SUMMER 2018

TADC

TEXAS ASSOCIATION OF DEFENSE COUNSEL

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

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The TADC Magazine is a publication of the Texas Association of Defense Counsel.
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TADC CALENDAR OF EVENTS

July 25-29, 2018	**TADC Summer Seminar** Hotel Argonaut – San Francisco, California Gayla Corley & Robert Ford, Program Co-Chairs Registration materials available at www.tadc.org
August 10-11, 2018	**West Texas Seminar** Inn of the Mountain Gods – Ruidoso, New Mexico Bud Grossman, Program Chair Registration materials available at www.tadc.org
September 19-23, 2018	**TADC Annual Meeting** La Fonda Hotel & Spa – Santa Fe, New Mexico Mike Shipman & Jennie Knapp, Program Co-Chairs Registration materials available at www.tadc.org
Jan. 30-Feb. 3, 2019	**2019 TADC Winter Seminar** The Steamboat Grand – Steamboat Springs, Colorado
May 1-5, 2019	**2019 TADC Spring Meeting** Westin Savannah Harbor Resort – Savannah, Georgia
July 16-20, 2019	**2019 TADC Summer Seminar** Hyatt Regency Maui – Maui, Hawaii

President's Message

By Chantel Crews,
Ainsa Hutson Hester & Crews, LLP, El Paso

"Summertime, and the livin' is easy…."

Ah, summer! Whether you are fast at work or actually enjoying some vacation time this summer, know that your TADC is working diligently for the membership. While it may be difficult to believe we are already half-way through 2018, there is no doubt that your TADC has already enjoyed a great year so far:

Programs:

TADC has already held three major meetings and seminars this year.

Winter Seminar:

The Winter Seminar in Telluride, CO was a great success. Thank you to Seminar Co-Chairs Christy Amuny and Dan Hernandez for putting together a wonderful seminar for our attendees; the seminar was well attended, and TADC members enjoyed the opportunity to meet members of the Louisiana Association of Defense Counsel at this joint meeting.

Milton C. Colia Trial Academy:

The Milton C. Colia Trial Academy was held in Fort Worth this year, and it was incredibly successful. Not only did our 42 young lawyers enjoy working with seasoned TADC faculty members throughout the weekend, but also this year, we were joined by trial judges from Fort Worth who presided over each of the break-out groups. Having the input from TADC members as well as trial judges was an incredible opportunity and experience for the Trial Academy graduates. Thank you to Co-Chairs George Haratsis and Doug Rees for putting the Trial Academy together, and a special thank you to TADC Past President Judge Mike Wallach for securing the courtrooms at the Vandergriff Civil Courts Building in Fort Worth and for enlisting the help of his fellow judges for Trial Academy.

Spring Meeting and Seminar:

Charleston, South Carolina is such a civilized and charming place to have a Spring Meeting and Seminar! Thank you to Co-Chairs Mitzi Mayfield and Trey Sandoval for assembling a superb seminar with a wonderfully diverse set of topics for our attendees. TADC members were treated not only to a great program, but also enjoyed the sights and sounds of Charleston, including an opening reception at the Edmondston-Alston historic home and even a Southern cooking school. Thank you also to Hayes and Rosanne Fuller for serving as social chairs and sharing all of the fabulous places to see and to eat in Charleston.

Legislative:

The TADC §18.001 affidavits task force continues its work on legislative reform efforts. All members should have received by mail a questionnaire soliciting your personal experiences with §18.001 affidavits. Please take the time to read that questionnaire and provide your input to the task force. The more real-life examples the task force has to share with legislators, the better the chance for actual reform. Thank you to task force members Mike Hendryx (leader), Clayton Devin, Roger Hughes, Mike Bassett, David Chamberlain, and Pamela Madere for your continued work on this much needed legislation.

Publications:

With the publication of the magazine you are currently reading, the Publications committee has produced two beautiful magazines filled with substantial and interesting content that will enlighten and educate our membership. Thank you to Publications Vice Presidents Gayla Corley and Doug Rees for their leadership on this committee, and a special thanks to the Publications committee for working on the articles and case summaries throughout this year.

Substantive Law Committees:

The TADC has been working on the creation of two substantive law committees for the areas of Construction Law and Commercial Law. Slater Elza has led the charge in making sure the exploratory committees are up and running. A big thank you to David Wilson, J.P. Vogel, and Cara Kennemer for their work in creating the Construction Law committee. The TADC Construction Law Committee will be ready to launch by the TADC's Annual Meeting in September. Stay tuned for more exciting developments as we get closer to the launch date!

Membership:

The TADC is enjoying an increase in our membership! Our numbers are up, and we are welcoming new members each week. Thank you for recruiting your colleagues and friends to our organization!

Looking ahead – the TADC still has plenty of exciting opportunities for its members for the remainder of the year:

Local Events:

Several local TADC events and CLEs have been planned throughout the summer months. If you haven't heard about events in your area, please let the TADC office know. Happy hour events, CLE presentations, and more have been planned, and we would love to see you there!

Summer Seminar:

Make plans to join the TADC in San Francisco, California July 25-29 this year for great CLE and fun experiences in the City by the Bay. Co-Chairs Gayla Corley and Rob Ford have put together an excellent seminar with plenty of time for you and your family to enjoy the sights, sounds, and fabulous food in San Francisco. Registration materials are available now at www.tadc.org.

West Texas Seminar:

TADC will join the New Mexico Defense Lawyers Association in the cool pines of Ruidoso, New Mexico August 10-11. Program Co-Chairs Bud Grossman, Mark D. Standridge and Young Lawyer Liaison Alex Yarbrough, have put together a great group of speakers to cover topics pertinent to Texas and New Mexico practitioners. Registration materials are available at www.tadc.org; make plans now to escape the Texas heat for this great event.

Annual Meeting:

TADC's Annual Meeting and Seminar this year will be in beautiful Santa Fe, New Mexico September 19-22. Seminar Co-Chairs Jennie Knapp and Mike Shipman have a wonderful seminar planned for our members, and registration materials will be out soon. Please make plans to join us as we celebrate and recognize the many accomplishments of our members and our organization this year and as we look forward to continued growth and strength of the TADC for the future!

Thank you to all of the hard working TADC Board members who implement so many great ideas and make the TADC better each and every day. Thank you to all TADC members for your loyalty and participation. Let us hear from you regarding how the TADC can help you in your practice. Take advantage of the incredible programming TADC has to offer, both locally and at our major seminars. Get involved by joining a TADC committee, contributing to a substantive law newsletter, or speaking on a TADC program. And keep recruiting your colleagues and friends to join our great organization!

Enjoy your summer, and see you soon!

TADC Legislative Update

By George S. Christian, TADC Legislative Consultant
The Christian Company, Austin

The end of the primary election season and the advent of summer doesn't mean that politics will take a breather. If anything, the immense amount of money being spent in the top ballot races of U.S. Senator Ted Cruz and Governor Greg Abbott will assure that Texans will get a fair dose of campaigning with their beer and barbecue this summer.

Senator Cruz is a practiced hand at raising and spending campaign funds. But in Congressman Beto O'Rourke (D-El Paso), he may have met his match, at least with respect to the out-of-state contributions already flowing into both campaigns. O'Rourke also has some personal wealth, which has usually been lacking in Democratic candidates of late. This race is already generating fairly intense national interest, which will only intensify this fall. With control of the U.S. Senate at stake, though, expect the President to support Ted in Texas.

Not to be left behind, Governor Greg Abbott is preparing to spend at least $50 million against his Democratic opponent, Dallas County Sheriff Lupe Valdez, who defeated businessman Andrew White (son of former Gov. Mark White) in the May 22 runoff. Abbott is seeking a big win to secure not only a second term, but potentially consideration for a future presidential run. Valdez, whom some see as soft on immigration, may give the Governor the chance to build a much larger national profile as the President's rightful political heir. We will see.

It's worth mentioning that Lt. Governor Dan Patrick also has a respectable Democratic challenger in CPA Mike Collier, who ran unsuccessfully against Comptroller Glenn Hegar four years ago. While no one expects Collier to win, the uncertainty of the mid-term election (and electorate) could make for some interesting drama at the top of the ticket. At the very least, GOP candidates, while they are likely to win comfortably, may not get the walkover to which we have become accustomed.

Moreover, if the mid-terms turn into a serious referendum on the current administration, they could put a handful of Senate and House incumbents in some jeopardy. Senator Don Huffines (R-Dallas) has the most "Democratic" Republican district in the state, one that went for Hillary Clinton in 2016 by five points, so a blue wave could open the door for challenger Nathan Johnson. In Fort Worth, Senator Konni Burton is trying to hold onto a district that the President won by a single point. Her challenger, Beverly Powell, is a well-known real estate developer active in the Fort Worth business community. Burton's opposition to economic development incentives could help throw some business support to the Democrat in this race.

On the House side, a few Republican incumbents in districts that went for Clinton might feel some heat, but there probably won't be any significant change in the make-up of the House. The May 22 primary runoff returned one

TADC member, Steve Allison, who takes the place of retiring House Speaker Joe Straus in HD 121. Another, longtime incumbent Rene Oliveira (D-Brownsville), was defeated in a runoff. Voters also elected some traditional conservatives (Reggie Smith in HD 62 in North Texas, Cody Harris in East Texas District 8, and Keith Bell in HD 4). Voters, especially in rural districts, proved once again that local issues matter a lot more to them than the ideological views of Dunn & Co. (Empower Texans)

In legislative news, the TADC Legislative Committee continues to work on the §18.001 issue. The Committee is also looking at potential construction law proposals that may arise next session, including some type of pre-suit inspection and right to cure legislation for construction defect claims, possible changes in the statute of repose for such claims, and legislation overturning SCOTX's decision in *El Paso Field Services, L.P. v. MasTec North America*.

We are also monitoring the work of the House Judiciary & Civil Jurisprudence Committee, which held an April 27 hearing on its interim charges pertaining to civil and criminal fees and the implementation of a statewide electronic data base for court records. The Office of Court Administration reported that there are 143 different criminal court costs and *more than 200* civil filing fees. Overall, the courts collect more than $1 billion in fees, but only $400 million gets spent on the judicial system. The OCA indicated that no litigant has yet challenged the constitutionality of the allocation of civil fees to certain segregated accounts, as was at issue in *Salinas v. Texas* (CCA held that the assessment of a fee to a person convicted of a criminal offense that was allocated to "abused children's counseling" and "comprehensive rehabilitation" violated separation of powers and were unconstitutional). The OCA suggested that the consolidation of court costs might avoid the constitutional issue.

With respect to the statewide data base, the County Clerks Association expressed concern about a clerk's liability for failing to redact sensitive data or other information that should not be made public, such as a sealed or expunged record. The OCA responded that it is working with developers to protect documents pertaining to family law and sealed adoptions, as well as the redaction of sensitive personal data. Travis County gave support to the project, saying that it already makes civil and probate records available to the public with appropriate redactions.

By Derek T. Rollins
Ogletree, Deakins, Nash, Smoak & Stewart, Austin

The New Legal Landscape for Sexual Harassment

I. Introduction

On October 8, 2017, the *New York Times* and *New Yorker* exposed decades of predatory behavior by Harvey Weinstein; the consequences for him were swift and severe. Fired by his namesake, the Weinstein Company (which itself recently filed Chapter 11), as well as the Academy of Motion Picture Arts and Sciences and the Producers Guild of America, Weinstein is now the subject of at least four active criminal investigations in Los Angeles, New York, and London. Meanwhile, the Weinstein Company has found itself named the vicariously liable defendant to civil claims of sexual assault and battery in lawsuits, including a class action in the Southern District of New York as well as a suit filed by the state's Attorney General.[1]

Weinstein's dizzying descent and the liability it has created for his business has caught the attention of employers far from Hollywood. To understand the implications in workplaces around the country, it is necessary to consider how we got here—why *now*, as there have been other Harveys before—and what changes are coming, if not already in motion, in this new climate of sexual harassment.

II. How Did We Get Here

Two prominent political scandals frame the public reaction to sexual harassment in recent decades. The first, Anita Hill's testimony against then U.S. Supreme Court nominee Clarence Thomas, shocked the country in 1991, and led to the doubling of EEOC complaints and a surge of women running for Congress.

The second, the alleged sexual misconduct of Bill Clinton, led to the impeachment of a president and a clarified definition of the word "is." More recent headlines highlighted Ellen Pao's suit against Kleiner Perkins for gender discrimination in 2012, and Gretchen Carlson's claims of sexual harassment claims against Fox News CEO Roger Ailes in 2016. The latter prompted more than twenty other women to raise similar allegations against Ailes, and resulted in his resigning in disgrace and 21st Century Fox Corporation settling with Carlson for $20M. Carlson admitted that she was emboldened by the support of the public in her efforts to expose the bad acts of her male boss, and in the process shined a light on rumors lobbed against other powerful men, including Bill O'Reilly and Weinstein.

It is no coincidence that Carlson found public support in mid-to-late 2016, during one of the crescendos of backlash against presidential candidate Donald Trump and the allegations of

[1] It remains to be seen whether this suit may be affected by the recent resignation of the New York Attorney General, Eric Schneiderman, after he himself was accused of physical and sexual abuse by at least four women. As the *New York Times* observed, the claims "showed again the power of allegations of physical and sexual misconduct in the #MeToo era, adding Schneiderman—who had advocated for women—to the lengthy list of high-profile men who have fallen from power after women came forward to make painful accusations."

sexual misconduct being lobbed against him. The release of an Access Hollywood tape, on which Trump appears to brag about committing sexual assault, grabbed the public by force and inspired marches and pink hats around the country.

The trend continued after Trump took office. In February 2017, software engineer Susan Fowler created an uproar after blogging about sexual harassment and misconduct at Uber, toppling CEO Travis Kalanick along with several other prominent investors in Silicon Valley. As opposed to being vilified for coming forward, Fowler—who once feared that her post might lead to retaliation—is now considered a celebrity in the business world, with both a book and movie deal in the works.

And while not exclusively "the Cos" of the current climate, Bill Cosby's first trial on charges of sexual assault (which resulted in a hung jury in June 2017) and the endless stream of accusers alleging similar conduct created a near-daily maelstrom of tweeted outrage. It is also noteworthy that the District Attorney who prosecuted him was elected on a platform explicitly focused on empowering and vindicating Cosby's victims. In addition, legal observers have argued that the change in public reaction toward sexual harassment allegations was a contributing cause of Cosby's recent conviction on three counts of sexual assault at his retrial last month.

So why was Harvey Weinstein the trigger for the #MeToo movement, as opposed to Roger Ailes or Bill Cosby? The answer appears to be the perfect storm of the exhaustive (and dueling) investigations by the *New York Times* and the *New Yorker*, the name recognition of the accusers—including Ashley Judd, Angelina Jolie, and Gwyneth Paltrow—and the fact that these women were willing to speak on the record with detailed allegations against Weinstein. Because of the sheer number and the similarities of the stories, the debate has shifted to exploring ***why*** it happened – no longer ***whether*** it happened. The Weinstein revelations shifted public sentiment from denial to anger, and that anger is having a sustaining effect.

As described by *The Atlantic:* "the stories have taken the emotion that women have traditionally been asked to squelch and smother and ignore, and brought it to the surface. They have meant that the Weinstein effect is, on top of everything else, a story of women's anger, weaponized. As more and more people are able to share their experience of the world and its betrayals – #MeToo, #BlackLivesMatter, #TakeaKnee and so many more – anger, increasingly, is the emotional posture that best reflects the world as it is lived and navigated. There is anger in the ether… Anger is power."

III. What Can Employers Expect

a. Limited Enforceability Now and Bans in the Future of Non-Disclosure Agreements

The concern that accusers have been routinely silenced for decades begins with non-disclosure agreements—namely, that accusers have been routinely silenced for decades by secret settlements. For years, companies have entered into settlement agreements with accusers to resolve pre- and post-litigation disputes, and nearly every agreement includes a clause preventing either party from discussing the allegations made in the complaint, the terms of settlement, and sometimes the agreement itself. Victim advocates believe these settlement agreements prevent accusers from identifying the perpetrator, thereby enabling the alleged harasser to continue his misconduct without reproach.

NDAs are a creature of contract, governed by state law; and, responding to the concern over NDAs, state legislators have begun to address them. Beginning in California, as so many employee protections do, Senator Connie Levya introduced the Stand Together Against Non-Disclosures (STAND) Act that would prohibit nondisclosure agreements in the settlement of sexual harassment, assault and discrimination claims brought against both public and private employers. "As we have clearly seen over the last few months, secret settlements serve one primary purpose: to keep sexual predators away from the public eye and continuing to torment and hurt innocent

victims. California successfully eliminated the statute of limitations on rape and sexual assault in 2016," Senator Leyva said. "These perpetrators should not be allowed to endanger others or evade justice simply because they have a fat wallet at their disposal."

In New York, Senator Brad Hoylman has launched a similar attack on confidentially clauses in light of the mounting sexual harassment scandals. "The secrecies around these agreements perpetuate cultures of harassment and abuse by ensuring the victims stay silent and the public remains in the dark. The remaining employees continue to be at risk of unacceptable behavior by the same predator." Sen. Hoylman recently introduced new language to an existing bill that would prevent employers from requiring employees sign contracts that require them to remain confidential about discrimination, retaliation and harassment, and would apply to all employment agreements and contracts. This would include claims that are settled in arbitration or through the judiciary. Similar efforts have recently been introduced in Pennsylvania (SB999) and (S. 3548).

It is worth noting, however, that even plaintiff's attorneys agree the issue is not so simply resolved, as some victims are willing and eager to agree to confidentiality in exchange for the higher settlement they may receive. Also, some accusers do not want prospective employers to discover the allegations, settlement or circumstances of the employee's separation from employment, for fear that it may lead to retaliation. While it is unclear what legislation would effectively resolve these competing interests, it seems inevitable that the pendulum will swing in the interim; and, as President Trump recently experienced with pornographic actress Stormy Daniels, enforcement of existing NDAs should not be presumed in the current #MeToo environment.

b. Impact on Arbitration Agreements

Employment arbitration agreements have also come under recent scrutiny recently from both the judiciary and legislature. In this galvanized, post-Weinstein context, employers should expect even more challenge to employment arbitration agreements as requiring employees to sign away the right to criticize the company and its leadership. Gretchen Carlson, for example, fought to keep her harassment complaint against Roger Ailes and Fox in the courtroom rather than through confidential arbitration, as was required by her signed agreement. Since settling her claims, Carlson has joined the fight against mandatory arbitration agreements as a condition of employment.

Notably, on October 2, 2017, the Supreme Court heard oral argument in *Murphy v. NLRB*, which will determine whether employees can be forced to waive any class or collective actions in favor of individual arbitration of claims. In November of 2008, as a condition of employment with Murphy Oil USA, Inc., an employee was required to sign an arbitration agreement with the company. The agreement contained a provision waiving the employee's right to pursue work-related claims through a class or collective action in any forum and, instead, compelled the employee to pursue such claims against the company solely through individual arbitration. The employee later filed a class action lawsuit against the company claiming the waiver violated the National Labor Relations Act. How the Court rules in *Murphy* may signal how courts will review more generally the enforceability of employment arbitration agreements.

c. Increase in EEOC Investigation and Subsequent Litigation

The EEOC responded quickly to the #MeToo headlines, which coincided with the findings of its own Select Task Force on the Study of Harassment in the Workplace that workplace harassment remains a persistent problem and often goes unreported. The Task Force acknowledged that sexual harassment claims were included in nearly one-third of all EEOC charges. In October, the Agency implemented two new training programs, Leading for Respect (for supervisors) and Respect in the Workplace (for all employees). In its press release announcing this initiative, the

EEOC explained that "[i]nstead of traditional compliance training that solely focuses on legal definitions and standards for liability, the new program provides an exciting training alternative for harassment prevention."

In the short term, however, the EEOC expects to receive a higher volume of harassment charges. This is not because a higher volume of harassment is anticipated, but rather because charging parties are expected to feel more comfortable coming forward with an allegation. Many of the allegations in the publicized harassment scandals are decades old, but the accusers claim they did not feel they could come forward for fear of retaliation. The atmosphere today is clearly more supportive and receptive to accusers, so expect to see a rise in not just charges and subsequent lawsuits, but also internal complaints to Human Resources.

Finally, it is foreseeable that there will be a backlash to the sexual harassment counterrevolution, and this could be seen in an uptick in suits (or counterclaims) from the accused harassers. These cases most often arise out of the accused's disagreement with his termination for harassment following an HR investigation. The claims typically involve breach of contract, defamation and/or wrongful termination. While it is too early to tell whether these lawsuits will be more or less successful today than they have been in the past, employers can best prepare for these lawsuits by ensuring harassment complaints are thoroughly investigated by an experienced and neutral investigator.

IV. How Can Employers Respond

Media coverage of the high profile harassment cases and the legislative response to them has created new scrutiny for all employers' response to sexual harassment claims. One of the public impressions left by this scandal is that employers may contribute to a culture of concealment, which discourages victims from coming forward. The Weinstein Company is already facing several lawsuits for the way it handled the claims made against Harvey Weinstein. Among other things, the allegations claim the company entered into a written contract with Harvey Weinstein which required him to pay for settlements with the accusers and liquidated damages to the company; in exchange, Weinstein's employment was protected no matter how many accusations were made. This is an illustrative, if extreme, example of the type of perceived corporate complicity which will be the subject of the inevitable onslaught of lawsuits against employers nationwide.

With the long-term enforceability of arbitration agreements and non-disclosure agreements in doubt, how best can an employer avoid becoming the subject of the next headline or EEOC press release? As part of the report of its own Task Force, the EEOC suggests four areas of review and improvement: (1) accountability in leadership; (2) well-written policies; (3) an effective complaint system; and, (4) effective harassment training.

