g., pending, dismissed);
(2) a civil cover sheet and certified copy of the state court docket sheet; a copy of all pleadings that assert causes of action (e.g., complaints, amended complaints, supplemental complaints, petitions, counter-claims, cross-actions, third party actions, interventions, etc.); all answers to such pleadings and a copy of all process and orders served upon the party removing the case to this court as required by 28 U.S.C. § 1446(a);
(3) a complete list of attorneys involved in the action being removed, including each attorney's bar number, address, telephone number, and party or parties represented by him/her;
(4) a record of which parties have requested trial by jury (this information is in addition to placing the word "jury" at the top of the notice of removal immediately below the case number); and
(5) the name and address of the court from which the case is being removed.

(d) Any motions pending in state court made by any party will be considered moot at the time of removal unless they are re-urged in this court.[83]

"Peeling the onion" of limited liability companies and limited partnerships

One final word of caution about removing cases based in diversity where any of the parties are limited liability companies or partnerships: know the rules the federal court will use to determine each entity's citizenship for diversity purposes. In the Fifth Circuit, the citizenship of a limited liability company or a partnership depends upon the citizenship of each member or partner of the business.[84]

[83] *Available at* http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=1164.

[84] *See Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1080 (5th Cir. 2008) (citizenship of LLC is determined by citizenship of all of its

But the analysis rarely ends there. If the members or partners of the LLC or partnership are themselves LLCs or partnerships, the analysis continues. The court must "further trac[e] their citizenships down the various organizational layers where necessary" to satisfy itself that complete diversity exists between the parties.[85] Importantly, the "ultimate burden on the issue of jurisdiction rests with . . . the party invoking federal jurisdiction."[86]

Where the plaintiff is an LLC or partnership and the citizenship of its members or partners is unknown, the defendant is faced with a difficult decision. On the one hand, the defendant can wait and take discovery to determine whether diversity exists and remove upon the "other paper" basis provided in 28 U.S.C. § 1446(b)(3).[87] Waiting comes with the risk that the federal court will disagree with your characterization of discovery as "other paper" upon which it could be determined that the case was removable. The other option is to remove immediately and seek jurisdictional discovery from the federal court to confirm diversity. The risk here is the possibility of a denial of the request for discovery and an immediate remand. Unfortunately, there is no clear answer. Perhaps this issue will be considered in the next round of legislation on federal court jurisdiction and removal procedures.

VI. Conclusion

The full impacts of the Clarification Act and *Minton* are yet to be felt. As of the date of this article, there have been no significant decisions by federal courts interpreting the Clarification Act. But the Clarification Act and *Minton* are sure to be front-and-center as litigants and courts continue to explore these important issues.

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members); *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195-96 (1990) (citizenship of partnership determined by the citizenship of its partners); *Ronald Alexander Leblanc Trust v. Ransom*, 276 F. Supp. 2d 647, 651 (S.D. Tex. 2003) ("For the purposes of diversity jurisdiction, the citizenship of a trust is determined by the citizenship of the trustee or trustees," citing *Goldstick v. ICM Realty*, 788 F.2d 456, 458 (7th Cir. 1986) and *UICI v. Gray*, No. Civ. A. 3:01CV0921L, 2002 WL 356753, at *6 n.10 (N.D. Tex. March 1, 2002) (citing *Navarro Savings Ass'n v. Lee*, 446 U.S. 458, 462, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980))).

[85] *Mullins v. TestAmerica Inc.*, 564 F.3d 386, 397 (5th Cir. 2009).

[86] *Coury v. Prot*, 85 F.3d 244, 250-51 (5th Cir. 1996).

[87] "Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b)(3).

2012 Annual Meeting

Westin St. Francis –September 26-30, 2012– San Francisco, CA

San Francisco provided the perfect setting for the TADC 2012 Annual Meeting. The program contained over 11 hours of CLE and Program Co-Chairs Gayla Corley with Langley & Banack, Inc. in San Antonio and Mike Hendryx with Strong, Pipkin, Bissell & Ledyard, L.L.P. in Houston put together a top shelf cast of presenters. Justice Phil Johnson, of our Texas Supreme Court, provided an update of the court's activities and cases and Jett Hanna with the Texas Lawyers Insurance Exchange gave a presentation on "Legal Malpractice and the Ethical Lawyer", "Technology in the Courtroom", "Social Media", "Legal Writing for the Re-wired Brain", "Alternative Fee Agreements", "Business Development in the 21st Century" and "Defending Fiduciaries" helped round out the program.

Members and guests gathered on Friday evening for a special Awards Dinner on top of the St. Francis with panoramic 360-degree views of San Francisco.

Above: President Tom Ganucheau, Milton & Margaret Ann Colia with Carl Green

Above: Sandy Riney, Molly Chambers, Tom Riney & Dennis Chambers

Right: Don Kent, Chantel Crews, Michael Ancell, Mike Morrison & Jarad Kent

Right: Cindy & Neal Flagg with Lori Bensing & Scott Stolley

Justice Phil Johnson, Carla Johnson, with Mo & Doug McSwane

2012 Annual Meeting

Jim Hunter & Dan Worthington

Catherine Driskill, Jeri Worthington, Jim Hunter, Sofia Ramon & Milton Colia

Bruce & Jan Williams with Dan & Marissa Hernandez

Kristy & Rett Holiday with Slater, Sterling & Shanna Elza

Betsy & George Christian

2012 Annual Meeting

Keith & KaRynn O'Connell with
Tom & Lisa Ganucheau

Gaston Broyles, Junie Ledbetter, Michele & Mitch Smith with
Catherine & Kevin Driskill

Mitzi & Todd Mayfield with Ka en & Brad Douglas

Mark & Alisa Bennett

Mike Jung, Gretchen Megowen with
Cathy & Mark Stradley

2012 Annual Meeting

Jerry Fazio receives the TADC President's Award

Don Kent receives the TADC Founders' Award

2012 DRI Annual Meeting – New Orleans, LA – October 24-28, 2012

TADC Past President Keith B. O'Connell receives the Fred H. Seivert Award from DRI President Henry Sneath, for his service to the defense bar.

