TADC

TEXAS ASSOCIATION OF DEFENSE COUNSEL

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

SUMMER 2019

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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 16-20, 2019	**2019 TADC Summer Seminar** Hyatt Regency Maui – Maui, Hawaii
August 9-11, 2019	**2019 TADC West Texas Seminar** Inn of the Mountain Gods – Ruidoso, New Mexico *Register online NOW! at tadc@tadc.org*
September 18-22, 2019	**2019 TADC Annual Meeting** Hotel Emma – San Antonio, Texas *Register online NOW! at tadc@tadc.org*
October 4, 2019	**2019 TADC Deposition Boot Camp** South Texas College of Law – Houston, Texas *Registration materials available after August 1, 2019*
February 5-9, 2020	**2020 TADC Winter Seminar** Elevation Resort & Spa - Crested Butte, Colorado
March 27-28, 2020	**2020 Milton C. Colia Trial Academy** Texas Tech Law School - Lubbock, Texas
April 29-May 3, 2020	**2020 TADC Spring Meeting** Atlantis – Paradise Island – Nassau, The Bahamas
July 15-19, 2020	**2020 TADC Summer Seminar** Talisa Hotel & Spa - Vail, Colorado
July 31, 2020	**TADC Nominating Committee** Austin, Texas
August 7-8, 2020	**2020 TADC West Texas Seminar** Inn of the Mountain Gods – Ruidoso, New Mexico
September 23-27, 2020	**2020 TADC Annual Meeting** San Luis Resort & Spa - Galveston, Texas

President's Message

By: Pam Madere
Jackson Walker, L.L.P. – Austin

"The Governor Has Signed the Bill"

Thanks to the guidance of our political consultant George Scott Christian, we made it through the 86th Legislative Session this year with great success! **After years of work leading up to the start of this session, the TADC was successful in passing HB 1693 by Representative John Smithee/SB 1465 by Bryan Hughes**, which among other things amends §18.001, CPRC, to:

1. modify the deadlines to give a defendant additional time to determine whether to controvert the affidavit, and

2. clarify that the affidavit does not support a finding of the causation element of the claimant's underlying cause of action.; and,

3. provide that if services are first provided after 90 days after the defendant files its answer, the plaintiff must serve the affidavit by the date the plaintiff must designate an expert under the TRCP. The defendant may file a counter affidavit by the later of 30 days after service of the affidavit or the date the defendant must designate an expert under the TRCP.

Thank you Mike Hendryx and Clayton Devin for your tireless work on this much needed legislation that was signed by the Governor on June 10, 2019, and is effective September 1, 2019.

Amicus Committee:

The Amicus Committee is again fielding numerous requests from the legal community for amicus briefs and are hard at work preparing several different briefs on issues important to our members.

Winter Seminar:

The Winter Seminar in Steamboat, CO, was a great success. Thank you to Seminar Co-Chairs David Brenner and Megan Schmid for putting together a wonderful seminar for our attendees; the seminar was well attended, and TADC members enjoyed the opportunity to collaborate with members of the Louisiana Association of Defense Counsel at this joint meeting.

Spring Meeting and Seminar:

This is the first time the TADC hosted a meeting in Savannah, Georgia. It is a beautiful, welcoming place to have a Spring Meeting and Seminar. Thank you Mike Hendryx for assembling an outstanding list of speakers and Judges for our attendees. TADC members were treated not only to a great program, but also a welcome party on the lawn overlooking the giant international cargo ships that travel the Savannah River. Thank you also to David and Arva Chamberlain for serving as social chairs and sharing all of the fabulous places to see and to eat in Savannah.

Summer Seminar:

The TADC is looking forward to its Summer Seminar in Maui from July 16-20. This event sold out immediately upon mailing of the registrations! Co-Chairs Mitch Moss and Diana Valdez have put together an excellent seminar and we are looking forward to the opening reception with the fire dancers!

Annual Meeting and Seminar:

The 5-Star Hotel Emma in San Antonio is the setting for our Annual Meeting and Seminar from September 18-22. The hotel is incredible, and Co-Chairs Mitzi Mayfield and Trey Sandoval have assembled an impressive list of Judges and other presenters to provide cutting edge information on a variety of topics. There is plenty of time for you and your family to enjoy the fabulous food in San Antonio. Registration materials are available now at www.tadc.org.

Publications:

With the publication of the magazine you are currently reading, the Publications Committee has produced two magazines filled with substantial and interesting content that will enlighten and educate our membership. Thank you to Publications Vice Presidents Doug Rees and Darin Brooks for their leadership on this committee. The Publications Committee has produced outstanding articles and case summaries this year.

Local Events:

Several local TADC CLEs and Young Lawyer events have been planned throughout the summer months. The Young Lawyers Committee, led by Kyle Briscoe, has been active and we enjoyed having the Young Lawyers attend the Board Meeting in Austin in February. If you haven't heard about events in your area, then please let the TADC office know.

West Texas Seminar:

TADC will join the New Mexico Defense Lawyers Association in the cool pines of Ruidoso, New Mexico from August 9-11. Program Co-Chairs Bud Grossman and William Anderson 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.

Deposition Boot Camp:

Based on overwhelming demand after the success of the 2018 Deposition Boot Camp, the TADC is hosting a Deposition Boot Camp in Houston at South Texas College of Law on October 4. Co-Chairs Jesse Beck and Michael Golemi are assembling another list of experienced, successful litigators to share their expertise with the attendees. Registration materials will be available soon at www.tadc.org.

Thank you!

Thank you to all of the TADC Board members and volunteers who work so hard for this organization. Keep recruiting your colleagues and friends so that they benefit from all the TADC has to offer.

TADC's 86th Sesson Legislative Wrap-up

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

On the day before Father's Day, Governor Greg Abbott completed the task of disposing of 1,564 bills and resolutions (only 58 were vetoed). And, in contrast to two years ago, there are no unaddressed priorities likely to trigger a special session.

Indeed, when the Legislature convened in January, Governor Abbott, Lt. Governor Patrick, and newly-elected House Speaker Dennis Bonnen pledged to work together on pressing needs, including Hurricane Harvey relief and disaster planning, school finance reform, restraining the growth of property taxes, and mental health. They kept their pledge. Each critical priority passed with large, bipartisan majorities. A $250 billion budget likewise passed with virtual unanimity. The divisive social issues that have dominated the past few sessions did not disappear, especially in the Senate, but Speaker Bonnen managed these issues by vetting them fully in committee and letting the members work things out so that nobody got everything he or she wanted. Though legislation dealing with hot button topics such as abortion and religious freedom did pass, it was sufficiently moderate to keep the peace on the House floor. Clearly, Speaker Bonnen's 22 years of experience as a House member served him well: he established an atmosphere of trust and bipartisanship that made it possible to address the state's critical needs without fanfare or grandstanding.

Governor Abbott also deserves credit for downplaying partisan issues and involving himself directly in negotiating his priority bills with the House and Senate. Lack of contention over the budget set a positive tone from the outset. The House and Senate appropriations chairs, Rep. John Zerwas (R-Houston) and Sen. Jane Nelson (R-Flower Mound), are consummate professionals whom their members trust implicitly to do the right thing on the budget, which they quietly did, leaving members free to work out the other big issues. And, the fact that the state coffers overflowed with billions of dollars in surpluses cleared the way for the first significant school finance reform in 13 years. HB 3 buys down recapture and school property taxes and gives teachers a big raise. How it might be paid for in the out years remains a question mark, but the Legislature has now committed the state to a much higher contribution to the cost of public education than it has in more than a decade. That is not a small achievement.

While negotiations on the big issues went on behind the scenes, the Legislature got a lot of other things done. The appointment of a number of new committee chairs in the House raised early questions about how the system would function, but those fears were soon laid to rest. Some of the most important and productive committees in the House—State Affairs, Ways & Means, Judiciary & Civil Jurisprudence, Energy Resources, Higher Education, Human Services, Transportation, and Natural Resources—had new chairs, some with only a couple sessions under their belts. By all accounts, however, these committees worked efficiently and deliberately. Moreover, these younger chairs—Rep. Dade Phelan (R-Beaumont), Rep. Dustin Burrows (R-Lubbock), Rep. Jeff Leach (R-Plano), Rep. Chris Paddie (R-Marshall), and Rep. Terry Canales (D-Edinburg), for example—shouldered their new

responsibilities with grace and skill. Speaker Bonnen has put together a strong core of leadership heading into the future.

Regarding civil justice issues, we saw one of the most active sessions in the past decade. TADC tracked 255 bills, testified or registered on two dozen, and led the successful effort on the expense affidavit bill, HB 1693. We also participated in negotiations on the Texas Citizens Participation Act reform bill (HB 2730), the emergency room standard of care fix (HB 2362), and changes to the Judicial Campaign Fairness Act (HB 3233). We once again appeared in opposition to chancery courts (HB 4149) and expressed serious concerns about legislation addressing the *Brainard* decision (HB 1739). And we supported the creation of a judicial selection reform study committee (HB 3040), changes in jurisdictional limits to enhance access to courts (SB 2342), and salary increases for judges (HB 2384). Your association continues to serve as a well-respected and authoritative voice in support of the civil trial system that has served our state so well.

Let us turn now to some of the most significant legislation that passed this session—and some that did not. Due to space limitations, this article does not address all of the bills that TADC monitored this session. If you are interested in something not on the list, please contact the TADC office for more information.

CIVIL PROCEDURE

The lead story here is changes to §18.001, CPRC. **HB 1693 by Rep. John Smithee (R-Amarillo) and Sen. Bryan Hughes (R-Mineola)** amends §18.001, CPRC, to modify the deadlines to give a defendant additional time to determine whether to controvert the affidavit. The deadline would run from the earlier of 120 days after the defendant files an answer or the date the offering party must designate expert witnesses under a court order. The bill also clarifies that an affidavit or counteraffidavit does not support a finding of the causation element of the claimant's underlying cause of action. Finally, it provides that if services are first provided after 90 days after the defendant files its answer, then the plaintiff must serve the affidavit by the date the plaintiff must designate an expert under the TRCP. The defendant may file a counteraffidavit by the later of 30 days after service of the affidavit or the date the defendant must designate an expert under the TRCP.

HB 1693 will take effect on September 1, 2019.

We owe a debt of gratitude to two past Presidents of TADC for the successful negotiation and passage of this bill: Mike Hendryx and Clayton Devin. Over the past two years, they worked with the Texas Medical Association, Texas Alliance for Patient Access, and the Texas Trial Lawyers Association to reach an acceptable compromise. We are also grateful to: Rep. Smithee, the House author, whose commitment to passing the bill facilitated those negotiations; House Judiciary & Civil Jurisprudence Chair Leach, whose willingness to hold an early hearing on the bill gave us plenty of time to work the process; Sen. Hughes, who introduced the bill in the Senate and was ready to proceed as soon as we got to the Senate; and Senate State Affairs Chair Joan Huffman for hearing the bill and voting it out in time to beat the deadlines in May.

A second bill in which TADC actively participated reforms the Texas Citizens Participation Act (Chapter 27, TRCP). **HB 2730 by Rep. Jeff Leach (R-Plano)/Rep. Joe Moody (R-El Paso)/Rep. Dustin Burrows (R-Lubbock)/Rep. Four Price (R-Amarillo)/Rep. Morgan Meyer (R-Dallas) and Sen. Hughes/Sen. Angela Paxton (R-McKinney)/ Sen. Beverly Powell (D-Fort Worth)**:

- narrows the definition of "exercise of the right of association" to mean "to join together to collectively express, promote, pursue, or defend common interests *relating to a governmental proceeding or a matter of public concern*";

- amends the definition of "legal action" to include declaratory relief and to exclude from the definition of "legal action": (1) a procedural action taken or motion made in an action that does not add a claim for legal,

equitable, or declaratory relief; (2) alternative dispute resolution proceedings; or (3) post-judgment enforcement actions.

- amends the definition of "matter of public concern" to mean "a statement or activity regarding: (1) a public official, public figure, or other person who has drawn substantial public attention due to the person's official acts, fame, notoriety, or celebrity; (2) a matter of political, social, or other interest of the community; or (3) a subject of concern to the public;

- amends §27.003(a), CPRC, to require the action to be "based on or in response to a party's exercise of the right to petition, right to free speech, or right of association (removes the broad "relates to" language in current law) *or arises from any act of that party in furtherance of the party's communication or conduct described by Section 27.010(b)*"(new Sec. 27.010(b) provides that the TCPA specifically applies to certain media organizations);

- excludes from the definition of "party" a governmental entity, agency, or official or employee acting in an official capacity;

- amends §27.003(b) to allow the parties my mutual agreement to extend the deadlines for filing a motion;

- adds §27.003(c) and (d) to require the moving party to provide written notice of the date and time of the hearing not later than 21 days before the date of the hearing unless otherwise provided by agreement of parties or order of the court. The nonmoving party must file the response no later than 7 days before the hearing unless otherwise agreed or ordered;

- amends §27.005(a) to require the court to rule no later than 30 days after the hearing concludes;

- amends §27.005(b) to require the court to dismiss if the moving party *demonstrates* that the legal action meets the requirements for dismissal (deletes preponderance of evidence standard);

- amends §27.005(d) to require the court to dismiss if the moving party establishes an affirmative defense or other grounds on which the moving party is entitled to judgment as a matter of law (deletes *establishes by a preponderance of evidence each essential element of a valid defense to the movant's claim.*);

- amends §27.006(a) to allow the court to consider evidence that a court could consider under Rule 166a, TCRP;

- amends §27.007(a) to provide that *if the court awards sanctions* (deletes *at the request of the party*), the court must issue findings;

- adds §27.0075 to specify that neither the court's ruling on a motion to dismiss nor the fact that it made a ruling is admissible at any later stage of the litigation and to provide that the court's ruling on a motion to dismiss in no way affects a burden or degree of proof in the action;

- amends §27.009 to make an award of sanctions permissive rather than mandatory. Limits recovery to reasonable attorney's fees and court costs (current statute also allows *other expenses*) and to add a new provision that if the court dismisses a compulsory counterclaim, then it may only award attorney's fees on a finding the counterclaim was frivolous or solely intended for delay;

- amends §27.010, to add several exemptions to the applicability of the statute: (1) a legal action arising from an officer-director, employer-employee or independent

contractor relationship that seeks recovery for misappropriation of trade secrets or corporate opportunities or seeks to enforce a nondisparagement agreement or covenant not to compete; (2) a legal action filed under Titles 1, 2, 4, and 5, Family Code, or an application for a protective order made under Chapter 7A, Code of Criminal Procedure; (3) a DTPA action other than one brought under §17.49(a), Business & Commerce Code; (4) a legal action in which a moving party raises a defense based on §160.010, Occupations Code, §163.033, Health & Safety Code, or the Health Care Quality Improvement Act of 1986 (medical peer review); (5) an eviction suit under Chapter 24, Property Code; (6) a disciplinary act or proceeding under Chapter 81, Government Code, or the Texas Rules of Disciplinary Procedure; (7) a legal action under Chapter 554, Government Code (whistleblower actions); or (8) a legal action based on a common law fraud claim;

- adds §27.010(b) to specify that the TCPA applies to communications for the creation, dissemination, exhibition, advertisement, or other similar promotion of a dramatic, literary, musical, political, journalistic, or otherwise artistic work, including AV work, a motion picture, a television or radio program, or an article published in a newspaper, magazine, website, or other platform (also applies the TCPA specifically to Yelp reviews and similar reviews of consumer opinions or business ratings); and

- adds §27.010(c) to apply TCPA to a legal action against a victim or alleged victim of family violence or dating violence.

These changes take effect on September 1, 2019.

SB 891 by Sen. Joan Huffman (R-Houston) and Rep. Jeff Leach (R-Plano), the omnibus courts bill, contains a provision that requires the Supreme Court to adopt rules to provide for the substituted service of citation by an electronic communication sent to a defendant through a social media presence, if substituted service of citation is authorized under the TRCP. The Court shall adopt rules not later than December 31, 2020. Keep an eye out for further developments on this front.

An important change to the "loser pays" bill passed in 2011 slipped under the radar this session. **HB 3300 by Rep. Andy Murr (R-Junction) and Sen. Huffman** amends §30.021, CPRC, to *allow* rather than *require* a court to award attorney's fees to a prevailing party as a result of a motion to dismiss granted or denied under Supreme Court rules adopted under §22.004(g), Government Code. The purpose of this bill is to lay the basis for the Supreme Court to adopt a motion to dismiss rule that more clearly parallels Federal Rule of Civil Procedure 12. As we predicted at the time, the mandatory attorney's fees provision has proved to be an impediment to an effective motion to dismiss rule in Texas. HB 3300 goes into effect on September 1, 2019.

TADC members pulled together to help each other during Hurricane Harvey two years ago, and this year the Legislature adopted changes to the system in anticipation of similar disasters in the future. **SB 40 by Sen. Judith Zaffirini (D-Laredo) and Rep. Leach** extends from 30 to 90 days the duration of an order of the Supreme Court to modify or suspend procedures for the conduct of any court proceeding affected by a disaster declared by the governor. It further authorizes the presiding judge of an administrative judicial region to modify the terms and sessions of a district court or statutory county court in the district affected by a disaster, with the approval of the affected judge. The bill makes the same change for statutory probate courts by the presiding judge of the statutory probate courts), county courts (by the presiding judge of the administrative judicial region, with the approval of the county judge), and justice courts and municipal courts (with the approval of the judge of the affected courts). Alternate locations may either be in the county or outside the county, with the approval of the

presiding judge of the administrative judicial district in that county. SB 40 took effect on June 7, 2019.

A few bills that did not survive are worthy of notice. **HB 2096 by Rep. Matt Krause (R-Fort Worth) and SB 1567 by Sen. Pat Fallon (R-Frisco)** would have directed the Supreme Court to adopt rules providing for mandatory disclosure of third-party litigation financing agreements to the parties in a civil action in connection with which third-party litigation financing is provided. This bill drew powerful opposition from TTLA and the litigation financing industry and never got out of committee. We expect to see it again next session, however. **HB 2375 by Rep. Julie Johnson (D-Dallas)** proposed to prohibit a court from enforcing an arbitration agreement regarding a dispute that had not yet arisen at the time the agreement was made if the agreement requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute or would have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under federal or state law. **HB 2500 by Rep. Johnson** would have amended §§42.002 and 42.005, CPRC, to allow any party to an action to invoke the offer of settlement procedure.