These suggestions include:

a. Leadership and Accountability

- State clearly, frequently, and unequivocally that harassment is prohibited;
- Allocate sufficient resources for effective harassment prevention strategies;
- Have a harassment complaint system that is fully resourced, is accessible to all employees, has multiple avenues for making a complaint, if possible, and is regularly communicated to all employees;
- Regularly and effectively train all employees about the harassment policy and complaint system; and,
- Direct staff to periodically, and in different ways, test the complaint system to determine if complaints are received and addressed promptly and appropriately.

b. Well-Written Policies

- State that the policy applies to employees at every level of the organization, as well as to applicants, clients, customers, and other relevant individuals;
- Include an easy to understand description of prohibited conduct, including examples;
- Describe the organization's harassment complaint system, including multiple (if possible), easily accessible reporting avenues;
- Assure that the organization will take immediate and proportionate corrective action if it determines that harassment has occurred; and,
- Periodically review and update the policies as needed, and re-translate, disseminate to staff, and post in central locations.

c. Effective and Accessible Complaint System

- Provide multiple avenues of complaint, if possible, including an avenue to report complaints regarding senior leaders;
- Include processes to determine whether alleged victims, individuals who report harassment, witnesses, and other relevant individuals are subjected to retaliation, and imposes sanctions on individuals responsible for retaliation;
- Includes processes to ensure that alleged harassers are not prematurely presumed guilty or prematurely disciplined for harassment;
- Ensure investigators are well-trained, objective, and neutral, take all questions, concerns, and complaints seriously, and respond promptly and appropriately; and,
- Appropriately document every complaint, from initial intake to investigation to resolution, use guidelines to weigh the credibility of all relevant parties, and prepare a written report documenting the investigation, findings, recommendations, and disciplinary action imposed (if any), and corrective and preventative action taken (if any).

d. Effective Harassment Training

- Provide to employees at every level and location of the organization;
- Tailor to the specific workplace and workforce;
- Conduct by qualified, live, interactive trainers or, if not feasible, design to include active engagement by participants;
- Include descriptions of prohibited harassment, as well as conduct that, if left unchecked, might rise to the level of prohibited harassment; and,
- Provide additional training to supervisors and managers identifying their additional responsibilities in the effort to discourage sexual harassment.

The agency's suggestions are helpful, if numerous (each of the four areas of improvement includes at least sixteen practices); but more importantly, they provide a checklist for good faith compliance efforts that may effectively mitigate an agency investigation or litigation arising out of sexual harassment allegations.

2018 Spring Meeting

May 2-6, 2018 – Renaissance Charleston Hotel – Charleston, SC

The TADC held its 2018 Spring Meeting in Charleston, South Carolina, May 2-6, 2018. The weather was picture-perfect and Charleston provided the perfect setting for a fantastic meeting, from the opening reception at the historic Edmondston-Alston House on the Battery to outings to Fort Sumter and the plantations!

Mitzi Mayfield, with Riney & Mayfield LLP in Amarillo and **Trey Sandoval** with MehaffyWeber, PC in Houston did a masterful job as Program Co-Chairs of the meeting. The program included many high-profile speakers including **Justice Phil Johnson** with the Texas Supreme Court, **Judge Patricia Kerrigan (ret.)**, 190th District Court and **Douglas Burrell**, DRI Secretary/Treasurer**.** Topics ranged from the Supreme Court Update to The Application of Settlement Credits. A fantastic luncheon presentation on The Art of Negotiation, was one of the highlights.

Jennie Knapp, Slater & Shanna Elza

Mike Hendryx, Trey Sandoval, Jason McLaurin & Eric Nichols

Miles & Marcy Nelson with Nicki Akin & Eric Rich

Rosanne Fuller & Arva Reyna

2018 Spring Meeting

David Chamberlain, Judge Patricia Kerrigan (ret.), Bud Grossman & Roger Hughes

Michael Golemi, Rachel Moreno, Pam Madere & Brandon Cogburn

Mitzi Mayfield, Chantel Crews & DRI Secretary Douglas Burrell

Dawn Crews & Claire Ancell

Hard at work

Texas Supreme Court Justice Phil Johnson

2018 Spring Meeting

Negotiation Panel: Trey Sandoval, Mitch Moss, Judge Pat Kerrigan (ret.) & Joe Ahmad

Lauren Goerbig

Alex Yarbrough

Scott Stolley

Stacy Obenhaus

Justice & Carla Johnson with Keith & KaRynn O'Connell

Amicus Curiae Committee News

There have been several significant amicus submissions.

Roger Hughes (Adams & Graham, L.L.P.) submitted an amicus in support the petition for review in *United Scaffolding v. Levine*, 537 S.W.3d 463 (Tex. 2017). This was round three for the new trials granted to Levine. See *In re United Scaffolding*, 377 S.W.3d 675 (Tex. 2012) and *In re United Scaffolding*, 301 S.W.3d 661 (Tex. 2010). The reviewability of a grant of a new trial by directed verdict was not reached. Instead, the Court held this was a premises liability case as a matter of law and it was improper to submit it on a general negligence charge. This is a potentially important construction liability case. USI provided and erected the scaffolding at Valero's plant for renovation work. USI was contractually obligated to erect and inspect it, but was not physically in control of it when Levine fell. The Court held that USI had a legal right to control the scaffolding (even absent physical control) and that made it a premises case requiring a premises liability question. A general negligence question did not submit any part of a premises liability theory.

Ruth Malinas (Plunkett, Griesenbeck & Mirari, Inc.) and Roger Hughes (Adams & Graham, L.L.P.) submitted an amicus in support the petition for review in *Columbia Valley Healthcare v. Zamarripa* 526 S.W.3d 453 (Tex. 2017). This was a wrongful death medical malpractice appeal over the sufficiency of the expert report to establish a hospital's nurse committed malpractice by failing to oppose or prevent the patient's transfer to another hospital. The patient's doctor determined a pregnant woman could not be treated at defendant hospital in Brownsville and ordered her transferred by ambulance to a Corpus Christi hospital; the woman died during the 2 ½ hour trip to Corpus Christi. Plaintiffs' expert claimed the nurses had a duty to oppose the transfer and their failure to oppose it caused the death. The Supreme Court held Tex. Civ. Prac. & Rem. Code §74.351 required the expert report explain "but for" causation – how but for failing to oppose the transfer the patient would have lived. The report was conclusory because it did not explain how the nurses' opposition could have prevented the transfer. However, the Court remanded to allow the trial court to consider granting an amendment on another negligent act.

TADC filed a joint amicus brief with TTLA, ABOTA and Tex-ABOTA, in support of the trial judge's sanctions in *Brewer v. Lennox Hearth Products*, ___ S.W.3d ___, 2018 WL 1474889, 2018 Tex. App. LEXIS 2127 (Tex. App.—Amarillo, Mar. 26, 2018, pet. filed). Roger Hughes (Adams & Graham, L.L.P.) signed for TADC. This case has received national attention. The decision merits study to determine when juror pool studies cross the line into jury tampering. Briefly, in a high visibility products liability case in a small community, defense counsel conducted a survey that the trial judge found was used to intimidate local witnesses and prejudice potential jurors. The lawyer was sanctioned. The Texarkana Court held the trial judge had inherent authority to protect the venire and judicial process from intentional, bad faith conduct. The trial judge must conclude there was intentional conduct that interfered with the court's ability to empanel a fair and impartial jury. The possibility that the opponent can voir dire jurors to detect bias is not sufficient to avoid sanctions.

Roger Hughes (Adams & Graham, L.L.P.) filed an amicus to support Petitioners in *Gunn v.*

McCoy, __ S.WW.3d __, 2018 WL 3014984, 2018 Tex. LEXIS 560 (Tex. June 15, 2018). This appeal addresses two important issues. First, the Supreme Court approved admitting medical expense affidavits made by the claimant's subrogated health insurer. Second, the Court held it was harmless error to exclude defense medical expert testimony that the claimed $3.2 million in future medical was excessive by over 50%. The Court reasoned that the excluded expert's testimony was cumulative because plaintiff's expert mentioned the excluded expert's figures when explaining why they were wrong and it was unclear the testimony would have significantly affected the future medical award. A motion for rehearing is expected.

Roger Hughes (Adams & Graham, L.L.Pfiled an amicus to support Petitioner in *Diamond Offshore Services, Ltd. v. Williams*, 546 S.W.3d 539 (Tex., Mar. 2, 2018). This is an important case setting standards to admit or exclude surveillance videos. The video depicted plaintiff doing yard and mechanic repairs over three days; once plaintiff admitted he could do those activities (but only with pain), the trial court excluded the video under Rule 403 as unduly prejudicial. The video was relevant because it bore on whether he could perform the activity with pain. The video was not unfairly prejudicial simply because it depicted only the few hours he worked in the yard

Roger Hughes (Adams & Graham, L.L.P.) filed an amicus brief to support Respondent in *Painter v. Amerimex Drilling, Ltd.*, __ S.W.3d __, 2018 Tex. LEXIS 310 (Tex. Apr. 13, 2018). This is important case to define the employer's vicarious liability. This is an injury/wrongful death suit arising from an auto accident; the critical issue is the proper legal test to make an employer vicariously liable. Amerimex rented a bunkhouse 50 miles from the drilling rig; it reimbursed the crew leader $50 a day if he drove the employees to the rig. The El Paso court upheld the summary judgment for the employer because the employer did not have a right of control over the crew leader as he drove between the bunkhouse and the rig. The Supreme Court reversed. The 'scope and course of employment' issue does not turn on a right to control the specific task being performed. An employee's conduct is within 'scope and course' if it is within his general authority in furtherance of the employer's business and to accomplish an object for which he was hired. The act must be of the same general nature as authorized conduct or incident to authorized conduct. A motion for rehearing was filed.

J. Mitchell Smith (Germer PLLC) filed an amicus brief to support the petition for review in *JBS Carriers v. Washington*, 513 S.W.3d 703 (Tex. App.—San Antonio 2017, pet. filed)(Barnard, J., dissenting). This is an interesting auto/pedestrian wrongful death case; the jury put 50% on JBS Carriers and its driver and 20% on the pedestrian/deceased. This critical issue was whether the trial court erred in excluding evidence that deceased suffered from mental illness, had been prescribed medications but was not taking them, and evidence the deceased had been drinking and taking cocaine and oxycodone. The trial court excluded it under TRE 403 as unfairly prejudicial. The court of appeals reversed, holding that the evidence unfairly prejudicial because it was not really probative. The dissent stressed that Rule 403 is to be used sparingly. If the defendant driver had this history and toxicology, it would come in – "sauce for the goose, sauce for the gander."

Brent Cooper (Cooper & Scully, P.C.) filed an amicus to support petitioner in *Rayner v. Dillon*, 501 S.W.3d 143 (Tex. App.—Texarkana 2016, pet. dismissed by agreement)(Moseley, J., dissenting). This is an important case from trucking accidents involving the use of circumstantial evidence and inference as "clear and convincing" evidence for gross negligence to prove the employer's subjective awareness that the driver was fatigued at the time of the accident. There is a companion issue on whether driver fatigue must be proven by clear and convincing evidence or only that the driver was generally incompetent. However, the case

settled during briefing and the petition was dismissed by agreement.

Roger Hughes (Adams & Graham, L.L.P.) filed an amicus to support the petition for review in *Medina v. Zuniga*, No. 04-16-0360-CV, 2017 WL 2261767 (Tex. App.—San Antonio, May 24, 2017, pet. filed)(memo. op.). This is a potentially important case concerning sanctions under Tex. R. Civ. P. 215.4(b) for denying a request to admit negligence and proximate cause. The trial court granted a directed verdict on those issues and plaintiff then moved for sanctions. This was an auto/pedestrian collision case; while exiting a parking lot, Medina ran over Zuniga because he did not look in her direction before driving out. After denying the admissions, Medina admitted in deposition that his interrogatory answers lied about looking both ways. At trial, his lawyer told the jury in opening argument the issue was damages and Zuniga asked too much. After a favorable verdict on damages, the plaintiff moved under Rule 215.4 to recover attorney's and expert witness fees for proving negligence and causation. The trial court awarded $37,000 in sanctions. The San Antonio court held Zuniga did not waive sanction by waiting until after trial because she did not clearly know until trial Medina should not have denied the admission. Whether Medina had a reasonable belief he could prevail was a fact question and the judge did not abuse his discretion to conclude Medina knew he would lose.

Roger Hughes (Adams & Graham, L.L.P.) filed an amicus brief to support the Texas Windstorm Ins. Ass'n's opposition to mandamus relief in *In re City of Dickinson*, Case No. 17-0020; the City seeks to reverse *In re Texas Windstorm Ins. Ass'n*, No. 14-16-677-CV, 2017 WL 7234466, 2016 Tex. App. LEXIS 13178 (Tex. App.-Houston [14th Dist.], Dec. 13, 2016, orig. proc.)(mem. op.). This is a first-party insurance dispute for windstorm benefits and extra-contractual liability. It presents a potentially important question about the attorney-client privilege for discussions with party employees who may become testifying experts. After TWIA's claims examiner gave an affidavit on causation, the City demanded all communications between TWIA's counsel and the examiner, claiming counsel had "corrected" the affidavit. The trial court held that TRCP 192.3(e) implicitly waived the privilege for communications with a party-employee who was a testifying expert. The Houston Court granted mandamus to vacate the order, finding TRCP 192.3 did not waive the privilege. The Supreme Court has ordered merits briefing.

Mike Thompson, Jr. (Wright & Greenhill, P.C.) submitted an amicus to support Petitioner in *In re Travis County*, No. 17-0947, on mandamus from *In re Travis County*, No. 03-17-0629-CV (Tex. App.—Austin, Nov. 2, 2017, orig. proc.)(mem. op.). This is to challenge the denial of discovery into a healthcare provider's agreed rates with plaintiff's medical insurer for treatment. This is a "don't-ask-don't-tell" case where plaintiff elected to not tell his provider of his insurance coverage and instead agreed to pay the maximum rates, with deferral of collection arranged via a letter of protection from his counsel.

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TADC Amicus Curiae Committee

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7 Things You Need to Know about 18.001

By Mike H. Basset[1] & Sadie Horner[2]
The Bassett Firm, Dallas

Introduction

Section 18.001 is a provision of the Texas Civil Practice and Remedies Code. Its purpose is to create an alternative -- and theoretically cheaper and more efficient -- means by which a party may prove up the reasonableness and necessity of a claim for economic damages. In other words, Section 18.001 provides an exception to the hearsay rule that would otherwise require plaintiffs to provide live expert testimony to establish the reasonableness and necessity of services.

The concept seems simple enough, but in practice the interpretation of the scope and effect of Section 18.001 varies widely from jurisdiction to jurisdiction.

This paper is intended to highlight the biggest challenges faced when dealing with Section 18.001 affidavits and to provide insight and guidance on how to respond to, and in some cases recover from, issues arising under Section 18.001.

#1

Know Your Deadlines

The 18.001 deadlines are no joke; they are clear and definite, and failing to respect them can dramatically impact your case.

> The party offering the affidavit in evidence or the party's attorney ***must serve*** a copy of the affidavit on each other party to the case at least ***30 days*** before the day on which evidence is first presented at the trial of the case. Except as provided by the Texas Rules of Evidence, the records attached to the affidavit are not required to be filed with the clerk of the court before the trial commences.[3]

For parties offering affidavits under 18.001, the use of the word "must" is crucial. This word imposes a mandatory deadline regardless of whether the failure to comply with the deadline is harmful to the opposing party. For example, in *Nye v. Buntin*, the injured party filed the 18.001 affidavits more than 30 days before the first day of evidence at trial, but did not serve them more than 30 days before the first day of evidence at trial.[4]

[1] **Michael H. Bassett**, Senior Partner at The Bassett Firm, was born in Chicago, Illinois, August 26, 1961. Admitted to bar, 1987, Texas, U.S. District Courts for Texas; Northern, Southern, Eastern, and Western Districts. "AV" rated by Martindale-Hubbell. Education: University of Texas El Paso (B.B.A. [dual majors], cum laude 1984); St. Mary's University School of Law (J.D., with distinction 1987). Articles Editor, St Mary's University Law Journal, 1986-1987; John Harlan Society; Briefing Attorney, Justice Ted Z. Robertson, Texas Supreme Court, 1987-1988. Certified Mediator and Neutral. Member: American Bar Association (Member of Litigation Section), Dallas Bar Association, Defense Research Institute (DRI), DRI Transportation Committee (Trucking Sub-Committee), American Trucking Association, Texas Association of Defense Counsel, International Association of Defense Counsel, Association of Defense Trial Attorneys, and American Transportation Lawyers Association. Areas of Practice: Transportation Litigation, Products Liability, Personal Injury, Premises Liability, Professional Liability, and Employment Litigation.

[2] **Sadie Horner** is an associate attorney with The Bassett Firm, whose litigation practice focuses on personal injury, insurance defense, and premises liability.

[3] Tex. Civ. Prac. & Rem. Code § 18.001(d) (emphasis added).

[4] *Nye v. Buntin*, No. 03-05-00214-CV, 2006 Tex. App. LEXIS 7067, at *6 (Tex. App.—Austin 2006).

When the trial court excluded the affidavits on grounds of timeliness, the injured party appealed arguing that her failure to timely file affidavits was harmless, because the defendants still had enough time to file a controverting-affidavit and in fact did file a timely controverting-affidavit.[5] The 3rd Court of Appeals did not buy this argument and concluded that a timely controverting-affidavit "does not cure the untimeliness" of the initial affidavit.[6]

The *Bituminous Cas. Corp. v. Cleveland* case is another good example of a failure to respect the 18.001 deadlines, which led to a nasty surprise. In this case, the defendant objected to 18.001 affidavits filed *after jury selection* on the grounds of timeliness and preserved error for appeal.[7] On appeal, the 7th Court of Appeals determined that the admission of the tardy affidavits was error and that it was harmful to the defendant.[8] Reasoning that, "The term 'must' as used in section 18.001 creates a condition precedent," the court cut the jury award for past reasonable and necessary medical expenses by more than half ($459,000.00 to $217,713.98).[9]

For controverting parties, typically defendants, Section 18.001 also imposes specific deadlines:

> A party intending to controvert a claim reflected by the affidavit must serve a copy of the counteraffidavit on each other party or the party's attorney of record not later than ***30 days*** after the day the party received a copy of the affidavit and at least 14 days before the day on which evidence is first presented at the trial of the case, or ***with leave of the court, at any time before the commencement of evidence*** at trial.[10]

Although from the language of Section 18.001 it appears that controverting parties have more leeway than offering parties, do not be lulled into a false sense of security. Treat the 30-day deadline with caution, or you may find yourself at trial precluded from contesting the reasonableness and necessity of services.[11]

Recently, the 6th Court of Appeals has offered guidance and clarification on the calculation of these 30-day deadlines imposed under 18.001. Specifically, the court first clarified that, whether you are calculating when the 30-day deadline under 18.001(e) begins to run or whether the date of service falls more than 30 days before the first day of evidence at trial under 18.001(d), the relevant service date is when the affidavit **and** the required itemized statement are served.[12] Next, the court confirmed that the Texas Code Construction Act applies to Texas Civil Practice and Remedies Code Section 18.001; therefore, "in computing a period of days, the first day is excluded and the last day is included."[13]

In other words, to calculate the relevant 30-day period under 18.001(d), you start on the day before the day evidence is first presented at trial and count back 30 days, including in your calculation the 30th day. Conversely, to calculate the relevant 30-day period under 18.001(e), you start on the day after service of the affidavit *and* the itemized statement and count forward 30 days, including in your calculation the 30th day.

#2

Yikes! I received 18.001 affidavits at the same time as the Original Petition, and I have less than 30 days to respond to both

Unfortunately, this offensive use of the 18.001 strategy might be picking up steam with savvy Plaintiffs' attorneys. It makes sense: catch opposing counsel off guard by serving her with

[5] *Id.* at *6-7.
[6] *Id.* at *7-8.
[7] *Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485, 488-493 (Tex. App.—Amarillo 2006)
[8] *Id*. at 494.
[9] *Id.* at 492-494.
[10] Tex. Civ. Prac. & Rem. Code § 18.001(e) (emphasis added).
[11] For ideas about what to do if you miss the 30-day deadline, see Section 3 of this paper.
[12] *Singleton v. Bowman*, No. 06-17-00082-CV, 2018 Tex. App. Lexis 1450, at *3-4 (Tex. App. – Texarkana Feb. 23, 2018).
[13] *Id.* at 6.

18.001 affidavits at the same time you serve her with the original suit, ***before discovery has started,*** and kick-start the 30-day clock for her to controvert while she is getting her wits about her to file the Answer.[14] ***This strategy is 100% permissible*** under the current statute**.**[15] So, as the Defendant, what can you do?[16]

First, understand that you are under a 30-day deadline to controvert, and you should act accordingly.[17] Under 18.001, this deadline applies unless the court grants leave. Accordingly, ***the best strategy is to request leave of court!*** Do this early. Do not allow the 30 days to run on the assumption that a court will grant leave after the deadline has passed.

Second, whether leave is granted or not, avoid taking short-cuts to controvert quickly. You do not want to be stuck with an inadequate counteraffidavit. Courts are quick to strike counteraffidavits on various grounds including (1) timeliness, (2) the qualifications of the expert, and (3) whether the counteraffidavit gives reasonable notice of the basis on which the party intends to controvert at trial.[18] ***Develop your firm's database of experts now***, before you need them, so you do not waste precious days locating an expert qualified to controvert.

Third, ***and inadvisably***, you can ignore the 18.001 affidavits and either (1) submit late controverting affidavits or (2) attempt to challenge reasonableness, necessity, and/or causation ***without*** serving controverting affidavits. But understand these are last-ditch and ***high-risk*** options in an area of the law that evolves quickly.

In fact, some appellate courts have specifically prohibited controverting parties from attacking reasonableness and necessity of services if they failed to file a proper counteraffidavit under Section 18.001.[19] Even if these high-risk strategies are permissible in your jurisdiction now, it might not stay that way for long.

3

Oops, no controverting affidavit - now what?!

You received 18.001 affidavits from opposing counsel, but ***for whatever reason***, you did not serve controverting affidavits within the timeframe required – what do you do now?

3a. Request Leave of Court

As soon as you catch your mistake, you should request leave of court to serve your controverting affidavits. In the most extreme circumstances, a court may grant leave even after the trial has started: "On the day of trial … the court gave appellant leave to file a counteraffidavit. The court did so even though the case had begun, and evidence had been presented."[20]

3b. If leave is denied – you *might* be able to controvert anyway

Texas appellate courts have varying and conflicting opinions on whether an opposing party may challenge reasonableness and necessity when the party failed to serve controverting affidavits.[21] Depending on which court you are in, you ***might*** be

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[14] Tex. Civ. Prac. & Rem. Code § 18.001(e)-(f).