TADC Legislative Update

By George S. Christian, TADC Legislative Consultant

The Legislature convenes on January 8 with almost 50 new members of the House and Senate. Combined with the large freshman class entering the House two years ago, the number is almost 70. This relative inexperience, particularly in the House, may mean slow going on major issues—the budget, school finance, water, and transportation—as members find their footing. It also means that House committees will invariably have a number of new faces that will require getting up to speed before legislation can be considered. All in all, I would expect a somewhat slow start with a pretty significant logjam at the back end. At the same time, it is probably true that both chambers will be somewhat more conservative this session, especially the Senate, which will dampen the enthusiasm for new and expansive government spending. Indeed, it appears that much legislative attention will be focused on issues such as school vouchers, immigration, abortion rights, and other so-called "social" issues.

Unlike last session, the state heads into the next fiscal biennium in outstanding condition. While last session began with a $10 billion shortfall, this one will commence with as much as an $8 or $9 billion surplus. The Rainy Day Fund, thanks to high oil prices, has also recharged to the tune of about $10 billion. Money is thus plentiful, but don't expect much appetite for restoring last session's cuts and increasing levels of funding for existing programs. Governor Perry has made it quite clear that holding the line on spending and preserving the Rainy Day Fund continue to be important priorities for him, and it is unlikely that a conservative legislature will buck him on this point. Moreover, the uncertainty over the school finance litigation, currently in trial in an Austin district court, will defer any big decisions on school funding until the Texas Supreme Court rules in the latest case, probably sometime this summer or fall.

The make-up of the House and Senate have not substantially changed since last session. The GOP lost its supermajority of 101 members, dropping to 95 under the court-ordered redistricting plan that governed the 2012 election. The Senate remained at 19 Republicans and 12 Democrats, thanks to Sen. Wendy Davis's (D-Fort Worth) narrow victory over Rep. Mark Shelton. This almost assures that the Lieutenant Governor will be under increasing pressure to sidestep the two-thirds rule in the Senate on major issues with profound partisan disagreement, such as school vouchers and immigration. Senator Dan Patrick (R-Houston), the new chair of the Senate Education Committee, has made it clear that he will advocate changing the rule, which currently requires the agreement of 21 of 31 Senators to bring a bill to the floor for debate, to a lesser threshold, allowing the Republican majority to set the agenda. This battle will take place at the beginning of the session, when the Senate adopts its rules.

On the House side, Rep. Bryan Hughes (R-Mineola) is challenging two-term Speaker Joe Straus for the House leadership. Most observers believe

Speaker Straus remains in solid shape for re-election, although the number of new members voting in their first speaker election may make the process more interesting than it would otherwise be. Rep. Hughes is touting House rules reforms that would essentially bypass the role of the House Calendars Committee and bring more bills to the floor. Such a change would theoretically reduce the power of the Speaker, who appoints the members of Calendars and exercises some control over bills that come to the floor. By the same token, it is interesting to see a Speaker candidate lobbying for rules changes that might reduce the power of the office. The House elects the Speaker on the first day of session, so if a competitive Speaker's race actually develops in the next six weeks, it will come to a head by then.

It looks like it might be a relatively quiet session with respect to civil justice issues. TADC member and longtime Senator Robert Duncan (R-Lubbock) has indicated interest in trying once more to inject some sanity into the judicial selection process. As everyone knows, incumbent Supreme Court Justice David Medina lost his seat to a relatively unknown and somewhat controversial former trial judge from Harris County, John Devine. Moreover, three highly regarded members of the Fourth Court of Appeals in San Antonio lost their seats (although we are proud that TADC member Patricia Alvarez of Laredo won one of them), as did an incumbent on the Austin Court and an excellent gubernatorial appointee to the El Paso Court. In addition to that, the partisan vote in urban counties such as Dallas, Harris, and Bexar, has resulted in a fruit basket turnover in the past two election cycles, as those counties passed from red to blue. The same will likely be true of the Courts of Appeals in the near future, as margins are very tight, though still in favor of the GOP.

We keep saying this, but it needs to be said: TADC members fared very well in the 2012 election, and we can be proud as an organization of this fact. Longtime member Travis Clardy (R) from Nacogdoches defeated a multi-term House incumbent in the primary and easily won the general election. Rep. Sarah Davis (R-Houston), who has served with great distinction on the House Judiciary and Civil Jurisprudence Committee, defeated a strong challenger, Ann Johnson, to keep her seat. Senator Robert Duncan (R-Lubbock) and Rep. Rene Oliveira (D-Brownsville) will return for new terms. Additionally, Rep. Pete Gallego won a tough election to the United States Congress, defeating GOP incumbent Quico Canseco in the face of millions of dollars in negative, Superpac funded advertising against him. We have already mentioned Pat Alvarez's election to the San Antonio Court and should add that former TADC member Gina Benavides won re-election to the Corpus Christi Court. The good news here is that TADC members continue to run for and be elected to legislative and judicial office. This reflects the tremendous diversity of our membership and the commitment and dedication of our members to public service. No matter which way the political pendulum swings at a given moment, TADC members are always there for their communities, their profession, and the constitutional liberties they are sworn to uphold. There is good reason to be optimistic for the next legislative session and beyond.

TADC PAC Report

By V. Elizabeth (Junie) Ledbetter, Trustee Chairman
Davis & Wright, P.C.; Austin

It seems just yesterday, back in the summer of 2011, that Tom Ganucheau wrote in the TADC PAC Report: "The 83rd Legislative Session seems a world away, but in reality it is just around the corner." Well, we've come around the corner, and opening day for the 83rd Session, January 8, is just weeks away. Bills can be pre-filed beginning November 13; most likely there will be several bills on file by the time you receive this publication. TADC needs your help.

For more than 50 years, TADC has been a reasonable voice during the legislative session at the Texas Capitol. TADC members have worked with members of the House and Senate alike to craft legislation intended to provide the opportunity for the citizens of the State of Texas to exercise their right to be judged by their peers, while providing fair and balanced rules in the courtroom to do just that. In looking back through the years, TADC has been instrumental in providing a steady hand to keep the system balanced.

In the last few years, TADC leaders like Keith O'Connell, Dan Worthington, and many others, have worked tirelessly to evaluate proposed legislation and voice TADC concerns on proposed legislation, including the following:

- "Paid or incurred" initiatives addressing revisions of CPRC 18.001 and 18.002, as interpreted in conjunction with CPRC 41.0105;
- Loser Pay proposals;
- Expedited trials for claims between $10,000 and $100,000;
- Offer of settlement modifications;
  Barratry;
- Indemnification and additional insured provisions in construction contracts;
- Eminent domain;
- Landowner's duty to trespassers;
- Asbestos and silica claims;
- Court reorganization; and
- Juror note-taking and juror questions.