Finally, **HB 2825 by Rep. Charlie Geren (R-Fort Worth)** proposed to require a party to disclose to all other parties the identity of any expert witness the party may use at trial. Specifically, if an expert witness is retained or specially employed for the case, or if the party has an employee who regularly gives expert testimony, then the disclosure must be accompanied by a written report that: (1) contains a complete statement of all the opinions to be expressed and the basis or reasons for those opinions; (2) the facts and data relied on by the witness to form an opinion; (3) copies of any exhibits; (4) the witness's qualifications, including all publications in the preceding 10 years; (5) a list of other cases in which the witness has testified in the last four years; and (6) a statement of the compensation paid for study and testimony in the case. If the witness is not required to file a report, then the disclosure must only include the subject matter of the witness testimony and a summary of the facts and opinions to be presented. Unless otherwise stipulated by the court, the disclosure must be made no later than 90 days before trial or, for rebuttal evidence, 30 days after the date of the other party's disclosure. The bill barred discovery of a communication between an attorney and expert witness made in anticipation of litigation or deposition or for trial, but did not bar discovery of the compensation to be paid to the witness, or facts, data, or assumptions supplied by the attorney and that the witness relied on in forming an opinion. It also barred discovery of a draft of a written report or other disclosure. We can expect to see this bill again next session as well.

COURTS

This session the Legislature paid more sustained attention to the operation of the judicial system than it has in many years. Part of the reason for this was the havoc caused by Hurricane Harvey, but growing pressures for bail and sentencing reform, mental health diversion, interdiction of human trafficking, and redressing sexual abuse and family violence put a spotlight on the courts. While much of this attention went to the criminal side of the docket, the civil side got its fair share as well.

Every session, the Legislature passes an omnibus judicial administration bill, and this session was no exception. **SB 891 by Sen. Huffman and Rep. Leach** creates a number of new district and county courts. It removes Brazoria County from the 23rd Judicial District and creates a new Brazoria County district court with preference for family law matters. It removes Medina County from the 38th Judicial District and creates a new district court for Medina County. It established new district benches in Travis, Guadalupe, Montgomery, Comal, Denton, Collin (two new courts, one with preference for family law and the other for civil matters), creates county courts at law in Chambers, Comal, Ellis, Gillespie, Hidalgo (two), Rockwall, and Liberty Counties, allows magistrates to be appointed by the

El Paso Council of Judges (criminal jurisdiction), Collin County Commissioners Court, and Fort Bend County Commissioners Court. It authorizes the Bell County Commissioners Court to select masters to serve the JP courts in truancy matters and the Kerr County Commissioners Court to enable district and statutory county court judges to appoint magistrates.

In addition to expanding the judiciary, **SB 891**:

- requires service of notice of appeal under the Texas Rules of Appellate Procedure to be served on each court reporter responsible for preparing the reporter's record, provides that on the request of a court reporter who reported a deposition, a court reporting firm shall provide the reporter with a copy of the document related to the deposition, known as the further certification, that the reporter has signed or to which the reporter's signature has been applied; and creates an apprentice court reporter certification and a provisional court reporter certification;

- requires the Office of Court Administration to publish a list of new or amended court costs and fees every two years, develop and maintain a public website that allows a person to easily publish public information on the site, and provide technical support to specialty court programs and to monitor specialty court programs for compliance with programmatic best practices;

- allows a person required to publish citation or notice in a newspaper to publish the citation or notice only on the OCA's public information website if the person files a statement of inability to pay court costs under the TRCP, the total cost of the required publication exceeds the greater of $200 or the amount set by Supreme Court, or the county in which the publication is required does not have a newspaper;

- shifts oversight of specialty court programs from the criminal justice division of the governor's office to the Office of Court Administration;

- directs the OCA to provide technical assistance to specialty court programs and to monitor compliance with programmatic best practices. (HB 2955 by Rep. Fore Price);

- requires notice served by publication to be published on the public information website maintained by OCA as well as in a newspaper (if service is made by publication, proof of service consists of an affidavit made by the OCA that contains a copy of the published notice and states the date of publication on the OCA website);

- authorizes a district clerk to post an official and legal notice by electronic display rather than a physical document; and

- changes the eligibility requirements for a retired former judge to allow a retired judge to be appointed if the judge has not in the preceding 10 years been publicly reprimanded or censured by the State Commission on Judicial Conduct in relation to behavior on the bench or judicial duties, provided the judge served as an active judge for at least four terms in office, or been convicted of a felony or crime involving domestic violence or moral turpitude.

SB 891 goes into effect on September 1, 2019.

Jurisdictional limits also got a significant makeover this session. **SB 2342 by Sen. Brandon Creighton (R-Conroe) and Rep. Leach** raises the cap on the amount in controversy for purposes of the expedited trial rules from $100,000 to $250,000 for county courts at law. It further raises the maximum jurisdictional limit for statutory county courts from $200,000 to $250,000; requires a jury in a case

pending in a statutory county court in which the matter in controversy is $250,000 or more to be composed of 12 members, unless the parties agree to fewer; standardizes statutory county court jurisdiction in a number of counties to the $250,000 cap (Angelina, Bosque, Hood, Jim Wells, Lamar, Wise, and Taylor); and raises the jurisdictional limit for justice courts from $10,000 to $20,000. The bill goes into effect on September 1, 2020.

In addition to new courts and expanded jurisdiction, the judiciary finally got a much-needed raise. **HB 2384 by Rep. Leach and Sen. Huffman** raises the minimum base salary of a district judge from $125,000 to $140,000. This increase has the effect of raising the base salaries of appellate judges, which are set at 110% of a district judge's salary for the courts of appeals and 120% for the Supreme Court. The bill also includes raises for statutory county court judges, probate judges, family judges, prosecutors, and others and increases the monthly amount of longevity pay from .031% to .05% multiplied by the amount of the judge or justice's current monthly state salary, payable after 12 (rather than 16) years of service. HB 2384 is effective on September 1, 2019.

For the third consecutive session, we saw a chancery court bill. As in the past, TADC, TTLA, and TXABOTA joined together in opposing this proposal. Though the bill failed, it is worth noting that several changes were made this session in an effort to move it off high center. We are also very likely to see the bill again next session, so additional detail about this year's proposal seems warranted here. **SB 2259 by Sen. Hughes and HB 4149 by Rep. Leach** sought to establish a business court with civil jurisdiction concurrent with district courts in: (1) a derivative action on behalf of an organization; (2) an action arising out of a qualified transaction in which the amount in controversy exceeds $10 million (excluding interest, statutory damages, exemplary damages, penalties, attorney's fees, and costs); (3) an action regarding the governance or internal affairs of an organization; (4) an action in which a claim under a state or federal securities or trade regulation law is asserted against an organization, governing person, or controlling person; (5) an action by an organization or its owner or member against an owner, managerial official, or controlling person of the organization alleging an act or omission by the person in the person's capacity as an owner, managerial official, or controlling person of the organization; (6) an action alleging that an owner, managerial official, or controlling person breached a duty, including the duty of care, loyalty, or good faith; (7) an action seeking to hold an owner, member, or governing person liable for an obligation of the organization, other than on account of a written contract signed by the person to be held liable in another capacity; (8) an action in which the amount in controversy exceeds $10 million that arises again, between, or among organizations, governing authorities, governing persons, members or owners relating to a contract transaction for business, commercial, investment, agricultural, or similar purposes or involve violations of the Finance Code or Business & Commerce Code; (9) an action brought under Chapter 37, CPRC, involving the Business Organizations Code, an organization's governing documents, or a dispute based on claims that fall within the provisions of this subsection; and (10) an action arising out of the Business Organizations Code.

As in past iterations, the bill granted the business court statewide jurisdiction and authorized it to grant any relief available in a district court. It excluded from the court's jurisdiction actions by or against a governmental entity, unless the entity invokes or consents to the court's jurisdiction. It further required the court to sever any claim in which a party seeks recovery of monetary damages for personal injury or death or any claim under the DTPA, Estates Code, Family Code, or Title 9, Property Code, unless all parties and the court judge agree that the claim may proceed in the business court, and gave the court authority to abate its proceedings pending resolution of a severed claim.

Under the bill, a party could make an original filing of an action over which the court had subject matter jurisdiction in the business court. A party

could remove to the business court an action filed in district or county court. The bill established a process to transfer actions over which the court does not have jurisdiction to a county in which the claim could have been originally filed and provided that a cause of action filed in the business court to be assigned to the docket of a judge on a rotating basis. It directed the Supreme Court to promulgate rules of civil procedure for the timely and efficient removal and remand of cases to and from the court and authorized the court to issue any writ necessary for the enforcement of the court's jurisdiction, including a writ of injunction, mandamus, sequestration, attachment, garnishment, and supersedeas.

To be qualified to serve as a business court judge, a candidate must be at least 35 years of age; a U.S. citizen, resident of Texas for two years; a licensed attorney in Texas or have 10 or more years of experience in practicing complex civil business litigation, practicing complex business transaction law, teaching courses in complex civil business litigation or business transaction law at an accredited law school in Texas, have served as a judge in a civil court in Texas, or any combination of the above. The business court would be composed of seven judges appointed by the governor with Senate confirmation with the possibility of reappointment after a six-year term. The Governor could not appoint more than three judges who reside in the same county or more than a majority of judges associated with the same political party.

The bill established a right to a jury trial in a county in which venue would be found under §15.002, CPRC, and allowed a plaintiff to choose a county of proper venue for the jury trial, if venue lies in more than one county. It applied the same rules for jury selection and practice and procedure as district courts and authorized the court to adopt rules of practice, subject to Supreme Court approval. The business court clerk would be located in Travis County, but judges would be required to maintain chambers in the county of their residence. The bill granted the court authority to adopt rates and fees sufficient to cover the costs of administering the court's business.

Finally, the bill provided for an appeal to a seven-member court of business appeals, composed of seven active justices from the courts of appeals appointed by the Governor for six-year terms. Appointees must also have met the qualifications of a business court judge. No more than three justices could be from the same court of appeals and justices would sit in randomly assigned three-judge panels, with the possibility of en-banc review on motion of a party. Appeal would be to the Supreme Court by petition for review. The bill granted the Supreme Court exclusive and original jurisdiction over a challenge to the constitutionality of this Act and provided that if the appointment of judges to the court was ruled unconstitutional, the business court shall be staffed by sitting or retired judges who are appointed by the Supreme Court.

HEALTH CARE

The Legislature made an important and necessary change to §74.153, CPRC. **HB 2362 by Rep. Joe Moody (D-El Paso) and Sen. Hughes** modifies the Supreme Court's decision in *Texas Health Presbyterian Hospital of Denton, Marc Wilson, M.D., and Alliance Ob/Gyn Specialists, PLLC v. D.A. and M.A., Individually and as Next Friends of A.A., a Minor* (2018) with respect to the standard of proof for medical care provided in a hospital obstetrical unit. The bill provides that the willful and wanton standard does not apply to: (1) medical care or treatment that occurs after the patient is stabilized and is receiving medical treatment as a nonemergency patient; (2) medical care or treatment that is unrelated to a medical emergency; or (3) any physician or health care provider whose negligent act or omission proximately causes a stable patient to require emergency medical care. HB 2362 represents a negotiated agreement between TTLA and TAPA and was strongly supported by TADC, TLR, and TCJL. We are grateful to Speaker Moody and Sen. Hughes for working with the stakeholders to address this problem. We are also grateful to former Senator and TADC member **Bob Duncan**, a co-author of the current §74.153, for facilitating the negotiations on this bill.

In response to a spate of litigation challenging hospital liens, **HB 2927 by Rep. Leach and Sen. Kelly Hancock (R-Richland Hills)** adds §55.0015, Property Code, to provide that for purposes of the attachment of a hospital lien, an injured person is considered admitted to a hospital if the person is allowed access to any department of the hospital for the provision of any treatment, care, or service to the individual. The bill provides that a hospital lien is for the lesser of the amount of the hospital's charges during the first 100 days of the injured person's hospitalization or 50% of all amounts recovered by the injured individual through a cause of action, judgment, or settlement described by §55.003(a). A hospital lien does not cover charges for which recovery is barred under §146.003, CPRC (timely billing of third-party payors). The bill became effective on June 10, 2019.

Three bills of interest that did not pass should be noted. **SB 1215 by Sen. Charles Schwertner (R-Georgetown) and HB 3832 by Rep. Reggie Smith (R-Sherman)** sought to amend §41.0105, CPRC, to require the trier of fact to consider a claimant's failure to seek reimbursement for medical or health care expenses that are obligated to be paid on the claimant's behalf as a failure to mitigate damages. **HB 765 by Rep. Gene Wu (D-Houston)** proposed to index to inflation the caps on noneconomic damages and the amounts of required financial responsibility in health care liability claims. **HB 3186 by Rep. Krause** would have required a claimant who files a supplemental or amended pleading in a health care liability claim that asserts a theory of direct liability against a defendant against whom the claimant had previously asserted a theory of vicarious liability to serve on the defendant an expert report not later than 60 days after filing the supplemental or amended pleading. We anticipate that at least HB 765 and SB 1215/HB 3832 will will return in some form next session.

INSURANCE

Most of the attention focused on a proposal to modify the Supreme Court's 2006 decision in *Brainard v. Trinity Universal Insurance Company*, which, among other things, held that an insured must obtain a judgment establishing the liability and underinsured status of the other motorist" to trigger an insurer's obligation under a UIM/UM policy. As originally filed, **HB 1739 by Rep. Geren** prohibited an insurer from requiring as a prerequisite to asserting a claim under underinsured or uninsured motorist coverage a judgment or other legal determination establishing the other motorist's liability or uninsured or underinsured status. The bill further specified that such a judgment or legal determination is not a prerequisite to having a claim under Chapters 541 or 542, Insurance Code. HB 1739 would have barred an insurer from requiring as a prerequisite to paying benefits under underinsured or uninsured coverage a judgment or legal determination of the other motorist's liability or the extent of the insured's damages before benefits are paid under the policy. It further required an insurer to make a good faith attempt to effectuate a fair, prompt, and equitable settlement of a claim once liability and damages become reasonably clear. Under the bill, prejudgment interest would have accrued on an uninsured or underinsured motorist claim on the earlier of the 180th day after the date the claimant notifies the insurer of the claim or the date on which suit is filed against the insurer to recover under uninsured or underinsured coverage. For purposes of the recovery of attorney's fees under §38.002, CPRC, a claim for uninsured or underinsured coverage would be presented when the insurer receives notice of the claim (defined as written notification to the insurer that reasonably informs the insurer of the facts of the claim).

After the bill cleared the House Insurance Committee, it was amended in an effort to address the concerns of the insurance industry and civil justice reform groups. As amended, the bill provided that an insured may provide notice of a claim for uninsured or underinsured coverage by giving written notification to the insurer that reasonably informs the insurer of the facts of the claim. It further specified

that a judgment or legal determination of the other motorist's liability or the extent of the insured's damages is not a prerequisite to recovery in an action under §541.151, Insurance Code, for a violation of §541.060. Finally, it provided that the insured's only extra-contractual cause of action with respect to a UM or UIM claim is provided by §541,151 for damages under §541.152 for a violation of §541.060. HB 1739 passed the House in this form, but was never referred to committee in the Senate. This high priority bill for TTLA will almost certainly make a comeback next session.

A bill of interest that did reach the Governor's desk, **HB 2757 by Rep. Leach and Sen. Larry Taylor (R-Friendswood),** amends §5.001, CPRC, to specify that the American Law Institute's Restatements of Law are not controlling in Texas. The adoption of the ALI's Restatement of the Law of Liability Insurance raised concerns among carriers and others that Texas courts might rely on it rather than divergent Texas case law precedent. The bill goes into effect on September 1, 2019.

After multiple sessions with no luck, **HB 259 by Rep. Ed Thompson (R-Pearland) and Sen. Hancock** finally made it over the finish line. The bill prohibits an insurer from using a named driver exclusion unless the exclusion specifically names each excluded driver and does not exclude a class of drivers. It further requires the insured to accept the exclusion in writing. HB 259 goes into effect on September 1, 2019. This bill shows the value of long-term persistence in the legislative process.

JUDICIAL ELECTIONS

The results of the 2018 election, in which several courts of appeals in the state experienced fruit basket turnover (not to mention sweeps at the district court level in recent years), caused alarm over the loss of judges with substantial experience on the bench and their replacement by new judges with little or no experience. Since its inception, TADC has supported judicial selection reform to *avoid* this situation, but for many decades has been a voice crying in the wilderness on the issue.

This might be about to change. For the first time, a Texas Governor has signed legislation directing the Legislature to conduct a study and make recommendations for change. While we have seen many studies in the past, none of them were sanctioned by the Governor, legislative leadership, and overwhelming majorities of both houses. **HB 3040 by Rep. Todd Hunter (R-Corpus Christi) an Sen. Huffman** establishes a bipartisan Texas Commission on Judicial Selection to study and recommend changes in the selection of trial and appellate courts at all levels. The commission consists of four members appointed by the lieutenant governor (three of whom must be senators), four appointed by the speaker (three of whom must be House members), and one member appointed by each of the chief justice of the supreme court, presiding judge of the court of criminal appeals, and president of the state bar. The Commission must report its recommendations by December 31, 2020. TADC will participate in the work of this committee over the interim.

Another important bill that did not receive widespread attention, **HB 3233 by Rep. Stephanie Klick (R-Fort Worth) and Sen. Fallon**, repeals a number of potentially unconstitutional provisions of the Judicial Campaign Fairness Act, including:

- the requirement that a person intending to make certain levels direct campaign expenditures to support or oppose a judicial candidate file a written declaration of the intent to make those expenditures;

- the requirement that a candidate for judicial office file a written statement stating an intent to comply with the expenditure limits or to make expenditures that exceed the limits;

- the provisions that allows a complying candidate to lift the contribution, expenditure, and reimbursement of personal loan limits if an opposing candidate does not comply with

the voluntary limits;

- the provision allowing a complying candidate to state voluntary compliance on political advertising;
- the expenditure limits; and
- the Judicial Campaign Fairness Fund.

HB 3233 significantly simplifies a complex law, conforms it to federal constitutional requirements, and eases compliance for both judicial candidates and those who contribute to their campaigns. It is a much overdue measure, and we are grateful to Rep. Klick, Sen. Fallon, TLR, TCJL, and TTLA for coming together on these changes.