[15] *See* Tex. Civ. Prac. & Rem. Code § 18.001.

[16] This abusive practice has not been ignored. There has been at least one attempt in the last several years to curb the potential for abuse by proposing modification of the language of Section 18.001. *See* 85(R) HB 2301.

[17] For more information, see Section 1 of this paper.

[18] See *City of Laredo v. Limon*, No. 04-12-00616-CV, 2013 Tex. App. LEXIS 13644 at *19 (Tex. App.—San Antonio 2013); *Hong v. Bennett*, 209 S.W.3d 795, 803 (Tex. App.—Fort Worth 2006); *Moreno v. Ingram*, 454 S.W.3d 186 (Tex. App.—Dallas 2014); *K Mart Corp. v. Rhyne*, 932 S.W.2d 140, 146 (Tex. App.—Texarkana 1996); *Nye v. Buntin*, No. 03-05-00214-CV, 2006 Tex. App. LEXIS 7067 at *3 (Tex. App.—Austin 2006); *Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485 (Tex. App.—Amarillo 2006); *Travelers Ins. Co. v. Martin*, 28 S.W.3d 42 (Tex. App.—Texarkana 2000).

[19] For more information, see Section 3b of this paper.

[20] *Ellen v. Carr*, No. A14-92-00292-CV, 1992 Tex. App. LEXIS 2987, at *6 (Tex. App.—Houston [14th Dist.] 1992) (unpublished). Use caution in relying on the reasoning in *Ellen*. The appellate court did not expressly condone the trial court's decision to grant leave after the case had begun, and ultimately, the controverting affidavit was struck on grounds other than timeliness.

[21] *Grove v. Overby*, No. 03-03-00700-CV, 2004 Tex. App. LEXIS 6822, at *18 (Tex. App.—Austin 2004); *Barrajas v. VIA Metro*. Transit Auth., 945 S.W.2d 207, 209 (Tex. App.—San Antonio 1997); *Burris v. Garcia*, No. 04-03-00361-CV, 2005 Tex. App. LEXIS 2788, at *17 (Tex. App.—San Antonio 2005); *Hudgins v. Logue*, No. 05-09-01502-CV,

able to challenge reasonableness and necessity at trial even though you missed the deadline to controvert or your controverting affidavits were struck.

The U.S. District Court for the Northern District of Texas reviewed 18.001 case law in Texas as part of an *Erie* analysis and summed up the situation well: "…those courts which have described the [18.001] provision as an evidentiary rule have generally held that a defendant who fails to properly file a responsive counter-affidavit is precluded from presenting any evidence contesting the reasonableness and necessity of the expenses… while other courts have permitted the presentation of controverting evidence, despite the absence of a filed counter-affidavit."[22]

In Texas, the Courts of Appeals for the following Districts ***expressly forbid*** challenging reasonableness and necessity without a proper controverting affidavit: 1st, 2nd,[23] 6th, 9th, 11th, and 14th.[24] These appellate courts have been clear, "If no controverting affidavit is filed, the other party may not controvert the claim."[25]

Each court relies on similar reasoning in reaching this conclusion. Specifically, "Section 18.001 is an evidentiary statute which accomplishes three things: (1) it allows for the admissibility, by affidavit, of evidence of the reasonableness and necessity of charges which would otherwise be inadmissible hearsay; (2) it permits the use of otherwise inadmissible hearsay to support findings of fact by the trier of fact; and ***(3) it provides for exclusion of evidence to the contrary, upon proper objection, in the absence of a properly-filed counteraffidavit***."[26] According to the courts that follow this approach, to interpret Section 18.001 otherwise, "would render Chapter 18 useless … [and] a party [would] be able to call a witness to the stand and ask questions concerning the initial affidavit and do so without complying with the law."[27]

In contrast, the Courts of Appeals for the 3rd, 4th, 5th, 7th, 12th, and 13th Districts ***seem to allow*** challenges to reasonableness and necessity even in the absence of a controverting affidavit; however, caution should be exercised in relying on the ability to challenge reasonableness and necessity without a proper controverting affidavit even in these jurisdictions.[28] First, the opinions from these courts do not distinguish whether the testimony and evidence allowed at trial in the absence of a controverting affidavit were strictly for purposes of challenging causation, reasonableness and necessity, or a combination.[29] While the opinions appear broad enough to support the argument that challenges to reasonableness and necessity are allowed even in the absence of controverting affidavits, this argument might not withstand further appellate scrutiny.

Second, in the *Ten Hagen Excavating* case, the 5th Court of Appeals clarified that the failure to

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2011 Tex. App. LEXIS 629, at *6 (Tex. App.—Dallas 2011); *Reyna v. Aldaco*, No. 07-04-0033-CV, 2005 Tex. App. LEXIS 10118, at *5 (Tex. App.—Amarillo 2005); *Goldberg v. Dicks*, No. 12-02-00053-CV, 2004 Tex. App. LEXIS 1258, at *56 (Tex. App.—Tyler 2004); *Walker v. Ricks*, 101 S.W.3d 740, 747 (Tex. App.—Corpus Christi 2003).

[21] *Petrello v. Prucka*, 415 S.W.3d 420, 431 (Tex. App.—Houston [1st Dist.] 2013); *Hong v. Bennett*, 209 S.W.3d 795, 801 (Tex. App.—Fort Worth 2006); *Hilland v. Arnold*, 856 S.W.2d 240, 242 (Tex. App.—Texarkana 1993); *Sloan v. Molandes*, 32 S.W.3d 745, 752 (Tex. App.—Beaumont 2000); *Beauchamp v. Hambrick*, 901 S.W.2d 747, 749 (Tex. App.—Eastland 1995); *Ellen v. Carr*, NO. A14-92-00292-CV, 1992 Tex. App. LEXIS 2987, at *7 (Tex. App.—Houston [14th Dist.] 1992).

[22] *Rahimi v. United States*, 474 F. Supp. 2d 825, 828 (N.D. Tex. 2006).

[23] The 2nd Court of Appeals recently found that, at least in the context of a Chapter 27 dismissal hearing, an uncontroverted 18.001 affidavit does not preclude argument that that attorney fees, which are the subject of the affidavit, are excessive. *McGubney v. Rauhauser*, No. 02-16-00244-CV, 2018 Tex. App. Lexis 2797, at *16-18 (Tex. App. – Fort Worth Apr. 19, 2018).

[24] *Petrello*, 415 S.W.3d at 431; *Hong*, 209 S.W.3d at 801; *Hilland*, 856 S.W.2d at 242; *Sloan*, 32 S.W.3d at 752; *Beauchamp*, 901 S.W.2d at 749; *Ellen*, 1992 Tex. App. LEXIS 2987, at *7.

[25] *See, e.g., Sloan*, 32 S.W.3d at 752.

[26] *Beauchamp*, 901 S.W.2d at 749 (emphasis added).

[27] *Ellen*, 1992 Tex. App. LEXIS 2987, at *8.

[28] *Grove*, 2004 Tex. App. LEXIS 6822, at *18; *.Barrajas*, 945 S.W.2d at 209; *Burris*, 2005 Tex. App. LEXIS 2788, at *17; *Hudgins*, 2011 Tex. App. LEXIS 629, at *6; *Reyna*, 2005 Tex. App. LEXIS 10118, at *5; *Goldberg*, 2004 Tex. App. LEXIS 1258, at *56; *Walker*, 101 S.W.3d at 747.

[29] *Grove*, 2004 Tex. App. LEXIS 6822, at *18; *.Barrajas*, 945 S.W.2d at 209; *Burris*, 2005 Tex. App. LEXIS 2788, at *17; *Hudgins*, 2011 Tex. App. LEXIS 629, at *6; *Reyna*, 2005 Tex. App. LEXIS 10118, at *5.

file timely and proper controverting affidavits will preclude a controverting party from offering ***expert*** testimony at trial challenging the reasonableness and necessity of services; however, the absence of a controverting affidavit will not preclude cross-examination of the Plaintiff, introduction of medical records, or ***arguments*** challenging reasonableness and necessity during opening and closing statements.[30]

Third, several of the opinions from these jurisdictions are limited to a very specific line of reasoning -- that the party presenting evidence of damages merely establishes that the medical bills are "reasonable and customary."[31] According to these courts, evidence that the medical bills are reasonable and customary is not the same as evidence that the bills are reasonable and necessary; therefore, a controverting party is not barred from challenging reasonableness and necessity at trial in the absence of a proper controverting affidavit.[32]

As for the remaining Courts of Appeal, neither the 8th nor the 10th Districts have yet expressed direct opinions on this issue. However, the 8th Court of Appeals recently issued an opinion stating that, "the statute simply allows a plaintiff to avoid the necessity of presenting expert witness testimony as to the reasonableness of the amount of his medical expenses."[33] The court was quick to note that 18.001 does not establish that a plaintiff is entitled to an award of the expenses reflected in 18.001 affidavits and that 18.001 affidavits do not establish the necessary "causal nexus between the defendant's negligence and the plaintiff's medical expenses."[34] With this in mind, it seems likely that the 8th Court of Appeals will permit ***argument*** but not ***expert testimony*** on the reasonableness and necessity of services and charges when confronted with the issue.

If you find yourself in the position of arguing the admissibility of evidence contesting reasonableness and necessity of services in the absence of a controverting affidavit, it would be wise to thoroughly research ***the most current*** law on this topic ***in your jurisdiction.*** This narrow issue on 18.001 affidavits in Texas ***is complicated and contradictory***, and the Texas Supreme Court has not yet weighed in on the issue. Failure to familiarize yourself with the most recent case law in your specific jurisdiction may leave you unable to contest reasonableness and necessity at trial.

3c. Challenge 18.001 affidavits on other grounds

Controverting aside, you should always evaluate 18.001 affidavits for potential challenges to the sufficiency of the affidavit and get them thrown out if you can. Use your Eagle Eyes to review them thoroughly and ensure they comply with statutory requirements.[35] Admittedly, there are not many statutory requirements with which the original affidavits must comply, but use every tool in your arsenal!

There is very little appellate guidance on strategies for successfully challenging the sufficiency of original 18.001 affidavits. However, outlined below are strategies that, whether proven in the fire of appellate practice or not, are worth consideration when putting together your plan of attack against 18.001 affidavits.

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[30] *Ten Hagen Excavating, Inc. v. Castro-Lopez*, No. 05-15-00902-CV, 2016 Tex. App. LEXIS 9549, at 61-62 (Tex. App. – Dallas Aug. 29, 2016).

[31] *Hudgins*, 2011 Tex. App. LEXIS 629, at *6; *Goldberg*, 2004 Tex. App. LEXIS 1258, at *56 ("evidence that medical expenses are reasonable ***and customary*** is no evidence concerning the reasonable necessity of those medical expenses") (emphasis added); *Walker*, 101 S.W.3d at 747. Note that reasonable ***and customary*** is not the statutory language from §18.001, nevertheless, the courts use this language in the rationale for permitting challenges to reasonableness and necessity.

[32] *Hudgins*, 2011 Tex. App. LEXIS 629, at *6; *Goldberg*, 2004 Tex. App. LEXIS 1258, at *56 ("evidence that medical expenses are reasonable ***and customary*** is no evidence concerning the reasonable necessity of those medical expenses") (emphasis added); *Walker*, 101 S.W.3d at 747.

[33] *Rumzek v. Lucchesi*, No. 08-15-00067-CV, 2017 Tex. App. Lexis 10740, at *29-30 (Tex. App. – El Paso Nov. 15, 2017).

[34] *Id*.

[35] Tex. Civ. Prac. & Rem. Code § 18.001. See also *Mass Mktg. v. Durbin*, No. 04-09-00697-CV, 2010 Tex. App. LEXIS 8377, at *13-14 (Tex. App.—San Antonio 2010) holding: "To comply with the statute, an affidavit must be sworn, made by the person who either provided the service or the person in charge of the records showing the service provided, and have an itemized receipt of the service and charge."

First, consider whether the affidavits are timely. If the affidavits are late, i.e. – delivered less than 30 days before trial, object and/or move to strike immediately.[36] Failure to timely object to the admission of late affidavits could result in waiver and/or failure to preserve the issue for appeal.[37]

Second, consider whether the affidavits include an itemized statement of the service and charge. If it does not, object and/or move to strike.[38]

Third, consider whether the affidavits were properly served.[39] If the affidavits were not ***served***, then they are not in compliance with the statute and you should object and move to strike.[40] For example, in *Nye*, the affidavits were ***filed*** with the court on time, but were served on opposing counsel after the deadline, and were thus excluded even though opposing counsel served responsive controverting affidavits by his statutory deadline.[41] Also, the affidavits must be served on ***each*** other party to the case; therefore, if the original affidavit is served on one defendant but not the others in a multi-defendant case, the statutory requirements may not have been met.[42]

Fourth, consider whether the affidavits were executed by a proper person. If the affidavits are not made by (1) the person who provided the service or (2) the records custodian of the service provider, then the statutory requirements have not been met.[43] However, be careful with this argument. Two appellate courts have recognized an exception here for affidavits executed by custodians who have stepped into the shoes of the original service provider, and the Texas Supreme Court has recently held that 18.001 affidavits may be executed by subrogation agents for the health insurance carriers that paid the plaintiff's medical expenses.[44]

Fifth, consider whether the affidavits contain proper language averring to the reasonableness and the necessity of the services at the time and place provided.[45] Section 18.002 provides sample wording for the original affidavits, ***but*** the appellate courts have been clear that use of this exact wording is not required: "Tex. Civ. Prac. & Rem. Code Ann. § 18.002 sets forth a sample form for the affidavit, but also provides that use of the form is not exclusive as long the affidavit substantially complies with § 18.001."[46]

Sixth, are you dealing with a Plaintiff or Plaintiff's attorney against whom discovery sanctions may be appropriate? Consider whether to

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[36] Tex. Civ. Prac. & Rem. Code § 18.001(d). *See also Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485 (Tex. App.—Amarillo 2006).

[37] *See Bituminous Cas. Corp. v. Cleveland*, 223 S.W.3d 485 (Tex. App.—Amarillo 2006) (holding that trial court's admissions of late affidavits was an abuse of discretion, only because the error was preserved on appeal by opposing counsel's objection). *See also Jamshed v. McLane Express Inc*., 449 S.W.3d 871, 884 (Tex. App.—El Paso 2014) (holding that the issue of untimely affidavits was not objected to at trial, and thus not preserved on appeal).

[38] Tex. Civ. Prac. & Rem. Code § 18.001. *See also Durbin*, 2010 Tex. App. LEXIS 8377, at *13-14. Most affidavits under 18.001 must be filed with an itemized statement of the service and charge; however, there is at least one exception to this general rule. *See Jamshed*, 449 S.W.3d at 884 (holding that affidavits for attorney's fees do not require itemized statements).

[39] Previous versions of Section 18.001 required affidavits to be both filed and served; however, the current version merely requires service to satisfy the requirements of a proper 18.001 affidavit. (Unless filing is otherwise required under the Texas Rules of Evidence. *See* § 18.001(d).)

[40] Tex. Civ. Prac. & Rem. Code § 18.001(d)-(e).

[41] *Nye v. Buntin*, No. 03-05-00214-CV, 2006 Tex. App. LEXIS 7067, at *4 (Tex. App.—Austin 2006).

[42] Tex. Civ. Prac. & Rem. Code § 18.001(e).

[43] Tex. Civ. Prac. & Rem. Code § 18.001(c).

[44] *Gunn v. McCoy*, No. 16-0125, 2018 Tex. Lexis 560, 2018 WL 3014984, at *50-56 (Tex. June 15, 2018)(publication pending); *Amigos Meat Distribs., L.P. v. Guzman*, 526 S.W. 3d 511 (Tex. App. – Houston [1st Dist.] 2017, pet. denied); *Katy Springs & Mfg. v. Favalora*, 476 S.W. 3d 579, 604 (Tex. App. – Houston [14th Dist.] 2015, pet. denied). For more information on this topic see Section 6 of this paper.

[45] Tex. Civ. Prac. & Rem. Code § 18.001(b).

[46] *Durbin*, 2010 Tex. App. LEXIS 8377, at *14; *see also Martinez v. Vela*, No. 03-98-00707-CV, 2000 Tex. App. LEXIS 87, at *7 (Tex. App.—Austin 2000) (unpublished) (holding that "submitted affidavits which generally track the language of the form in section 18.002" were acceptable); *see also Cruz v. Van Sickle*, 452 S.W.3d 503, 521 (Tex. App.—Dallas 2014) (holding that "an affidavit that substantially complies with Section 18.001 is sufficient [under 18.002]."); *see also Hong*, 209 S.W.3d at 803 (holding that "affidavits submitted by Bennett substantially follow the format set forth in section 18.002(b) by including a statement averring that '[t]he services provided were necessary and the amount charged for each service was reasonable at the time and place that the service was provided'.").

ask the Court to strike the Plaintiff's 18.001 affidavit as a sanction for discovery abuses. At least one appellate court has upheld such an action.[47] Keep in mind, however, that success on such a request will depend on the nature and severity of the discovery abuse for which sanction is sought, and the Court may only impose such a sanction if it determines the sanction is just.[48]

Seventh, look for other miscellaneous errors or grounds for objection: are the affidavits signed? Are there mistakes in the math used in the itemized statement? Do the affidavits accurately reflect paid or incurred amounts? Perhaps you are seeing some weird issue in an affidavit that we have not even thought to address here?

3d. No matter *what* else you do – challenge causation!

On this subject, the courts are in agreement: causation has ***nothing*** to do with the 18.001 affidavits.[49] For example, the 5th Court of Appeals has clarified that, "This statutory provision addresses amount, reasonableness and necessity of the charges, but does not address the issue of causation."[50] Similarly, the 9th Court of Appeals has specified that, "Compliance with the statute does not establish that the amount of the damages shown to be reasonable and necessary was ***caused*** by the defendant's negligence and therefore does not establish the plaintiff's entitlement to those damages as a matter of law."[51]

Thus, there is no substitute for expert testimony under Section 18.001 on the matter of causation. With a challenge to causation, you might be able to force opposing party's expert to take the stand live at trial.[52]

When causation is challenged and the injuries lay ***outside the common knowledge*** of laypersons, expert testimony is required: "We conclude that expert medical evidence is required to prove causation unless competent evidence supports a finding that the conditions in question, the causal relationship between the conditions and the accident, and the necessity of the particular medical treatments for the conditions are within the common knowledge and experience of laypersons."[53]

Some injuries are not outside the common knowledge, and therefore do not require expert testimony. For example, "causation as to certain types of pain, bone fractures, and similar basic conditions following an automobile collision can be within the common experience of lay jurors."[54] In contrast, injuries relating to complicated medical issues, such as cancer, traumatic brain injury, skull fractures, and infections, or that involved a more complicated timeline, such as delay in treatment or a significant prior medical history, require expert testimony.[55]

3e. Remember – Controverted or not, the jury is not bound by the 18.001 Affidavit

While an uncontroverted affidavit 18.001 may provide a streamlined procedure for a party to submit evidence of the reasonableness and necessity of expenses without paying an expert to appear at trial, do not lose sight of the fact that ***the jury is not bound by the uncontroverted affidavits***:[56]

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[47] *Adams v. Allstate Cnty. Mut. Ins. Co*., 199 S.W.3d 509, 511 (Tex. App.—Houston [1st Dist.] 2006). The court's ruling was based on the fact that when opposing counsel attempted to serve the affiant with a subpoena for a deposition, the affiant pretended to be someone else and refused service. The affidavit was thus stricken for Plaintiff's and Affiant's "unwillingness to cooperate in the discovery process."

[48] *See Petroleum Solutions, Inc. v. Head*, 454 S.W. 3d 482, 489 (Tex. 2014).

[49] *Rumzek v. Lucchesi*, No. 08-15-00067-CV, 2017 Tex. App. Lexis 10740, at *29-30 (Tex. App. – El Paso Nov. 15, 2017); *Grove*, 2004 Tex. App. LEXIS 6822, at *18; *Beauchamp*, 901 S.W.2d at 749; See *Guevara v. Ferrer*, 247 S.W.3d 662, 663 (Tex. 2007); *Hilland*, 856 S.W.2d at 242; *Sloan*, 32 S.W.3d at 749; *Sanders v. Perez*, No. 05-97-00454-CV, 1999 Tex. App. LEXIS 3800, at *7 (Tex. App.—Dallas 1999); *Walker*, 101 S.W.3d at 748.

[50] *Sanders*, 1999 Tex. App. LEXIS 3800, at *7.

[51] *Sloan*, 32 S.W.3d at 749 (emphasis added).

[52] *See Beauchamp*, 901 S.W.2d at 748.

[53] *Guevara*, 247 S.W.3d at 663.

[54] *Id.*

[55] *See Id.* at 666.

[56] *Burris*, 2005 Tex. App. LEXIS 2788, at *1; *Grove*, 2004 Tex. App. LEXIS 6822, at *2; *Barrajas*, 945 S.W.2d at 210; *Beauchamp*, 901 S.W.2d at 748; *Hilland*, 856 S.W.2d at 243; *Nye*, 2006 Tex. App. LEXIS 7067, at *1; *Lopez*, 2006 Tex. App. LEXIS 1512, at *2; *Sanders*, 1999 Tex. App. LEXIS 3800, at *2; *Hudgins*, 2011 Tex. App. LEXIS 629, at *7; *Ford v. Chapman*, No. 05-96-00622-CV, 1998 Tex. App. LEXIS

> The jury was not bound by the statements contained within the affidavits… A factfinder is not bound by the opinion of an expert witness on the necessity of medical treatment, and nothing in section 18.001 makes the statements of non-expert affiants on the issues of reasonableness and necessity any more binding on factfinders than the live testimony of a medical expert.[57]

Time and time again, successful plaintiffs have appealed their verdicts when their juries have awarded significantly less damages than reflected in the uncontroverted affidavits admitted at trial, and time and time again the appellate courts have affirmed the jury verdicts.[58]

The courts are clear that, "While an uncontroverted section 18.001 affidavit provides ***legally sufficient evidentiary support*** for a fact finding on the amount of damages, it is ***not binding*** on a jury and does not operate to limit a jury's discretion in assessing damages."[59] For example, the 4th Court of Appeals in San Antonio specified that, "The jury was entitled to scrutinize the medical bills that [the Plaintiff] produced and determine which bills and which future medical expenses were connected to the bus accident. The jury could also choose to be guided or not by the testimony on the amount of damages."[60]

The Texas Supreme Court underscored this fact when it recently acknowledged that "section 18.001 is purely procedural, providing for the use of affidavits to streamline proof of the reasonableness and necessity of medical expenses. Thus, the affidavits are not conclusive …"[61]

3f. DON'T PANIC

If you find yourself in a position where you have missed the deadline to controvert 18.001 affidavits, remember that such mistakes are fixable and consider whether the strategies outlined here will assist you in recovering from the fumble.