We expect that many controversial bills will again be introduced this next session, involving many of the same topics.

You are instrumental in keeping up the good work. We can all invest time and talent in reviewing, evaluating, and proposing appropriate language for legislation. You also 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.

Each year, TADC suggests a contribution the equivalent of one billable hourBa small price to protect the Texas trial system. We urge you to make the contribution that represents your dedication to the continuation of the civil justice system. We thank you for your support.

2012-2013 TADC PAC
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Texas Association of Defense Counsel PAC

The Political Action Committee of the Texas Association of Defense Counsel

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THE NEW TEXAS ANTI-SLAPP LAW: WHAT IS IT AND HOW DOES IT APPLY?

By Mark C. Walker, Cox Smith Matthews, Inc.

I. INTRODUCTION.

On June 17, 2011, Texas' new anti-SLAPP[1] law, entitled the Texas Citizens Participation Act (the "TCPA"), was signed into law, purportedly aimed at preventing frivolous lawsuits from stifling free speech activities.[2] As drafted, however, the TCPA will likely trigger significant unintended consequences, especially in cases involving reputational torts. The TCPA introduces a new dispositive motion that does not require the movant to show that the action is in fact frivolous. The TCPA includes an unknown standard of proof, mandatory fees and sanctions, and burden-shifting that raises questions as to the constitutionality of the law. The potential for abuse of this newly crafted dispositive motion is significant, and is addressed in detail in the full article that can be found at ***www.tadc.org*** This article describes important provisions and questions about the new law.

II. THE TEXAS CITIZENS PARTICIPATION ACT: WHAT IS IT?

A. Background and Enactment of the TCPA.

1. What is a SLAPP lawsuit?

SLAPP suits are typically considered to be legally meritless suits designed, from their inception, to intimidate and harass critics into silence. The goal of a SLAPP suit is not to achieve a legal victory resulting in a judgment, but instead to make it prohibitively expensive and burdensome for the defendant to continue participation in her constitutionally protected activity. The concept assumes that the SLAPP plaintiff enjoys a great advantage in resources to fund litigation, and can afford to overwhelm and silence the defendant critic with lawsuit expenses and fees.

2. Stated Purpose: Prevent Frivolous Suits.

Although the Act's legislative history states that it was intended to target "frivolous lawsuits aimed at silencing citizens who are participating in the free exchange of ideas,"[3] the Legislature did not discuss the applicability of existing anti-frivolous lawsuit rules and statutes, or how such established body of law was inadequate to curtail any perceived harm. The Legislature did not otherwise define a frivolous lawsuit in the context of the statute, or define what constitutes a "meritorious lawsuit" that would otherwise not be subject to the anti-SLAPP motion to dismiss. Despite the stated legislative intent, the Legislature did not require that a movant prove that a suit was frivolous in order to have it dismissed under the TCPA.

3. Underlying Purpose: Protection of Media Defendants.

It appears that the statute was a solution in search of a problem. The legislative history of the TCPA was silent about whether any studies or data existed to demonstrate a particular need for the

bill, other than generally stating that "abuses of the legal system have also grown, including the filing of frivolous lawsuits aimed at silencing these citizens who are participating in the free exchange of ideas."[4] There was no data suggesting that there was any widespread abuse of suits involving speech issues, nor was there any indication that the bill was intended to correct any specific case.

Further research reveals the impetus behind the passage of the Act. Media organizations, including the Freedom of Information Foundation of Texas "FOIFT," were the principal drafters and proponents of both the TCPA[5] and the 2009 adoption of the reporter's privilege, codified in TEX. CIV. PRAC. & REM. CODE § 22.021 *et seq.* The research is discussed in detail in the full article.

III. APPLICATION OF THE TCPA.

A. What claims are covered?

The TCPA applies to "a ***legal action*** [that] is ***based on***, ***relates to***, or ***is in response to*** a party's exercise of the right of free ***speech***, right to ***petition***, or right of ***association***…, "[6] which concepts are very broadly defined. A "legal action" is very broadly defined,[7] and although the Legislature went to great pains to define "free speech," "petition," "association," and "communication," it did not specify what it means by "based on, relates to, or is in response to…." Broadly stated, the Act applies to any judicial proceeding[8] about a communication related to anything in commerce or government. Despite the underlying David/Goliath premise of anti-SLAPP legislation, there is no discussion or requirement in disparity of resources to invoke the TCPA.

B. Exceptions to the TCPA.

The TCPA provides three general categories of exemptions from the application of the statute, including government enforcement actions,[9] suits for bodily injury, wrongful death, or survival,[10] and actions brought against a ("seller of goods about those goods").[11]

C. Procedure.

1. A New Form of Dispositive Motion.

The TCPA's motion to dismiss is a new procedure for summary dismissal of claims and suits based on matters outside the pleadings that does not grant any substantive rights or create a cause of action.

2. Deadline to File the Motion.

The motion to dismiss must be filed within 60 days following the service of the legal action. The time to file the motion to dismiss may be extended on a showing of good cause.[12] The length, or number, of extensions is not addressed in the statute.

3. Deadline for Hearing and Decision.

The hearing on the motion must be set not later than 30 days after the date of service of the motion, unless the court's docket conditions require a later hearing,[13] and there is no guideline as to how long the hearing may be delayed due to the court's "docket conditions." Importantly, there is no provision for a trial court to permit the hearing to be delayed for good cause, or to allow the respondent sufficient time to respond. The hearing can be conducted with minimal notice.[14] Once the hearing is set, the court must

rule on the motion not later than 30 days following the hearing.[15]

4. Discovery Stay.

When the motion is filed, it operates to immediately suspend all discovery in the underlying legal action until the court rules on the motion to dismiss.[16] This appears to be an automatic suspension that requires no further order of the court or other notice. The suspension of discovery would apparently refer to all discovery, including that unrelated to communication litigation. Nor is there any provision in the statute for remedies in the event that parties attempt to conduct discovery without leave of court, or whether the discovery stay applies to the entire case, if the motion to dismiss applies only to certain causes of action.