CONSTRUCTION LAW

For the last several sessions, construction law issues have been among the most contentious, pitting owners, general contractors, subcontractors, and design professionals, and construction lawyers for and against one another. Here is what passed:

HB 1734 by Rep. Justin Holland (R-Rockdale) and Sen. Eddie Lucio (D-Brownsville) requires a school district that brings an action for damages for a construction defect to provide the commissioner of education with a copy of the petition, by registered or certified mail, not later than the 30th day after the action is filed, or the action will be dismissed. The dismissal extends the statute of limitations for 90 days. If the district receives state assistance for facilities, the commissioner may join the action. The district must use the proceeds of the action to repair the defect and ancillary damage to furniture or fixtures, for the replacement of the damaged facility, for the reimbursement of the district for repairs, or for any other purpose with the approval of the commissioner. The bill grants the attorney general additional authority to enjoin a violation of this section recover the state share of any recovery, if the state has provided part of the financing for the construction of an instructional facility that is the subject of the suit. It also authorizes the attorney general to recover a $20,000 civil penalty. The bill goes into effect on September 1, 2019.

HB 1999 by Rep. and Leach/Sen. Creighton requires a governmental entity (the state and local governments), before bringing an action against a contractor or design professional for a construction defect, to provide each party with whom the entity has a contract for construction or design of an affected structure a written report by certified mail, return receipt requested, that clearly: (1) identifies the specific defect: (2) describes the present physical condition of the affected structure; and (3) describes any modification, maintenance, or repairs to the affected structure by the governmental entity or others since the structure was initially occupied or used. The contractor must provide a copy of the report to each subcontractor whose work is subject to the claim. The bill permits the opportunity to inspect within 30 days and to correct within 120 days after inspection and provides that an entity is not required to allow a party to make a correction or repair if the party cannot provide a bond, provide liability insurance or workers' compensation insurance, has previously been terminated for cause, or has been convicted of a felony. It further provides that the entity is not required to allow the party to make a correction or repair if the entity has already complied with the process and the defect was either not corrected or the attempt to correct the defect or related condition resulted in a new construction defect or related condition. Limitations are tolled for one year after the report is sent, if it occurs in the final year of the limitations period. The public entity can recover the costs of the report if it prevails in the action or a correction or repair is made. Finally, the bill requires an insurer to treat written notice of a defect or receipt of a report to the party as filing a suit asserting a claim against the party for purposes of the relevant policy terms. The bill became effective immediately.

HB 2440 by Rep. Krause and Sen. Fallon amends §150.002, CPRC, to require the third-party professional who gives a certificate of merit on behalf of a claimant against a licensed professional to practice in the same area as the defendant (the

current law merely says "knowledgeable" in the defendant's area of practice). The bill became effective immediately.

HB 2899 by Rep. Leach and Sen. Juan Hinojosa (D-McAllen) provides that a contractor operating under a contract with a governmental entity for the construction of a road, highway, bridge, tunnel, overpass, or other highway extension, is not responsible for defects or the consequences of defects in the adequacy, accuracy, sufficiency, or suitability of plans, specifications, or other design or bid documents provided to the contractor by the governmental entity or a third party under a separate contract with the governmental entity. The bill applies to the state and political subdivisions of the state. It also provides that a governmental entity may not require the engineering or architectural services be performed to a level of professional skill and care beyond the level that would be provided by an ordinarily prudent engineer or architect with the same professional license and under the same or similar circumstances in a contract for engineering or architectural services or that contains engineering or architectural services as a component of the contract. The bill became effective immediately.

And here is what didn't pass:

HB 1185 by Rep. John Cyrier (R-Lockhart) and SB 737 by Sen. Hughes sought to amend §§114.003 and 114.004, CPRC, to expand the waiver of sovereign immunity to a suit against a state agency for breach of contract by removing the limitation that the waiver only applies to a claim for break "of an express provision" of the contract. The bill also allowed recovery of increased costs directly resulting from owner-caused delays or acceleration regardless of whether the contract expressly provides for that compensation, as well as the recovery of just and equitable attorney's fees, regardless of whether the contract expressly provides that the recovery of attorney's fees is available to all parties to the contract. The bill passed the House but did not get out of committee in the Senate.

HB 1211 by Rep. Drew Darby and Sen. Lois Kolkhorst (R-Brenham) added §130.0021, CPRC, to mandate that a contract for architectural or engineering services must require a licensed engineer or registered architect to perform services with the professional skill and care ordinarily provided by competent engineers or architects practicing under the same or similar circumstances and professional license. It also amended §130.002(b), CPRC, to further limit the scope of indemnification in a construction contract with a registered architect or licensed engineer. The added language voided an indemnity clause that required an architect or engineer to defend an owner or owner's agent (the current language says "indemnify or hold harmless") from liability that is caused by or results from the negligence of a person other than the architect or engineer (the current language specifies the owner or owner's agent). HB 1211 passed the House and got out of committee in the Senate, but it was used as a vehicle for eminent domain reform and did not get to a vote on the Senate floor.

Under **HB 1737 by Rep. Holland,** the committee substitute would have reduced the statute of repose for a claim against a contractor, registered or licensed architect, engineer, interior designer, or landscape architect from 10 to 7 years arising out of a defective or unsafe condition of real property, an improvement to real property, or equipment attached to real property. The bill cleared committee in the House but did not make a calendar.

HB 2901 by Rep. Leach proposed to overturn the longstanding *Lonergan* standard under Texas law in favor of the *Spearin* rule. It would have provided that a contractor is not civilly liable or otherwise responsible for the consequences of defects in and may not warranty the adequacy, sufficiency, or suitability of plans, specifications, or other design or bid documents provided to the contractor by the person with whom the contractor entered into the contract or another person on behalf of the person with whom the contractor entered into the contract. The bill prohibited a contractual waiver of this provision. The bill got out of committee in the House but did not reach the floor.

We fully expect the bills that did not succeed to make a return appearance in 2021.

EMPLOYMENT LAW/WORKERS' COMPENSATION

Although numerous bills were introduced in the employment law arena, only a few passed, and one was vetoed by the Governor. **HB 621 by Rep. Victoria Neave (D-Dallas) and Sen. Zaffirini** amends §261.110, Family Code, to prohibit an employer from taking an adverse employment action against a professional who reports child abuse or neglect. The bill allows a person to sue for injunctive relief and damages if the employer takes a prohibited adverse employment action. It takes effect on September 1, 2019. **SB 1500 by Sen. Zaffirini and Rep. Hubert Vo (D-Houston)** repeals §61.063(b), Labor Code, which provides that failure of a person seeking judicial review of the determination of a wage claim to pay the amount owed to the commission or into escrow within 30 days of the commission's order constitutes a waiver of judicial review. The bill took effect on May 22, 2019. **HB 2348 by Rep. Tracy King (D-Uvalde) and Sen. Charles Perry (R-Lubbock)** would have prohibited employment discrimination against an employee who is a volunteer emergency responder for an emergency service organization. This bill was among the 58 that fell to the Governor's veto pen.

One important workers' compensation bill with potential implications for future expansion passed this session. **SB 2551 by Sen. Hinojosa and Rep. Burrows** amends §67.055, Government Code, to specify the types of cancer that may be presumed to result from the course and scope of employment of a firefighter or emergency medical technician. "Cancer" means: (1) cancer that originates at the stomach, colon, rectum, skin, prostate, testis, or brain; (2) non-Hodgkin's lymphoma; (3) multiple myeloma; (4) malignant melanoma; and (5) renal cell carcinoma. The bill modifies the standard for the rebuttable presumption from "caused" the individual's disease or illness to "was a substantial factor in bringing about" the disease or illness, "without which the disease or illness would not have occurred." It requires an administrative law judge to make findings of fact and conclusions of law that a risk factor, accident, or hazard not associated with the employee's service as a firefighter or EMT was a substantial factor in bringing about the employee's disease, without which the disease or illness would not have occurred. Under the bill, an insurance carrier does not commit an administrative violation and has reasonable grounds for refusal to pay benefits if the carrier has sent notice to the employee that describes the evidence the carrier reasonably believes is necessary to complete its investigation of the compensability of the claim. In determining whether to assess sanctions, the commissioner shall consider whether the employee has cooperated with the carrier's investigation and the employee has timely authorized access to the applicable medical records before the carrier's deadline to begin payment of benefits or to notify the division and employee of its refusal to pay benefits. In the event of a violation, the carrier may be liable for sanctions, administrative penalties, and other remedies and attorney's fees. Finally, the bill uthorizes a pool or a political subdivision that self-insures to establish an account for the payment of death benefits or lifetime income benefits for compensable injury to a firefighter or EMT. The bill took immediate effect.

There is already discussion about expanding the presumption under the bill to police officers, but one might easily extend its rationale to other workplaces that expose employees to various kinds of smoke, particulate matter, chemicals, or other potentially harmful substances. Those who still practice in the workers' compensation arena should keep a close eye on developments in future sessions.

As always, it has been a great privilege to represent TADC this session. I am consistently amazed, but not surprised, by the high standards of professionalism and integrity that TADC demonstrates in everything it does, including its legislative program. While we do make modest political contributions to support candidates with a proven record of support for a strong and independent judiciary, legislators listen to what we say because we have credibility and put the right of every Texan to his or her day in court above our own self-interest. I am looking forward to continuing this work in 2021 and beyond.

TADC PAC Report

By: Leonard R. (Bud) Grossman, Trustee Chairman
Craig, Terrill, Hale & Grantham, L.L.P.; Lubbock

A tremendous thank you to our membership for the commitment to our slogan: "I BACK THE PAC". This has been perhaps one of the most productive and important legislative sessions in many, many years. As addressed in my previous TADC PAC Report, we were monitoring a number of bills. I would like to join in the high praise to our leadership, especially Michael Hendryx, Clayton Devin and David Chamberlain, among many others who worked behind the scenes to get Civil Practice and Remedies Code §18.001 passed. This was two years in the making. As we learned, and past TADC president Michael Hendryx will readily tell you, "it is much easier to kill a bill, than to pass a bill."

The Senate passed HB 1693, which is the expense affidavit bill that makes very much needed improvements to Civil Practice and Remedies Code §18.001. The bill was signed into law on June 10th and takes effect on September 1, 2019. TADC worked closely with TMA, TTLA, and other stakeholder groups to reach a compromise that has broad support in the bar and business community. We are grateful to Rep. John Smithee (R-Amarillo) for authoring the bill in the House and to Sen. Bryan Hughes (R-Mineola) for sponsoring HB 1693 in the Senate. While 1693 may not solve all the problems with §18.001, it represents a significant improvement in the process. This also shows the importance of involvement and support of our membership and the PAC.

Another bill of particular interest was monitored. HB 1739 by Rep. Geren provides that an insured may provide notice of a claim for uninsured or underinsured coverage by giving written notification to the insurer that reasonably informs the insurer of the facts of the claim. More importantly, this bill provides that a judgment or legal determination of the other motorist's liability or the extent of the insured's damages is not a prerequisite to recovery in an action under §541.151, Insurance Code, for a violation of §541.060. It also provides that the insured's only extra-contractual cause of action with respect to a UM or UIM claim is provided by §541.151 for damages under §541.152 for a violation of §541.060. This bill was not referred to committee in the Senate and ultimately died there.

We need the PAC to continue to make a difference for our profession and sustaining our civil justice system. One can see, especially in this legislative session, how important it is for us to support our leadership and involvement in the process. Special interest groups have stepped up their efforts to erode our civil jury system. The TADC does more than counteract such interests. The PAC advocates for the independence of the legal profession and fairness in our judicial system.

It takes you and your donations to support PAC's activities. The PAC combined with those that volunteer their time and resources are a proven success. With your help, the PAC will continue to help raise awareness of our mutual interests by supporting the various legislators and judicial candidates and support the integrity of the judicial system. With the increased attacks to the right to trial by jury, and our independence as a profession, we need the PAC.

Show your support for the PAC and those that devote their time and skills in making the practice of law a level playing field as it was intended. TADC encourages our members to donate $300, or more if you are able, to the PAC. Your bright green sticker not only proclaims your support of our organization, it shows our leadership appreciation to our members who go to extraordinary lengths following through with the mission of the TADC. For those who have already made your contributions, a very big thank you. To those who have yet to do so, please BACK THE PAC and make your contribution today!

2019 TADC Winter Seminar

January 30 - February 3, 2019 - Steamboat Grand - Steamboat Springs, CO

The 2019 TADC Winter Seminar was held jointly with the Louisiana Association of Defense Counsel at the Steamboat Grand in Steamboat Springs, Colorado, January 30-February 3, 2019. David Brenner with Burns, Anderson, Jury & Brenner, L.L.P. in Austin and Megan Schmid, Thompson & Knight LLP in Houston served as Program Co-Chairs. The program featured practical topics for the practicing litigator. Members enjoyed 8.5 hours of CLE and great skiing!

Curt & Vicki Kurhajec, Rosemary & Max Wright, Karen & David Brenner and David Boyle

Robert & Heather Sonnier with Russell & Trish Smith

Jay Old and Ann Grimes with Dan & Jeri Worthington

Lauren & Phil Goerbig

Sarah Anderson and Pam Madere

Shanna & Slater Elza

2019 TADC Winter Seminar

The Ethics Panel: Darryl Foster, Max Wright, The Judges Pitman and LADC Executive Dane Ciolino

The Arambulas – Jonathan, Belinda, Penelope & Amelia

President Pam Madere with Program Chairs David Brenner, Megan Schmid and Christy Amuny (seated)

Hard at Work!

By: Alexis W. Foster,
Gray Reed & McGraw LLP
Originally published in
NASPD Pipeline Magazine

Avoid the Battle, Win the War:

Why What You Say, How You Say It, and When You Say It Matters

"Victorious warriors win first and then go to war, while defeated warriors go to war first and then seek to win." Sun Tzu, *The Art of War*. From handshake deals to seemingly perfectly papered transactions, commercial business is still the Wild West in terms of the variety of ways in which we see multimillion dollar deals being done. Although the configuration of any given deal varies, a vast amount of business is conducted via an exchange of formal and informal communications including emails, telephone calls, requests for quotes, quotes, purchase orders, order confirmations and invoices, all without a signed contract. And in some cases, a deal is simply done on a handshake or written down on a bar napkin. But while the expression, "a man is only as good as his word" may have governed commercial business practice for years, litigation is at an all-time high. And the cold hard truth is that the company who did everything right, sent or received a formal purchase order, its risk shifting terms and conditions and sent or received an order confirmation is likely no better off than the company who relied solely on a handshake. How can that be, you say?

Take a typical transaction for the sale of goods between a distributor and manufacturer: (1) a distributor sends a request for quote to a manufacturer; (2) the manufacturer sends the distributor a quote, including the price and other material sales' terms with or without the manufacturer's terms and conditions attached; (3) the distributor then sends the manufacturer a purchase order with the distributor's terms and conditions attached; and (4) finally, the manufacturer sends the distributor an order confirmation with the manufacturer's terms and conditions attached, or simply performs in response to the purchase order and then sends an invoice to the distributor with the manufacturer's terms and conditions attached. The competing terms and conditions are often one-sided boilerplate terms and conditions, printed in small print on the back of the document and neither party signs the other party's document, much less bothers to read it.

Here's the rub. If there is no signed contract, then whose terms and conditions govern the parties' transaction? If a dispute arises, this can be a multi-million dollar question, and its answer hinges solely on the following question: When was the contract formed? (Commonly referred to as a "battle of the forms"). With the rapid expansion of interstate commerce, a need to regulate business transactions in a uniform way gave birth to the Uniform Commercial Code (the "UCC"). A joint effort by the National Conference of Commissioners on Uniform State Law and the American Law Institute, the UCC was a comprehensive effort to modernize the law governing commercial transactions designed to provide clarity, ensure uniformity in the adopting states, and to promote certainty and predictability in commercial transactions. It is the longest and most elaborate of the uniform acts and was written to address common law inequities of contract formation.

While largely successful at achieving this ambitious goal, one of the most confusing and fiercely litigated sections of the UCC is the battle of the forms. It has been described as a "miserable, bungled, patched-up job," and "arguably the greatest statutory mess of all time." In fact, due in part to the massive confusion the UCC's battle of the forms engendered, a revised version was offered in 2003, but the revision has never been enacted by any state. So at least for now, we're stuck wading through the

current statutory framework. To decide when the contract was formed, courts must determine which formal or informal communication constituted the offer, and which one created the acceptance.

At common law, to create a contract, it was necessary for the offer and the acceptance to reflect identical terms. If the acceptance included any term additional to or different than the terms of the offer, then it constituted a counteroffer, not an acceptance. This was referred to as the "Mirror Image Rule." The common law also recognized, however, that a contract could also be formed by performance. In other words, an offer or counter-offer could be accepted by paying for or delivering goods. Accordingly, because it was rare in commercial transactions for an offer and an acceptance to contain identical terms, contracts were most often formed solely by the counteroffer and performance of the other party. In that scenario, the terms that governed the parties' transaction were only those contained in the counter-offer; the last party to send its terms and conditions before performance by the other party won the battle of the forms. This was referred to as the "Last Shot Rule." For example, even if you thought you sold material "as is, where is," thereby disclaiming any express or implied warranties, if you did not send your terms and conditions last, then you might be stuck with terms and conditions that required you to warrant the material for a specific purpose or for a long period of time.

To combat the inherent unfairness of the Mirror Image Rule and the Last Shot Rule, the UCC endeavored to liberalize the formation of contracts so as to avoid frustrating the parties' intentions by attempting to fit the transaction into the common-law model of offer and acceptance. Unfortunately, and often because of inadvertent yet sloppy business practices, more problems were created than solved.

Under the UCC, a valid offer need only demonstrate that: (1) the offeror intended to make an offer, (2) the terms of the offer were clear and definite, and (3) the offeror communicated the essential terms of the offer to the offeree. For our purposes, the essential terms necessary for an offer are a description of the product and the price based on the quantity ordered. Additional terms such as the place and time of payment, shipment and delivery are not necessary to create a valid offer. Vastly different than the common law's Mirror Image Rule, the UCC provides that any definite expression of acceptance, or a written confirmation which is sent within a reasonable time, operates as an acceptance, and not a counter-offer, even though it states terms additional to or different from those offered or agreed upon. Accordingly, more often than not, under a UCC battle of the forms, a seller's quote issued in response to a specific inquiry (usually a request for quote) that simply identifies the product and price, is an offer that is capable of acceptance and the buyer's purchase order is the acceptance (not the offer).