#4

Controverting affidavits - navigating the 18.001 obstacle course

As an exception to the hearsay rule, Section 18.001 provides significant time and cost savings "by providing a means to prove up the reasonableness and necessity of medical expenses" before trial.[62] This characterization may hold true for offering parties, but for controverting parties, Section 18.001 presents a challenging and expensive obstacle course offering plenty of opportunities to fall on your face.

It is widely acknowledged that, "[T]he statute places a greater burden of proof on counteraffidavits to discourage their misuse in a manner that frustrates the intended savings."[63] Therefore, to properly controvert, you will need to keep ***three concepts*** in mind:

1. ***deadlines,***
2. ***notice, and***
3. ***qualifications.***[64]

3830, at *2 (Tex. App.—Dallas 1998) (unpublished); *Reyna*, 2005 Tex. App. LEXIS 10118, at *1; *Walker*, 101 S.W.3d at 750.

[57] *Reyna*, 2005 Tex. App. LEXIS 10118, at *6 (internal citations omitted).

[58] *Burris*, 2005 Tex. App. LEXIS 2788, at *1; *Grove*, 2004 Tex. App. LEXIS 6822, at *2; *Barrajas*, 945 S.W.2d at 210; *Beauchamp*, 901 S.W.2d at 748; *Hilland*, 856 S.W.2d at 243; *Nye*, 2006 Tex. App. LEXIS 7067, at *1; *Lopez*, 2006 Tex. App. LEXIS 1512, at *2; *Sanders*, 1999 Tex. App. LEXIS 3800, at *2; *Hudgins*, 2011 Tex. App. LEXIS 629, at *7; *Ford v. Chapman*, No. 05-96-00622-CV, 1998 Tex. App. LEXIS 3830, at *2 (Tex. App.—Dallas 1998) (unpublished); *Reyna*, 2005 Tex. App. LEXIS 10118, at *1; *Walker*, 101 S.W.3d at 750.

[59] *Grove*, 2004 Tex. App. LEXIS 6822, at *17 (emphasis added).

[60] *Barrajas*, 945 S.W.2d at 209.

[61] *Gunn v. McCoy*, No. 16-0125, 2018 Tex. Lexis 560, 2018 WL 3014984, at *50 (Tex. June 15, 2018)(publication pending).

[62] *Turner*, 50 S.W.3d at 746.

[63] *Hong v. Bennett*, 209 S.W.3d 795, 803 (Tex. App.—Fort Worth 2006); *See also Turner v. Peril*, 50 S.W.3d 742, 747 (Tex. App.—Dallas 2001).

[64] Only notice and qualifications are addressed in this section; however, for a full discussion of deadlines see Section 1 of this paper.

4a. Notice

Section 18.001 tells us that "[t]he counteraffidavit must give reasonable notice of the basis on which the party serving it intends at trial to controvert the claim reflected by the initial affidavit."[65] But what does that mean?

For starters, it means that the expert must state her opinion that a charge was unreasonable and/or services were unnecessary ***and*** explain why/how she came to that conclusion.[66] Conclusory statements are insufficient.[67] In other words, the counteraffidavit should be clear as to what is being controverted and why the expert disagrees about the reasonableness or necessity of what is being controverted.

Keep in mind that it is important to understand both the scope of the initial affidavit and the scope of your expert's controverting opinions. At least one appellate court has found that an expert whose basic opinion is "that all services beyond the initial trip to the ER were unreasonable and unnecessary" challenged only the reasonableness and necessity of services, not the reasonableness and necessity of charges.[68] Although the counteraffidavit gave reasonable notice of the grounds on which the expert intended to controvert the reasonableness and necessity of *treatment*, the court concluded that it did not give reasonable notice of the grounds on which he intended at trial to controvert the reasonableness and necessity of *charges*; therefore, it was not an abuse of the trial court's discretion to admit the initial affidavits to establish the reasonableness of the fees charged in spite of the timely filed controverting affidavit.[69]

4b. Qualifications

In order for the controverting affidavit to be valid, it can only "be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise" to controvert the reasonableness of the charges or the necessity of the services.[70]

For example, an orthopedic surgeon specializing in spinal cord injuries with no training, education, or experience in chiropractic treatment is not qualified to testify about the reasonableness and necessity of chiropractic services.[71] Further, an orthopedic surgeon cannot merely make a blanket statement that his education qualifies him to contradict the necessity of services that are not related to orthopedic care.[72] Bottom line - a licensed physician is not automatically qualified as an expert in every medical field.[73]

Similarly, a chiropractor is generally not qualified to render expert opinion regarding non-chiropractic medical expenses.[74] In *Hong*, the appellate court held that the controverter, a licensed chiropractor, was not qualified to controvert the reasonableness or necessity of services provided by a medical doctor, radiologist, or pharmacist.[75] In its reasoning, the appellate court relied on the Texas Occupational Code, which makes it clear that, "The practice of chiropractic does not include; (1) incisive or surgical procedures; (2) prescription of controlled substances . . . ; or (3) the use of x-ray therapy or therapy that exposes the body to radioactive materials."[76]

Lessons learned on qualifications – make sure your expert does more than simply state that he or she is qualified. Your expert must explain how he or she is qualified by identifying his or her specific knowledge, skill, experience, training, education, or other expertise that is relevant to the particular records or bills being controverted.

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[65] Tex. Civ. Prac. & Rem. Code § 18.001(e).
[66] *Turner*, 50 S.W.3d at 748.
[67] *City of Laredo v. Limon*, No. 04-12-00616-CV, 2013 Tex. App. LEXIS 13644, at *19 (Tex. App.—San Antonio 2013).
[68] *Rountree v. Cavazos*, No. 05-16-00512-CV, 2017 Tex. App. Lexis 5888, 2017 WL 2730422, at *11 (Tex. App. – Dallas June 26, 2017).
[69] *Id*. at 13-14.
[70] Tex. Civ. Prac. & Rem. Code § 18.001(f).
[71] *Travelers Ins. Co. v. Martin*, 28 S.W.3d 42, 48 (Tex. App.—Texarkana 2000).
[72] *Turner*, 50 S.W.3d at 747.
[73] *Id.*; *see also Martin*, 28 S.W.3d at 48; *see also Moreno v. Ingram*, 454 S.W.3d 186, 193 (Tex. App.—Dallas 2014).
[74] *Hong v. Bennett*, 209 S.W.3d 795, 804 (Tex. App.—Fort Worth 2006).
[75] *Id* at 803.
[76] Tex. Occ. Code. § 201.002(c).

4c. Additional Obstacles:

i. **Waiver of the Consulting Expert Privilege**

Use caution when using a consulting expert as an affiant for 18.001 purposes. If a consulting expert prepares a controverting affidavit, the expert's otherwise privileged mental impressions and opinions may become discoverable, and the consulting expert may be subject to deposition.[77] For example, in *Mendez*, the court held that the defendant voluntarily disclosed her consulting expert's opinion by filing a controverting affidavit.[78] However, the court emphasized that the consulting expert privilege was waived only as to those matters that were stated in the controverting affidavit.[79]

ii. **Overreaching - be thoughtful about the scope of your controverting affidavit**

If your expert's controverting affidavit addresses subjects for which he or she is unqualified, a court may strike the entire affidavit rather than allow you to remove or redact the improper portions. For example, in *Limon*, an orthopedic surgeon made a conclusory statement that he was qualified to discuss emergency room, chiropractic, radiology, anesthesiology, and pathology services in addition to the services provided by orthopedic surgeons.[80] The expert's opinions were struck, and on appeal, the court upheld the entire jury verdict, including portions the expert may have been qualified to controvert.[81] The court specifically declined to "parse through the affidavit and strike only those portions pertaining to non-orthopedic surgeon services."[82]

5

Proper affidavits and controverting affidavits have been served.

What next?

Congratulations! You have successfully made it through the obstacles in the preceding four sections: you have received affidavits, and you have properly controverted in a timely and statutorily compliant manner. The burning question then becomes – what happens next: which affidavits (if any) are now admissible?

Courts have broad discretion in deciding whether to admit or exclude evidence, and predictably, the Texas appellate courts vary in their handling of 18.001 affidavits and counteraffidavits on this issue. To date, the Texas Supreme Court has not chimed in on the debate.

Of the various appellate courts that have directly addressed admissibility of 18.001 affidavits and counteraffidavits, all agree that if a ***proper*** affidavit is served and no corresponding counteraffidavit is served, then the affidavit is admissible.[83] Note the emphasis on "proper." If a controverting party successfully argues that the affidavit failed to meet the requirements under 18.001, then the affidavit is not admissible, regardless of whether a counteraffidavit was filed.[84]

This is good to know, but what happens when the affidavit was proper and a counteraffidavit ***was*** served? Oddly enough, not many appellate courts have directly addressed this issue.

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[77] *In re Mendez*, 234 S.W.3d 105, 108-11 (Tex. App.—El Paso 2007).
[78] *Id.* at 111.
[79] *Id.*
[80] *City of Laredo v. Limon*, No. 04-12-00616-CV, 2013 Tex. App. LEXIS 13644, at *17 (App.—San Antonio 2013).
[81] *Id.* at *19.
[82] *Id.*
[83] *Gunn v. McCoy*, 485 S.W. 3d 75, 102 (Tex. App. – Houston [14th Dist.] 2016, pet. filed); *Flynn v. Racicot*, No. 09-11-00607-CV, 2013 Tex. App. LEXIS 1096, 2013 WL 476756, at 2 (Tex. App. – Beaumont Feb. 7, 2013, no pet.); *City of Laredo v. Limon*, No. 04-12-00616-CV, 2013 Tex. App. LEXIS 13644, 2013 WL 5948129, at 17 (Tex. App. – San Antonio Nov. 6, 2013, no pet.); *Bituminous Cas. Corp. v. Cleveland*, 233 S.W. 3d 485, 492 (Tex. App. – Amarillo 2006, no pet.); *Hong v. Bennett*, 209 S.W. 3d 795, 804 (Tex. App. – Ft. Worth 2006, no pet.); *Grove v. Overby*, No. 03-03-00700-CV, 2004 Tex. App. LEXIS 6822, 2004 WL 1686326, at 17 (Tex. App. – Austin July 29, 2004, no pet.).
[84] *See, e.g., Flynn*, 2013 Tex. App. LEXIS 1096, at 2. See section 3 of this paper for more ideas on how to argue an affidavit is improper without controverting it.

Of the courts that have, the 14th Court of Appeals and the 4th Court of Appeals have upheld ***exclusion*** of both affidavits ***and*** counteraffidavits when both meet all of the respective requirements under 18.001.[85] In other words, in these jurisdictions, if both sides meet their burdens under 18.001, the most likely outcome is that the affidavits ***cancel each other out*** and the parties fall back on expert testimony to establish or contest the reasonableness or necessity of services. However, neither the 14th Court of Appeals nor the 4th Court of Appeals specifically held that ***admission*** of both proper affidavits and counteraffidavits would be an abuse of discretion.[86]

Interestingly, although it did not analyze the issue on appeal, the 5th Court of Appeals noted that the 192nd Judicial District Court in Dallas County admitted redacted versions of the claimant's affidavits with related medical records when the defendant filed controverting affidavits challenging only the necessity of treatment. In other words, the trial court admitted the portions of the initial affidavits pertaining to the *reasonableness of the charges* and excluded/redacted all references to *necessity of the treatment* in light of the proper but limited controverting affidavits.[87]

The 2nd Court of Appeals in Fort Worth has been more clear. Specifically, according to the 2nd Court of Appeals, when a proper affidavit and proper counteraffidavit have been served, it is an ***abuse of discretion*** for a court to admit ***either*** at trial.[88]

The 2nd Court of Appeals is also the only appellate court to have addressed what happens when a counteraffidavit is served but is found to be insufficient. In such a case, the 2nd Court of Appeals finds that it is ***not*** an abuse of the court's discretion to admit the affidavit and counteraffidavit and let the jury decide which to believe.[89]

[85] *Gunn*, 485 S.W. 3d at 103; *Limon*, 2013 Tex. App. LEXIS 13644, at 17.
[86] *Gunn*, 485 S.W. 3d at 103; *Limon*, 2013 Tex. App. LEXIS 13644, at 17.
[87] *Moreno v. Ingram*, 454 S.W. 3d 186, 188 (Tex. App. – Dallas 2014).
[88] *Hong*, 209 S.W. 3d at 802.
[89] *Id.* at 804.

6

I got an affidavit from who? Factoring Companies are an exception to the rule under 18.001(c)(2)

Section 18.001 provides that affidavits must be made by (1) the person who provided the service or (2) the records custodian of the service provider.[90] So, what happens if someone ***who is neither*** executes an affidavit under 18.001? Specifically, what if you receive medical bills with an affidavit executed by an employee of a factoring company rather than the health care provider or the health care provider's custodian of records? Specifically, what if you receive medical bills with an affidavit executed by an employee of a factoring company rather than the health care provider or the health care provider's custodian of records?

As defined by the 14th Court of Appeals, "[f]actoring is a process by which a business sells to another business (the "factor"), at a discount, its right to collect money before the money is paid."[91] Put another way, factoring occurs when a company "sells accounts receivable to get quick cash."[92]

You would think that an affidavit executed by a factoring company would be insufficient under Section 18.001; however, at least one appellate court has expressly created a loophole for such affidavits.[93]

According to the 14th Court of Appeals, factoring companies are the assignees of the health care providers from whom accounts receivable are purchased; therefore, factoring companies "stand … in the shoes of [their] assignor[s]."[94] In the *Favalora* case, the 14th Court of Appeals reasoned that not only did the factoring company step into the shoes of the health care provider, but also the contract between the factoring company and the health care provider specifically transferred custodianship of the patient's records to the

[90] Tex. Civ. Prac. & Rem. Code § 18.001(c).
[91] *Katy Springs & Mfg. v. Favalora*, 476 S.W. 3d 579, 601, n. 4 (Tex. App. – Houston [14th Dist.] 2015, pet. denied).
[92] Black's Law Dictionary, thelawdictionary.org/factoring-accounts-receivable/ (last visited Aug. 17, 2016).
[93] *Gunn v. McCoy*, 489 S.W. 3d 75, 108 (Tex. App. – Houston [14th Dist.] 2016, pet. filed); *Favalora*, 476 S.W. 3d at 605.
[94] *Favalora*, 476 S.W. 3d at 604.

factoring company.[95] Therefore, the 14th Court of Appeals concluded an affidavit executed by the custodian of records for the factoring company, rather than the health care provider, still meets the requirements under 18.001.[96]

From a defense perspective, this reasoning has a distinctly negative aspect in that it allows a person who clearly has no personal knowledge as to the reasonableness or necessity of services nevertheless to swear to the jury via affidavit that the charges incurred were reasonable and the services provided were necessary.

One other appellate court directly has addressed this issue thus far – the 1st Court of Appeals. In *Amigos Meat Distributors, LP v. Guzman*, the court heard challenges to the paid or incurred amounts set forth in the billing affidavits served. It is unclear whether the affidavits were prepared by the medical provider or by the factoring company that purchased the accounts; however, it is clear that the balance reflected on each affidavit had been assigned to the factoring company. The court adopted the reasoning set forth in the *Favalora* case and concluded that the trial court did not abuse its discretion in admitting the billing affidavits and records in this case.[97]

No other appellate courts have directly addressed the interplay of factoring companies and 18.001 affidavits yet; however, recently, the Texas Supreme Court weighed in on a similar issue.

In *Gunn v. McCoy*, the Court evaluated a challenge to affidavits completed by "subrogation agents for health insurance carriers that had paid [the plaintiff's] medical expenses" and assessed "whether subrogation agents are in a position to testify to the reasonableness and necessity of medical expenses."[98]

Focusing on the complexity of today's health care costs and the difference between list prices and actual price paid for health care services, the Court noted that "insurance agents are generally well-suited to determine the reasonableness of medical expenses."[99] Considering the reality of the American health care system and the specific language of the statute, the Court ultimately concluded that:

> by drafting section 18.001 to allow either "the person who provided the service" or the "person in charge of records" to testify to reasonableness and necessity, the Legislature has acknowledged and made allowance for the reality that the ideal paradigm does not reflect today's complex health care system. And, for better or for worse, in the context of our health care system, what is "necessary" is often heavily influenced by insurance companies and by what treatments and procedures they are willing to cover.
>
> Thus, **the plain language of section 18.001 does not limit the proper affiants to medical providers and medical providers' record custodians, and the reality of our health care system does not mandate such a limitation in order to establish the reasonableness and necessity of expenses**.[100]

In support of this decision the Court further explained:

> If we were to hold that the subrogation agents' affidavits were also insufficient, as the dissent advocates and Dr. Gunn and OGA would have us do, we would in effect render the Legislature's streamlined proof procedure a complicated trap requiring plaintiffs to provide two sets of affidavits: (1)

[95] *Id.* at 605.
[96] *Id.*
[97] *Amigos Meat Distribs., L.P. v. Guzman*, 526 S.W. 3d 511 (Tex. App. – Houston [1st Dist.] 2017, pet. denied)
[98] *Gunn v. McCoy*, No. 16-0125, 2018 Tex. Lexis 560, 2018 WL 3014984, at *50-56 (Tex. June 15, 2018)(publication pending).
[99] *Id.* at 54.
[100] *Id.* at 55-56 (emphasis added).

> affidavits as to necessity of treatment from medical providers with actual knowledge of the patient's treatment, or their record custodians; and (2) separate affidavits as to reasonableness of paid charges from local or regional insurance agents or someone else with knowledge of customary amounts paid for particular treatments in that particular region. Such an approach would frustrate the Legislature's intent.[101]

Thus, at least in the context of affidavits executed by insurance subrogation agents, the Texas Supreme Court has been clear that challenges to an affidavit based on their execution by someone other than the medical provider or the medical provider's custodian of record will be unsuccessful.

#7

Fruits and nuts - random thoughts on 18.001

7a. 18.001 – It's not just for medical services

We tend to think of "services" as medical in nature, but Section 18.001 is not limited to medical expenses.

For instance, an 18.001 affidavit may be used as a means for attorneys to show their fees are reasonable and necessary. Affidavits for attorney fees must meet the usual requirements under § 18.001 with one exception; they do not have to include an itemized statement.[102]

Another example outside the medical context is the use of 18.001 affidavits to prove up construction costs.[103] In a case involving replacement costs to a restaurant bar that was destroyed in a flood, the restaurant's general manager made an affidavit that included "an itemized summary of the services provided . . . by various vendors as a result of the flood."[104] The affidavit included a statement concerning the reasonableness of the charges and services.[105] The affidavit went uncontroverted, and the court held that there was sufficient evidence that the cost was reasonable.[106]

However, certain services have also been specifically excluded from utilization of 18.001 affidavits. For example, Section 18.001 does not "apply to proof in a delinquent tax case."[107]

7b. 18.001 does not allow for live testimony by a custodian of records

Although 18.001 affidavits can be made by either the service provider or the custodian of records, live testimony from the custodian of records is ***not*** a valid alternative to establishing that the charges were reasonable and the services were necessary.[108] In *Castillo*, the court reasoned that normally expert testimony must be used to establish the reasonableness and necessity of medical expense, and that Section 18.001 is an evidentiary rule that "provides a *limited* exception."[109] Ultimately, the injured party's bills were excluded, because the custodian's live testimony did not establish that the past medical charges were reasonable and necessary.[110]

7c. 18.001 in the Federal Courts

Perhaps unsurprisingly given the variety of interpretations in the state appellate courts, the issue of whether Section 18.001 applies in Texas Federal Courts also varies by jurisdiction.

Proving up reasonableness and necessity of services by affidavit under Section 18.001 is acceptable in the Northern District of Texas, albeit

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[101] *Id*. at 57.
[102] *Jamshed v. McLane Express Inc.*, 449 S.W.3d 871, 884 (Tex. App.—El Paso 2014); See also *Ellen v. Carr*, NO. A14-92-00292-CV, 1992 Tex. App. LEXIS 2987, at *3 (App.—Houston [14th Dist.] 1992) (unpublished).
[103] *Ins. Alliance v. Lake Texoma Highport, LLC*, 452 S.W.3d 57, 70 (Tex. App.—Dallas 2014).
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Galindo v. Cnty. of Dall*., No. 05-00-00650-CV, 2001 Tex. App. LEXIS 1390, at *3 (App.—Dallas 2001).
[108] *Castillo v. Am. Garment Finishers Corp*., 965 S.W.2d 646, 653 (Tex. App.—El Paso 1998).
[109] *Id*., at 654 (emphasis added).
[110] *Id.*

with some minor adjustments.[111] Specifically, the Northern District of Texas has held that whether an injured party may file an 18.001 affidavit in order to make a prima facie showing that his or her past medical expenses are reasonable and necessary is a matter of substantive state law.[112] Applying the *Erie* doctrine, the court decided it would defer to Section 18.001, because not doing so would "deprive Plaintiff of means to avoid the significantly more expensive and time-consuming alternatives to proving damages which would otherwise be available in a personal injury action brought in a Texas state court."[113]

However, the court clarified that only ***a portion*** of Section 18.001 was substantive law; the rest involved procedural matters to be governed by Federal Rules instead.[114] The court's division of Section 18.001 between substantive and procedural matters is outlined below:

- 18.001(b) – substantive; governed by TCPRC
- 18.001(c) – substantive; governed by TCPRC
- 18.001(d) – procedural; governed by FRCP 26(a)(2) and (4)
- 18.001(e) – procedural; governed by FRCP 26(a)(2) and (4)
- 18.001(f) – procedural; governed by FRCP 26(a)(2) and (4)[115]

Thus, the streamlined process by which a party can ***present an affidavit*** to support the reasonableness and necessity of services is governed by state law; however, the means by which a party can ***controvert said affidavit*** and the ***deadlines*** imposed on both parties are governed by federal law.