Limited discovery may be allowed on issues relevant to the motion to dismiss, based on a motion by the court or a party.[17] There is no provision for when a motion for discovery may be brought, whether a movant is entitled to hearing, or how the court may respond to such a motion. There does not appear to be any authority for a trial court to extend hearing deadlines in order to permit discovery for reasons unique to the parties, such as illness, incarceration, or any other reason that would normally constitute "good cause."

D. Standards and Burdens of Proof/Actions by Court.

1. What evidence may be considered?

The court is required to consider the pleadings and supporting and opposing affidavits.[18] The TCPA does not clearly indicate whether live testimony and evidence is permissible at the hearing, and there is no provision for any continuance of the hearing once it commences.

2. Burden of Proof on the Movant.

The standard for the defendant bringing the motion to dismiss is "preponderance of the evidence."[19] In order to require a dismissal of the underlying legal action, there is no requirement that the movant obtain any finding that the action against him was frivolous or groundless and brought in bad faith or for purposes of harassment, despite the avowed intent of the statute, or otherwise was brought for the purpose of harassing or maliciously inhibiting the free exercise of First Amendment rights. Importantly, the Legislature did not condition the application of the TCPA on a finding of improper motive by the plaintiff. Nor is there a requirement under the statute that the trial court take into consideration any disparity in the resources available to the parties.

3. Burden of Proof on the Respondent.

Once the movant files a verified motion that merely states the statutory allegations, the burden of proof shifts to the plaintiff/respondent. There are crucial questions about what the burden of proof on the respondent is and how it is met. The court "may not dismiss a legal action under this section if the party bringing the legal action establishes by ***clear and specific*** evidence a prima facie case for each essential element of the claim in question."[20] What does that mean? What must a respondent do to defeat a motion to dismiss?

i. "Clear and specific evidence" is undefined and, if it is meant to be a

higher standard of proof than "preponderance of the evidence," may very well violate the Open Courts provision of the Texas Constitution.

It is not clear what the Legislature meant by "clear and specific evidence," as there is no such recognized standard under Texas law for any cause of action. "Clear and specific evidence" is evidently derived from the reporter's privilege codified in 2009 in the "Journalists' Qualified Testimonial Privilege in Civil Proceedings" in which a party seeking to compel information from a reporter must make a "clear and specific showing" about the need to obtain the information. TEX. CIV. PRAC. & REM. CODE § 22.024. The "clear and specific showing" does not apply to any cause of action, or a burden of proof for any right of action for damages. Proponents want it to mean an intermediate standard of proof, though it should not mean anything other than some evidence of each element; otherwise, the Act would impermissibly impose a higher burden of proof that would ultimately be required of a plaintiff at the trial of the legal action.

If indeed "clear and specific evidence" is supposed to represent a "more significant burden" than a "preponderance of the evidence," the statute may very well run afoul of the open courts provisions of Article I, Section 13 of the Texas Constitution.[21]

ii. What is a "prima facie case?"

"Prima facie" appears to refer to some evidence on the elements of the cause of action, though the statute provides no definition.

iii. What about non-communication claims joined in the same lawsuit?

A Chapter 27 motion to dismiss may apply to all causes of action, regardless of whether they are based on a communication, because of the statute's application to "legal actions," and its application is not limited only to communication-based causes of action. When faced with a motion to dismiss an entire "legal action," the respondent may consider whether to avoid joining related claims in the same suit, or whether to seek to sever[22] certain claims.

4. Ruling by the Court – Dismissal Mandatory/Effect of Non-Suit.

If the movant meets her modest burden, the court has no discretion, but "*shall dismiss*" the legal action brought against the movant, so long as the nonmovant does not "establish" "clear and specific evidence" on *some* element of *any* cause of action. There is no statutory requirement of any written finding in support of the trial court's ruling. At the request of the movant, but not the respondent, the court "shall issue" findings about whether the legal action was brought for improper purposes, and must issue the findings not later than 30 days following the request.[23] Since it is not an element of the motion that there be a finding that the lawsuit was brought for an improper purpose, then there is little reason to make the request.

If the plaintiff nonsuits the case, we would expect that a motion to dismiss would not survive, since it is not a cause of action or claim for sanctions, but merely a dispositive motion.

E. Mandatory, Not Discretionary, Award of Fees and Sanctions for Movant Upon Dismissal of Legal Action.

If the court dismisses a legal action, again the court has no discretion, but "*shall* award to the moving party: (1) court costs, reasonable attorney's fees, and other expenses …; and (2) sanctions against the party who brought the legal action as the court determines sufficient to deter the party who brought the legal action from bringing similar actions…."[24]

F. Award of Fees, Not Sanctions, for Respondent/Plaintiff – Predicated on Frivolous Motion.

In contrast to the broad recovery favoring the subject of the legal action, the only recovery that the party who brought the legal action may obtain in responding to a motion to dismiss would be for court costs and reasonable attorney's fees, but only if the court finds that the motion to dismiss is "frivolous or solely intended to delay."[25] Unlike the movant, the respondent cannot recover sanctions under the statute, and would have to resort to existing Texas law to recover any sanctions for frivolous pleadings.

G. Appellate Review.

1. Interlocutory Appeal Limited to Denial of Motion to Dismiss by Operation of Law.

Although the Legislature devoted a separate section of the statute to "Appeal,"[26] the scope of interlocutory appeal is limited. Interlocutory appeals lie only for motions to dismiss overruled by operation of law, and not where a timely written order overruling the Chapter 27 motion to dismiss exists.[27] During the interlocutory appeal from the trial court's failure to rule on the motion to dismiss, the trial is not stayed and court proceedings are not suspended.[28]

2. Written Denial of Motion to Dismiss – Mandamus Available.

If the trial court timely signs an order denying the motion to dismiss, the movant may be able to proceed with a petition for writ of mandamus, alleging that the trial court abused its discretion when required to dismiss the action.[29] This may be an action of limited utility, given the confusing array of definitions and burdens of proof, and the later availability of summary judgment motions.

3. Motion to Dismiss Timely Granted – Appealable Noninterlocutory Order.[30]

An order granting a motion to dismiss under Section 27.005 may be appealable as a final judgment, or severable and appealable as a final, non-interlocutory order disposing of all issues and all parties,[31] which may be reviewed for legal sufficiency.[32]

4. Deadlines for Chapter 27 Appeal or Writ.

Either party has 60 days after the court's order is signed to actually file the appeal or writ, not just a notice of appeal, if the appeal or other writ is brought "under this section."[33] The deadline for any other appeal or writ should be governed by applicable law.[34] A failure to timely rule is treated as a denial by operation of law to trigger the appellate deadline.[35]

5. Any Appeal or Writ From An Order On A Chapter 27 Motion to Dismiss Shall be Expedited.

Section 27.008(b) indicates that any appeal or writ is to be expedited.