Once a court determines then communications are the offer and acceptance, then the court must decide whose terms and conditions apply. Under the UCC, the terms of a contract are those contained in the offer plus any additional or different terms contained in the acceptance unless: (1) the offer expressly limits acceptance to the terms of the offer, (2) the additional or different terms materially alter any term or condition in the offer, or (3) the offer contains an objection to any additional or different terms that could be contained in an acceptance. To put it bluntly, under the UCC, all of the offeror's terms and conditions, along with any unimportant or immaterial terms and conditions provided by the offeree govern the transaction.

Thus, while the UCC overrules the Mirror Image Rule and the Last Shot Rule, it simply swaps the Last Shot Rule for what could be coined as the First Shot Rule. The bottom line? Unless you want to risk being the biggest loser in a battle of the forms you must make sure that: (1) you are the offeror; (2) you send your terms and conditions with each and every quote; and (3) in the event you are not the offeror, your terms and conditions contain the magic language making your acceptance of any offer expressly conditional on the other party's acceptance of your terms and conditions.

2019 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 9-10, 2019 ~ Inn of the Mountain Gods ~ Ruidoso, NM

PROGRAM AND REGISTRATION

Approved for 5.25 Hours CLE, including 1.0 hours ethics

Program Co-Chairs: **Leonard R. (Bud) Grossman**, Craig, Terrill, Hale & Grantham, L.L.P., Lubbock,
William R. Anderson O'Brien & Padilla, P.C., Las Cruces

Friday, August 9, 2019 ***(All times Mountain Time)***

6:00-8:00pm Opening Reception– ***Deck on the Green (Golf Course)***

Saturday, August 10, 2019

7:00am-9:00am Buffet Breakfast– ***Nation's Buffet, ticketed***

7:30am Welcome & Introductions– ***Mescalero Ballroom F***
Pam Madere, TADC President
Jackson Walker, LLP, Austin
Leonard R. (Bud) Grossman, Craig, Terrill, Hale & Grantham, L.L.P, Lubbock, TADC President-Elect and Chair
William R. Anderson O'Brien & Padilla, P.C., Las Cruces, NMDLA President-Elect and Co-Chair
Alex Yarbrough, Riney & Mayfield, Amarillo, TADC Young Lawyer Chair

7:45-8:45am CONFESSIONS OF A MEDIATOR:
6 THINGS YOU NEED TO DO TO GET THE BEST SETTLEMENTS
Mike Bassett, The Bassett Firm, Dallas

8:45-9:15am NMDLA AMICUS/APPELLATE UPDATE
Mark D. Standridge, Jarmie & Rogers, P.C., Las Cruces

9:15-10:00am UPDATE ON TRUCKING LITIGATION
Mark Chisholm, Kinzie Johnson & Jonathan Galley, Craig, Terrill, Hale & Grantham, L.L.P., Lubbock

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

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

10:45-11:30am LITIGATING LIKE A HOMETOWNER: AN OVERVIEW OF NM & TX
Michael Dean, Dan Hernandez & Christopher Tebo , Ray, McChristian & Jeans, P.C., Albuquerque, Fort Worth, El Paso
William R. Anderson, O'Brien & Padilla, P.C., Las Cruces

11:30-12:00pm LITIGATION HOLD LETTERS
Slater C. Elza, Underwood Law Firm, P.C., Amarillo

12:00-12:30pm COURTROOM DECORUM *(ethics)*
The Honorable James T. Martin,
3rd Judicial District Court, Division VI of New Mexico

12:30-1:00pm A VIEW FROM BEHIND THE BENCH *(ethics)*
The Honorable W. Stacy Trotter
358th District Court, Ector County, Texas

1:00pm ADJOURN TO ENJOY RUIDOSO

Sunday, August 11, 2019

7:00-9:00am Buffet Breakfast– ***Nation's Buffet, ticketed***

Thanks to our Meeting Sponsor!

AEI CORPORATION
Advanced Engineering Investigations

2019 TADC West Texas Seminar
August 9-10, 2019
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 8, 2019

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 26, 2019) to the meeting date. A $25.00 Administrative Fee will be deducted from any refund. Any cancellation made after July 26, 2019 IS NON-REFUNDABLE.

2019 TADC WEST TEXAS SEMINAR

August 9-10, 2019

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 8, 2019. 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#_____

By David Lauritzen
Cotton, Bledsoe,
Tighe & Dawson, P.C.

The Texas Supreme Court Approves a Contractual Waiver of Punitive Damages in *Bombardier Aerocorp v. SPEP Aircraft Holdings*

Much of this country's free market success has been predicated upon freedom of contract. Contracts are pervasive in today's society as is evidenced in our line of work by the fact that a full year of contracts is required in virtually every accredited law school in the country.

As we learned in our contract classes, contract law permits, and in some cases even encourages, breach by way of a remedy scheme that is designed to financially compensate the non-breaching party without the infliction of additional penalties upon the breaching party. Generally, no matter how egregious the breach is, contract damages are limited to those amounts necessary to place the non-breaching party in the position he or she would have been in had there been no breach. Consequently, punitive and exemplary damages are generally not available for "mere" breach of contract.

Traditional contract law damages stand in opposition to traditional tort damages, which in common law will generally permit the recovery of punitive or exemplary damages for particularly reprehensible behavior. The contrast between contract law and tort law has resulted in at least two significant bodies of evolving law: (1) the "contort" where a party to a contract attempts to recover punitive damages through additional tortious behavior by the breaching party; and (2) the preemptive contractual attempt to limit tort damages.

The growth of "contorts" and the concomitant rejection of contractual punitive damage waivers arise out of the same concept – "Fraud vitiates everything it touches." *Hooks v. Samson Lone Star, Ltd. P'ship.*, 457 S.W.3d 52, 57 (Tex. 2015); *see also Schlumberger Technology Corp. v. Swanson* 959 S.W.2d 171, 179 (Tex. 1997). Indeed, "fraud vitiates every transaction tainted by it" and "vitiates an otherwise apparently valid contract." *Farnsworth v. Dolch*, 488 S.W.2d 531, 532 (Tex. Civ. App. – Waco 1972, writ refused n.r.e.); *Fletcher v. Edwards*, 26 S.W.3d 66, 76 (Tex. App. – Waco 2000, pet. denied) ("If [plaintiffs] were fraudulently induced to enter the real estate contract as they allege, that fraud vitiates all documents, which [plaintiffs] executed as a part of the transaction"). Thus, pre-injury contractual attempts to limit punitive damages have generally been held invalid as against public policy. *See Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 687 (Tex. 2008).

Enter the Texas Supreme Court's recent opinion in *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213 (Tex. 2019) In *Bombardier*, the Plaintiff-purchaser of a putatively new jet airplane sued Bombardier for both breach of contract and fraud after discovering

that used engine parts had been installed in the aircraft. At trial, the airplane purchaser obtained a jury verdict on both its breach of contract and its fraud causes of action. (This is a common contorts strategy – the plaintiff seeks recovery on both theories and elects entry of whichever verdict is higher after receiving an award of either attorney's fees for breach of contract or an award of punitive damages for fraud.) The purchaser elected to recover on its fraud cause of action, which awarded punitive damages that were twice the amount of the base award.

Bombardier defended on the basis of damage limitations in two of the parties' contractual agreements. The Purchase Agreement provided that Bombardier would not be liable for punitive damages that arose out of "services rendered or delivered under this purchase agreement." A concurrent Management Agreement also contained a provision that "[n]either party hereto may be held liable to the other party for any indirect special or consequential and/or punitive damages for any reason." The trial court disregarded these provisions, however, as being against public policy and the court of appeals affirmed. *See Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 565 S.W.3d 280 (Tex. App. – Dallas 2017, pet. granted).

The Texas Supreme Court reversed the punitive damages award. The Court acknowledged that it has held that "[f]raud vitiates whatever it touches." However, the Court qualified what seems like a pretty definitive statement with: "We have never held, however that fraud vitiates a limitation-of-liability clause. We must respect and enforce terms of a contract that parties have freely and voluntarily entered." *Bombardier*, 572 S.W. 3d at 232.

In its analysis, the Court referenced Texas's "strongly embedded public policy favoring freedom of contract." It further noted that, "absent a compelling reason, courts must respect and enforce the terms of a contract that the parties have freely and voluntarily made." *Id.* at 230. The Court then noted, "Rather than seeking rescission of the agreements based on Bombardier's fraudulent conduct, the plaintiffs have tried to enforce the agreements, seeking an award of actual damages, while at the same time seeking to strike the limitation-of-liability clauses to receive an exemplary damages award." It reasoned that in this case the Plaintiff-purchaser, "cannot both have [the] contract and defeat it too." *Id.* at 232.

The Court made a distinction between contractual clauses that limited liability and clauses that only limited damages. "In balancing the competing interests between protecting parties from 'unintentionally waiving a claim for fraud' and 'the ability of parties to fully and finally resolve disputes between them,' we believe parties can bargain to limit exemplary damages." The Court further pointed out that the parties did not waive a claim for fraud (which presumably still cannot be contractually waived as a matter of public policy), but rather they only waived the ability to recover punitive damages for any fraud. "As such, the limitation-of-liability clauses must stand." *Id.* at 232.

The Court noted that the result might have been different if the plaintiffs had sought rescission of the contracts and it expressly reserved ruling on whether punitive damages could be awarded in a fiduciary situation.

A couple of obvious problems arise. First, this ruling seems at odds with the long-held practice in Texas that parties may plead and take to a jury duplicative and/or incompatible causes of action. *See* Tex. R. Civ. P. 48; *Houston Sash & Door Co., Inc. v. Davidson*, 509 S.W.2d 690, 692

(Tex. Civ. App. – Beaumont 1974, writ ref'd n.r.e.); *Texarkana Water Supply Corp. v. L.E. Farley, Inc.*, 353 S.W.2d 885, 888 (Tex. Civ. App. – Houston 1962, no writ); *Santa Maria Water Control & Imp. Dist. No. 4 v. Towery Equipment Co.*, 241 S.W.2d 755, 758 (Tex. Civ. App. – El Paso, no writ).

Likewise, it seems to ignore the reality that a plaintiff being fraudulently induced to enter into a contract would likely never have entered into the contract with the punitive damages waiver if he or she had known that he or she was being defrauded. The intermediate Dallas Court of Appeals expressly recognized this and reasoned that, "a buyer cannot be bound by an agreement waiving exemplary damages if the seller commits fraud by nondisclosure. To conclude otherwise would allow a seller to deliberately fail to disclose material facts to entice a buyer to enter a contract and then shield himself from damages to which the buyer is entitled." *Bombardier Aerospace Corp.*, 565 S.W.3d at 305. This should be especially true where the fraud deprives the non-breaching party of the benefit of the bargain because that benefit has been otherwise lost or destroyed. The Texas Supreme Court simply dismissed this by explaining that "when sophisticated parties represented by counsel disclaim reliance on representations about a specific matter in dispute, such a disclaimer may be binding, conclusively negating the element of reliance in a suit for fraudulent inducement. *Bombardier*, 572 S.W. 3d at 232 quoting Italian Cowboy Partners, Ltd. v. Prudential Insurance Company of America, 341 S.W.3d 323, 332 (Tex. 2011); *see also Schlumberger Technology Corp.*, 959 S.W.2d at 180. Given that "sophisticated parties represented by counsel" is, at best, an imprecise term, future identification of when and where this rule will apply seems problematic.

Finally, what if a non-breaching party is no longer in the position to rescind the contract? Take, for example, a situation where a plaintiff sells defendant oil-producing leases in Green Acre. The contract states that after the defendant has received a certain amount of money from the sale of oil, it will assign half of the property back to the plaintiff, cost free. Yet, the defendant entered into the contract with the knowledge that it planned to let over 90% of the Green Acre leases expire because it did not plan to develop those minerals. What good is rescission where 90% of the property at issue is now gone forever?

Does this mean that all contractual limitations on punitive damages in Texas are now permissible? Not necessarily. As the Texas Supreme Court noted, it did not rule on whether a limitation-of-damages clause would apply where a fiduciary relationship is involved. Further, the Court seemed to indicate that a party could plead different causes of action and/or remedies, *i.e.* for rescission of a contract, and possibly reach a different result.

Further, there may be a distinction between common law fraud damages and damages that are expressly authorized by statute. In 2008, the Texas Supreme Court held that a provision in an arbitration agreement was void as against public policy because it would limit damages that were expressly provided in a statute. *In re Poly-America, L.P.*, 262 S.W.3d 337 (Tex. 2008) involved an employment agreement with an arbitration provision. The provision eliminated the punitive damages available in the anti-retaliation provision of the Texas Worker's Compensation Act. The Texas Supreme Court ruled that this provision was void as against public policy because it would limit damages that were expressly authorized by the Act. The *Bombardier* opinion did not overrule *In re Poly-America* or announce any change in the law when exemplary damages are expressly authorized by a statute.

In a more recent decision, *Zachary Construction Corp. v. Port of Houston Authority,* 449 S.W.3d 98 (Tex. 2014), Zachary Construction contracted with the Port of Houston to construct a wharf. Zachary suffered millions of dollars in delayed damages because of the Port's deliberate and wrongful interference. When the Port argued that it was immune from liability because of a no-damages-for-delay provision in the contract, the Texas Supreme Court held that the provision was unenforceable when it was used to shield the owner from liability for deliberate and wrongful interference with the contractor's performance. As Chief Justice Hecht explained:

> Generally, a contractual provision "exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy." We think the same may be said of contract liability. To conclude otherwise would incentivize wrongful conduct and damage contractual relations. This conclusion is supported by lower court decisions in Texas and court decisions in at least 28 American jurisdictions. We join this overwhelming consensus.

Zachary Construction, 449 S.W.3d at 116, *quoting* the Restatement (Second) of Contracts § 195(1) (1981). If the Texas Supreme Court in *Bombardier* meant to overrule *Zachary*, surely it would have said so explicitly and explained why it was reversing course only four years after unequivocally joining "this overwhelming consensus."

Within the *Bombardier* decision itself, the Texas Supreme Court acknowledged that a contractual damages limitation clause could not waive DTPA liability and described it as "holding that the damages-limitation clause was valid to bar a breach of warranty claim but not valid 'in-so-far as it purported to waive liability' for a deceptive act under the Deceptive Trade Practices Act (DTPA)." *Bombardier*, 572 S.W. 3d at 230, *citing Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572, 576 (Tex. 1991)*; see also Security Services Federal Credit Union v. Sanders*, 264 S.W.3d 292, 300-01, Tex. App. – San Antonio 2008, no pet.) (holding that arbitration agreement that eliminated statutory remedies available under the DTPA was unenforceable).

In conclusion, it does not appear that *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC* has overruled longstanding Texas cases holding that waivers or limitations of exemplary damages are against public policy when the exemplary damages are expressly authorized by statute. Nevertheless, the *Bombardier* opinion remains an interesting decision that may ultimately raise more issues than it settles. In the meantime, it represents a significant new tool available to the defense attorney in both a personal injury and commercial context. At the very least, it is advisable to include punitive damage waivers in future contracts to protect clients from unjustified fraud claims arising from the same facts and circumstances as breach of contract claims.

2019 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:

Pamela Madere
Jackson Walker, L.L.P.
100 Congress Ave., Ste. 1100 PH: 512/236-2000
Austin, TX 78701 FX: 512/236-2002
Email: pmadere@jw.com

Texas Association of Defense Counsel

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

400 West 15th St., Ste. 420, Austin, Texas 78701 **512/476-5225 Fax 512/476-5384**
Website: www.tadc.org **Email: tadc@tadc.org**

July 15, 2019

TO: Members of TADC

FROM: Pamela Madere, President
Chantel Crews, Nominating Committee Chair

RE: Nominations of Officers & Directors for 2019-2020

OFFICES TO BE FILLED:
*Executive Vice President
*Four (4) Administrative Vice Presidents
*Eight (8) Regional Vice Presidents
*District Directors from even numbered districts
(#2, #4, #6, #8, #10 ,#12, #14, #16, #18, #20)
*Directors At Large - Expired Terms

Nominating Committee Meeting - August 2, 2019

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

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

Amicus Curiae Committee News

There have been several significant amicus submissions.

J. Mitchell Smith (Germer PLLC) filed an amicus brief to support the petition for review in *JBS Carriers v. Washington*, 564 S.W.3d 830 (Tex. 2018). This is an auto/pedestrian wrongful death case; the jury put 50% on JBS Carriers and its driver and 20% on the pedestrian/deceased. The critical issue was whether the trial court erred in excluding evidence that the 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 Supreme Court reversed. The evidence was probative to explain whether the deceased walked into the truck's path due to impairment. Specific proof of intoxication is not necessary; it is enough that drug use or mental illness would be connected to her actions. Because the deceased's decision-making process was a material issue, evidence of drug use or mental illness was not unfairly prejudicial.

Roger Hughes (Adams & Graham, L.L.P.) filed an amicus brief to support the Texas Windstorm Ins. Association's opposition to mandamus relief in *In re City of Dickinson*, 568 S.W.3d 642 (Tex. 2019). This is a first-party insurance dispute that presented an 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 about the affidavit, 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. *In re Texas Windstorm Ins. Ass'n*, 549 S.W.3d 592 (Tex. App.—Houston [14th Dist.] 2016, orig. proc.). After a detailed analysis of TRCP 192.3 and 194.2, the Court concluded that neither waived the attorney-client communication privilege for clients designated to be testifying experts.

Roger Hughes (Adams & Graham, L.L.P.) filed an amicus to support Petitioner in *Medina v. Zuniga*, Case No. 17-0498, 2019 WL 1868012, 2019 Tex LEXIS 387 (Tex. Apr. 26, 2019). Review was granted and oral argument was Dec. 4, 2018. This is an important case concerning sanctions under Tex. R. Civ. P. 215.4(b) for denying a request to admit negligence and proximate cause. 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 counsel conceded liability in opening argument, the trial court granted a directed verdict on liability; the jury found gross negligence and awarded punitive 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 Supreme Court reversed and rendered on sanctions and punitive damages. Merits preclusive requests to admit are disfavored. Counsel may deny such requests on which the opposing party has the burden of proof. Because counsel had some ground to believe defendant could prevail on those issues, it was error for the judge to grant sanctions; the decision to deny the request and later concede is not a basis for sanctions. There was no evidence defendant's conduct objectively created an extreme risk of harm. There was no speed limit or stop sign at the exit and pedestrian traffic was not heavy. His failure to look both ways made an accident more likely, but does not amount to gross negligence.