> Under Federal Rule of Civil Procedure 26, controverting expert testimony must be made in accordance with the court's scheduling order.[116] If the court has not approved a scheduling order, the evidence used to contradict an opposing parties expert testimony must be disclosed within ***30 days*** after the other party's disclosure.[117]

In contrast, the Southern District of Texas has focused on the Texas Supreme Court's identification of Section 18.001 as a "procedural rule" in the *Haygood v. De Escabedo* case, and therefore has determined that "the Federal Rules of Evidence, rather than § 18.001, govern."[118]

Neither the Western District of Texas nor the Eastern District of Texas has directly addressed this issue yet. Therefore, as with the state courts, it is important to double-check the current precedence in your particular jurisdiction whenever this issue arises.

Concluding Thoughts

Perhaps the biggest challenge in the Section 18.001 arena is dealing with the lack of clear and consistent guidance from higher courts on basic concepts such as (1) what exactly it takes to satisfy the requirements under Section 18.001 and (2) what happens once the requirements are satisfied.

With that in mind, the best practice when dealing with Section 18.001 affidavits is to play it safe. Stay on top of your deadlines and carefully evaluate the qualifications and opinions of your controverting experts before you submit a counter affidavit. Be prepared to defend your counteraffidavits against Motions to Strike, and be ready with alternate plans of attack.

Do not let a mistake or a negative ruling on the issue of 18.001 affidavits completely derail your case. Take advantage of the lack of guidance in this area and get creative where you can.

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[111] *See Rahimi v. United States*, 474 F. Supp. 2d 825, 829 (N.D. Tex. 2006); *Rhoades v. Grossman*, No. 3:17-CV-2739-D, 2018 U.S. Dist. Lexis 1423 (N.D. Tex. Jan. 4, 2018); *Gorman v. ESA Mgmt., LLC*, No. 3:17-CV-0792-D, 2018 U.S. Dist. Lexis 1424, 2018 Wl 295793 (N.D. Tex. Jan. 4, 2018); *Butler v. United States*, No. 3:15-cv-2969-M, 2017 U.S. Dist. Lexis 214131 (N.D. Tex. June 2, 2017).

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] Fed. R. Civ. P. 26(a)(2)(D).

[117] Fed. R. Civ. P. 26(a)(2)(D)(ii).

[118] *Akpan v. United States*, No. H-16-2981, 2018 U.S. Dist. Lexis 5584, 2018 WL 398229 (S.D. Tex. Jan. 12, 2018).

Milton C. Colia Trial Academy

On February 23 and 24, the TADC held the Milton C. Colia Trial Academy in the Tom Vandergriff Civil Courts Building in downtown Fort Worth, TX. This biennial TADC-sponsored event provides a valuable opportunity for young lawyers to learn and practice courtroom skills that will help them make a positive difference in the lives or businesses of their clients.

The TADC Trial Academy was renamed in 2016 in honor of past TADC President Milton C. Colia. Milton was a wonderful mentor to so many attorneys across the state, and he always took the time to help young lawyers. He led by example in his practice and through his leadership in the TADC, and naming the Trial Academy in his honor was a fitting tribute to his legacy of service

The TADC Trial Academy is a significant undertaking and requires recruiting volunteers, coordinating schedules, and managing the logistics of several breakout courtrooms, judges, lunches, and more. Such an event needs dedicated TADC leadership and members in order to run smoothly and successfully. Co-chairs George Haratsis at McDonald Sanders, P.C., in Fort Worth, and Doug Rees with Cooper & Scully, P.C., in Dallas, rallied TADC volunteers from around the state, as well as witness volunteers from area law schools and law firms. A special thank you to Joe Krug, McDonald Sanders, P.C., for his coordination of events leading up to and during the weekend.

This year's Trial Academy was an incredible success with 42 young lawyer participants (26 who are new TADC members), dozens of TADC volunteers with years of experience as faculty members, and, for the first time in Trial Academy history, current sitting trial judges presided over each of the student breakout courtrooms.

Past TADC President Judge Mike Wallach, 348th District Court, recognizing the value of giving every student participant the chance to hear critiques from active judges, was instrumental in recruiting fellow trial judges to participate in this year's Trial Academy. It's not often that an attorney gets to hear from an actual judge on how to improve his or her courtroom techniques, but students had that very opportunity in each of the breakout sessions and for the very first time at a TADC Trial Academy.

Thank you to the following judges who helped Trial Academy participants this year:

Judge Wade Birdwell, 342nd District Court, Fort Worth
Judge Josh Burgess, 352nd District Court, Fort Worth
Judge John Chupp, 141st District Court, Fort Worth
Judge David Evans, 48th Distrct Court, Fort Worth
Justice Lee Gabriel, Second Court of Appeals, Fort Worth
Judge Susan McCoy, 153rd District Court, Fort Worth
Justice Mark Pittman, 17th District Court, Fort Worth
Chief Justice Bonnie Sudderth, 2nd Court of Appeals, Fort Worth
Judge R.H. Wallace, 96th District Court, Fort Worth
Judge Mike Wallach, 348th District Court, Fort Worth
Judge Dana Womack (Ret.), 17th District Court, Fort Worth

Thank you to the TADC Trial Academy Faculty and Witnesses:

William Allred, Cooper & Scully, P.C., Dallas
Wade Barrow, Barrow Law, PLLC, Fort Worth
Mike Bassett, The Bassett Firm, Dallas
Nicole Battaglini, Cooper & Scully, P.C., Dallas
Scott Cain, Cain & Associates, Cleburne
Bruce Campbell, Brackett & Ellis, P.C., Fort Worth
Janet Colaneri, The Colaneri Firm P.C., Arlington
Denise Collins, Brown, Dean, Proctor & Howell LLP, Fort Worth
Monika Cooper, Moses, Palmer, & Howell LLP, Fort Worth
Gretchen Diebel, McDonald Sanders, P.C., Fort Worth
Slater Elza, Underwood Law Firm, Amarillo
Alex Guiam, Texas A&M JD; Lacy Malone Steppick Ryder & Menefee, PLLC, Fort Worth
Greg Hargrove, McDonald Sanders, P.C., Fort Worth
Bob Haslam, Haslam & Gallagher, LLP, Fort Worth
Dan Hernandez, Ray, McChristian & Jeans, PC, El Paso
Bill Kirkman, Kirkman Law Firm PLLC, Fort Worth
Zach Kleiman, McDonald Sanders, P.C., Fort Worth
Jennie Knapp, Underwood Law Firm, P.C., Amarillo
Sandy Liser, Naman, Howell, Smith & Lee, PLLC, Fort Worth
Cynthia Kent Maragoudakis, The Law Office of Cynthia Kent Maragoudakis, PLLC, Grapevine
Angelique McCall, Brackett & Ellis, P.C., Fort Worth
Kleber Miller, Lacy Malone Steppick Ryder & Menefee, PLLC, Fort Worth
Bruce Moon, Brackett & Ellis, P.C., Fort Worth
Randy Moore, The Law Offices of Randall D. Moore, PLLC, Fort Worth
Jackie Robinson, Naman, Howell, Smith & Lee, PLLC, Fort Worth
Dan Steppick, Lacy Malone Steppick Ryder & Menefee, PLLC, Fort Worth
Jim Stouffer, Ray, McChristian & Jeans, P.C., Fort Worth
Tesch Ussery, Texas A&M JD, Fort Worth
Regina Vasquez-Espinosa, Phelps Dunbar LLP, Southlake
Jim Watson, Watson, Caraway, Midkiff, & Luningham, L.L.P., Fort Worth

The next Milton C. Colia Trial Academy will be held in 2020. We look forward to seeing you there!

Just a few of the many judges and faulty who volunteered their time to impact young attorneys at the 2018 Trial Academy.

Co-Chair Doug Rees, President Chantel Crews & Co-Chair George Haratsis

Trial Academy Graduates

Alix Allison, Thompson & Knight LLP, Fort Worth
Sophia Bajwa, Cooksey, Marcin & Huston, PLLC, The Woodlands
Jesse Beck, MehaffyWeber, PC, Beaumont
Robert "Tracy" Carson, Hallett & Perrin, P.C., Dallas
Sydne Collier, Thompson & Knight LLP, Dallas
Selina A. Contreras, Germer PLLC, Houston
Brandon Coony, Porter, Rogers, Dahlman & Gordon, P.C., San Antonio
Donald W. Elliott, Jr., Gault, Nye & Quintana, L.L.P., Corpus Christi
Tyler J. Eyrich, Cotton, Bledsoe, Tighe & Dawson, P.C., Midland
Elizabeth Fitch, Hallett & Perrin, P.C., Dallas
Emily Fitzgerald, Thompson & Knight LLP, Dallas
Chad M. Hainley, Owen & Fazio, P.C., Dallas
Kathryn Hand, Cotton, Bledsoe, Tighe & Dawson, P.C., Midland
Rebekah Lynne Hudgins, Kane Russell Coleman Logan, PC, Dallas
Jordan Irons, Cotton, Bledsoe, Tighe & Dawson, P.C., Midland
Conrad W. John, Parker Straus, LLP, Fort Worth
Sarah A. Judge, Cotton, Bledsoe, Tighe & Dawson, P.C., Midland
Carol Kennedy, Cooksey, Marcin & Huston, PLLC, The Woodlands
Kirsty Koopmans, Fairchild, Price, Haley & Smith, L.L.P., Nacogdoches
John Robert Lamont, Gault, Nye & Quintana, L.L.P., Corpus Christi
Meredith Larson, Atlas, Hall & Rodriguez, LLP, McAllen
Christopher Lollis, Owen & Fazio, P.C., Dallas
Justin Major Lopez, Parker Straus, LLP, Fort Worth
Averie Maldonado, Naman, Howell, Smith & Lee, PLLC, San Antonio
Austin B. Martin, Orgain, Bell & Tucker, L.L.P., Houston
Dina McKenney, Thompson & Knight LLP, Dallas
Connor McKinney, Thompson & Knight LLP, Houston
Taylor Shelton Montgomery, Germer PLLC, Beaumont
Nadine Ona, Germer PLLC, Beaumont
Nathan Palmer, Thompson & Knight LLP, Austin
Daniel J. Paret, Brown Pruitt Wambsganss Ferrill & Dean, P.C., Fort Worth
Mary Kate Raffetto, Beck | Redden LLP, Houston
Brett Rector, Thompson & Knight LLP, Dallas
A. Chris Rodriguez, Parker Straus, LLP, Fort Worth
Andy Rose, Cotton, Bledsoe, Tighe & Dawson, P.C., Midland
Mackenzie Salenger, Thompson & Knight LLP, Dallas
Maritza Y. Sanchez, Brackett & Ellis, P.C., Fort Worth
Brittany Taylor, Sprouse Shrader Smith, P.L.L.C., Amarillo
Conner N. Turner, Mills Shirley L.L.P., Galveston
Nicholl B. Wade, Brackett & Ellis, P.C., Fort Worth
Jasmine Wynton, Thompson & Knight LLP, Dallas
Whitley B. Zachary, Plunkett, Griesenbeck & Mimari, Inc., San Antonio

Texas Association of Defense Counsel, Inc.

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

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Website: www.tadc.org **Email: tadc@tadc.org**

June 25, 2018

TO: Members of TADC

FROM: Chantel Crews, President
Mike Hendryx, Nominating Committee Chair

RE: Nominations of Officers & Directors for 2018-2019

OFFICES TO BE FILLED:
*Executive Vice President
*Four (4) Administrative Vice Presidents
*Eight (8) Regional Vice Presidents
*District Directors from odd numbered districts
(#1, #3, #5, #7, #9 ,#11, #13, #15, #17, #19)
*Directors At Large - Expired Terms

Nominating Committee Meeting - August 4, 2018

Please contact Mike Hendryx with the names of those TADC members who you would like to have considered for leadership through Board participation.

Mike Hendryx
Strong Pipkin Bissell & Ledyard, L.L.P.
4900 Woodway Dr., Ste. 1200
Houston, TX 77056
PH: 713/651-1900 FX: 713/651-1920
Email: mhendryx@strongpipkin.com

NOTE:

ARTICLE VIII, SECTION I - Four Vice Presidents shall be elected from the membership at large and shall be designated as Administrative Vice Presidents. One of these elected Administrative Vice Presidents shall be specifically designated as Legislative Vice President. A Fifth Administrative Vice President may be elected and specifically designated as an additional Legislative Vice President. One of these elected Administrative Vice Presidents shall be specifically designated as Programs Vice President. A Sixth Administrative Vice President may be elected and specifically designated as an additional Program Vice President. One of these elected Administrative Vice Presidents shall be specifically designated as Membership Vice President. A Seventh Administrative Vice President may be elected and specifically designated as an additional Membership Vice President. One of these elected Administrative Vice Presidents shall be specifically designated as Publications Vice President. An Eighth Administrative Vice President may be elected and specifically designated as an additional Publications Vice President. Eight Vice Presidents shall be elected from the following specifically designated areas

1.) Districts 14 & 15
2.) Districts 1 & 2
3.) District 17
4.) Districts 3, 7, 8 & 16
5.) Districts 10 & 11
6.) Districts 9, 18, 19 & 20
7.) Districts 5 & 6
8.) Districts 4, 12 & 13

2018 TADC
Awards Nominations

PRESIDENT'S AWARD

A special recognition by the President for meritorious service by a member whose leadership and continuing dedication during the year has resulted in raising standards and achieving goals representing the ideals and objectives of TADC.

Possibly two, but no more than three such special awards, to be called the President's Award, will be announced annually during the fall meeting by the outgoing President.

Recommendations for the President's Award can be made by any member and should be in writing to the President, who will review such recommendations and, with the advice and consent of the Executive Committee, determine the recipient. The type and kind of award to be presented will be determined by the President, with the advice and consent of the Executive Committee.

Following the award, the outgoing President will address a letter to the Managing Partner of the recipient's law firm, advising of the award, with the request that the letter be distributed to members of the firm.

Notice of the award will appear in the TADC Membership Newsletter, along with a short description of the recipient's contributions upon which the award was based.

Members of the Executive Committee are not eligible to receive this award.

FOUNDERS AWARD

The Founders Award will be a special award to a member whose work with and for the Association has earned favorable attention for the organization and effected positive changes and results in the work of the Association.

While it is unnecessary to make this an annual award, it should be mentioned that probably no more than one should be presented annually. The Founders Award would, in essence, be for service, leadership and dedication "above and beyond the call of duty."

Recommendations for such award may be made by any member and should be in writing to the President. The President and Executive Committee will make the decision annually if such an award should be made. The type and kind of award to be presented will be determined by the President, with the advice and consent of the Executive Committee. If made, the award would be presented by the outgoing President during the fall meeting of the Association.

Members of the Executive Committee are not eligible for this award.

In connection with the Founders Award, consideration should be given to such things as:

- Length of time as a member and active participation in TADC activities;
- Participation in TADC efforts and programs and also involvement with other local, state and national bar associations and/or law school CLE programs;
- Active organizational work with TADC and participation in and with local and state bar committees and civic organizations.

NOMINATIONS FOR BOTH AWARDS SHOULD BE SENT TO:

Chantel Crews
Ainsa Hutson Hester & Crews, LLP
5809 Acacia Cir. PH: 915/845-5300
El Paso, TX 79912 FX: 915/845-7800
Email: ccrews@acaciapark.com

2018 Winter Seminar

January 31 - February 4, 2018 – Hotel Madeline - Telluride, Colorado

The 2018 TADC Winter Seminar was held jointly with the Louisiana Association of Defense Counsel at the magnificent Hotel Madeline in Telluride, Colorado, January 31-February 4, 2018. Christy Amuny with the Beaumont law firm of Germer PLLC and Dan Hernandez with the El Paso law firm of Ray, McChristian & Jeans, P.C., served as Program Co-Chairs. The program featured practical topics for the practicing litigator. Members enjoyed 8.5 hours of CLE and great skiing!

A Full House

Jennie Knapp with David & Peggy Brenner

Pam Madere with Doug & Gina Rees

2018 Winter Seminar

Kathy Walthall, Lisa Richard, David Brenner & Lauren Goerbig

Let's Eat!

Joe Hood, Tom & Sandy Riney with Matt Matzner

Peggy Brenner with Michael Ancell & Chantel Crews

Texas Law vs. Louisiana Law Panel: Professor Bill Corbett, Beth Liner, Christy Amuny & Mitch Smith

Program Co-Chair Dan Hernandez

The Honorable Frances & The Honorable Mike Pitman


Mitzi S. Mayfield & Alex L. Yarbrough
Riney & Mayfield LLP, Amarillo

BUCKLE UP! It's The Law and it May be Admissible

I. Introduction

Since the Texas Supreme Court first spoke to the issue in 1974, evidence of a driver's failure to use a seat belt has been inadmissible in Texas lawsuits involving car accidents. The Court reversed that rule in February 2015 in an opinion that now allows evidence of a plaintiff's failure to use a seat belt as evidence of a plaintiff's comparative negligence.

This paper will analyze some of the evidentiary issues related to the plaintiff's failure to use a seatbelt post *Nabors Well Servs., Ltd. v. Romero,* 456 S.W.3d 553, 557–59 (Tex.2015). A brief overview on the history of seat belt evidence and some discussion of the unresolved issues that are sure to arise as a result of the *Romero* opinion are also included.[1]

II. *Nabors Well Services, Ltd. v. Romero*

Nabors Well Servs., Ltd. v. Romero, 456 S. W.3d 553, 557–59 (Tex.2015) arose from a collision between a Nabors Wells Services truck and a personal vehicle carrying eight occupants. Nabors tried to introduce expert testimony that five of the seven occupants were unbelted and ejected from the vehicle and wanted to argue these occupants' failure to use seat belts caused their injuries. *Id.* Nabors also attempted to introduce evidence of the driver's previous citation for failing to properly restrain child passengers. *Id.* Following the Texas Supreme Court's ruling in *Carnation Co. v. Wong,* 516 S.W.2d 116 (Tex. 1974), the trial court excluded this evidence, with the trial ending in a $2.3 million verdict for the plaintiffs. *Id.*

In revisiting its previous ruling in *Carnation*, the Texas Supreme Court observed that *Carnation* was decided at a time when there was no law requiring seat-belt use and when the contributory-negligence rule in Texas entirely barred plaintiffs from recovery if they were negligent in any way. *Id.* In contrast, all passengers today are required to buckle up, and drivers must ensure that persons seventeen or younger are also secured. Most important to the Court's analysis, however, is the comparative-negligence regime now in place in Texas, which requires a jury to allocate damages based on the fault of the respective parties. The Court held that because plaintiffs no longer suffer the risk their claims would be completely barred for omissions such as seatbelt misuse, this evidence should now be admissible (if relevant) to prevent plaintiffs from gaining a windfall from their negligent conduct. *Id.*

[1] This paper will borrow liberally from other outstanding articles: "Handling Motor Vehicle Accident Cases" by John W. Chandler and "Biomechanics: About, Analysis, and Experts" by Marisa Ybarra presented to the State Bar of Texas Prosecuting & Defending Truck and Auto Collision Cases (2017).

The Court noted that mandatory seat-belt laws began, and became more strict, after its 1974 ruling. Given that change, the Court referred to its prior holding as "a vestige of a bygone legal system and an oddity in light of modern societal norms." *Id.* at 555.

The Court rejected the argument that intervening statutes had, implicitly through silence, approved the blanket rule against the admission of seatbelt evidence. *Id.* at 558-559. In 1985, while approving Texas's first mandatory-seatbelt law, the Legislature passed a prohibition on the admission of evidence about seatbelt use that was even broader than the Court's. But in 2003, the Legislature repealed that provision while making other changes. *Id.* The Court saw this repeal — without adding other language about the seat-belt question — as the Legislature choosing for its part to be silent. Thus, the Court rejected the argument the Legislature had weighed in either way.

The Court reasoned normal rules of evidence should apply, leaving the details to be sorted out in the usual way:

> Today's holding opens the door to a category of evidence that has never been part of our negligence cases, but we need not lay down a treatise on how and when such evidence should be admitted. Seat-belt evidence has been unique only in that it has been categorically prohibited in negligence cases. With that prohibition lifted, our rules of evidence include everything necessary to handle the admissibility of seat-belt evidence. As with any evidence, seat-belt evidence is admissible only if it is relevant. … The defendant can establish the relevance of seat-belt nonuse only with evidence that nonuse caused or contributed to cause the plaintiff's injuries. And the trial court should first consider this evidence, for the purpose of making its relevance determination, outside the presence of the jury. … Expert testimony will often be required to establish relevance, but we decline to say it will be required in all cases. And, of course, like any other evidence, even relevant seat-belt evidence is subject to objection and exclusion under Rule 403.

Id. at 563. It is important to note the Court's statement regarding expert testimony – expert testimony will often be required to establish relevance. This paper discusses some of the nuisances surrounding expert testimony and the use of seat belt evidence.

III. Expert testimony is generally needed to establish causal link

In most cases the Defendant will have to retain an expert witness to establish the causal link between the Plaintiff's nonuse of a seat belt and their injuries: i.e., that the Plaintiff would not have sustained any injury whatsoever or that the Plaintiff's injuries would not have been as severe, if they had been wearing a seat belt.

Even in a case involving a collision where the Plaintiff is ejected from the vehicle because they admittedly were not wearing a seat belt, an expert witness should be retained. Without expert proof it may be difficult, if not impossible, to establish the Plaintiff would not have died or suffered severe injuries had they been wearing a seat belt. For example, in *Petersen v. Klos*, 426 F.2d 199 (5th Cir. 1970), the Fifth Circuit rejected the argument expert testimony was not required. Due to the severity of the damage to the passenger side of the automobile, it was not appropriate for the Trial Court to admit evidence of the Plaintiff's failure to wear a seat belt and allow the jury to reduce his damages for failing to do so, absent expert testimony showing a causal relationship between the Plaintiff's failure to wear a seat belt and his death.