6. Standard of Review of Interlocutory Appeal.

Although a trial court's resolution of questions turning on the application of legal standards is a de novo review, it is unclear whether the court's determination of whether the respondent met its burden of proof will be reviewed for an abuse of discretion[36] or legal and factual sufficiency.[37]

H. Does the TCPA Apply in Federal Court?

The Texas anti-SLAPP dismissal motion may be unavailable in federal court sitting under either diversity or federal question jurisdiction, since the law attempts to answer the same questions that Federal Rules 12[38] and 56[39] cover, and therefore cannot be applied in a federal court sitting in diversity.[40] The analysis was whether the federal rule, fairly construed, answers or covers the question in dispute.[41] If the federal rule answers the question, the state law does not apply.[42]

I. Does the Act Conflict with the Supreme Court's Rule-Making Authority?

In reviewing the new law, the practitioner should question whether it may violate the separation of powers between the Legislature and the rulemaking authority of the Texas Supreme Court. The Supreme Court derives its rulemaking authority initially from the Texas Constitution, which specifically and separately empowers the Supreme Court to promulgate rules of civil procedure.[43] The Supreme Court's statutorily conveyed power is plenary, because the Rules of Practice Act provides: "[s]o that the supreme court has full rulemaking power in civil actions, a rule adopted by the Supreme Court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed."[44] If, under the *Boulter* analysis, the Texas anti-SLAPP statute is procedural, it would seem to be subject to the Texas Rules of Civil Procedure.[45] It is conceivable that the Texas Supreme Court could, by order, repeal the motion procedure in Section 27.001 *et seq.*

J. Does the Statute Conflict With Texas' Constitutional Protection of Rights to Sue for Reputational Torts?

Since the Chapter 27 motion to dismiss is directed squarely at claims based on communications, at least many of which would be brought as reputational torts, there is a significant question whether the statute fatally conflicts with longstanding Texas law protecting the right to sue for reputational damages as guaranteed in the Texas Free Expression Clause.[46]

IV. Unintended Consequences and Considerations.

A. Overbroad Application and Chilling Effect on Meritorious Actions.

Whether the lawsuit is actually frivolous is irrelevant to a motion to dismiss under the TCPA. While the Act was not enacted to legalize illegal activity, or to provide a safe harbor for violations of Texas law, it may have this unintended consequence,[47] and may have a chilling

effect on the bringing of otherwise meritorious lawsuits.

B. When The Texas Attorney General Must Be Invited to the Party.

Since the objection of Chapter 27 motions to dismiss are necessarily targeted at communications that may be constitutionally protected, it is a fair assumption that there will be constitutional challenges in the legal action. If so, the Texas Attorney General must be timely notified and given an opportunity to participate, both under a 2011 addition to the Government Code, [48] and under the Declaratory Judgment Act.[49] How to reconcile the 30-day hearing requirement with longer notification provisions is a thorny, unresolved problem.

V. CONCLUSION.

Regardless of the reader's viewpoint on the new law, the TCPA requires your attention and understanding of its application in a wide variety of legal actions, far beyond the intended targeted class of SLAPP cases. Considering the significant questions raised about the conflicts and weaknesses in the statute, it is very conceivable that it will be revisited in an upcoming legislative session.

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[1] "Strategic Lawsuits Against Public Participation."

[2] *See* TEX. CIV. PRAC. & REM. CODE § 27.001, *et seq.* (2011).

[3] House Comm. On Judiciary and Civil Jurisprudence, *Bill Analysis,* Tex. HB 2973, 82nd Leg., R.S. (2011).

[4] House Comm. On Judiciary and Civil Jurisprudence, *Bill Analysis,* Tex. HB 2973, 82nd Leg., R.S. (2011).

[5] *See http://www.foift.org/?page_id=1923* for FIFT's discussion of the passage of the Act.

[6] TEX. CIV. PRAC. & REM. CODE § 27.003(a)(emphasis added).

[7] TEX. CIV. PRAC. & REM. CODE § 27.001(6).

[8] And possibly administrative proceedings.

[9] TEX. CIV. PRAC. & REM. CODE § 27.010(a).

[10] TEX. CIV. PRAC. & REM. CODE § 27.010(c).

[11] TEX. CIV. PRAC. & REM. CODE § 27.010(b).

[12] *Id.* § 27.003(a).

[13] TEX. CIV. PRAC. & REM. CODE § 27.004.

[14] TEX. R. CIV. P. 21.

[15] TEX. CIV. PRAC. & REM. CODE § 27.005(a).

[16] *Id.* § 27.003(c).

[17] TEX. CIV. PRAC. & REM. CODE § 27.006(b).

[18] TEX. CIV. PRAC. & REM. CODE § 27.006(a).

[19] *Id.* § 27.005(b).

[20] *Id.* § 27.005(c) (emphasis added).

[21] The "open courts provision" of the Texas Constitution provides that "[a]ll courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13; *Trinity River Auth. v. URS Consultants, Inc.,* 889 S.W.2d 259, 262 (Tex. 1994).

[22] TEX. R. CIV. P. 41.

[23] TEX. CIV. PRAC. & REM. CODE §27.007(a,b).

[24] TEX. CIV. PRAC. & REM. CODE § 27.009(a).

[25] *Id.* § 27.009(b).

[26] TEX. CIV. PRAC. & REM. CODE § 27.008.

[27] *Jennings v. Wallbuilder Presentations, Inc.,* 2012 Tex. App. LEXIS 6834 (Tex. App.—Ft. Worth August 16, 2012, no pet. h.) (dismissing appeal for lack of jurisdiction); *see also Lipsky v. Range Production Co., et al.,* 2012 Tex. App. LEXIS 7059 (Tex. App.—Fort Worth Aug. 23, 2012, no pet. h.)(dismissing appeal for want of jurisdiction for same reason, but granting motion to consider the proceeding as a petition for writ of mandamus).

[28] TEX. CIV. PRAC. & REM. CODE §51.014(b).

[29] *Wallbuilder,* 2012 Tex. App. LEXIS 6834 *9.