Roger Hughes (Adams & Graham, L.L.P.) filed an amicus to support petitioner in *DLA Piper LLP v. Linegar*, 537 SW3d 512 (Tex. App.—Eastland 2017, pet. filed). The Supreme Court has requested merits briefing. This is the appeal from the remand of *DLA Piper v. Linegar*, 495 S.W.3d 276 (Tex. 2016). This is a legal malpractice case arising from DLA's alleged failure to perfect the security for a loan resulting in nonpayment after default. Linegar caused the trust holding his retirement funds to loan the money. DLA designated as responsible third parties the trustee who loaned the money as making an illegal loan and the assignee of the loan as settling it too cheap after default. The trial court excluded all evidence about the trustee and assignee, and then refused to submit them in the charge. The court of appeals found no error, because (1) their alleged acts did not cause DLA's failure to timely perfect the security interest, and (2) all evidence of their actions was irrelevant because the acts were too remote to cause the loss. This could be an important Chapter 33, CPRC, case on defining the injury for apportioning fault to responsible third parties.

Lawrence Doss (Mullin Hoard & Brown, LLP) submitted an amicus to support Petitioner Truck Insurance in *Hernandez v. Truck Ins. Exchange*, 553 S.W.3d 689 (Tex. App.—Fort Worth 2018, pet. filed). This is a suit to collect an alleged *Stowers* claim against a medical malpractice insurer after a judgment against the insured for wrongful death was affirmed in *Yagnik v. Hernandez*, No. 02-11-00510-CV, 2013 WL 1668304 (Tex. App.—Fort Worth Apr. 18, 2013, pet. denied)(mem. op.). The first issue is whether the former art. 4590i, §11.02, created a direct action/*Stowers* claim for plaintiffs against a medical malpractice insurer without first obtaining an assignment of the claim from the insured healthcare provider. The second issue is whether there was a *Stowers* claim if the verdict exceeded policy limits, but the judgment was capped under art. 4590i to an amount within policy limits and the insurer paid the judgment. Here, the jury awarded a $2.7 million verdict against Dr. Yagnik, but the judgment reduced the award to $1.8 million. In return for Dr. Yagnik's release of a potential *Stowers* claim, the insurer executed a supersedeas bond for the entire judgment. After Dr. Yagnik lost the appeal, the insurer paid the judgment. Then, the Hernandez family sued the insurer under *Stowers*, arguing art. 4590i, §11.02, created a direct action under *Stowers* to recover the difference between the capped judgment and the verdict. The trial court held they had no standing and granted summary judgment; the Fort Worth Court reversed, holding they had a direct action for the difference between the judgment and the verdict.

Roger Hughes (Adams & Graham, L.L.P.) submitted an amicus support the petition for review in *Avalos v. Loya Ins. Co.*, No. 04-17-0070-CV, 2018 WL 3551260, 2018 Tex. App. LEXIS 5629 (Tex. App.—San Antonio July 25, 2018, pet. filed)(Angelini, J., concurring). This case presents an issue of applying the eight-corners rules on the duty to defend when the injured person and the insured collude to conceal from the liability insurer (Loya) that the accident is an excluded loss. Here, the insured's husband was an excluded driver under the Loya policy. The husband, while driving the insured vehicle, had an accident with his friend, Guevara. The insured, her husband and Guevara then colluded to tell the police the insured was driving and that Guevara could sue claiming she was driving. A lawsuit ensues, and the insured answered discovery that she was driving. Before her deposition, the insured confessed that she lied, her husband was driving, and Guevara's allegation she was the driver was the result of agreed fraud. Loya withdrew from defending her; Guevara got a summary judgment based on the insured's earlier discovery responses. In the resulting bad faith suit, the trial court granted Loya a summary judgment. The San Antonio court reversed, holding the eight-corners rule precluded evidence the allegations within coverage were false and the result of collusion with the insured.

TADC joined an amicus brief with TTLA, ABOTA and Tex-ABOTA, in support of the trial judge's sanctions in *Brewer v. Lennox Hearth Products*, 546 S.W.3d 866 (Tex. App.—Amarillo

2018, pet. filed). A petition for review was filed and the Texas Supreme Court has asked for merits briefing. 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 of Appeals 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 the petition for mandamus in *In re Buchanan, M.D.*, Case No. 19-0193, which seeks to reverse *In re Echols*, 560 S.W.3d 776 (Tex. App.—Dallas Dec. 19, 2018, orig. proc.). The issue is the designation of an unknown assailant as a responsible third party. Echols is a pimp who was shot in the head by one of his girl's customers during a dispute. He brought a medical malpractice suit against ER Doctor Buchanan, who allegedly failed to detect a bullet fragment in his skull, resulting in a serious infection. In his deposition, Echols claimed not to know the customer's identity; Dr. Buchanan then filed a motion to designate 'John Doe' as a responsible third-party. The trial court granted it, but the court of appeals granted mandamus to vacate the designation, because Tex. Civ. Prac. & Rem. Code §33.004(j) required Dr. Buchanan to identify unknown criminal RTPs within 60 days of his answer. Dr. Buchanan argues that he is entitled to designate non-criminal RTPs under §33.004(a). There is a serious issue whether §33.004 allows a 'John Doe' RTP designation only when the defendant's conduct was criminal.

TADC has authorized an amicus to support the mandamus petition from *In re McAdoo*, 559 S.W.3d 589 (Tex. App.—San Antonio 2018, orig. proc.)(Barnard, J., dissenting). Dr. McAdoo seeks mandamus relief to vacate a new trial order after the jury unanimously gave a defense verdict. The trial judge held the failure to find negligence and causation was against the great weight of the evidence. The original panel split; Justice Rios (joined by Martinez) summarily denied relief; Justice Barnard wrote a lengthy dissent. Rehearing *en banc* was summarily denied, but Chief Justice Marion and Justice Angelini joined the dissent. In short, the court split 4/3, the majority being unwilling to explain itself in the face of a detailed dissent. Instead of filing a response to the petition, plaintiff nonsuited the action without prejudice in the trial court and argues the mandamus is moot. Dr. McAdoo argues that the case is not moot because limitations have not run and he is entitled to a judgment on the verdict.

****

TADC Amicus Curiae Committee

Roger W. Hughes, Chair, Adams & Graham, L.L.P.; Harlingen

Ruth Malinas, Plunkett, Griesenbeck & Mimari, Inc.; San Antonio

George Muckleroy, Sheats & Muckleroy LLP; Fort Worth

R. Brent Cooper, Cooper & Scully, P.C.; Dallas

Scott P. Stolley, Stolley Law, P.C.; Dallas

Robert Cain, Alderman Cain & Neill PLLC; Lufkin

J. Mitchell Smith, Germer PLLC.; Beaumont

Michael W. Eady, Thompson, Coe, Cousins & Irons, L.L.P.; Austin

Timothy Poteet, Chamberlain ♦ McHaney; Austin

Richard B. Phillips, Jr., Thompson & Knight LLP; Dallas

George W. Vie III, Feldman & Feldman P.C.; Houston

2019 TADC Spring Meeting

May 1-5, 2019 - Westin Savannah Harbor Resort - Savannah, GA

The TADC held its 2019 Spring Meeting in historic Savannah, Georgia, May 1-5, 2019. The weather was picture-perfect and Savannah provided the perfect setting for a fantastic meeting.

Mike Hendryx, with Strong Pipkin Bissell & Ledyard L.L.P. in Houston did a masterful job as the Meeting Program Chair. The program included many great subjects for the practicing trial lawyer including "Recent Discovery Cases" and "How to Save Your Client from Late Notice". Highlights included a luncheon presentation, "A Trial Judge's Lament Over the Vanishing Jury Trial" by Federal District Judge Joseph Anderson and "Living a Meaningful Life in the Law" by TADC member Lewis Sifford.

Rusty & Jane Beard, Arva & David Chamberlain, Chantel Crews, Michael Ancell and Brad Douglas

Arlene Matthews, Bud & Karen Grossman with Barry & Tisha Peterson

Rosanne Fuller, Karen Douglas, Shanna Elza, Hayes Fuller and Slater Elza

Scott Stolley and Mark Stradley

2019 TADC Spring Meeting

KaRynn & Keith O'Connell with Michele Smith

The Honorable Joseph Anderson and Stacey Atkinson

Heather & Warren Wise

Brandy & Jimmy Manning

Pat Weaver

Christy Amuny, Pam Madere, Trey Sandoval and Robert Booth

2019 TADC Spring Meeting

Brent Cooper

Judge Joseph Anderson

Joseph Ahmad

George S. Christian

Class is in Session!

Papers Available

2019 TADC Winter Seminar ~ Steamboat Springs, CO ~ January 30 - February 3, 2019

The Giant Slalom: Presenting Daubert Challenges – David Boyce, Callan Haley – 16 pgs. + 28 pg. PPT

Recent Developments in Legal Ethics – Dane S. Ciolino – 31 pgs.

"Sweeping the Ice" with Texas Civil Practice and Remedies Code, Section 18.001 Affidavits – Lauren Goerbig – 12 pgs. + 35 pg. PPT

First, Make a Roux! A Recipe for Winning at Trial and Appeal Court – The Honorable Frances Pitman, The Honorable Mike Pitman – 8 pgs.

General Negligence Update – Curtis J. Kurhajec – 25 pg. PPT

Texas Supreme Court Update – Richard B. Phillips, Jr. – 18 pgs. + 34 pg. PPT

Shreddin' the Fresh Powder – 2018 Commercial Litigation Update – Megan H. Schmid – 9 pgs. + 40 pg. PPT

A Look Back at the Seven Years Since Texas Enacted the Construction Anti-Indemnity Act – David V. Wilson II – 7 pgs. + 15 pg. PPT

Sharpening Your Edges: Tools for Cross-Examining Experts – Christy Amuny – 27 pg. PPT

The Medicare Claimant's Case: 5 Best Practices for Defense Counsel – Bruce A. Cranner – 27 pg. PPT

A Conversation About Lawyer Ethics and MSP Compliance – Bruce A. Cranner, John V. Cattie, Jr. – 5 pgs.

The MSP and the False Claims Act – The Government's Most Potent Recovery Tool – John Cattie, Bruce A. Cranner – 6 pgs.

Cranner's Checklist for Settling Medicare Enrolled Beneficiary Claims – Bruce A. Cranner – 4 pgs.

Distracted Driving: Impact in Product Liability, Trucking, and Common Car Crashes – G. Robert Sonnier – 53 pg. PPT

Preventing the Avalanche: Federal Procedure and E-Discovery Update – Sarah Stogner, Dan Worthington – 28 pg. PPT

The Super G - Voir Dire (1st Party/Property Damages) – Victor V. Vicinaiz – 13 pgs.

The Super G - Voir Dire (Premises Liability) – Victor V. Vicinaiz – 3 pgs.

The Super G – Jury Voir Dire – Victor V. Vicinaiz – 18 pg. PPT

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Running the End Around: Corporate and LLC Officers' and Owners' Personal Liability for Their Company's Conduct – David Chamberlain – 21 pgs. + 27 pg. PPT

Papers Available

2019 TADC Spring Meeting Continued

How to Save Your Client from Late Notice – R. Brent Cooper – 19 pgs. + 4 pg. attachment

Texas Supreme Court Update – Roger W. Hughes – 42 pgs.

Don't Outkick the Coverage – A Game Plan for Tackling Coverage Issues in Construction Litigation – Chris McKinney – 20 pgs.

Witness Examination – You Only Have One Shot! Or Lessons from "Hamilton" – Pat Long-Weaver – 14 pgs. + 33 pg. PPT

Fire & Explosion Investigation – Nick Zito – 26 pgs. + 110 pg. attachment

Conducting Internal Corporate Investigations (What could possibly go wrong?) Joseph Y. Ahmad – 16 pg. PPT

7 Things You Need to Know About 18.001 – Mike Bassett, Sadie Horner – 16 pgs.

Winning the AV Tax Game – Brandy Manning – 31 pg. PPT

The Care and Feeding of an Engineer (or Scientist): What Your Expert Needs from Their Trial Lawyer – Genevieve Nauhaus, Ph.D. – 26 pg. PPT

~~**Mis**~~**Designating Experts** – Trey Sandoval – 8 pg. PPT

Recent Discovery Cases: The Practical Effect for Trial Lawyers – Scott P. Stolley – 13 pg. PPT

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By: Chance Decker and Ryan Sears
Gray Reed & McGraw LLP, Houston

Top Ten Texas Oil and Gas Cases of 2018

This article discusses significant oil and gas decisions from state courts in Texas during 2018. It is not intended to be a strict legal analysis, but rather a useful guide for industry professionals in their daily work and attorneys providing advice to the oil & gas industry. A complete discussion of all legal analyses contained in the decisions are not always included.

1. *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858 (Tex. March 23, 2018)

In this case, the Texas Supreme Court rejected ConocoPhillips's claim that standard term nonparticipating royalty interest reservations violate the Rule Against Perpetuities. In 1996, Lois Strieber sold 120 acres to Lorene Koopmann, reserving a 15-year one-half NPRI that could be extended "as long thereafter as there is production in paying or commercial quantities. " The 15-year term ended Dec. 27, 2011. Koopmann subsequently gifted two-thirds of her undivided interest to her two children. Koopmann executed an oil and gas lease in 2007 that had a three-year primary term and an option to extend the primary term two additional years for $24,000. Burlington (as lessee, the predecessor to ConocoPhillips) subsequently tendered this payment to the Koopmanns, thus extending the primary term to Oct. 22, 2012. Despite pooling activity and Strieber's conveyance of a 60 percent interest in her NPRI to Burlington, a wellsite within the pooled unit was not yet producing any oil or gas. Production began in February 2012, which was two months after the expiration of Strieber's 15-year term NPRI. Prior to the expiration of the 15-year term, Burlington sent a letter to Koopmann that indicated it had identified a well location and also included "shut-in royalty payments" to the Koopmanns in an effort to perpetuate the NPRI beyond its 15-year primary term. A dispute later arose as to whether the well was *capable* of producing in paying or commercial quantities as of Dec. 27, 2011 (the NPRI's date of termination). Royalty payments were suspended, and a lawsuit ensued.

Burlington asserted the Koopmanns' future interest in Strieber's NPRI violated the Rule Against Perpetuities and was therefore void. The basis for this argument was that the phrase "as long thereafter" within the reservation created a springing executory interest in favor of the Koopmanns that was not certain to vest within the period required by the rule (21 years after the death of some life or lives in being at the time of conveyance). The Texas Supreme Court disagreed and held that Strieber actually conveyed a future interest to the Koopmanns that "vested" immediately and therefore did not violate the rule for two reasons:

(1) The court strictly adheres to the rules of construction that courts should construe instruments equally open to two interpretations as valid rather than void and that the Legislature requires courts to reform an interest that violates this rule to effect the ascertainable general intent of the creator of the interest.

(2) Modern scholarship supports

> construing the rule based on its purpose and intent and avoiding its application when, like in the present case, doing so would not serve the rule's purpose.

This modern approach is particularly appropriate because restraints on alienability and promoting the productivity of land is not an issue in the context of oil and gas. Because the court reasoned that Strieber reserved the NPRI for a limitation certain to occur at some point (*i.e.*, for 15 years and as long thereafter as there is production in paying or commercial quantities), the Koopmanns' interest was more akin to a vested remainder (and not a springing executory interest) when it was created. Therefore, the court held that — in the context of an NPRI reservation — where a defeasible term interest is created by reservation, leaving an executory interest that is certain to vest in an ascertainable grantee, the rule does not invalidate the grantee's future interest.

Having found that Koopmanns' interest did not violate the rule, the Court still had to address whether the savings clause perpetuated the NPRI beyond its term. Since no well was actually producing on Dec. 27, 2011, Strieber's interest in the NPRI could continue beyond that date only if the savings clause's three requirements were satisfied: (1) There was a lease on the premises, (2) the lease was maintained in force and effect by payment of "shut-in royalties or any other similar payments made … in lieu of actual production" and (3) there was a well "capable of producing oil, gas, or other minerals in paying or commercial quantities," but which is shut in "for lack of market or any other reason." The Texas Supreme Court affirmed the appellate court's holding that "or any other similar payments made" was ambiguous as a matter of law. Therefore, there were unresolved fact issues as to whether Burlington's payment of "shut-in" royalties (later couched as delay rental payments on appeal) extended the term NPRI that necessitated remand to the trial court.

Burlington also unsuccessfully argued that Section 91.402 of the Texas Natural Resources Code barred the Koopmanns' breach-of-contract claim and served as their exclusive remedy. That statute requires lessees to make royalty payments within 120 days after the end of the month of first sale of production, but it also allows a lessee to withhold royalty payments without interest when there is "a dispute concerning title that would affect distribution payments." Section 91.404(c) gives royalty owners a statutory cause of action for nonpayment of royalties and interest. Burlington argued the Texas Legislature intended royalty owners' cause of action for failure to pay royalties under Section 91.402 to be exclusive. Again, the Court disagreed with Burlington and held that the statute did not contain the requisite express "clear repugnance" to statutorily abrogate the Koopmanns' common-law cause of action based on the terms of their lease. Therefore, the Koopmanns were free to pursue that breach-of-contract claim.

2. *Endeavor Energy Resources, L.P. v. Discovery Operating, Inc.*, 554 S.W.3d 586 (Tex. Apr. 13, 2018)

Endeavor Energy Resources, L.P. v. Discovery Operating, Inc. is yet another retained-acreage case decided by the Texas Supreme Court in 2018. The facts were as follows: Endeavor acquired oil and gas leases covering a 640-acre tract and the north half of an adjoining 640-acre tract to the south. The leases contained retained acreage clauses and Endeavor drilled four wells on the leases. The two wells drilled on the 640-acre tract were both located in the southeast quarter of the section. The two wells drilled in the north half of the adjoining tract were both drilled in the eastern portion of that half section. After completing the wells, Endeavor filed certified proration plats with the Texas Railroad Commission. The plats designated approximately 81 acres for each well encompassing a total of 320 acres (two quarter sections where the wells were actually located).

After the primary terms of Endeavor's leases expired, Patriot Royalty and Land LLC reviewed the leases and proration plats Endeavor filed with the RRC and concluded that Endeavor's leases terminated as to the northwest quarter of Section 9 and the southwest quarter of Section 4. Patriot then obtained leases on that acreage and later assigned them to Discovery. Discovery then drilled producing wells on that acreage, which led to the lawsuit.

When Endeavor learned that Discovery had drilled wells on the tracts, it objected to Discovery's assertion of any leasehold interest. Relying on the retained acreage clauses, Discovery asserted that Endeavor's leases had expired as to the lands outside the 81-acre proration units Endeavor formed at the RRC. In response, Endeavor argued that it retained *160* acres around each well because the leases' references to "maximum producing allowable" meant that each proration unit automatically consists of the greatest amount of acreage permitted per RRC rules.