Although some Courts have allowed medical experts to provide such causal opinion testimony, most Courts have refused to do so. For example, in *Bentzler v. Braun*, 34 Wis. 2d 362, 149 N.W.2d 626 (1967), the Wisconsin Supreme Court held testimony from an orthopedic surgeon was not sufficient to support the seat belt defense because the orthopedic surgeon, although qualified in his chosen profession, was not qualified to render opinions as to the effect the use or non-use of a seat belt would have had on the Plaintiff's injuries.

As a general rule, a biomechanical engineer is the appropriate expert witness to testify with regard

to the issue of whether Plaintiff's failure to use a seat belt would have prevented or reduced the severity of their injuries. A biomechanical engineer generally refers to an engineer or physician expert who has special education, training, and/or experience in automobile crash occupant kinematics or may be someone who has studied the paths of body travel of belted and unrestrained automobile occupants when involved in motor vehicle collisions.

IV. Biomechanics

Biomechanics integrates the laws of engineering and physics to describe the motions of body parts and the external and internal forces acting upon them during any given activity. *See What is Biomechanics?* NEW JERSEY INSTITUTE OF TECHNOLOGY, https://web.njit.edu/~sengupta/IE665/biomechanics lecturedist.pdf (last visited February 18, 2018). Biomechanics is important in determining exactly what and how injuries are caused. Biomechanics in humans most often refers to studying how the human musculature system and skeletal systems operate under various conditions. *Id*. Generally, scientists in this field will apply mathematically based formulas and other physics principles to analyze and discover what the capabilities and limits of the human biological systems are. *Id*.; *see also Nabors Well Servs., Ltd. v. Romero,* 456 S.W.3d 553, 557–59 (Tex.2015) ("Biomechanics is 'the study of the application or relation of the laws of mechanics to the body.'") (quoting 2 J.E. Schmidt, Attorney's Dictionary of Medicine, B–115 (2004)).

V. Biomechanical Engineers

Using multiple damage and liability experts is most often unavoidable in severe motor collision cases, especially cases where seat belt usage is an issue. *See* Eric L. Probst, *The Biomechanical Expert: A Valuable Defense Team Member*, PROBST, PORZIO, BROMBERG, &NEWMAN,P.C.http://pbnlaw.com/media/443261/the-biomechanical-expert-a-valuable-defense-team-member.pdf (last visited February 18, 2018). *Id*. As discussed above, biomechanical engineers explain how alleged injuries to a claimant are caused (or not caused) by the impact between vehicles, thus making them a very valuable resource to defense counsel. *Id.;E.g., Nabors Well Servs., Ltd. v. Romero,* 508 S.W.3d 512 (Tex. App.–El Paso, 2016) ("Biomechanical experts are commonly designated when a plaintiff or defendant wish to prove that a particular kind of injury might or might not result from an auto collision at a particular speed").

With the information relayed by a biomechanical engineer, attorneys are able to better evaluate whether to settle or defend a claim. *Id*. In addition to early case assessment, biomechanical engineer experts can assist attorneys with motions to exclude expert witnesses and deposition preparation. *Id*. These experts have the ability to determine the amount of outside forces being applied to occupants of a vehicle, and, in turn, can determine whether the alleged injuries are consistent with the amount of forces applied. *Id*.

As the El Paso Court of Appeals provided in *Romero*:

> Biomechanics is "the study of the application or relation of the laws of mechanics to the body." J.E. Schmidt, Attorney's Dictionary of Medicine, B–115 (2004); *see also Eskin v. Carden,* 842 A.2d 1222, 1228 (Del.2004)("*Admissible* biomechanical testimony bridges the gap between the general forces at work in an accident determined by physical forces analysis (whether it be 'physics' or 'engineering') and the specific injuries suffered by the particular person who was affected by those forces."); *Smelser v. Norfolk S. Ry. Co.,* 105 F.3d 299, 305 (6th Cir.1997)(biomechanics applies the principles in mechanics to the facts of a specific accident and provides ***531** information about the forces generated in that accident "[to] explain how the body moves in response to those forces, and thus determine what types of injuries would result from the forces generated.").
>
> Biomechanical experts are commonly designated when a plaintiff or defendant wish to prove that a particular kind of injury might or might not result from an

> auto collision at a particular speed. *E.g. Nash v. Gen. Motors Corp.,* 153 P.3d 73, 75 (Okla.App.Div. 1 2006); *Eskin,* 842 A.2d at 1227. Biomechanical experts also appear in cases when a driver is attempting to prove that the *malfunction* of a seat belt enhanced their injury from an accident. *E.g. Smelser* 105 F.3d at 301; *Rangel v. Lapin,* 177 S.W.3d 17, 22 (Tex.App.–Houston [1st Dist.] 2005, pet. denied)("To prevail in a passive restraint products liability suit, some combination of expert medical, biomechanical, and/or design opinions" was necessary to prove defect and causation). And as here, biomechanical experts are used when the defendant attempts to demonstrate a plaintiff's injury was caused by the *failure to use* a seat-belt.

Romero at 530-531.

VI. General Issues Surrounding Biomechanical Experts

As with any expert, the guiding rules and principles are found in TEX. R. EVID. 702 which provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Tex. R. Evid. 702. Rule 702 requires at least three predicates: the witness must be *qualified;* the opinion must be *relevant*; and the opinion must be based on a *reliable* foundation. *See Helena Chemical Co. v. Wilkins,* 47 S.W.3d 486, 499 (Tex. 2001) ; *E.I. du Pont de Nemours and Co., Inc. v. Robinson,* 923 S.W.2d 549, 556 (Tex. 1995). This paper will only briefly discuss the general issues regarding an expert's qualifications, relevance, and reliability

In deciding whether an expert is *qualified,* the trial court must ensure they truly have expertise concerning the "actual subject about which they are offering an opinion." *Cooper Tire & Rubber Co. v. Mendez,* 204 S.W.3d 797, 800 (Tex.2006), *citing Gammill v. Jack Williams Chevrolet, Inc.,* 972 S.W.2d 713, 719 (Tex.1998). The test is whether the expert has the "knowledge, skill, experience, training, or education" regarding the specific issue before the court which qualifies the expert to give an opinion on that very subject. *In re Commitment of Bohannan,* 388 S.W.3d 296, 305 (Tex.2012). The test mandates some flexibility. In *Broders v. Heise,* 924 S.W.2d at 152–153, for instance, the court held simply because an emergency room physician was a medical doctor, he was not necessarily qualified to testify the conduct of a neurologist caused an injury. But nor did the rule mandate that only a neurologist would be so qualified. *See also Roberts v. Williamson,* 111 S.W.3d 113, 122 (Tex.2003)(pediatrician in that case *was* qualified to testify to cause and effect of neurological injuries); *In re Commitment of Bohannan,* 388 S.W.3d at 307 (reversing trial court's exclusion of counselor who was offered to testify about future dangerousness only because witness was not a licensed psychologist or medical doctor).

Expert opinion testimony is *relevant* when it is "sufficiently tied to the facts of the case [so] that it will aid the jury in resolving a factual dispute." *Robinson,* 923 S.W.2d at 556 (citation omitted). The requirement incorporates a traditional relevancy analysis under TEX. R. EVID. 401 and 402. *Robinson,* 923 S.W.2d at 556. Simply put, irrelevant evidence is of no assistance to the jury. *Id.*

Rule 702 also requires an expert's testimony to be *reliable. Robinson* identifies six factors useful in determining reliability: (1) the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the expert's subjective interpretation; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique. *Robinson,* 923 S.W.2d at 557. These factors are non-exclusive as Rule 702 requires a

flexible inquiry. *Id.* (the factors "will differ with each particular case.").

Subsequent case law dictates that reliability is based on more than just satisfying the *Robinson* factors. *Gharda USA, Inc. v. Control Solutions, Inc.,* 464 S.W.3d 338, 348–49 (Tex.2015); *Volkswagen of Am., Inc. v. Ramirez,* 159 S.W.3d 897, 904–05 (Tex.2004). Expert testimony might also be unreliable if "there is simply too great an analytical gap" between the data on which the expert relies and the opinion offered. *Gammill,* 972 S.W.2d at 726, *quoting Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 146, 118 S.Ct. 512, 519, 139 L.Ed.2d 508 (1997). "Whether an analytical gap exists is largely determined by comparing the facts the expert relied on, the facts in the record, and the expert's ultimate opinion." *Gharda,* 464 S.W.3d at 349. Analytical gaps arise when experts improperly apply otherwise sound principles and methodologies, the expert's opinion is based on incorrectly assumed facts, or the expert's opinion is based on tests or data that do not support the conclusions reached. *Gharda,* 464 S.W.3d at 349 (citation omitted). A court is "not required ... to ignore fatal gaps in an expert's analysis or assertions that are simply incorrect." *Volkswagen,* 159 S.W.3d at 912; *Cooper Tire & Rubber,* 204 S.W.3d at 800–01. But however these issues may play out, it is not the court's role to decide if the expert's opinions are correct, only that they are reliably formed. *Exxon Pipeline Co. v. Zwahr,* 88 S.W.3d 623, 629 (Tex.2002).

Accordingly, the use of a biochemical engineer must be predicated on meeting the standards of qualification, relevance, and reliability. If it is worth the expense to use a biomechanical expert, it is worth the expense to insure their opinions provide the necessary conclusions as to whether or not the failure to use a seatbelt caused, or at least contributed, to the Plaintiff's injuries.

VII. Medical Testimony: It is needed?

On appeal, the Romeros advanced the following position: "Injury causation requires medical testimony from a doctor with credentials showing he is qualified to give testimony on the particular type of injury sustained." *Romero,* 508 S.W.3d at 531. In effect, the Romeros argued unless a medical doctor is willing to state a medical opinion about the effect of the use or non-use of seat belts, a party fails to meet their causation burden. The El Paso Court of Appeals thought this position went "too far." *Id.*

As noted by the El Paso Court of Appeals, the intersection of overlapping areas of expertise is fertile ground for conflict. *Id.* For example, in *Guentzel v. Toyota Motor Corp.,* the plaintiff took the exact opposite position as the Romeros. *See, Guentzel v. Toyota Motor Corp*.768 S.W.2d 890, 899 (Tex.App.–San Antonio 1989, writ denied) In *Guentzel*, it was argued a doctor was *unqualified* to express seat belt causation opinions, and only a biomechanical expert would suffice. The San Antonio Court of Appeals, pre *Romero,* noted that "engineers possess an extensive data base dealing with injury and cause. It is clear that their testimony could assist the jury." *Id.* But the court was unwilling to restrict causation opinions only to the field of biomechanics noting:

> Essentially then, we have a situation where a biomechanical engineer, who is not a doctor, can testify as to the cause of injuries and a medical doctor, with experience with lap belt injuries, cannot. Not only is this not logical, but it is also not within the framework of the expert witness rule. As the engineer could assist the jury with the technical viewpoint, so could Dr. McFee, with the medical viewpoint. In a case of this nature, the jury should have been presented with both.

Id. at 899. (applying pre-*Robinson* law).

As with Romero, doctors are often uncomfortable expressing opinions about what injuries would or would not have occurred but for the failure to use seat belts. They instead are willing to defer to a biomechanical expert. 508 S.W.3d at 531. This begs the question: Should I have a biomechanical expert and a medical expert?

As with any complicated issue, there are cases deciding this issue both ways. There are cases

where medical doctors alone have testified but there are more cases where only a biomechanical engineer or other nonmedical professional has testified and been allowed to opine on the ultimate conclusion of what did or did not cause the injury/death. *See Bilderback v. Priestley,* 709 S.W.2d 736, 741 (Tex. App.–San Antonio 1986, writ ref'd n.r.e.) (non-physician professor of biophysics could testify about "the mechanics, forces and effects of weights used in administering physical therapy" because he was a professor of biophysics who taught physical therapy students how to do the task at issue"); *Johnson v. Hermann Hosp.,* 659 S.W.2d 124, 126 (Tex.App.–Houston [14th Dist.] 1983, writ ref'd n.r.e.) (former RN, based on her experience, could testify to standard of care of use of endotracheal tube). *Ponder v. Texarkana Memorial Hosp.,* 840 S.W.2d 476, 477–78 (Tex.App.–Houston [14th Dist.] 1991, writ denied) (non-physician PhD may qualify as a medical expert on the cause of brain damage because he conducted research on the causes of neurological injuries and taught neurophysiology, neuroanatomy, and neurochemistry to MDs and PhDs); In these appellate court cases where a non-physician has given an ultimate opinion, the court ruled the non-physician was qualified, showing training or experience on the precise question at issue.

However, the Supreme Court ruled differently in *Gammill v. Jack Williams Chevrolet, Inc.* In *Gammill,* a passenger died as a result of a crash and it was alleged the failure of a seat belt led to his death. The plaintiffs designated Ronald Huston, a well-educated and experienced professional engineer who had conducted research in biomechanics, vehicle occupant kinematics, and vehicle occupant restraint systems. He had tested vehicle restraint systems and had presented and published extensively on the topic. Nonetheless, the trial court struck his opinion that a seat belt was defectively designed, and consequently, the vehicle occupant received a fatal head injury. *Id.* at 716–17. The Texas Supreme Court concluded that Huston was in fact qualified to testify about the design issues and failure of the seat belt system. But in addressing his qualifications, the court noted: "Huston, too, lacks any qualifications to testify concerning the cause of [the occupant's] death." *Id.* at 719. Causation, however, was not an issue before the court as it had not been raised in the summary judgment which led to the appeal. *Id.* at 720. In discussing the *Gammill* opinion in *Romero,* the court concluded "We cannot read the single sentence in *Gammill* as a blanket prohibition on engineers testifying to any causation issue that touches upon medicine." 508 S.W.3d at 532.

Opinions from other jurisdiction have likewise gone both ways, most finding a properly qualified biomechanical expert may express an opinion as to how forces act on the human body during a collision and some allowing the type of injuries that can be sustained from those forces.

- *Smelser,* 105 F.3d at 305 (noting expert's admission that "biomechanics are qualified to determine what injury causation forces are in general and can tell how a hypothetical person's body will respond to those forces....")
- *Berner v. Carnival Corp.,* 632 F.Supp.2d 1208, 1212–13 (S.D.Fla.2009) (biomechanical expert may give an opinion about the energy involved and whether the energy is *sufficient* to have caused an injury of the type alleged to have been suffered. Dr. Williams will not testify that Berner *has* a mild to moderate traumatic brain injury—or a brain injury at all. She will not testify that Berner's brain injury (if any) *was caused* by his head striking the floor.").
- *Kelham v. CSX Transp., Inc.,* No. 2:12–CV–316, 2015 WL 4426027, at *6 (N.D. Ind. July 17, 2015) (expert "may testify about the forces involved in the accident and, in general, what injuries those forces were expected to cause. Therefore, he may indicate what types of injuries were likely to occur based on the forces involved in this accident. However, [he] may not testify about the specific cause for ... [plaintiff's] specific injuries.")
- *Roach v. Hughes,* 4:13–CV–00136–JHM, 2015 WL 3970739, at *11 (W.D.Ky. June 30, 2015)(noting that biomechanical engineers are qualified to testify in general terms that "X" forces would generally lead to "Y" injuries and "Y" injuries are consistent with those the persons incurred)
- *Wagoner v. Schlumberger Tech. Corp.,* No.

07–CV–244–J, 2008 WL 5120750, at *1 (D.Wyo. June 19, 2008)("[Biomechanics experts] may, for example, testify as to the forces involved in the ... accident and how those forces may affect an individual or object; they may not express any opinions regarding whether plaintiff ... has suffered a brain injury ... or as to the ... cause of the alleged brain injury.")

- *Morgan v. Girgis,* No. 07 Civ.1960 (WCC), 2008 WL 2115250, at *5–6 (S.D.N.Y. May 16, 2008) (while biomechanical expert could testify to the "observed ... force on a human body in comparable accidents ... he may not testify as to whether the accident caused or contributed to any of plaintiffs injuries.")
- *Bowers v. Norfolk S. Corp.,* 537 F.Supp.2d 1343, 1377 (M.D.Ga.2007) ("[A biomechanical engineer] may testify as to the effect of locomotive vibration on the human body and the types of injuries that may result from exposure to various levels of vibration ... [H]e may not offer an opinion as to whether the vibration ... caused Plaintiff's injuries.")
- *Shires v. King* No. 2:05–CV–84, 2006 WL 5171770, at *3 (E.D.Tenn. Aug. 10, 2006)("[The biomechanical engineer] clearly should be allowed to testify regarding the forces applied to plaintiff's head ... and how a *hypothetical* person's body would respond [sic] to that force. He cannot offer opinions, however, 'regarding the precise cause' of plaintiff's injury.")
- *Henry v. Hoelke*, 82 So. 3d 962 (Fla. 4th DCA 2011) Although in some cases, a defendant will not need an expert to sustain his burden of proving the causal relationship between the injury sustained and plaintiff's failure to wear a seat belt, the dynamics of seatbelts are not within the common understanding of the jury where the injuries did not obviously result from hitting the windshield, door, or dashboard and certain fact patterns that might require expert testimony to establish the causal connection between the lack of a seatbelt and the injuries sustained).
- *Russell v. Beddow*, 82 So. 3d 996 (Fla. 1st DCA 2011) (plaintiff's testimony that, had she been wearing seatbelt, her head would not have gone forward far enough to hit steering wheel and then fling back into head rest was not sufficient to satisfy defendant's evidentiary burden, since plaintiff was not an expert, and expert's testimony that he did not think plaintiff was any worse off as of time of trial than she would have been had she worn seatbelt was also insufficient to satisfy defendant's evidentiary burden, as it was speculative).

In the following cases, it is unclear if any objection to the above testimony was made at trial.

- *Walker v. Ford Motor Co.,* No. 14-CA-0273, 2015 WL 5260382, at *7 (Colo.Ct.App. September 10, 2015)("Paul Lewis, a biomechanical engineer ***534** and expert on injury causation, testified that, if Walker's seat back had remained upright in the accident and the seat had had an adequate headrest, Walker would not have sustained any of his more significant injuries.")
- *Gaertner v. Holcka,* 219 Wis.2d 436, 580 N.W.2d 271, 274 (1998)("Dr. Joel Myklebust, a qualified biomechanical engineer expert witness, opined that Koldeway's damages would have been reduced substantially had Koldeway been wearing a seat belt at the time of the accident. According to the expert, 75 percent of Koldeway's injuries were caused by the failure to wear a seat belt and 25 percent were caused by the accident.")
- *Waterson v. Gen. Motors Corp.,* 111 N.J. 238, 544 A.2d 357, 361 (1988)("Mr. Montalvo testified in detail concerning the injuries sustained by plaintiff. He also testified about ... the specific causes of each of plaintiff's injuries, and the specific parts and surfaces of the car's interior with which plaintiff came into contact during the crash.... Ultimately, his opinion was that plaintiff would not have sustained any of her injuries had she been wearing her seat belt at the time of the accident.").

VIII. Reliability of Opinions Can Be Fertile Ground for Conflict

Biomechanical engineer expert testimony is almost always stated as an absolute; "NO injury" was possible as a result of this particular accident. *See* Daniel G. Kagan, Defense Biomechanical Expert, Berman & Simmons. http://www.bermansimmons.com/law-articles/defense-biomechanical-expert. In this sort of expert testimony, an absolute position could become a critical weakness for the expert. *Id*. If he does not back down from this position, a basis for his opinion satisfying *Daubert* and its progeny must be established by the defense. *Id*.

To opine that it is impossible for any person to have been injured in an accident, it is common for biomechanical engineers to follow a similar logical path: that no human being can sustain an injury when a certain threshold of force is not reached. *Id*. In other words, defense biomechanical engineer experts commonly assert that a particular accident produced a force upon the occupants of a vehicle less than the necessary force to break the threshold needed to cause an injury, and therefore, no injury could have occurred as result of this accident. *Id*. In support, the biomechanical engineer expert typically cites from a list of studies concluding human beings cannot be injured as a result of "low speed" accidents. *Id*.

Plaintiff attorneys should not be intimidated by the biomechanical engineer expert's list of citations because those studies are typically not what they seem. *Id*. In a 1999 article addressing the methodological flaws of the studies relied on by biomechanical experts, Dr. Michael Freeman critiques the defense studies by pointing out such flaws in the studies, including:

- Inadequate sample size in the study;
- Inappropriate study design;
- Selection bias;
- Inappropriate use of technology;
- Conclusion unsupported by the study results;
- Misquoted and/or biased literature cited in the study;
- Unsubstantiated and/or unreferenced claims;
- Study sample not represented of real-life claimants; and
- Crash conditions not representative of real-life conditions and/or overly generalized. *Id.*

See also Michael Freeman, *A Review and Methodologic Critique of the Literature Refuting Whiplash Syndrom*, SPINE (vol. 24, No. 1 pp 86-98).

As discussed above, reports relied on by biomechanical engineer experts can be subject to *Daubert* attacks and motions to exclude. *Id*. However, assuming *arguendo* such reports are valid, the biomechanical expert must still apply the studies in which he relies to the facts of the case at hand. *Id*. As such, opining that forces are insufficient to cause injury, it is necessary for the biomechanical engineer to calculate such forces. *Id*. This calculation is a common area for attack by the plaintiff. *Id*.

A change in velocity (Delta V) occurs when a vehicle collides with another object. *Id*. Delta V is used when calculating g-forces caused by a collision. *Id*. Calculating such g-forces is complex and requires consideration of many factors. *Id*. Defense biomechanical engineer experts, however, always manage to come up with precise g-force figures, which are always below the level of forces needed to cause injury to human beings. *Id*.

In concluding that the forces occurring during a low-speed automobile accident are below those needed to cause injury to a human body, a defense biomechanical expert may rely on assumptions that are inherently flawed. *Id*. For example, calculating g forces imposed on a car cannot be based merely by looking at photographs of the crash. *Id*. Further, he may assume that the g forces imposed on a car will impose the exact same force on the occupants of that car, and that the same force will be imposed on each portion of the occupant's body. *Id*. These assumptions, if relied on, are insupportable. *Id*. Real world accidents involve many variables. *Id*. Any conclusions drawn are not reliable, unless the biomechanical expert knows the exact crash conditions. *Id*. The biomechanical engineer does not have enough information to opine by merely looking at photographs of property damage. *Id*.