[30] An untimely order granting the motion to dismiss would be construed to overrule the motion as a matter of law.

[31] *Wallbuilder,* 2012 Tex. App. LEXIS 6834 *9, citing *Martinez v. Humble Sand & Gravel, Inc.,* 875 S.W.2d 311, 312 (Tex.1994) (recognizing that trial court may "make the judgment final for purposes of appeal by severing the causes and parties").

[32] *See City of Keller v. Wilson,* 168 S.W.3d 802 (Tex. 2005).

[33] *Id.* § 27.008(c).

[34] *See* TEX. R. APP. P. 25.1, 26.1.

[35] *Id.* § 27.008(a).

[36] *See In re Doe,* 19 S.W.3d 249 (Tex. 2000).

[37] *See, e.g., King Ranch, Inc. v. Chapman,* 118 S.W.3d 742 (Tex. 2003).

[38] FED. R. CIV. P. 12.

[39] FED. R. CIV. P. 56.

[40] *3M Co. v. Boulter,* 2012 U.S. Dist. LEXIS 12860 *44 (D.C. 2012). In this case, 3M sued U.K. defendants in federal court for blackmail, tortious interference, business disparagement, and related claims. The defendants filed motions to dismiss under the new D.C. anti-SLAPP statute.

[41] *Boulter,* 2012 U.S. Dist. LEXIS 12860 *25; *Shady Grove,* 130 S.Ct. at 1437.

[42] *See Shady Grove,* 130 S.Ct. at 1437.

[43] TEX. CONST. art. V, § 31(b): "The Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts."

[44] TEX. GOV'T CODE § 22.004(c). *See also,* Nathan L. Hecht & E. Lee Parsley, Procedural Reform: Whence and Whither (Sept. 1997).

[45] Unlike TEX. CIV. PRAC. & REM. CODE § 9.003, the anti-SLAPP law contains no savings provision that it does not alter the Texas Rules of Civil Procedure or the Texas Rules of Appellate Procedure.

[46] "Although we have recognized that the Texas Constitution's free speech guarantee is in some cases broader than the federal guarantee, we have also recognized that 'broader protection, if any, cannot come at the expense of a defamation claimant's right to redress.'" *Turner v. KTRK Television, Inc.,* 38 S.W.3d 103, 116-117 (Tex. 2000), (quoting *Casso v. Brand,* 776 S.W.2d 551, 556 (Tex. 1989)). "Unlike the United States Constitution, the Texas Constitution expressly guarantees the right to bring reputational torts." *Turner,* 38 S.W.3d at 117 (citing TEX. CONST. art. I, §§ 8, 13

[47] The Act became effective on June 17, 2011 and there is no case law interpreting it or applying it. Under the Code Construction Act, it is proper to consider legislative history and the object sought to be obtained by the Legislature when construing and applying any statute. *See* TEX. GOV'T CODE § 311.023.

[48] TEX. GOV'T CODE § 402.010 (new 2011 statute) (2012).

[49] TEX. CIV. PRAC. & REM. Code § 37.006.

AMICUS CURIAE COMMITTEE NEWS

Since the last report in July of 2012,

Roger Hughes (Adams & Graham) filed an amicus brief to support the petition for review in *Haddard v. Rios*, 2012 WL 1142779 (Tex. App.—Corpus Christi April 5, 2012, pet. filed)(memo. opin.). This case presents two issues of proving future medical expenses and causation for all expenses. The jury awarded $20,000 past and $30,000 future medical expenses. First, plaintiff relied on a retained chiropractor to give opinion testimony based solely on the medical records that an auto accident "can cause" disk herniations, plaintiff's herniation did not appear old, and it was "doubtful" that it was caused by pre-existing degenerative conditions. The issue is whether this suffices to prove the accident caused the herniation. Second, future medical expenses were awarded based solely on an unsigned doctor's note in a medical report that plaintiff might require surgical intervention; there was no evidence of what that would cost and there were not past bills for similar treatment. This case is important because it signals a trend – to make the whole case on damages from medical records and expense affidavits coupled with conclusory opinions from hired experts.

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PAPERS AVAILABLE

2012 TADC Summer Seminar – Sandestin, FL – July 18-22, 2012

E-Discovery and the Practical Applications of New Technologies – David A. Pluchinsky, Shawn M. Stricker – 39 pgs.

Lease Preservation and Lease Re-Negotiation: Tips and Tactics for Busting or Preserving Your Mineral Lease – Ron T. Capehart – 17 pgs.

Strange Bedfellows: How the U.S. Congress and the Texas Supreme Court Have Changed Removal to Federal Courts in Texas, and Other Pitfalls to Avoid Remand – Alex B. Roberts – 25 pgs.

Switching Sides: A Plaintiff Lawyer's Guide to Being a Better Defense Lawyer and Ethical Issues that Affect Both Bars – Russell Serafin – 14 pgs.

Trouble Across the Pond: Preparing for Cross-Border Litigation of Employment Claims – Daniel J. Schuch – 28 pgs.

What a Waste of Time: Effective Presentation Techniques for Bench Trials – Judge R. K. Sandill – 30 pgs.

What Young Lawyers Are Thinking, But Not Saying – 9 pgs.

What's Happening in the High Court – Katherine W. Binns – 25 pgs.

Why Texas Defense Counsel Should Argue that Texas Law Controls Federal Supersedeas Bonds – Terry Adams, Jeff Nobles – 17 pgs.

2012 Annual Meeting – San Francisco, CA – September 26-30, 2012

Courtroom Technology – Effective Use in Trial – iPad Apps for Lawyers – Jarad Kent, Don Kent – 3 pgs.

Facebook & LinkedIn & Twitter, Oh My! Considerations for Attorneys Using Social Media – Chantel Crews – 46 pgs.

Davalos Update: Going Down the Hole – Navigating Texas Law to Determine When the Insured is Entitled to Select Its Own Counsel – Michael J. Shipman – 17 pgs.

Defending the Fiduciary: What You Really Need to Know – Joyce W. Moore – 51 pgs.

2012 Annual Meeting – Continued

Developing Business in the 21st Century – David H. Freeman – 40 pgs.

Elevating Your Skill Level Easily: Mastery of Google Advanced Search and Google Scholar – Glen M. Wilkerson – 5 pgs.

Independent Counsel Issues Under Texas Insurance Law – Robert D. Allen – 7 pgs.