At the time, the RRC's rules for the Spraberry Trend Area allotted 80 acres to a proration unit with an additional 80 acres of "tolerance acreage" at the operator's election. The Spraberry field rules required operators to file certified plats describing their proration units. The leases' retained acreage clauses stated, "[this] lease shall automatically terminate … save and except those lands and depths located within a governmental proration unit assigned to a well … [containing] the number of acres required to comply with the applicable rules and regulations of the Railroad Commission of Texas for obtaining the maximum producing allowable for the particular well. "The Texas Supreme Court concluded that the leases' use of "assigned" referred to the lessee's assignment of acreage through its regulatory filings.

Focusing on the specific lease language, the Court agreed with Discovery that the retained acreage clauses required the operator to file a plat assigning only the amount of acreage necessary to obtain the maximum producing allowable as determined by the applicable field rules, which in this case was 80 acres. To retain 160 acres, Endeavor needed to actually assign 160 acres to each well, which it did not do. Having met the threshold requirement for compliance with the field rules, Endeavor retained "exactly what it bargained for: approximately 81 acres per well."

Notably, the Court further indicated that "[a]lthough such an assignment would hypothetically raise each well's maximum producing allowable, when productive acreage is a component of the maximum producing allowable — as it is here — the operator must verify that additional acreage is actually necessary or required to achieve the maximum allowable" or it may "open itself up to claims that it is not acting in good faith in purporting to retain a substantially greater amount of acreage."

3. *XOG Operating, LLC v. Chesapeake Expl., Ltd. P'Ship*, 554 S.W.3d 607 (Tex. Apr. 13, 2018)

This case is a companion to the *Endeavor* case. Like in *Endeavor*, the court wrestled with how much acreage was retained by a retained acreage clause. Here, the retained acreage clause in a term assignment from XOG Operating to Chesapeake stated Chesapeake would keep the leased acreage within the proration or pooled unit of each drilled well. However, the assignment contractually defined "proration unit" to include the boundaries of a proration unit "then established or prescribed by field rules." The commission's field rules for the Allison-Britt Field applied. A "prescribed" proration unit under the Allison-Britt rules was 320 acres per well.

Chesapeake filed its Form P-15 for each well and assigned proration units totaling 800 acres. XOG Operating sued Chesapeake after Chesapeake refused to release or reassign any acreage to XOG. Each side moved for summary judgment. XOG argued that the disputed acreage was not retained by Chesapeake pursuant to the term assignment's retained acreage provision because Chesapeake failed to "assign" that acreage to a proration unit in its P-15 filings. Chesapeake argued that it retained 320-acre units as "prescribed by field rules."

The same principles applied in *Endeavor* were applied in this case, but this time with a different result based on the alternative language in the retained acreage clause. The Court acknowledged that although retained acreage provisions are based on regulatory filings and rules, they are fundamentally contractual in nature and parties to these clauses are presumed to know the law and to have stated their agreement in light of it.

The Court held that acreage "included within the proration unit for each well … prescribed by field rules" referred to acreage set by the field rules, not acreage "assigned" by the operator (like in *Endeavor*). At the time, the field rules defined a "prescribed" proration unit as 320 acres for the Allison-Britt Field. Therefore, under the retained acreage provision's language, Chesapeake retained 1,920 acres for its five wells drilled — not just 800 acres. The Court distinguished *Endeavor* from this case in that the field rules in *Endeavor* referred to assignments by operators claiming acreage. The field rules in this case referred to "assigned" acreage as well, but unlike the rules in *Endeavor*, the rules here also "prescribed" proration units.

4. *Dimock Operating Co. v. Sutherland Energy Co. LLC*, No. 07–16–00230–CV, 2018 WL 2074643 (Tex. App. — Amarillo, April 24, 2018, pet. denied) (memorandum opinion)

This case discusses the impact of certain key contractual provisions within a farmout agreement, and it displays how the court will interpret such provisions based on the farmout's express language. *Dimock* yet again highlights the importance of paying close attention to the express language in your oil and gas agreements, as standard provisions within oil and gas agreements frequently vary in wording.

Dimock Operating Co. and Dimock entered into a seismic exploration and farmout agreement in which Dimock (farmor) farmed out 15 sections in Hardeman County to Sutherland (farmee). The parties agreed that upon "project payout," Sutherland would assign well operations and a 51 percent working interest back to Dimock, and the remaining 49 percent would be assigned to various charities. "Project payout" was the point at which revenues equaled two times Sutherland's capital costs. A dispute subsequently arose as to whether Sutherland reached payout.

This case addresses four significant oil and gas issues. First is whether costs incurred by Sutherland after drilling its initial well constitute "capital cost[s]" and should therefore be considered in determining whether Sutherland reached "project payout. "The SEFA expressly defined Sutherland's capital cost as "cost[s] incurred by Farmee [Sutherland] for land and seismic for the Hamrick Area 3D Shoot … a fifty thousand dollar ($50,000) prospect fee, and cost for drilling, testing, completing, and equipping, the Initial Earning Well." Land and seismic costs were undefined. The Court found that, contrary to Dimock's argument, "land and seismic costs" were not ambiguous merely because the terms had no contractual definitions. Nor were the terms "deposit" and "prospect fee" ambiguous within the agreement. Additionally, one punctuation mark cost Dimock a financial blow: a comma. Dimock argued that the placement of the comma after the word "equipping" made the definition of "capital costs"

ambiguous. The Court disagreed and concluded that it was a grammatical error to contend that the comma's placement indicated a modifying element — seismic costs were "capital costs" under the SEFA.

Interestingly, at trial, Sutherland passed up the opportunity to obtain a ruling from the trial court that "project payout" had not occurred. Instead, it requested that the court find that "capital costs" included the cost of undertaking seismic operations — a fact that Sutherland assumed would resolve the question of project payout. The Court of Appeals did not find the solution so simple. There was a finding about whether project payout had occurred, but there was no finding on whether the capital costs claimed by Sutherland were actually proper under the SEFA. Of the 66 points of error Dimock raised on appeal, many were reversed and remanded to the trial court for further proceedings because there was no adjudication of these key issues.

Next, Dimock argued that the joint operating agreement executed along with the SEFA obligated Sutherland to seek the consent of the nonoperators before incurring expenses associated with the seismic operations. The court disagreed. The SEFA provided Sutherland with the "sole, exclusive and irrevocable right to conduct Seismic Operations" and the right to "use its sole discretion to determine the type, nature, timing, and extent of all Seismic Exploration Operations. "The operating agreement, in contrast, obligated Sutherland as the operator to seek consent from nonoperators for any project reasonably estimated to cost more than $25,000. Sutherland argued that the JOA was not effective as between Dimock and Sutherland until after project payout— when Dimock actually owned an interest in th contract area. The court disagreed with Sutherland yet ruled in Sutherland's favor on this issue. The SEFA stated that the SEFA would serve as the governing agreement in the event of any conflict between the operating agreement and the SEFA. Language giving Sutherland discretion to determine when to conduct seismic operations prevailed over the subsequent operations language in the JOA.

While the trial court did not specify the reason it concluded that Sutherland had the right to conduct the seismic operations, the controlling language within the SEFA could have served as the basis for such a holding. Therefore, the Court of Appeals affirmed the trial court's judgment.

Dimock also brought a claim for fraud alleging Sutherland falsely represented that seismic analysis was needed to locate the proper drill site, thus inducing Dimock to include seismic costs in the parties' agreement. Contrary to its representations, Sutherland did not undertake seismic operations prior to drilling the first well. Sutherland alleged Dimock did not reasonably rely on this alleged misrepresentation. The Court concluded that Sutherland did not conclusively negate justifiable reliance, however, and that summary judgment on Dimock's fraud claim was improper and would be remanded for trial.

Finally, Dimock alleged Sutherland breached its fiduciary duty. The JOA created a contractual fiduciary duty requiring Sutherland to properly account for the distribution of well proceeds to Dimock. Dimock alleged that Sutherland breached this duty by failing to distribute the well proceeds to Dimock and converting them for Sutherland's own use. The Court recognized that while a JOA alone does not generally create a fiduciary relationship, the "Custody of Funds" provision (which is standard in most model forms of the JOA) states that the agreement does not establish a fiduciary relationship between the parties "for any purpose other than to account for Non-Operator funds as herein specifically provided." This language effectively created a contractual fiduciary duty to Dimock from Sutherland to properly account for the distribution of well proceeds. Because the Court identified unresolved fact issues as to this claim,

summary judgment on the claim was improper as well and would be remanded for trial.

5. *Devon Energy Production Co. L.P. v. Apache Corp.*, 550 S.W.3d 259 (Tex. App. — Eastland, April 30, 2018, pet. denied Oct. 19, 2018)

In this case of first impression, the Eastland Court of Appeals held that Section 91.402 of the Texas Natural Resources Code (the "Division Order Statute") does *not* require an operator to pay lease royalties to mineral interest owners who have leased to a different working interest owner. And, by implication, the Court held that such mineral interest owners are *not* entitled to royalties under the Division Order Statute until payout of the well from which royalties are due.

Norma Jean Hester leased her undivided one-third mineral interest in a tract of land in Glasscock County to Apache, reserving a 25 percent royalty. The remaining mineral owners leased their combined two-thirds mineral interest to Devon, also reserving a 25 percent royalty. Devon and Apache were unable to agree on a JOA. Apache then drilled seven producing oil and gas wells on the property and, after payout, paid Devon its two-thirds share of the production revenue net of Apache's costs.[1] Apache left it to Devon to pay the Devon lessors their quarter royalty.

The Devon lessors sued Devon and Apache alleging generally that they had not been paid all royalties due under their leases with Devon, among other claims. Devon filed a cross-claim against Apache seeking a declaratory judgment that the Division Order Statute required Apache to pay the Devon lessors' royalties under Devon's leases: (i) directly and (ii) *before payout* of Apache's wells. Devon alleged Apache was then to charge those royalty payments against Devon in determining the wells' payout point.

The Eastland Court of Appeals noted the rules of equitable accounting among mineral co-tenants are well established. "A co-tenant has the right to extract minerals from common property without first obtaining the consent of his co-tenants; however, he must account to them on the basis of the value of any minerals taken, less necessary and reasonable costs of production and marketing." It was also clear that Devon and Apache, as lessees, were co-tenants in the mineral estate.

However, the question of *which* co-tenant must pay royalties to the lessors of a nonparticipating working interest owner under the Division Order Statute has never been addressed by the Texas appellate courts. The statute provides as follows:

> "The proceeds derived from the sale of oil or gas production from an oil or gas well located in this state must be paid to each payee by payor 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 to each payee on a timely basis according to the frequency of payment specified in the lease or other written agreement between payee and payor."[2]

Siding with Apache, the Court focused on the words "payor" and "payee" in the statute to determine Devon — not Apache — was obligated to pay the Devon lessors. A "payor" is "the party who *undertakes* to distribute oil or gas proceeds to the payee, whether as the purchaser of the production of oil or gas generating such proceeds or as operator of the well from which such production was obtained or as lessee under the lease on which royalty is due."[3] A "payee" is "any person

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."[4]

The Court held Apache and the Devon lessors did not have a "payor-payee relationship" under the Division Order Statute because Apache did not "undertake" to pay the Devon lessors by entering into leases with them. Thus, even though Apache was the "operator of the well from which … production was obtained," it was not a "payor" under the Division Order Statute. Paying the Devon lessors their lease royalty was Devon's obligation, not Apache's.

The Court's opinion did not expressly address the issue of *when* a royalty owner who has leased to a nonparticipating working interest owner is entitled to royalties pursuant to their lease — before or after payout. However, the Court's opinion appears to have answered that question by implication. The Division Order Statute does not require an operator to pay royalties to mineral interest owners who have leased to a different working interest owner. And, Texas co-tenancy law does not require the operator to pay net production revenues to a nonparticipating co-tenant until after payout. Thus, absent special lease provisions, a mineral estate lessor is not entitled to lease royalties from a well drilled by the lessee of a different mineral estate co-tenant until after payout of the well from which royalties are due. Until that point, the operator is not required to pay net production revenue to the other lessee/nonparticipating co-tenant, and the other lessee/nonparticipating co-tenant has received no revenues on which royalties are due to his lessor.

6. *TRO-X L.P. v. Anadarko Petroleum Corp.*, 548 S.W.3d 458, (Tex. 2018)

This case is a cautionary tale about failing to draft robust "anti-washout" clauses. In 2007, TRO-X entered into five mineral leases covering acreage in Ward County, Texas. The leases contained identical terms, including a 660-foot offset well clause. TRO-X later entered into a participation agreement transferring its interest in the 2007 leases to Eagle Oil and Gas and reserving a 5 percent back-in option once the 2007 leases reached "project payout." The participation agreement contained an "anti-washout clause" providing that TRO-X's back-in option "shall extend to and be binding upon any renewal(s), extension(s), or top lease(s) taken within one year of termination of the underlying interest."

Eagle Oil and Gas eventually assigned its interest in the 2007 leases to Anadarko. A year later, Anadarko completed a well on land adjacent to the tract covered by the 2007 leases approximately 550 feet from the lease line. Anadarko then failed to drill an offset well within the required period. When one of the lessors alleged Anadarko breached the 2007 leases' offset well clause, Anadarko engaged all of the lessors in negotiations that culminated in their executing new leases. These 2011 leases were with the same lessors and covered the same mineral interest as the 2007 leases, but they did not release — and in fact did not even mention — the 2007 leases. The 2011 leases all specified an effective date of June 17, 2011, and were executed on various dates between June 15 and June 30, 2011, on which date Anadarko executed a written release of the 2007 leases. When TRO-X later approached Anadarko to confirm that its back-in interest in the 2011 leases was valid, Anadarko denied that it was.

TRO-X filed suit against Anadarko in February 2014, asserting claims for breach of contract and trespass to try title. The case was tried to the bench, with the central issue being whether the 2011 leases were "top leases" in which TRO-X retained its back-in interest or new leases that washed out TRO-X's interest. Anadarko argued the very act of executing the 2011 leases terminated the 2007 leases. Therefore, according to Anadarko, the

2011 leases were not top leases because they were never in effect at the same time as the 2007 leases. TRO-X, however, argued the 2007 leases remained in effect until Anadarko executed its release. Therefore, according to TRO-X, the 2007 and 2011 leases were all in effect between June 17, 2011 (the 2011 leases' effective date) and June 30, 2011 (the date Anadarko executed its release of the 2007 leases). Thus, TRO-X alleged the 2007 and 2011 leases were in effect at the same time, albeit briefly, and thus the 2011 leases were top leases subject to TRO-X's back-in interest. The trial court sided with TRO-X. The El Paso Court of Appeals reversed, holding that TRO-X had not proved the parties intended the 2011 leases to be top leases. The Texas Supreme Court granted review.

The Court began its analysis with the familiar maxim that mineral leases are interpreted using the same rules applied to other contracts. Thus, whether the parties intended the 2011 leases to be top leases must first be determined by reviewing the 2011 leases' plain language. If the plain language unambiguously provided the 2011 leases were or were not top leases, the inquiry is complete. The Court then explained that, "[b]asically, a top lease is a subsequent oil and gas lease which covers one or more mineral interests subject to a valid, subsisting lease." A top lease becomes effective only upon termination of the bottom lease.

The Court then summarized the law regarding lease termination through execution of a new lease in three parts. First, "when a lessor and lessee under an existing lease execute a new lease of the same mineral interest subject to the existing lease, the existing lease is terminated unless the new lease objectively demonstrates both parties' intent otherwise[.]" Second, "[a] party contending that a new lease did not terminate the previous one has the burden to prove and obtain a finding that the parties intended for the previous lease to survive execution of the new lease." And third, "[t]he proof must be either specific language in the new lease objectively demonstrating that intent, or an ambiguity in the new lease as to termination of the previous lease together with evidence that the parties did not intend the new lease to terminate the prior lease."

The Court found the 2011 leases did not contain language indicating the parties intended the 2007 leases to survive the 2011 leases' execution. Therefore, the 2007 leases were terminated by the 2011 leases' execution and were never in effect at the same time as the 2011 leases. Accordingly, the 2011 leases were not top leases and were not subject to TRO-X's back-in interest. The fact that Anadarko executed a release of the 2007 leases a few days after some of the 2011 leases were executed was irrelevant because the 2011 leases were unambiguous.

One might assume that TRO-X's back-in interest could easily have been preserved if the parties had included language in the participation agreement making the anti-washout clause applicable to "new leases." However, on July 26, 2018, the Amarillo Court of Appeals held that such a clause violates the Rule Against Perpetuities.[5] In light of the Texas Supreme Court's opinion in TRO-X, the Amarillo Court's opinion in *Yowell* will be one to watch in 2019.

7. *Murphy Exploration & Production Co.-USA v. Shirley Adams, et al.*, 560 S.W.3d 105 (Tex. 2018), *opinion corrected and superseded* (Nov. 30, 2018)

In this case, the Texas Supreme Court held that an offset well clause in an operator's leases with the plaintiffs did not require the operator to drill wells reasonably calculated to protect against drainage from the neighboring tract. Four justices issued a stinging dissent[6] arguing the majority disregarded the well-established meaning of the term "offset well" as used in the Texas oil field for decades.

In 2009, Murphy Exploration & Production Co.-USA entered into two oil and gas leases with the plaintiffs (the Herbsts).[7] The leases contained identical offset well clauses, which provided:

> It is hereby specifically agreed and stipulated that in the event a well is completed as a producer of oil and/or gas on land adjacent to and contiguous to the leased premises, and within 467 feet of the premises covered by this lease, that Lessee herein is obligated to … commence drilling operations on the leased acreage and thereafter continue the drilling of ***such off-set well or wells*** with due diligence to a depth adequate to test the same formation from which the well or wells are producing from the adjacent acreage.

When a well on a neighboring tract triggered this clause, Murphy drilled a well on the Herbsts' tract … 2,100 feet from the triggering well. It was undisputed this well would *not* prevent drainage from the neighboring tract. Thus, the Herbsts argued the well did not satisfy the leases' offset well clause because it was not designed to protect against drainage.[8] In response, Murphy argued the well satisfied the offset well clause because it was drilled on the leased premises to the same depth as the triggering well, which Murphy claimed is all the leases' explicit language required. Murphy argued the notion that an offset well must actually protect against drainage or even be reasonably calculated to do so has no place in horizontal drilling in tight shale formations where drainage is minimal. The trial court sided with Murphy. The San Antonio Court of Appeals sided with the Herbsts. The Texas Supreme Court granted review.