Sometimes a defense biomechanical expert did not have the opportunity to visit the scene of the

accident and may not have seen the vehicles in person. As such, the deposition of a biomechanical engineer should be used to explore what information he relied on in reaching conclusions about the forces that were imposed on the occupants of the car. *Id*. The less specific the information, the more the variables of the accident remain unknown. *Id.*

Practically, some areas to explore with a biomechanical engineer expert include:

1. "What was the angle and direction of collision? Too often it is assumed that a rear end collision occurred from straight behind or at exactly ninety degrees from the plaintiff's vehicle. Yet sometimes the defendant's vehicle swerves or turns before impact, imparting a twisting force to the plaintiff's vehicle. Similarly, if the target vehicle's wheels were turned at the time of impact, that vehicle will likely move in the direction of the tires, not the direction of the defendant's vehicle. A rear-end collision that is off-center or at less than 90 degrees may cause twisting of the seat back, decreasing the seat's ability to cradle the occupant and possibly causing the head to miss the head restraint entirely. An off-angle impact also increases the likelihood that the plaintiff's head may have struck something on the car's interior, such as a door frame or side window.

2. What was the plaintiff's body position at the moment of impact? It is common for people riding in cars to be sitting in a less than optimum position. Twisting to face a fellow passenger, leaning on one side or another, reaching for something inside the car, and even sleeping are common. Studies suggest that the position of the plaintiff's head just before impact can be critical to the post-accident outcome. The neck's range of motion is greatest when the head is in the neutral position. When the head is moved in various planes of motion, not surprisingly, the neck's range of motion is decreased. When the head is extended, rotated, or both, the strains on the supporting ligaments is greater and the capacity for injury is greater.

3. What effect, if any, did the expert ascribe to the plaintiff's gender? There are enough studies indicating that women are at greater risk of injury from rear end accidents than are men that this proposition should be considered beyond challenge. If your client is a woman, look at the subjects who took part in the studies cited by the defense expert. Were they healthy middle-aged males?

4. What does the expert know about the plaintiff's body type? There are studies suggesting that people with slight muscular development are at greater risk of injury from a particular accident than those with more developed musculature. Also, neck flexibility and strength decrease with age. Thus, an older woman of slight build may fare worse in an accident than a relatively young man of average build. Again, compare your client to the subjects used in the studies upon which the defense expert relies.

5. What was the position of the seat back and head rest at the time of the accident? Related to the question of the plaintiff's body position is the question of the position of the seat and head restraint. The biomechanical engineer's report will often refer to the vehicle as being equipped with a head-restraint, implying that this device would prevent injury. This argument is flawed for several reasons. First, the injury may occur before the head ever strikes the restraint. In fact, "whiplash" in the low-speed impact case may be a misnomer. The medical evidence suggests that it is not an excessive flexion/extension movement but rather the initial movement of a portion of the cervical spine relative to the rest of the spine that causes the injury. The fact that the head does not move to the point of excessive flexion or extension, due to head restraint or otherwise, may be irrelevant in analyzing the neck injury in the rear end case. Second, it is rare that the biomechanical expert will know the precise position of the headrest and the seat back relative to the plaintiff's anatomy. Without this information, it is impossible to know the extent of movement of the plaintiff's body before striking the head restraint and/or the seat back, if in fact the plaintiff's body struck the head restraint at all. Finally, as we know, the existence of head restraints does not guarantee safety. A check on the website of the Insurance Institute for Public Safety will tell you that relatively few of the passenger cars on our country's roads today have head restraints rated as "good" or even "acceptable." This same website confirms that even minute differences in adjustment of the head restraint and seat back can make a significant difference in the amount of force imposed upon the occupant in a rear-end collision. Quite an admission, given the source of the information!

6. Was the plaintiff ready for the impact? Just as a denser, more powerful body type may be less susceptible to injury in an accident, so can a body tensed in anticipation of impact protect better against injury.

7. What were the road conditions? This is important for several reasons. First, plaintiff's vehicle's tires will adhere better to a dry road, causing less forward movement of the target vehicle on impact. There is less adhesion on an icy or slippery road, so the target vehicle can accelerate further and faster with the impact. Second, a collision on an icy, slippery road can cause unpredictable movement of the target vehicle, with exaggerated rotational force combining with the above-mentioned increase in acceleration upon impact. Other than generalizations such as "wet", "dry" or "snow-covered", the information typically available to the bio mechanist is inadequate to allow any precise calculation of either g force or direction.

8. What is the construction of the seat back? Often overlooked in the biomechanical analysis is a discussion of the elastic energy available from the seat back itself. Since the rear end collision projects the upper body forward, it is the seat back that creates the initial movement. The seat back can create a "trampoline" effect that accentuates the acceleration. One study suggests that this effect can double the g force imposed upon the cervical spine. Because there are no known studies of the construction of seat back construction in even a small sampling of the vehicles available for sale in this country, it is virtually impossible for a biomechanical expert to have this information.

9. Did the expert consider the ramping effect of the rear end collision? It is typically assumed that the occupant's body moves linearly backwards during a rear end impact. This is not so. Depending upon a number of the factors discussed above, such as seat back angle, occupant position, seat back construction, seat surface friction (leather is slipperier than velour), as well as vertical motion of the target vehicle during impact and seat belt use, the occupant's body may move upward as well as backward during the impact. This ramping effect can increase the initial travel of the torso and head backwards into the seat back and head restraint, which increases the likelihood of cervical injury.

10. What about seat belts? Seat belts have proven to be a mixed blessing. Part of the problem is that, like head restraints, seat belts are useless or possibly even harmful if not positioned properly. Particularly at risk are shorter people who wear the shoulder portion higher toward the neck.

11. What are the relative sizes of the vehicles? Since mass and velocity are multiplied to calculate momentum, the relative sizes of the vehicles is important. Basic math tells you that a 5000 pound vehicle delivers twice the force of a 2500 pound vehicle at an equal speed.

12. What were the individual's physiological limits and pre-existing medical conditions? Biomechanical engineers typically have little or no knowledge of medical issues generally and the claimant's medical condition specifically. Yet the specifics of the individual claimant can make all the difference.

13. How did the vehicles move after the impact? Superficially, the notion that a bumper with no visible damage proves that the impact was "minor" makes sense. In fact, all it really means is that the bumper did its job. Automotive bumpers are designed to protect the vehicle itself, not the cargo or occupants. Bumpers work by absorbing the energy of the impact into a spring or shock absorber. Basic physics tells us that after the initial action of absorbing the energy, there will be a reaction as the spring or shock absorber releases its load. This is seen in the form of a "bounce." Sometimes this bounce is seen as the target vehicle is propelled forward. Other times the vehicle is seen to "shake" without actually moving forward, particularly if the brakes are applied. Considerable energy is conserved and dissipated within the car itself - including its cargo and occupants - even as the bumper performs as designed in protecting the vehicle itself from expensive property damage.

14. How did the expert calculate delta V? Accepted accident reconstruction principles hold that the forces in a collision between vehicles are imparted over a period of time rather than instantaneously. If you were to look at a graph with time on one axis and force on the other, you would seem some variant of a bell curve. At some point in the collision, delta V is at its highest, meaning the change in velocity is greatest. This is the point at which the accident imposes the greatest g-force upon the vehicle and its occupants. Frequently, however, defense biomechanical experts take the average of delta V rather than the peak delta V as appropriate." *See* Daniel G. Kagan, Defense

Biomechanical Expert, Berman & Simmons. http://www.bermansimmons.com/law-articles/defense-biomechanical-expert. (last visited February 18, 2018).

IX. Seat Belts on Tractors

If your accident involved a farm tractor, can you still use evidence of use or non-use of a seat belt? As noted above, Texas law requires the use of seat belts. Specifically, Texas Transportation Code Section 545.413 provides the statutory framework for offenses related to safety belts during the operation and movement of vehicles. TEX. TRANSP. CODE ANN § 545.413 (Vernon Supp. 2016). Summarily, an offense only occurs when the person/passenger operates a "passenger vehicle." Under Section 545.413, the definition of "passenger vehicle" has the same meaning as assigned by Section 545.412. TEX. TRANSP. CODE ANN § 545.412 (Vernon Supp. 2016). According to Section 545.412(f)(2), "passenger vehicle" means a passenger car, light truck, sport utility vehicle, passenger van designed to transport 15 or fewer passengers, including the driver, truck, or truck tractor. TEX. TRANSP. CODE ANN § 545.412 (f)(2) (Vernon Supp. 2016). However, under Section 541.201, the definition of "passenger car" means a motor vehicle, other than a motorcycle, used to transport persons and designed to accommodate 10 or fewer passengers, including the operator. TEX. TRANSP. CODE ANN § 541.201 (Vernon Supp. 2016).

It should be noted the Texas Transportation Code does provide a definition for "farm tractor." A "farm tractor" means a motor vehicle designed and used primarily as a farm implement to draw an implement of husbandry, including a plow or a mowing machine. TEX. TRANSP. CODE ANN § 541.201 (Vernon Supp. 2016). Additionally, a "tractor (John Deere)," as it is commonly referred to in Texas, should not be confused with a "truck tractor." A "truck tractor" is defined as a motor vehicle designed and used primarily to draw another vehicle but not constructed to carry a load other than a part of the weight of the other vehicle and its load. *Id.*

Summarily, because seat belt offenses only apply to passenger vehicles and a farm tractor is not a passenger vehicle, an operator of a farm tractor is not required by law to be restrained by a seat belt. After a thorough investigation, it appears there is no statute that requires the use of a seat belt in Texas on a farm tractor. However, in 2003, the Occupational Safety & Health Administration issued a memorandum regarding the use of seat belts and earth moving equipment. *See* OSHA Memorandum, December 16, 2003, Re: Earthmoving equipment, use of seat belts; Section 1926.602(a)(2), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24902 (last visited February 18, 2018). Summarily, OSHA believed if "employees operating earthmoving equipment are exposed to hazards that can be lessened by the wearing of seat belts (which typically is the case), failure to use seat belts would be citable." *Id.* (emphasis added). A defense attorney could then argue, because OSHA has at least addressed the issue, the defense should be allowed to introduce evidence of the non-use of seat belts on a farm tractor (within the above mentioned framework).

X. Conclusion

Back to the original question: Should I have a biomechanical expert and a medical expert? Based on the law as it stands today, the answer is yes. As we have seen with the other areas of the law, too little may be too late on appeal. Furthermore, do not ask your experts to go out on a limb. If your biomechanical engineer is strong on the injury forces, use them for their strength. A qualified medical doctor on ultimate causation will only better both experts' opinions and likely help you keep your verdict on appeal.

TADC 2018 Annual Meeting
September 19-23, 2018 ~ La Fonda Hotel & Spa ~ Santa Fe, New Mexico

Program Co-Chairs: Jennie C. Knapp, Underwood Law Firm, P.C., Amarillo &
Michael J. Shipman, Fletcher, Farley, Shipman & Salinas, LLP, Dallas
CLE Approved for: 10.25 hours, including 2.25 hours ethics

Wednesday, September 19, 2018

6pm-8pm TADC Welcome Reception

Thursday, September 20, 2018

7:00-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Chantel Crews, TADC President**,** Ainsa Hutson Hester & Crews LLP, El Paso
Jennie C. Knapp, Underwood Law Firm, P.C., Amarillo
Michael J. Shipman, Fletcher, Farley, Shipman & Salinas, LLP, Dallas

7:30-8:00am *HOT TOPICS IN LITIGATION*
Christy Amuny, Germer PLLC, Beaumont

8:00-8:45am *CIVILITY IN LITIGATION (.75 hrs ethics)*
Slater C. Elza, Underwood Law Firm, P.C., Amarillo

8:45-9:15am *INDEMNITY AGREEMENTS AND INSURANCE COVERAGE FOR THOSE CONTRACTUAL OBLIGATIONS*
Sandra Liser, Naman, Howell, Smith & Lee, PLLC, Fort Worth

9:15 -9:45am *THE NEW WORLD OF MANDAMUS*
Lawrence M. Doss, Mullin Hoard & Brown, LLP, Lubbock

9:45-10:00am *B R E A K*

10:00-10:30am *AVOIDING THE RUNAWAY JURY: JURY SELECTION IN THE MODERN ERA*
Mark Stradley, The Stradley Law Firm, Dallas

10:30-11:00am *CROSS EXAMINATION OF TREATING PHYSICIANS*
Joshua L. Nicholls, Brock Person Guerra Reyna, P.C., San Antonio

11:00-11:45am *WHAT THE TRIAL LAWYER NEEDS TO KNOW ABOUT THE JURY CHARGE*
Craig L. Reese, Fletcher, Farley, Shipman & Salinas, LLP, Dallas

11:45-12.45pm LUNCHEON SPEAKER: *LEWY AND THE LAW: DEMENTIA'S EFFECT ON LAWYERS (.5 hrs ethics)*
Don W. Kent, Kent, Anderson, Bush, Frost & Metcalf, P.C., Tyler

12:45-1:00pm *B R E A K*

1:00-1:30pm *TOOLS FOR MEDICAL MALPRACTICE LITIGATION*
Tony Valdevit, M.D., SEA Limited, Columbus, OH

1:30-2:15pm *REPTILE THEORY FOR THE DEFENSE LAWYER*
Carlos Rincon, Rincon Law Group, P.C., El Paso

Thursday afternoon free to enjoy Santa Fe!

Friday, September 21, 2018

7:00-9:00am Buffet Breakfast

7:15-7:30am Welcome & Announcements
Chantel Crews, TADC President**,** Ainsa Hutson Hester & Crews LLP, El Paso
Jennie C. Knapp, Underwood Law Firm, P.C., Amarillo
Michael J. Shipman, Fletcher, Farley, Shipman & Salinas, LLP, Dallas

7:30-8:00am *DEFENDING GOVERNMENT INVESTIGATIONS AND REGULATORY PROCEEDINGS*
Jenny L. Smith, Cobb & Counsel, Austin

8:00-8:45am *ETHICS IN THE PRACTICE OF LAW (.75 hrs ethics)*
The Honorable Robert Dinsmoor (Ret.), Law Offices of the Honorable Robert Dinsmoor, El Paso

8:45-9:30am *DEFENDING DAMAGE CLAIMS*
Liz Fraley, Fraley & Fraley, L.L.P., Dallas

9:30-10:00am *TADC AMICUS UPDATE*
Roger W. Hughes, Adams & Graham, L.L.P., Harlingen

10:00-10:15am *B R E A K*

10:15-10:45am *WHAT TO RAISE POST-JUDGMENT*
Lisa Hobbs, Kuhn Hobbs PLLC, Austin

10:45-11:15am *RECENT DEVELOPMENTS IN TEXAS TRADE SECRET LAW*
Ed Perkins, Sheehy, Ware & Pappas, P.C., Houston

11:15am-12:15pm *TEXAS SUPREME COURT UPDATE (.25 hrs ethics)*
Justice Debra Lehrmann, Texas Supreme Court, Austin

12:15-12:25pm TADC Business Meeting

Friday afternoon free to enjoy Santa Fe!

6:30pm-9:00pm
TADC Awards Dinner
For Members, Spouses & Guests

Saturday, September 22, 2018

7:00-9:00am Buffet Breakfast

Saturday free to enjoy Santa Fe!

Sunday, September 23, 2018

Annual Meeting Adjourned

2018 TADC Annual Meeting

September 19-23, 2018 • La Fonda Hotel & Spa
100 East San Francisco St.-Santa Fe, NM 87501

Pricing & Registration Options

Registration fees include Wednesday through Saturday group activities, including the Wednesday evening welcome reception, hospitality room, all breakfasts, TADC Awards Dinner, CLE Program each day and related expenses. If you would like CLE credit for a state other than Texas, check the box below and a certificate of attendance will be sent to you following the meeting.

Registration for Member Only (one person) $875.00
Registration for Member & Spouse/Guest (2 people) $1,225.00

Spouse/Guest CLE Credit

If your spouse/guest is also an attorney and would like to attend the Annual Meeting for CLE credit, there is an additional charge to cover written materials, meeting materials and coffee breaks. $75.00

Hotel Reservation Information

For hotel reservations, **CONTACT THE LA FONDA HOTEL DIRECTLY AT 800-523-5002 *option #1* and reference the TADC 2018 Annual Meeting.** The TADC has secured a block of rooms at the FANTASTIC rate of $229 per night. It is **IMPORTANT** that you make your reservation as soon as possible ***as the room block will sell out***. Any room requests after the deadline date, or after the room block is filled, will be on a space available basis.

DEADLINE FOR HOTEL RESERVATIONS IS AUGUST 29, 2018

TADC Refund Policy Information

Registration Fees will be refunded ONLY if a written cancellation notice is received at least TEN (10) business days prior (SEPTEMBER 5, 2018) to the meeting date. A $75.00 Administrative Fee will be deducted from any refund. Any cancellation made after SEPTEMBER 5, 2018 IS NON-REFUNDABLE.

2018 TADC ANNUAL MEETING REGISTRATION FORM

September 19-23, 2018

For Hotel Reservations, contact the La Fonda Hotel DIRECTLY at* 800-523-5002 *option #1

CHECK ALL APPLICABLE BOXES TO CALCULATE YOUR REGISTRATION FEE:

- ☐ **$875.00 Member ONLY (One Person)**
- ☐ **$1,225.00 Member & Spouse/Guest (2 people)**
- ☐ **$75.00 Spouse/Guest CLE Credit**
- ☐ **(no charge) CLE for a State OTHER than Texas - a certificate of attendance will be sent to you following the meeting.**
- ☐ **Save $50 on your total registration fee if postmarked by August 29, 2018. If registering online, use discount code EB50 and register by August 29, 2018.**

TOTAL Registration Fee Enclosed $_____

NAME:_____FOR NAME TAG:_____

FIRM:_____OFFICE PHONE:_____

ADDRESS:_____CITY:_____ZIP:_____

SPOUSE/GUEST (IF ATTENDING) FOR NAME TAG:_____

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

EMAIL ADDRESS:_____

PAYMENT METHOD:
A CHECK in the amount of $_____ is enclosed with this form - OR REGISTER ONLINE AT WWW.TADC.ORG

MAKE PAYABLE & MAIL THIS FORM TO: TADC, 400 W. 15th St., Ste. 420, Austin, TX 78701

CHARGE TO: (circle one) Visa Mastercard American Express

_____

Card Number **Expiration Date**

Signature:_____ (as it appears on card)

TADC
400 W. 15th St.
Ste. 420
Austin, TX 78701
PH: 512/476-5225
FX: 512/476-5384
tadc@tadc.org

(For TADC Office Use Only)
Date Received_____ Payment-Check#_____ (F or I) Amount_____ ID#_____

El Paso Baseball & CLE

Southwest University Park – June 14, 2018 – El Paso, Texas

El Paso area TADC Officers and Directors once again organized a very successful event for El Paso area members. Baseball and CLE at Southwest University Park with the Chihuahuas has become a fixture for El Paso Members!

TADC President Chantel Crews provided an update on "Looking toward the 86th Legislative Session" and Diana Valdez, of the Law Office of Diana Macias Valdez PLLC in El Paso, gave a very insightful presentation on "The Weinstein Effect: The New Legal Landscape for Sexual Harassment". Look for this event to be back next baseball season.

TADC Valley "Roadshow" CLE

Santa Fe Steakhouse – June 18, 2018 – McAllen, Texas

Great turnout at the TADC's "Roadshow" CLE event! Thanks to TADC local leadership, Victor Vicinaiz, Legislative Vice President, Jim Hunter, District Director, and Sofia Ramon, Area Vice President for South Texas, as well as the law firms of Ramon Worthington, PLLC, Roerig, Oliveira & Fisher, L.L.P. and Royston, Rayzor, Vickery & Williams, L.L.P., who hosted and co-sponsored this CLE event at the Santa Fe Steakhouse in McAllen. A huge thank you to Chantel Crews, TADC president and Mike Bassett, TADC Dallas Director and presenter!

Thank you to all the TADC members who attended, including Dan Worthington, former TADC President. Special thanks to Jeri Worthington for all her help in organizing the event!

Victor Vicinaiz, Sofia Ramon, Mike Bassett, Chantel Crews & Jim Hunter

Peyton Kampas, Raul de la Garza & Alexandra Habbouche

Nice Crowd!