Supreme Court of Texas Update (3 Months/May-July 2012) - Justice Phil Johnson – 38 pgs.

Supreme Court of Texas Update (12 Months/June 2011-May 2012) – Justice Phil Johnson – 88 pgs.

Juggling Your Experts in a Complex Case – Rick Tonda, PE, Ph.D – 75 pgs.

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10 pages or less	$10.00	41-65 pages	$40.00
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and a *Special Thank You* to all the Members who completed and returned the Expert Witness Follow-up Forms

EXPERT WITNESS DATABASE

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 Azoology.@ 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.

DEPOSITION & TRIAL TRANSCRIPT LIBRARY

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 computer disk form and can be sent overnight for an additional charge.

Expert Witness Research Service
Overall Process

- 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).
- If the request is for a defense expert within a given speciality, please include as much information as possible. For example, accident reconstruction can include experts with a speciality of seat belts, brakes, highway design, guardrail damage, vehicle dynamics, physics, human factors, warning signs, etc. If a given geographical region is preferred, please note it on the form.
- Send the form via facsimile to 512/476-5384 or email to tadcews@tadc.org
- Queries will be run against the Expert Witness Research Database. All available information will be sent via return facsimile transmission. The TADC Contact information includes the attorney who consulted/confronted the witness, the attorney's firm, address, phone, date of contact, reference or file number, case and comments. To further assist in satisfying this request, an Internet search will also be performed (unless specifically requested NOT to be done). Any CV's depositions, and/or trial transcripts that reside in the Expert Witness Research Service Library will be noted.
- 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.

Expert Witness Service
Fee Schedule

Single Name Request

Expert Not Found In Database	$15.00
**Expert Found In Database, Information Returned To Requestor	$25.00
A RUSH Request Add An Additional	$ 10.00
A $50.00 surcharge will be added to all non-member requests	$50.00

** Multiple names on a single request form and/or request for experts with a given specialty (i.e., MD specializing in Fybromyalgia) are billed at $80.00 per hour.

Generally, four to five names can be researched, extracted, formatted, and transmitted in an hour.

The amount of time to perform a specialty search depends upon the difficulty of the requested specialty, but usually requires an hour to extract, format, and transmit. If the information returned exceeds four pages, there is a facsimile transmission fee.

The TADC Expert Witness Service Deposition Library can provide copies of depositions. The TADC Expert Witness Library can provide copies of depositions, CVs, trial transcripts, etc. The fee for locating and copying or printing material is $40.00 for an electronic (diskette) copy; hard-copy is $40.00, plus a $0.05 per page

TEXAS ASSOCIATION OF DEFENSE COUNSEL, INC.

400 West 15th Street, Suite 420 * Austin, Texas 78701 * 512/476-5225

Expert Witness Search Request Form

Please FAX this completed form to: **512/476-5384**

Date: _____ ☐ NORMAL ☐ **RUSH** (Surcharge applies)

Attorney: _____ ☐ TADC Member ☐ **Non-Member** (Surcharge applies)

Requestor Name (if different from Attorney): _____

Firm: _____ City: _____

Phone: _____ FAX: _____

Client Matter Number (for billing): _____

Case Name: _____

Cause #: _____ Court: _____

Case Description: _____

➢ ☐ **Search by NAME(S):** (Attach additional sheets, if required.)

Designated as: Plaintiff Defense Unknown

Name: _____ Honorific: _____

Company: _____

Address: _____

City: _____ State: _____ Zip: _____ Phone: _____

Areas of expertise: _____

_____

➢ ☐ **SPECIALTY Search**: (Provide a list of experts within a given specialty.)

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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➢ ☐ **INTERNET:** INCLUDE Internet Material DO NOT Include Internet Material

A research fee will be charged. For a fee schedule, please call 512 / 476-5225 or visit the TADC website www.tadc.org

TADC/IDC 2013 WINTER SEMINAR
February 6-10, 2013
Sheraton Steamboat Springs Resort - Steamboat Springs, CO

Greg Curry, Thompson & Knight, L.L.P., Dallas & Randy Walters, Walters Balido & Crain, L.L.P., Dallas – Program Co-Chairs

CLE Approved for: 8.5 hours, including 1.75 hours ethics

Wednesday, February 6, 2013

6pm – 8pm TADC Welcome Reception

Thursday, February 7, 2013

6:45-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Dan K. Worthington, TADC President
Atlas, Hall & Rodriguez, L.L.P., McAllen
Greg W. Curry, Thompson & Knight, L.L.P., Dallas – Program Co-Chair
Randy Walters, Walters Balido & Crain, L.L.P., Dallas – Program Co-Chair

7:30 - 8:15am *NIGHTMARE ON APPELLATE STREET – COSTLY MISTAKES AT TRIAL*
J. Mitchell Smith
Germer Gertz, L.L.P., Beaumont

8:15 - 8:50am *YOUR HONOR-PLAINTIFFS CALL DEFENDANT'S IN-HOUSE COUNSEL TO THE STAND: NOW WHAT? (.5 hours ethics)*
G. Robert Sonnier
Germer Gertz, L.L.P., Austin

8:50 - 9:25am *WHAT'S HAPPENING IN THE HIGH COURT: TEXAS SUPREME COURT UPDATE (.25 hours ethics)*
Gregory D. Binns
Thompson & Knight, L.L.P., Dallas

9:25 - 10:00am *TRYING YOUR CASE TO THE JURY: LESSONS LEARNED THE HARD WAY*
Christy Amuny
Bain & Barkley, Beaumont

10:00 -10:30am *FINDING THE TRUTH IN WRITTEN AND ORAL TESTIMONY*
S. Lance Phy, ACTAR
Rimkus Consulting, San Antonio

4:00pm - 5:00pm *THE JURY RULES: POST-TRIAL VIDEOTAPED INTERVIEWS WITH REAL JURORS (.5 hours ethics)*
The Honorable James Stanton
Andrews & Kurth, L.L.P., Dallas

Friday, February 8, 2013

6:45-9:00am Buffet Breakfast

7:15-7:20am Welcome & Announcements
Dan K. Worthington, TADC President
Greg W. Curry, Program Co-Chair
Randy Walters, Program Co-Chair