The Texas Supreme Court began its analysis by noting the law is well-established that courts interpret oil and gas leases just like any other contract. Thus, a court must read the lease, give its terms their plain and ordinary meaning, and enforce the lease as written. Courts may not modify a lease's explicit language absent extraordinary circumstances. However, a court can consider the context in which a lease was negotiated and executed to inform its interpretation of the words used in the lease. And, a court can interpret words and phrases in a lease in accordance with any special definitions those terms have in a particular industry.

In a 5-4 opinion, the Court held Murphy's offset well clause did *not* require Murphy to drill a well to protect against drainage from the neighboring tract and that Murphy's well, some 2,100 feet from the triggering well, satisfied the leases' offset well clause. The Court's opinion was based on two important premises. First, the Court held Murphy's leases provided their own definition of "offset well." That is, the leases stated that when the offset well clause was triggered, Murphy had to drill a well (1) on the Herbsts' tract, (2) with due diligence, and (3) to the same depth as the triggering well, and the drilling of **"such offset well"** would satisfy the offset well clause. Because the leases used the term "such offset well" when setting forth three criteria for a satisfactory well, but did not include a proximity requirement or an express protection requirement, the Court would not impose one.

Second, the Court considered the "surrounding circumstances" under which the leases were executed in interpreting the offset well clause. The Court noted leases were executed in 2009 and were drafted with horizontal drilling in the Eagle Ford Shale in mind. The Court considered expert testimony presented by Murphy that drainage is almost nonexistent from horizontal wells in tight-shale formations like the Eagle Ford. Thus, the Court concluded it would be "illogical" for an offset well clause to

require a well — even an "offset well" to attempt to protect against nonexistent drainage.

Four justices dissented, arguing the commonly understood definition of "offset well" required Murphy to drill its offset well at a location where a reasonably prudent operator would drill to protect the leasehold from actual or potential drainage, regardless of whether any was actually occurring. The dissent claimed the majority opinion effectively read the term "offset" out of the leases.

While the Court purported to limit its holding to the facts before it, the Murphy opinion may have far-reaching consequences for the Texas oil and gas business. The vast majority of wells drilled in Texas today are horizontal, tight-shale wells. The Court's opinion indicates the common understanding of an "offset well" is antiquated in this context. How can operators protect against drainage that does not exist? The Murphy opinion indicates the Texas Supreme Court believes they cannot — and that they no longer have to even try.

8. *U.S. Shale Energy II LLC v. Laborde Properties L.P.*, 551 S.W.3d 148 (Tex. 2018)

In this case, the Texas Supreme Court considered whether the royalty interest reserved to the grantor in a 1951 deed was fixed (set at a specific percentage of production) or floating (dependent on the royalty amount in the applicable oil and gas lease). In 1951, J.E. and Minnie Bryan conveyed by deed a tract of land in Karnes County to S.E. Crews. The deed reserved an NPRI to the Bryans, as follows:

> There is reserved and excepted from this conveyance unto the grantors herein, their heirs and assigns, an undivided one-half (1/2) interest in and to the Oil Royalty, Gas Royalty, and Royalty in other Minerals in and under or that may be produced or mined from the above described premises, the same being equal to one-sixteenth (1/16) of the production. This reservation is what is generally [sic] termed a non-participating Royalty Reservation.

Through a series of conveyances, U.S. Shale acquired a share of the Bryans' NPRI. In 2009, EOG acquired a lease on the subject tract providing for a lessor's royalty of 20 percent, *i.e.*, one-fifth. In 2010, Laborde acquired some of the property burdened by the Bryan-U.S. Shale NPRI and thus became a lessor under EOG's lease. EOG sent Laborde a division order crediting the Bryan heirs and U.S. Shale with one-half of the one-fifth royalty under EOG's lease for a total royalty of one-tenth of production. Laborde disputed the division order, alleging the Bryan heirs and U.S. Shale should only be credited with one-sixteenth of production by virtue of a fixed one-sixteenth NPRI reserved in the Bryan deed. After Laborde notified EOG of its disagreement, EOG put all parties in suspense, and litigation ensued. The trial court ruled for the Bryan heirs and U.S. Shale. The Court of Appeals reversed, and the Texas Supreme Court granted review.

The Texas Supreme Court explained that a royalty may be conveyed or reserved as a "fractional" royalty interest or a "fraction of" royalty interest. A "fractional" royalty interest is referred to as a "fixed" royalty because it remains constant and is untethered to the royalty amount in a particular oil and gas lease. A "fraction of" royalty interest is referred to as a "floating" royalty because it varies depending on the royalty in the oil and gas lease in effect and is calculated by multiplying the fraction in the royalty reservation by the royalty in the lease.

Turning to the Bryan deed, the Court found that read independently, the first

clause of the royalty reservation unambiguously reserved a floating royalty ("an undivided one-half (1/2) interest in and to the Oil Royalty, Gas Royalty and Royalty in other Minerals"). The issue was whether the second clause ("the same being equal to one-sixteenth (1/16) of the production") indicated an intent to fix the Bryans' NPRI at one-sixteenth of production. In determining that it did not, the Court noted that when the Bryan deed was executed, a one-eighth lessor's royalty was "ubiquitous." Thus, even though no lease was in effect covering the Bryans' property at the time the deed was executed, the Bryans must have assumed that when a lease was taken on the property, it would provide for a one-eighth royalty. Of course, one-half of a one-eighth royalty equals one-sixteenth. Thus, the Court reasoned the Bryans must have intended to reserve a one-half floating royalty, which the Bryans must have assumed would equal one-sixteenth of production. Had they not, the first clause of the reservation tying the NPRI to the applicable royalty would be rendered meaningless. Accordingly, the Court reinstated the trial court's judgment finding the Bryan deed unambiguously reserved a floating one-half royalty interest.

Three justices dissented[9], finding the Bryan deed's reference to one-half of the "Oil Royalty, Gas Royalty and Royalty in other Minerals," none of which were defined terms in the deed, did not unambiguously create a floating royalty. The dissent found the reservation's second clause, however —"the same being equal to one-sixteenth of production"— could not have more plainly stated an intent to reserve a fixed one-sixteenth royalty. Accordingly, the dissent would have held the Bryan deed's reservation created a fixed one-sixteenth royalty interest.

9. *Louis Dorfman, et al. v. JP Morgan Chase Bank N.A., et al.*; No. 02-17-00387-CV, 2018 WL 5074769, (Tex. App. — Fort Worth, Oct. 18, 2018, no pet.)

This is the second appeal in a lawsuit over a title dispute in Karnes County, Texas. In 2010, Petrohawk Properties L.P. acquired a lease on approximately 200 mineral acres in the Eagle Ford. The owners of the property were Dorfman and Moravits.[10] Dorfman and Moravits traced their ownership in the tract back to a 1901 deed from William Mayfield to Mary Moravits. Around the same time that Petrohawk acquired its lease, JP Morgan Chase Bank N.A., acting as trustee for the Red Crest Trust, leased the very same acreage to Orca Assets G.P. LLC. Orca traced the trust's ownership back to a 1929 deed from Mary Moravits to H.J. McMullen. Unbeknownst to JP Morgan, however, the 1929 deed from Moravits to McMullen had been "cancelled and held for naught" by a 1944 judgment in a lawsuit by Mary Moravits and her sons. It is unclear just what Orca knew about this judgment. It was undisputed that when Orca leased the acreage from JP Morgan, however, Orca knew there was a "problem" with the title but was prepared to defend it and believed it could be resolved in the Red Crest Trust's favor. In 2011, Petrohawk filed suit against JP Morgan and Orca seeking to quiet title based on the 1944 judgment. The trial court sided with Petrohawk, Dorfman and Moravits. The 1929 deed was void and, as a result, so was Orca's lease.

The trial court allowed a permissive interlocutory appeal of its title decision, and the Court of Appeals affirmed. The case was then remanded back to the trial court for adjudication of Dorfman and Moravits' tort claims against JP Morgan and Orca.

Specifically, Dorfman and Moravits alleged JP Morgan and Orca had slandered their title to the disputed acreage and that JP Morgan had been negligent in leasing the acreage to Orca when it should have known the Red Crest Trust did not own it.[11] A slander of title claim, however, requires evidence of "legal malice" from the defendant. And malice is not

present if a claim to title is made under a reasonable belief that the claimant had title. Therefore, if a party claims title "under color of title upon the advice or attorneys, or upon reasonable belief that a party has title to the property acquired," he has not acted with legal malice. Likewise, a negligence claim requires proof the defendant acted unreasonably.

Both the trial court and the Court of Appeals found that Dorfman and Moravits presented no evidence that JP Morgan or Orca acted with legal malice or even unreasonably when they claimed title to the disputed acreage. The Court of Appeals noted that JP Morgan and Orca had several legal arguments as to why, notwithstanding the 1944 judgment, they held valid title to the acreage, and "[a]lthough these arguments were unavailing at the end of the day, they evinced the reasonableness of JP Morgan and Orca Assets' belief under the applicable law that JP Morgan held title to the tract." The absence of any proof of unreasonableness was fatal to Dorfman and Moravits' slander of title, negligence and tortious interference claims. Thus, the claims were dismissed.

10. *Carl M. Archer Trust No. Three, et al v. Ronald Ralph Tregellas and Donnita Tregellas*, 566 S.W.3d 281 (Tex. 2018)

In this case, the Texas Supreme Court held the Discovery Doctrine tolled the statute of limitations for breach of a right of first refusal ("ROFR") in mineral property even though the conveyance made in violation of the ROFR was filed in the public records. In June of 2003, members of the Cook family executed a deed conveying the surface estate of a tract of land in Hansford County, Texas (top of the Panhandle) to two trusts (the "Trustees"). The sellers retained the mineral estate, but granted the Trustees a right of first refusal ("ROFR") to purchase the mineral estate.

In March of 2007, two of the ROFR grantors (the "Farbers"), executed a mineral deed conveying their interest in the mineral estate to Ronald and Donnita Tregellas. The Farbers did not notify the Trustees of the sale, but the deed was filed of record on March 30, 2007. Nevertheless, the Trustees did not learn of the sale until May 4, 2011. The Trustees then promptly sued the Farbers and the Tregellases for breach of the ROFR and tortious interference on May 5, 2011. The Trustees sought damages and specific performance requiring the Tregellases to transfer the mineral interest to the Trustees.

The defendants argued the Trustees' claims were barred by the statute of limitations. Specifically, the defendants argued the Trustees' claims accrued on March 28, 2007 at the very moment the mineral estate was transferred to the Tregellases in violation of the ROFR. Because the Trustees did not file suit until May 5, 2011, the defendants argued the Trustees missed the four-year statute of limitations by seven days. In response, the Trustees argued the Discovery Doctrine tolled the limitations period to May 4, 2011, the date they learned of the offending conveyance, among other arguments.

The trial court sided with the Trustees, but the Amarillo Court of Appeals reversed, holding that the Trustees cause of action accrued when the mineral estate was conveyed without notice on March 28, 2007. The court of appeals held that the breach of a right of first refusal is not the type of "inherently undiscoverable" injury to which the Discovery Doctrine applies because conveyance documents, like the Farber to Tregellas deed, are usually filed in the public records.

The Texas Supreme Court reversed the court of appeals and reinstated the trial court's judgment. The Court noted that a ROFR grantor has a duty to provide the grantee with notice of his or her intention to sell the property burdened by the ROFR. Thus, a ROFR holder does not have a duty to "continually monitor public records" for conveyances made in violation of the ROFR. Accordingly, the violation

of a ROFR is the type of "inherently undiscoverable" injury to which the Discovery Doctrine applies. This situation is different than an underpaid royalty owner, for example, who has a duty to confirm his or her royalties have been paid correctly, and thus, is put on notice of royalty underpayments based on Railroad Commission filings. Pursuant to the Discovery Doctrine, the Trustees' claim for breach of the ROFR did not accrue until May 4, 2011, the date on which the Trustees discovered the offending conveyance, and thus, their May 5, 2011 lawsuit was timely. The Court, therefore, reinstated the trial court's judgment, and awarded the Tregellases' mineral estate to the Trustees.

CONCLUSION

We hope this article has helped you address the legal issues presented by modern oil and gas activities. As always, if you believe one of these decisions might have a bearing on an action you are about to take or a decision you might make, then consult an oil & gas lawyer.

[1]Prior to commencing drilling operations, Apache sent Devon an Authorization for Expenditure offering to jointly develop the property. Ultimately, Devon elected not to participate in drilling the wells.

[2]Tex. Natural Res. Code § 91.402(a) (Vernon Ann. 2016).

[3]Tex. Natural Res. Code § 91.401(2) (Vernon Ann. 2016).

[4]Tex. Natural Res. Code § 91.401(1) (Vernon Ann. 2016).

[5]See *Tommy Yowell, et al. v. Granite Operating Co., et al.*, No. 07-17-00112-CV, 2018 WL 3596744 (Tex. App. — Amarillo, July 26, 2018).

[6]Justices Johnson, Green, Guzman and Boyd.

[7]The leases covered adjacent 302-acre tracts in Atascosa County.

[8]The Herbsts did not contend Murphy's offset well had to "actually" protect against drainage and never stated how close to the triggering well the offset well had to be. Rather, the Herbsts merely argued the offset well had to be "in close proximity to the lease line adjacent to the tract where the triggering well was drilled" and that Murphy's purported offset well was not close enough.

[9]Justices Boyd, Johnson and Blacklock.

[10]As used herein, "Dorfman" and "Moravits" refers collectively to the plaintiffs, Louis Dorfman, K1 Holdings Ltd., Sam Myers, J.M.D. Resources Inc., Bill Cogdell Bowden, Barbara Standfield, Stacey Dorfman-Kivowitz, Julia Dorfman, Mark Dorfman, David Phillip Cook, Cheryl King Cook, Sam Y. Dorfman Jr., Frank Moravits, individually and as the trustee of the Moravits Children Trusts Nos. 1 and 2, Shelby Moravits and Jerry Kortz.

[11]Dorfman and Moravits also brought claims against JP Morgan and Orca for tortious interference with property rights and tortious interference with existing and prospective contractual relationships. However, the appellate Court's analysis was limited to the slander of title claim.

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July 10, 2019

To: TADC Members

From: Mike Bassett and Heath Hendricks

Re: TADC Transportation Section

TADC Members:

We are excited to announce the formation of the Transportation Section of the TADC. The goal of this new Section is to create networking, publishing, and learning opportunities for TADC members by including transportation-related articles in upcoming TADC magazines and newsletters.

Our new Section also is working on securing speaking slots for transportation-related issues at upcoming TADC conferences, which will begin at the Summer 2019 Seminar in Maui, Hawaii.

If you have just started handling transportation cases, or you have been doing it for years, this Section is for you.

We look forward to seeing this Section grow and invite you to participate. If you have any questions or comments – or would like to directly contribute – please contact one of the following Committee Members:

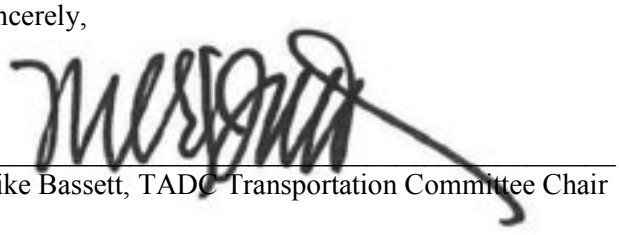
(1) Mike H. Bassett, The Bassett Firm, 3838 Oak Lawn Ave., Suite 1300, Dallas, Texas, 75219, 214.219.9900, mbassett@thebassettfirm.com, or

(2) W. Heath Hendricks, Riney & Mayfield LLP, 320 S. Polk Street, Suite 600, Amarillo, Texas 79101, 806.468.3204, hhendricks@rineymayfield.com.

Our hope is that this Section can add value to both your TADC membership and transportation law practice. There is ***no fee*** to join this Section and participation is encouraged.

Please email Bobby Walden at bwalden@tadc.org and he will add you to the Transportation Section roster.

Sincerely,



Mike Bassett, TADC Transportation Committee Chair

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By: John G. Browning,
Passman & Jones, P.C., Dallas

Upheaval In The Courts:

The 2018 Texas Appellate Elections and Their Implications for the Future

"On the appellate and district courts alone, the Texas Judiciary in the last election lost seven centuries of judicial experience at a single stroke."

– Chief Justice Nathan Hecht
State of the Texas Judiciary Address
February 6, 2019

On November 6, 2018, in the shadow of the hotly-contested U.S. Senate race between incumbent Republican Ted Cruz and Democratic challenger Robert Francis "Beto" O'Rourke, there were 32 contested general elections statewide pitting a Republican candidate against a Democratic candidate for an intermediate appellate court bench. Democratic candidates won 31 of those elections, flipping the courts once dominated by Republicans in Texas's most populous judicial districts. This article will examine what happened, the factors that contributed to this seismic shift, what the reaction was to this change in terms of Texas's method of judicial selection, and what the future implications may be for corporate defendants and their counsel.

I. THE PENDULUM SWINGS

Going into the November 2018 elections, Republicans held a stranglehold on appellate benches in Texas. On the state's two highest courts, the Supreme Court of Texas and the Court of Criminal Appeals, Republicans held (and still hold) all 18 seats. Of Texas's 14 intermediate appellate courts, Democrats held majorities on only 3; on the other 11 courts, Democrats had no seats at all. In addition, Democrats have been shut out from any statewide offices in Texas since 1994—the longest such stretch in the nation. On Texas's biggest intermediate appellate court, Dallas's 13 member 5th Court of Appeals, no Democrat had sat since 1992.

But in November 2018, the pendulum swung back, at least for the intermediate appellate courts. On Houston's 1st Court of Appeals, Democrats won all 5 contested seats, gaining majority control. On Austin's 3rd Court of Appeals, Democrats won all 4 contested races, earning majority control. On San Antonio's 4th Court of Appeals, Democrats triumphed over Republicans in all 5 contested elections, consolidating control of that court. The 5th Court of Appeals experienced the most dramatic of the Election Day transformations, with all 8 contested seats (including that of the Chief Justice) going to Democratic challengers and creating a "blue" majority overnight. At the 13th Court of Appeals in Corpus Christi, Democrats won all 4 contested races, retaining control of that court. On Houston's 14th Court of Appeals, Democrats were victorious over all 5 Republican incumbents, flipping that court to Democrat control. Only in Fort Worth's 2nd Court of Appeals did a Republican incumbent defeat his Democrat challenger.