Viola Garza & Elizabeth Cantu

Allison Kennamer & Dan Worthington

2018 West Texas Seminar

A Joint Seminar with the TADC & NMDLA

Texas Association of Defense Counsel
400 W. 15th Street, Suite 420
Austin, Texas 78701

PH 512-476-5225
FX 512-476-5384
tadc@tadc.org

August 10-11, 2018 ~ Inn of the Mountain Gods ~ Ruidoso, NM

PROGRAM AND REGISTRATION

Approved for 5.0 Hours CLE, including 1.0 hours ethics

Program Co-Chairs: **Leonard R. (Bud) Grossman**, Craig, Terrill, Hale & Grantham, L.L.P., Lubbock, **Mark D. Standridge**, Jarmie & Associates, Las Cruces

Friday, August 10, 2018 ***(All times Mountain Time)***

6:00-8:00pm Opening Reception

Saturday, August 12, 2018

7:00am-9:00am Buffet Breakfast

7:30am Welcome & Introductions
Chantel Crews, TADC President
Ainsa Hutson Hester & Crews LLP, El Paso
Leonard R. (Bud) Grossman, Craig, Terrill, Hale & Grantham, L.L.P, Lubbock, Co-Chair
Mark D. Standridge,
Jarmie & Associates, Las Cruces, Co-Chair
Alex Yarbrough, Riney & Mayfield, Amarillo, TADC Young Lawyer Co-Chair

7:45-8:15am TX 18.001 COUNTER-AFFIDAVITS ISSUES
Mike Bassett, The Bassett Firm, Dallas
Leonard R. (Bud) Grossman, Craig, Terrill, Hale & Grantham, L.L.P., Lubbock

8:15-8:45am NMDLA AMICUS UPDATE
Mark D. Standridge, Jarmie & Associates, Las Cruces

8:45-9:45am I PLEAD THE FIFTH: THE BASICS OF 5TH AMENDMENT PRIVILEGES IN CIVIL CASES IN TX/NM
Will Aldrete, Ray, McChristian & Jeans, P.C., El Paso

9:45-10:15am UPDATE ON ENERGY LITIGATION
David W. Lauritzen, Cotton, Bledsoe, Tighe & Dawson, P.C., Midland

10:15-10:30am B R E A K

10:30-11:30am LITIGATING LIKE A HOMETOWNER: AN OVERVIEW OF NM & TX
Deena Buchanan, Michael Dean & Dan Hernandez, Ray, McChristian & Jeans, P.C., Albuquerque, Fort Worth, El Paso
William R. Anderson, Law Offices of Daniel G. Acosta, Las Cruces

11:30-12:00pm DON'T MESS UP THE CRIMINAL CASE – SUCCESSFULLY NAVIGATING PARALLEL PROCEEDINGS
Slater C. Elza, Underwood Law Firm, P.C., Amarillo

12:00-12:30pm EFFECTIVENESS FROM THE COURT'S PERSPECTIVE *(ethics)*
The Honorable Gregory Wormuth,
United States Magistrate Judge, Las Cruces, New Mexico

12:30-1:00pm COURTROOM CIVILITY COUNTS *(ethics)*
The Honorable James Rush, 244th District Court of Ector County, Texas

1:00pm ADJOURN TO ENJOY RUIDOSO

Sunday, August 12, 2018

7:00-9:00am Buffet Breakfast

2018 TADC West Texas Seminar
August 10-11, 2018
Inn of the Mountain Gods ~ Ruidoso, NM
287 Carrizo Canyon Road ~ Mescalero, NM 88340
Ph: 800/545-9011

Pricing & Registration Options

Registration fees include Friday & Saturday group activities, including the Friday Evening welcome reception, Saturday & Sunday breakfasts, CLE Program and related expenses. This program will be approved for both Texas and New Mexico Continuing Legal Education.

Registration for Member Only (1 person)	$150.00
Registration for Member & Spouse/Guest (2 people)	$175.00

Hotel Reservation Information

For hotel reservations, **CONTACT THE INN OF THE MOUNTAIN GODS DIRECTLY AT 800/545-9011 and reference the TADC West Texas Seminar.** The TADC has secured a block of rooms at a FANTASTIC rate. It is **IMPORTANT** that you make your reservations as soon as possible ***as the room block is limited***. Any room requests after the deadline date, or after the room block is filled, will be on a space available basis.

DEADLINE FOR HOTEL RESERVATIONS IS
July 10, 2018

TADC Refund Policy Information

Registration Fees will be refunded ONLY if a written cancellation notice is received at least TEN (10) business days prior (JULY 30, 2018) to the meeting date. A $25.00 Administrative Fee will be deducted from any refund. Any cancellation made after July 30, 2018 IS NON-REFUNDABLE.

2018 TADC WEST TEXAS SEMINAR

August 10-11, 2018

For Hotel Reservations, contact the Inn of the Mountain Gods DIRECTLY at 800/545-9011

CHECK APPLICABLE BOX TO CALCULATE YOUR REGISTRATION FEE:

- ☐ **$150.00 Member ONLY (1 Person)**
- ☐ **$175.00 Member & Spouse/Guest (2 people)**

TOTAL Registration Fee Enclosed $_____

NAME:_____FOR NAME TAG_____

FIRM:_____OFFICE PHONE:_____

ADDRESS:_____CITY_____ZIP_____

SPOUSE/GUEST (IF ATTENDING) 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 July 10, 2018. This 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 OR register online at www.tadc.org

CHARGE TO: (circle one) Visa Mastercard American Express

_____
Card Number **Expiration Date**

Signature:_____
as it appears on card

TADC
400 W. 15th Street, Ste. 420, Austin, TX 78701
PH: 512/476-5225 FAX: 512/476-5384
Email: tadc@tadc.org

(For TADC Office Use Only)

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


Heightened Suspense

Suspending Royalty Payments the Right Way

By Conrad D. Hester and Nicholas S. Davis
Thompson & Knight LLP, Dallas

An Oscar Wilde character once drolly remarked, "This suspense is terrible. I hope that it will last." But participants in the oil and gas industry are not looking to prolong suspense. For royalty owners, a suspended royalty payment means money that cannot be accessed. For operators, while suspension can be a useful tool to prevent overpayment, it also can constitute an accounting headache and legal exposure. Still, it is unexceptional that an operator may suspend payments on proceeds from the production of hydrocarbons to royalty owners. In fact, the Texas Legislature clearly provides specific contexts in which this is proper.[1] What is less clear is how a dispute over suspended funds will play out as a practical matter, and thus counsel representing suspending operators or other payors should tread carefully so as to avoid legal pitfalls. This article takes a close look at Texas cases addressing the situations to which the suspense statutes apply, the authorized reasons for withholding payments without interest and the payment of attorneys fees in the event of a lawsuit.

Types of Disputes

The sections of the Texas Natural Resources Code dealing with suspense apply to particular oil and gas industry actors and guide specific types of disputes. Section 91.404 gives a "payee" a cause of action against a "payor" for nonpayment of oil or gas proceeds or interest on those proceeds. A "payee" is anyone "legally entitled to payment from the proceeds derived from the sale of oil or gas from an oil or gas well located in this state."[2] A "payor" is "the party who undertakes to distribute oil and gas proceeds to the payee."[3]

The statute may apply then to the "usual" case of a mineral owner or lessor suing an operator or a lessee for failure to pay royalties, either at all or in the proper amount. In practice, it has also applied to some disputes that may not be immediately intuitive, for example:

- disputes between mineral owners and the first purchaser of oil and gas at the well (as opposed to the operator or lessee);[4]

[1] Subchapter J (Sections 91.401 through 91.408) of the Texas Natural Resources Code sets forth certain statutory requirements related to the payment of oil and gas proceeds and Section 91.402, in particular, establishes the time for payment of proceeds and the circumstances in which payments may be withheld without interest.

[2] Tex. Nat. Res. Code § 91.401(1).

[3] *Id.* at § 91.401(2). The definition continues on to include both "the purchaser of the production of oil or gas generating such proceeds or as operator of the well from which such production was obtained" and the "lessee under the lease on which royalty is due." The statute further specifies that the "payor" is "the first purchaser of such production of oil or gas from an oil or gas well, unless the owner of the right to produce under an oil or gas lease or pooling order and the first purchaser have entered into arrangements providing that the proceeds derived from the sale of oil or gas are to be paid by the first purchaser to the owner of the right to produce who is thereby deemed to be the payor having the responsibility of paying those proceeds received from the first purchaser to the payee."

[4] *Northern Natural Gas Co. v. Vanderburg*, 785 S.W.2d 415, 419 (Tex. App. — Amarillo 1990, no writ) (holding that a company that bought 100 percent of the gas produced from an operator's wells from the operator was a "payor"); *Anadarko E&P Co., LP v. Clear Lake Pines Inc.*, No. 03-04-00600-CV, 2005 WL 1583506, at *3 (Tex. App. — Austin July 7, 2005, no pet.) (purchaser was "payor" and liable for royalty payments, not lessee).

- disputes between working interest owners and operators;[5]
- disputes between operators and overriding royalty interest owners;[6]
- co-tenant suits for accounting;[7] and
- disputes regarding improper deductions from royalties.[8]

Thus, operators and others in the oil and gas industry should be sure to confirm that Subchapter J does (or does not) apply to them before altering any payments from the proceeds of oil and gas.

Withholding Without Interest

Payors certainly will not want the suspense to last if interest is accruing. Fortunately for them, royalty payments may be withheld without interest beyond the time limits set out in Section 91.402(a) when certain listed circumstances apply.[9] The time limits in Subsection (a) provide that proceeds derived from the sale of oil or gas production must be paid "on or before 120 days after the end of the month of first sale of production from the well." After that time, payments must be made on a timely basis according to the written agreement between the payee and payor or, if there is no written agreement, no later than 60 days after the end of the calendar month in which subsequent oil production is sold or 90 days after the end of the calendar month in which subsequent gas production is sold. If an operator withholds payment beyond those time limits, it must do so for a statutorily authorized reason. However, this statute does not limit the parties' ability to contract for interest payments on suspended royalties.[10]

Title Dispute

Subsection (b)(1)(A) says that payments may be withheld without interest beyond the time limits when there is "a dispute concerning title that would affect distribution of payments."[11] Application of this subsection depends on what exactly constitutes a "dispute concerning title."

Quantum of Interest

Most courts that have considered the issue have determined that a dispute as to the quantum of ownership interest is a "title dispute." For example, the Texas Supreme Court case of *Concord Oil Co. v. Pennzoil Exploration & Production Co.* involved an ambiguous deed that appeared to convey both a 1/96th mineral interest and a 1/12th mineral interest.[12] The operator suspended payments because of the ambiguous deed. The court ultimately held that the deed conveyed a 1/12th interest in the minerals and that the operator did not have to pay interest on the withheld payments because "[t]here is no doubt that a dispute concerning title exists in this case." This was the result despite the fact that the operator was the disputing party and its claims failed.

However, it is likely that only the disputed portion can be suspended without interest. In *Neel v. Killam Oil Co. Ltd.*,[13] the operators did not dispute that the

[5] *Concord Oil Co. v. Pennzoil Exploration & Production Co.*, 966 S.W.2d 451, 461 (Tex. 1998) ("Nevertheless, the language of the statute is not limited to royalty interests. It is broad enough to encompass working interest owners and operators.").

[6] *See Stable Energy L.P. v. Newberry*, 999 S.W.2d 538, 553–54 (Tex. App. — Austin 1999, pet. denied) (holding that an operator was liable to an overriding royalty interest owner for prejudgment interest).

[7] *Mitchell Energy Corp. v. Samson Res.*, 77 F.3d 479 (5th Cir. 1996) (indicating that Tex. Nat. Res. Code §§ 91.401-91.406 allows in some circumstances the recovery of interest and attorneys fees by a co-tenant who recovers an accounting of the profits from the other co-tenant).

[8] *Heritage Res., Inc. v. Nations Bank*, 895 S.W.2d 833, 837 (Tex. App. — El Paso 1995), *rev'd on other grounds*, 939 S.W.2d 118 (Tex. 1996) ("We conclude that the trial court was justified in finding that Heritage was statutorily liable for the deducted transportation costs, as well as under a breach of contract theory.").

[9] Tex. Nat. Res. Code § 91.402(b).

[10] *Samson Exploration LLC v. T.S. Reed Props. Inc.*, 521 S.W.3d 26, 53–54 (Tex. App. — Beaumont 2015) *aff'd*, 521 S.W.3d 766 (Tex. 2017).

[11] Prior to legislation effective September 1, 2017, Subsection (b)(1)(A) was Subsection (b)(1).

[12] 966 S.W.2d 451, 461 (Tex. 1998); *see also Bomar Oil & Gas, Inc. v. Loyd,* No. 10-08-00016-CV, 2009 WL 2136404, at *13 (Tex. App. — Waco July 15, 2009), on reh'g, 298 S.W.3d 832 (Tex. App. — Waco 2009, pet. denied) (dispute concerning quantum of interest where court held, "[i]t is apparent that section 91.402 applies in this case, given the dispute over title."); *Headington Oil Co., L.P. v. White,* 287 S.W.3d 204, 212 (Tex. App. — Houston [14th Dist.] 2009, no pet.) ("Because the disagreement affected [the operator's] abilities to distribute royalty payments in accordance with section 91.402(a), it was a title dispute.").

[13] 88 S.W.3d 334, 341 (Tex. App. — San Antonio 2002, pet. denied).

mineral owners were entitled to at least a 1/16th royalty interest. The San Antonio Court of Appeals held that accordingly, "there was no title dispute that 'would affect distribution of [these] payments'" and ordered the operators to pay prejudgment interest on the 1/16th royalty interest that was withheld but undisputed.[14]

JOAs

A joint operating agreement likely will not qualify as a "title dispute" excusing royalty and interest payments. In *Valence Operating Co. v. Anadarko Petroleum Corp.*[15] Valence was operator under a JOA for the purposes of a four-well proposal where Anadarko declined consent. When Valence did not commence work within a specific time frame, Anadarko sued for breach of contract. The trial court entered judgment for Anadarko, requiring Valence to pay prejudgment interest under Section 91.402. On appeal, Valence argued that Anadarko was not entitled to prejudgment interest because the suit involved a title dispute. The Texarkana Court of Appeals disagreed, noting that neither party "disputes the other party's title to the oil and gas payments that will be paid according to the compliance or noncompliance" with the JOA. The court concluded that the case did not involve a legitimate title dispute, and the trial court properly awarded prejudgment interest.

Reasonable Doubt

Under Subsection (b)(1)(B), payments may be withheld without interest beyond the time limits when there is "a reasonable doubt" that the payee (i) "has sold or authorized the sale of its share of the oil or gas to the purchaser of such production" or (ii) "has clear title to the interest in the proceeds of production."[16]

This subsection is not litigated very often. One of the cases that discusses it, *Hondo Oil & Gas Co. v. Texas Crude Operator, Inc.*, involved a dispute between the successor of a nonoperator and an operator for the operator's alleged failure to pay revenues.[17] Hondo brought suit when it realized Texas Crude was withholding money from it to offset the money Hondo's predecessor withheld following a dispute over the accounting procedure in a series of operating contracts. The 5th Circuit Court of Appeals held that Texas Crude did not have to pay prejudgment interest to Hondo because there was a reasonable doubt that Hondo had clear title. The court concluded that because Hondo's predecessor was withholding payments from Texas Crude, and Texas Crude had an operator's lien on the proceeds, Texas Crude "acted reasonably at the time in questioning Hondo's rights to the proceeds."[18]

The only other case that discusses this subsection, *Crimson Expl., Inc. v. Magnum Producing L.P.*, involved a dispute between a non-operating working interest owner and the operator who had obtained top-leases on the property at issue.[19] The Corpus Christi Court of Appeals held that a prior agreement between the two parties obligated the operator to give the non-operator the right to participate in the top leases.[20] The non-operator sought prejudgment interest on payments the operator had withheld, but the court found that "pervasive doubt surrounded title to the" top leases and the operator's "loss neither means that its doubt regarding the legal effect of the [agreement] was unreasonable, nor that the title dispute in this case lacked merit or legitimacy."

Though there have not been many cases discussing Subsection (b)(1)(B), operators should act reasonably. If there is a legitimate reason for doubting title, a court likely will not require an operator to pay interest on withheld payments.

Title Opinion Requirements

Subsection (b)(1)(C) says that payments may be withheld without interest beyond the time limits when there is "a requirement in a title opinion that places in issue the title, identity, or whereabouts of the payee and that has not been satisfied by the payee after a reasonable request for curative information has been made by the payor."[21]

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[14] *Id.*

[15] 303 S.W.3d 435, 445 (Tex. App. — Texarkana 2010, no pet.).

[16] Prior to September 1, 2017, Subsection (b)(1)(B) was Subsection (b)(2).

[17] 970 F.2d 1433, 1439 (5th Cir. 1992).

[18] *Id.*

[19] No. 13-15-00013-CV, 2017 WL 6616740, at *1-2 (Tex. App.—Corpus Christi Dec. 28, 2017, no pet.).

[20] *Id.* at *7.

[21] Prior to September 1, 2017, Subsection (b)(1)(C) was Subsection (b)(3).

No cases discuss this subsection. However, under the plain language of the statute, if a title opinion places in issue the title, identity or whereabouts of the payee, the operator should make a reasonable request for curative information. The statute does not specify to whom the request should be made, but the operator should endeavor to act reasonably, which may mean sending the request to whatever payee it knows about or the authors of the title opinion. Only after sending that request and receiving an unsatisfactory response after a reasonable time, may the operator suspend payments under this subsection without incurring interest.

Family Code

Under Subsection (b)(2), payments may be withheld without interest if the payments are subject to a child support lien or an order or writ of withholding under the Family Code. This Subsection was added by the Texas legislature on June 15, 2017, and became effective on September 1, 2017. Given its recent enactment, there are no cases discussing it. Counsel representing payees should be sure to inquire of their clients whether there is evidence that the payments are subject to the specified chapters of the Family Code.

Division Order

Subsection (e) allows for payments to be suspended without interest for as long as an owner refuses to sign a division order. Subsection (c), in turn, specifies the provisions that must be in a division order, including the effective date, a description of the property, the fractional interest, name and address of the payee, etc. According to the plain language of Subsection (e), an operator may withhold payments without interest if an owner refuses to sign a division order that "includes only the provisions specified in Subsection (c)." This means that an owner's refusal to sign a division order that contains provisions in addition to those specified in Subsection (c) will not relieve an operator of prejudgment interest.

In *Coastal Oil & Gas Corp. v. Roberts*,[22] for example, the lessor sued the lessee, arguing that the lease had terminated because the lessee failed to pay royalties on a gas well. The lessee claimed that it was entitled to a signed division order before paying royalties. The court disagreed with the lessee. The division order contained indemnity language, which the lessee argued it was entitled to. In the court's view, because the lease was made without warranty, the parties had otherwise agreed not to indemnify the lessee with respect to title.

Interestingly, the indemnity provision at issue in the division order is the exact provision included in Subsection (d) of Section 91.402. But the court noted the distinction between Subsection (d) and (c)(1): "Coastal urges that it complied with section 91.402(d) of the code, which provides an alternative form of division orders. However, this section provides the division order form for 'oil payments.' Because the F-6 well was a gas well, section 91.402(d) was inapplicable; the division order for the F-6 well must have complied with 91.402(c)(1)."[23]

The San Antonio Court of Appeals considered a few other issues related to this subsection in *Prize Energy Resources L.P. v. Cliff Hoskins Inc.*, including that "the statute places the burden on the payor to submit a division order to the payee for its signature; it is not the royalty owner or mineral interest owner's burden to draft its own division order, sign it, and submit it to the payor."[24] Thus, an operator cannot escape the Natural Resources Code simply by failing to send the mineral owner a division order.

Attorneys Fees

Section 91.406 provides for fees, stating where "a suit is filed to collect proceeds and interest under this subchapter, the court shall include in any final judgment in favor of the plaintiff an award of (1) reasonable attorney's fees; and (2) if the actual damages to the plaintiff are less than $200, an additional amount so that the total amount of damages equals $200."

Unlike the payment of interest, a title dispute does not excuse the payment of attorneys fees.[25] Thus if an operator suspends, and the mineral owner obtains a final judgment awarding it suspended funds, the operator may not have to pay interest for suspended payments but may have to pay the mineral owners' attorney fees. The San Antonio Court stated, "the

[22] 28 S.W.3d 759, 766 (Tex. App. — Corpus Christi 2000, pet. dism'd), judgment set aside (Mar. 21, 2002).
[23] *Id.*
[24] 345 S.W.3d 537, 560 (Tex. App.—San Antonio 2011, no pet.).
[25] *Id.*

statutory language of TNRC section 91.406 contains no exception prohibiting recovery of attorney's fees in a title dispute."[26] On the other hand, it could be argued that if proceeds are suspended due to a title dispute and then released as soon as the title dispute is resolved, then the royalty payment section of the Natural Resources Code was never violated in the first place. Otherwise, the divergence in the statutory drafting may be the result of an oversight, as it is unclear why a payor would be entitled to avoid interest for properly withholding but still be liable for attorneys fees. A payor may seek to limit liability for fees in this instance by interpleading previously suspended funds if it is a disinterested stakeholder.

The key issue in determining an award of attorney's fees under this statute is whether the judgment was "in favor of" the plaintiff. Courts consider any judgment "favorable" to the plaintiff when he obtains a measure of relief that leaves him in a better position than he held before filing suit.[27] This is not the same standard that is used in other contexts — the plaintiff need not be the "prevailing party."[28]

However, the operator may still yet avoid paying interest or attorneys fees before judgment is entered against it. In the recent case of *Garcia v. Genesis Crude Oil L.P.*,[29] the successor to a mineral estate lessor sued the payor for violations of the Natural Resources Code. After suit was filed, the payor tendered full payment of proceeds and interest to the lessor. The court granted the payor's motion for summary judgment, dismissed the case and held that the lessor was not entitled to attorneys fees because her cause of action was not viable. Thus, if a dispute between the parties is resolved before suit is filed, the plaintiff may not be entitled to attorneys fees.[30]

In closing, payors should recognize that (i) the scope of the royalty payment statutes encompasses more than just operator/royalty owner payment, (ii) limited case law has examined and applied the nuances of the specific statutory reasons for suspending and (iii) an asymmetrical statutory scheme may allow a payor to withhold without interest while still leaving it on the hook for attorneys fees. A payor that keeps these premises in mind should be able to capitalize on this important tool when confronted with unclear payment obligations and manage the suspense accordingly.

Conrad D. Hester and Nicholas S. Davis are trial attorneys in the Fort Worth office of Thompson & Knight LLP. Hester's practice focuses on oil and gas litigation. His expertise includes contract disputes, royalty litigation, lease termination and title suits, surface access and surface damage disputes. Davis focuses his practice on complex business litigation and dispute resolution matters. He has significant experience handling matters involving oil and gas with a focus on lease termination litigation and other title disputes.

An earlier version of this article appeared in the March/April 2018 issue of *Landman* magazine.

[26] *Id.*

[27] *Headington Oil Co., L.P. v. White*, 287 S.W.3d 204, 216 (Tex. App. — Houston [14th Dist.] 2009, no pet.).

[28] *Id.* ("Under this statute, the proper standard to be applied is 'any final judgment in favor of the plaintiff,' not the 'prevailing party' standard applied elsewhere.").

[29] No. 13-14-00727-CV, 2016 WL 1732436, at *4 (Tex. App. — Corpus Christi Apr. 28, 2016, no pet.).

[30] *Holland v. EOG Res., Inc.*, 10-09-00153-CV, 2010 WL 1078480, at *3 (Tex. App. — Waco Mar. 24, 2010, no pet.) (mineral owners were not entitled to attorneys fees even though their overriding royalty interest payment had been incorrectly computed because the issue "was resolved before suit was filed, regardless of when the corrected amounts were received").

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