7:30 – 8:15am *JURISDICTION AND VENUE AFTER THE FEDERAL COURT'S JURISDICTION AND VENUE CLARIFICATION ACT OF 2011*
Peter R. Jennetten
Quinn, Johnston, Henderson, Pretorius & Cerulo, Peoria, IL

8:15– 9:15am *TECHNOLOGY IN THE COURTROOM: THERE'S AN APP FOR THAT!*
Mark Bennett
Strasburger & Price, L.L.P., Frisco
Timothy A. Weaver
Pretzel & Stouffer, Chartered, Chicago

9:15 – 10:00am *SOCIAL MEDIA AS AN INVESTIGATIVE TOOL: YOU WON'T BELIEVE WHAT'S OUT THERE!*
Heidi A. Coughlin
Wright & Greenhill, P.C., Austin

Saturday, February 9, 2013

6:45 - 9:00am Buffet Breakfast

7:15 - 7:20am Welcome & Announcements
Dan K. Worthington, TADC President
Greg W. Curry, Program Co-Chair
Randy Walters, Program Co-Chair

7:20 - 8:00am *WHY THE PRESERVATION OF THE JURY TRIAL IS CRITICAL: A YOUNG LAWYER'S PERSPECTIVE (.5 hours ethics)*
McKenzie Wallace
Thompson & Knight, L.L.P., Dallas

8:00 - 8:35am *VOIR DIRE & PRESERVATION OF ERROR*
David Brenner
Burns, Anderson, Jury & Brenner, Austin

8:35 - 9:10am *WHAT THE $&*@ IS AN ECM AND HOW DO YOU DOWNLOAD IT? ANSWERING THIS AND OTHER BURNING QUESTIONS FROM YOUR FIRST COMMERCIAL TRUCK COLLISION CASE*
Ron T. Capehart
Galloway, Johnson, Tompkins, Burr & Smith, Houston

Sunday, February 10, 2013

Depart for Texas!

Thanks to:
2013 Winter Seminar Sponsor

RIMKUS
CONSULTING GROUP, INC.

2013 TADC Winter Seminar
February 6-10, 2013

Steamboat Sheraton - Steamboat Springs, CO - 2200 Village Inn Court - Steamboat Springs, CO 80477

Pricing & Registration Options

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.

Registration for Member Only (one person)	$560.00
Registration for Member & Spouse/Guest (2 people)	$685.00

Children's Registration

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

Children Age 12 and Older	$120.00
Children Age 6-11	$80.00

Spouse/Guest CLE Credit

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 Seminar	$75.00

Hotel Reservation Information

CONTACT THE SHERATON STEAMBOAT RESORT DIRECTLY AT 800/848-8877 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, 2012

TADC Refund Policy Information

Registration Fees will be refunded ONLY if a written cancellation notice is received at least TEN (10) BUSINESS DAYS PRIOR (JANUARY 23, 2013) to the meeting date. A $75.00 ADMINISTRATIVE FEE will be deducted from any refund. Any cancellation made after January 23, 2013 IS NON-REFUNDABLE.

2013 TADC WINTER SEMINAR REGISTRATION FORM
February 6-10, 2013

For Hotel Reservations, contact the Sheraton Steamboat Springs DIRECTLY at 800/848-8877

CHECK ALL APPLICABLE BOXES TO CALCULATE YOUR REGISTRATION FEE:

☐ **$ 560.00 Member ONLY (One Person)**
☐ **$ 685.00 Member & Spouse/Guest (2 people)**
☐ **$ 75.00 Spouse/Guest CLE Credit**
☐ **$ 75.00 CLE for a State OTHER than Texas - State(s) _____**

☐ **$120.00 Children 12 & Older _____**
☐ **$80.00 Children 6-11 _____**

TOTAL Registration Fee Enclosed $_____

NAME:_____ FOR NAME TAG:_____

FIRM:_____ OFFICE PHONE:_____

ADDRESS:_____ CITY:_____ ZIP:_____

SPOUSE/GUEST/CHILDREN FOR NAME TAG:_____

☐ *Check if your spouse/guest is a TADC member*

EMAIL ADDRESS:_____

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, 2012. This deadline coincides with the deadline set by the hotel for hotel accommodations.

PAYMENT METHOD:

A CHECK in the amount of $_____ is enclosed with this form.

MAKE PAYABLE & MAIL THIS FORM TO: TADC, 400 West 15th Street, Suite 420, Austin, Texas 78701

CHARGE TO: (circle one) Visa Mastercard American Express

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Card Number **Expiration Date**

Signature:_____ (as it appears on card)

TADC
400 W. 15th Street
Suite 420
Austin, TX 78701
PH: 512/476-5225
FX: 512/476-5384

(For TADC Office Use Only)

Date Received_____ Payment-Check#_____ (F or I) Amount_____ ID#_____

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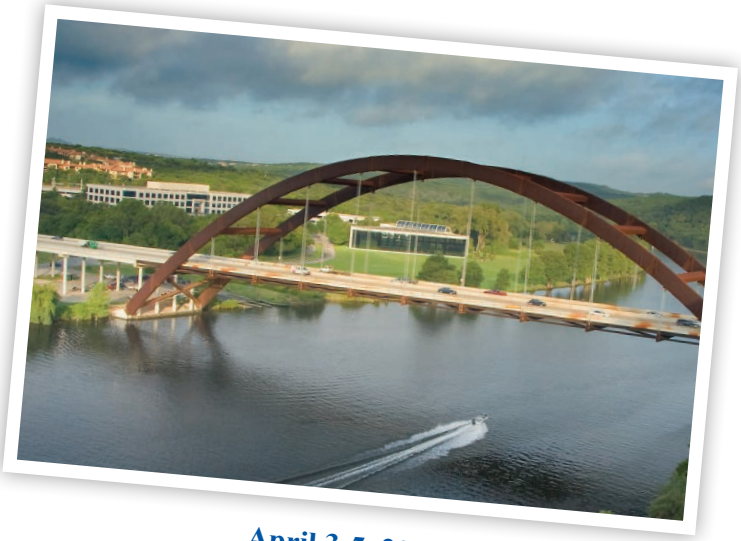
Mark Your Calendars!

February 6-10, 2013
TADC Winter Seminar
Sheraton Steamboat - Steamboat Springs, Colorado



April 3-5, 2013
TADC Spring Meeting and Legislative Day
Doubletree Suites - Austin, Texas

July 17-21, 2013
TADC Summer Seminar
Westin Whistler - Whistler, Vancouver