Of course, the "blue wave" that failed to sweep O'Rourke into a Senate seat or place any Democrats into statewide offices had its greatest splash further down the ballot, and not just in the appellate races. In Harris County, home to Houston and the third largest county in the United States, a staggering 59 candidates for county, family, and juvenile court benches unseated Republican judges, transforming the local judiciary overnight. Particularly noteworthy is the fact that in a county that traditionally elected white men, 19 of these new judges are African-American women. Statewide, as Chief Justice Nathan Hecht pointed out in his "State of the Texas Judiciary" speech, 28 of Texas's 80 intermediate appellate court judges (35%) are new to the bench. A total of 443 Texas judges are new to their jobs, including a third of all constitutional county court judges and ¼ of all trial judges (encompassing district, county, and justice of the peace levels).

II. HOW DID IT HAPPEN? A PERFECT STORM

With Democrats now controlling the biggest, busiest, and most influential appellate courts in Texas, the first question that comes to mind is how did it happen? There is no single root cause, but instead a "perfect storm" of contributing factors that all came together at the same time. The first cause is one of the easiest to identify: the relative unpopularity of the top of the ticket. President Trump's approval rating in reliably-red Texas just before the election (October 2018) was just 48%, with 36% approving "strongly" and 12% approving "somewhat."[1] Forty-five percent disapproved of the president's job performance (with 40% disapproving "strongly").[2] And, while the polarizing Republican president was not up for re-election in 2018, his name and policies loomed large in a mid-term election that witnessed the largest voter turnout in decades. The marquee matchup on the ticket, of course, was the U.S. Senate race between incumbent Republican Ted Cruz and Democratic challenger O'Rourke. The so-called "Beto Effect" drew unprecedented numbers of voters (many of them new voters) to the polls, resulting in a too-close-for-comfort 50.9% to 48.3% win for Senator Cruz over O'Rourke (in raw numbers, 4,244,204 voted for Cruz compared to 4,024,777 for O'Rourke). In addition, while O'Rourke predictably did well in large urban counties doubling as Democrat strongholds like Dallas, Harris, and Travis counties, he also did surprisingly well in some of the larger suburban counties, winning in Fort Bend (just outside of Houston) and Williamson (outside of Austin). O'Rourke even won, albeit narrowly, in Tarrant County—long regarded as the most conservative large urban county in the United States. The Cruz/O'Rourke race, in fact, was the closest a Democrat has come to toppling a Republican incumbent U.S. senator since 1978.

The change brought about by increased voter turnout was significant, as was the "purpling" of suburban counties. Consider, for example, the experience of Justice Ken Molberg, one of the newly-elected justices on Dallas' 5th Court of Appeals. In 2014, Molberg—then a district judge in Dallas County—ran for the 5th Court of Appeals and came up nearly 72,000 votes short in his bid to unseat incumbent Craig Stoddart. In 2018, however, Molberg won by more than 80,000 votes. If one looks at the experience in traditionally Republican-leaning Collin County, it is telling. Of the six counties that comprise the 5th Judicial District—Dallas, Collin, Grayson, Hunt, Kaufman, and Rockwall—only Dallas can be considered "blue," its courthouse having flipped to Democratic control in 2006. And, despite Dallas being the most populous county, the reliably Republican voting of the five suburban counties had ensured Republican control of the 5th Court all the way up until November 2018. In Collin County in 2014, for instance, Craig Stoddart won 68.9% of the vote to Molberg's 31.01%, or 115,558 votes out of that county's 167,534 total votes in that race.

[1] The Texas Politics Project at the University of Texas at Austin (Oct. 2018); https://texaspolitics.utexas.edu/set/donald-trump-approval-october-2018.

[2] *Id.*

But 2018 was a very different story. In the intervening years, Collin County experienced an explosion of business and population growth, including relocation of large corporate employers like Toyota North America, with much of the influx of businesses and residents coming from blue states like California. Did those relocating to Collin County bring their politics with them? Consider this: the Democratic base vote grew by about ten percentage points in Collin County between 2016 and 2018, with the county voting 58.2% Republican in 2018 to 41.3% Democrat. Not only was the Republican percentage of voters higher in previous cycles, but the voter turnout in 2018 was markedly higher in Collin County than in earlier midyear elections. In 2010, 37% of registered voters went to the polls in Collin County, and in 2014 the number dropped slightly to 36%. But in 2018, 59% of Collin County registered voters turned out, a percentage more akin to a presidential election year.

Yet higher than normal turnout, polarizing figures at the top of the ticket (which contributed to increased voter registration), and the possible "purpling" demographic changes in large suburban counties, does not tell the whole story. The final, and arguably most crucial, element contributing to 2018's perfect storm was straight ticket voting, and November 2018 marked the last cycle in which voters of either party could exercise this option. Why was it so important? Entering the November 2018 elections, only two states in this country combined both straight ticket voting and the partisan election (and subsequent re-election) of judges all the way from the trial court level to the supreme court level: Texas and Alabama.[3] The straight ticket option can play a particularly outsized role in judicial elections, given the judicial branch's status as the quietest, least understood branch of government. With even statewide judicial races drawing little media attention or fundraising, voters often do not know the qualifications or even the identities of the judges for whom they are voting. In the case of the intermediate appellate courts in Texas, this unsung status is especially alarming in light of the appellate courts' importance. With the Supreme Court of Texas only accepting about 80–100 cases each year, and the 14 courts of appeals handling nearly 11,000 new appeals each year, appellate courts are for all practical purposes the courts of last resort for 99% of all litigants. Their rulings shape the law on all kinds of issues, ranging from the enforceability of jury verdicts to evidentiary challenges to matters of contract interpretation. In a perfect world, all voters would make informed choices and elect only the most qualified and experienced individuals to the ranks of appellate judges, but the realities of straight ticket voting can paint a different picture.

III. IMPLICATIONS FOR THE FUTURE OF "ACCIDENTAL JURISTS"

Gilberto Hinojosa, the state Democratic Party Chair (and a former appellate justice himself) was ecstatic over the November results, saying "This is a big, big, big win for us in Texas," and calling it "one of the most significant waves we've ever had."[4] But what are the consequences of this dramatic shift in Texas' appellate courts? The *Dallas Morning News* issued a sobering editorial in the aftermath of the election, observing "Texas did experience a Democratic wave. You just might have missed it. And it could change the state in ways that the governor's office on down could never dream of." Of the ideological shift, the editorial noted that "The new courts are all but assured to be the more active sort of judiciary that the left always appreciates and the right wishes would just put down the gavel."

Putting judicial philosophies aside (for the moment), it was the vast disparity in experience between the Republicans and their

[3] Mark P. Jones, Ph.D., *The Selection of Judges in Texas: Analysis of the Current System and of the Principal Reform Options*, RICE UNIVERSITY'S JAMES A. BAKER III INSTITUTE FOR PUBLIC POLICY (Jan. 2017).

[4] Emma Platoff, "Texas Democrats' Biggest Win on Election Night May Have Been the Courts", Texas Tribune, Nov. 8, 2018.

Democratic opponents that the *Dallas Morning News* found most troubling. The editorial observed that with the Democratic sweep, "People with decades of appellate judicial experience and institutional memory will be packing away their robes to be replaced by lawyers who have never written an appellate brief." As one example of what it described as "glaring" experience gaps, the *Dallas Morning News* mentioned newly-elected 5th Court of Appeals Justice Robbie Partida-Kipness, who "has never written an appellate brief" and whose jury trial experience was sadly lacking as well.

Indeed, nowhere was this gap in meaningful experience more apparent than the 8 races for the 5th Court of Appeals. All 8 of the Republican candidates earned the recommendation of the *Dallas Morning News*, with the newspaper making it clear that in almost all instances, it wasn't even a close call. Not only did the 6 incumbents boast decades of judicial experience and stellar reviews in bar polls, but each of the two Republican candidates for open seats had about 30 years of practice experience, were seasoned trial and appellate advocates, and had judicial service as well. In contrast, while 2 of the 8 Democratic candidates were sitting judges, the remaining 6 had little or no appellate experience by comparison and some barely satisfied the statutory ten-year minimum level of licensure that Texas requires for an appellate bench. Even the independent, nonpartisan Committee for a Qualified Judiciary, which vets all candidates in order to assess a baseline rating of "Qualified" or not, did not rate 5 of the 8 Democrat candidates "Qualified" (all 8 Republican candidates, in contrast, were deemed "Qualified").

Lack of experience is troubling enough, especially when one recently-elected judge commented at a CLE seminar shortly after being sworn in, "I can't believe we won. It's a good thing voters don't know they're paying for our on-the-job training." But judicial turnover is a fact of life, particularly with partisan elections, and those recently-ousted Republican justices were once "newbie judges" themselves. Of greater concern is the lack of familiarity with applicable law, including the Texas Constitution. Not even 3 months into his new job as the judge of Harris County Civil Court at Law Number Four, recently-elected Democrat William McLeod decided he was ready for bigger and better things. So, he went on Facebook and posted about his plans to run for the Supreme Court of Texas, blissfully unaware about Article 16, Section 65 of the Constitution. That provision considers any declaration of candidacy by a county court of law judge for another office to be an automatic abdication of that official's current position. Learning that he'd inadvertently resigned and acknowledging that he'd "messed up," McLeod sought leniency from the Harris County Commissioners Court. But he was unsuccessful, and a replacement judge was appointed by the commissioners at their April 9, 2019 meeting.

But there can be even more disturbing byproducts of straight ticket voting by an ill-informed electorate in partisan elections. Consider, for example, recently-elected 13th Court of Appeals Justice Rodolfo "Rudy" Delgado. Delgado had been the judge of the 93rd State District Court until April 2018, when he resigned in the middle of his fourth term. His resignation, which even Delgado characterized as "in the public's best interest," followed his February 2018 indictment by a federal grand jury on bribery charges. But that didn't deter Delgado from running as a Democrat for a vacant seat on the 13th Court of Appeals, a 20-county district encompassing Hidalgo, Cameron, and Willacy counties. Delgado won the Place 4 seat over his Republican opponent, with Democratic voters seemingly unaware or unconcerned about his pending indictment. Within two hours of being sworn in as a new justice in early January, Delgado was suspended without pay by the State Commission on Judicial Conduct. He has yet to execute his duties as an appellate justice, and his trial on bribery charges has been set for July 1, 2019.

IV. LEGISLATIVE REACTIONS TO THE SHIFT

Not surprisingly, the overnight flip of Texas's biggest and busiest appellate courts from Republican to Democrat control prompted renewed interest from Republican lawmakers in revamping Texas' appellate courts and particularly Texas' system of partisan election of judges. Redistricting the 14 judicial districts to realign the geographic distribution of the statewide appellate workload is one measure that has been explored, but since redistricting will not be taken up by the Legislature until the 2021 session, it remains an option that's received little attention. In reaction to the lack of experience of many newly-minted judges, Senator Judith Zaffirini introduced Senate Bill 561, which would increase the minimum age for judges of statutory county courts and probate courts to 30 (from 25). Senator Zaffirini also authored Senate Joint Resolution 35, which would increase the minimum level of practice experience for trial judges from 4 years to 8 years, and for an appellate or Supreme Court justice from a minimum of 10 years to 12 years.

But efforts to change the way Texas selects its judges may have more far-reaching effects than any other legislative reform. And, although notable figures like former Chief Justices Thomas Phillips and Wallace Jefferson have called for an end to partisan judicial elections for years, the seismic shift of Texas' appellate courts in November gave renewed momentum to such efforts. Chief Justice Hecht, in his State of the Judiciary address, urged lawmakers to revisit the issue of judicial selection, calling partisan sweeps "demoralizing to judges, disruptive to the legal system, and degrading to the administration of justice." As he bluntly put it, "a judicial selection system that continues to sow the political wind will reap the whirlwind."

Two such bills, both introduced by Representative Brooks Landgraf (R-Odessa), merit closer consideration. House Bill 4504 establishes an appoint-and-retain system of judicial selection for appellate judges and justices, as well as for judges of district courts in counties with a population of 500,000 or more (and in counties that "opt in" to the system). Under this proposal, (1) the governor would nominate a person to a judicial vacancy; (2) a nonpartisan citizens board would rate that nominee as "highly qualified," "qualified," or "unqualified"; (3) the Senate would then confirm the appointment by a two-thirds majority; and (4) the appointee would then serve a term of 12 years, with a nonpartisan, up-or-down "retention" election in the fourth and eighth years of the judge's term.

House Joint Resolution 148, in conjunction with House Bill 3040 (Hunter) and Senate Bill 1728 (Huffman), would establish the joint select committee on judicial selection, applicable to both trial and appellate courts. The committee would consist of 6 Senators appointed by the Lieutenant Governor and 6 House members appointed by the Speaker. That select committee is charged with reporting its recommendations by December 31, 2020.

V. IMPLICATIONS FOR THE NEXT 6 YEARS (AND POSSIBLY BEYOND)

What does the pendulum swing of Texas's most influential intermediate appellate courts mean, at least for the 6 year terms of the newly-elected justices (and potentially beyond 2024)? The impact has already been felt in the form of Democratic candidates feeling newly emboldened to challenge Republican incumbents. In Dallas, for example, all three incumbent Republican justices (among the 5 remaining) who are up for re-election in 2020 drew challengers (all of whom are sitting Dallas County trial judges) within a month of the November election results. But what will the change mean for defense attorneys and their clients?

While it is still too early to glean meaningful insight from actual reported opinions, some of the new justices themselves promised a marked difference in judicial philosophy, pointing perhaps to a path of judicial activism instead of restraint. Justice Bill Pedersen of the 5th Court of Appeals criticized the court while on the campaign trail, accusing it of having "a predilection to be

hostile to verdicts before they are fairly reviewed." Justice Meagan Hassan, who won a seat on the 14th Court of Appeals, said "The diversity of ideology of opinions on the court will become greater, and that will lead to more decisions that are more balanced, more fair and represent the people of Texas." Texas Democratic Party Chair Hinojosa said the Democrat-controlled courts "are much more likely to hold corporations responsible for irresponsible behavior." New 5th Court of Appeals Justice Ken Molberg proclaimed, "We will give a greater deference to jury verdicts and have a keener awareness and understanding of the actions of trial judges."

And, while Justice Molberg has been quick to downplay the impact that partisan affiliation might have on the 5th Court's future rulings (saying "there aren't Republican or Democratic ways to decide a breach of contract dispute or a car wreck case"), in some areas of the law it's possible to forecast how the swing taken by these appellate courts from "R" to "D" may influence their jurisprudence. For example, while it may be easy to speculate that the new Democrat majorities will be less "business-friendly" than their Republican predecessors, in certain areas like arbitration, we can track empirical results. Take then-candidate Molberg. Viewing his record on the bench as a Dallas County civil district court judge, there are 187 total Westlaw citations reflecting 96 decisions on the merits (not counting 3 dismissed for reasons like settlement of the case, failure to brief, etc.). This search revealed a total of 49 reversals (a 50.55% reversal record). And in arbitration cases specifically, then-Judge Molberg was reversed 8 out of 13 times (61.5% reversal rate). In the 5 cases in which Molberg's rulings to deny arbitration were affirmed, they were usually straightforward applications of the law in which a non-party was moving to compel arbitration or in which the moving party had substantially invoked the litigation process.[5] But in the majority of the cases that resulted in reversals, there is no such justification for refusing to compel arbitration in accordance with the overwhelming body of well-settled Texas law (and public policy) favoring arbitration.[6] It remains to be seen whether a Justice Molberg will be more inclined to apply longstanding Texas precedent regarding enforcement of arbitration agreements, or if he will exhibit the reluctance that he did as a trial judge.

Longtime appellate court observers and veteran appellate practitioners agree that while it remains unclear just how dramatic the changes will be on Texas' appellate courts, change is definitely coming. Speaking about the flip on the 5th Court of Appeals, appellate expert Chad Baruch says "certainly attorneys representing plaintiffs in employment, consumer, and malpractice cases will be feeling more optimistic about their odds of prevailing on appeal on those types of cases. Chad Ruback, another Dallas appellate specialist, says "I believe that they newly-elected Democratic court of appeals justices may be a bit more skeptical of summary judgments, orders compelling arbitration, and judgments favoring a corporation over an individual." Jeff Nobles, a Houston appellate expert, observes of

[5] *See, e.g.*, *Redi-Mix, LLC v. Martinez*, No. 05-17-01347-CV, 2018 WL 3569612 (Tex. App.—Dallas July 25, 2018, no pet. h.) (employer not a party to arbitration agreement); *Archer v. Archer*, No. 05-13-01341-CV, 2014 WL 2802735 (Tex. App.—Dallas June 17, 2014, no pet.) (arbitration not required by contract); *VSR Financial Services, Inc. v. McLendon*, 409 S.W.3d 817 (Tex. App.—Dallas 2013, no pet.) (no contractual agreement to arbitrate); *Senter Investments, L.L.C. v. Veerjee*, 358 S.W.3d 841 (Tex. App.—Dallas 2012, no pet.).

[6] *See, e.g.*, *Micocina, Ltd. v. Balderas-Villanueva*, No. 05-16-01507-CV, 2017 WL 4857017 (Tex. App.—Dallas Oct. 27, 2017, no pet.); *In re Signor*, No. 05-16-00703-CV, 2017 WL 1046770 (Tex. App.—Dallas Mar. 20, 2017, no pet.); *Ace Cash Express, Inc. v. Cox*, No. 05-15-01425-CV, 2016 WL 4205850 (Tex. App.—Dallas Aug. 9, 2016, no pet.); *Robinson v Pace Homes, Inc.*, No. 05-15-00758-CV, 2016 WL 1719067 (Tex. App.—Dallas Apr. 28, 2016, no pet. h.); *Bonded Blders. Home Warranty Ass'n of Texas, Inc. v. Smith*; 488 S.W.3d 468 (Tex. App.—Dallas 2016, no pet.); *White v. White*, 369 S.W.3d 911 (Tex. App.—Dallas 2012, no pet.).

the Houston courts that "we might expect to see a better outlook for the accused in some criminal cases, for plaintiffs in business and personal injury cases, and for the underdog in many areas."

VI. "CALIFORNIA DREAMIN'?" FINAL THOUGHTS FOR THE LONG TERM

Texas has enjoyed tremendous business growth and a thriving economy for years now. It is consistently named as the "Best State for Business" by sources varying from *Forbes* to *Chief Executive Magazine* to CNBC. Part of that growth has resulted from companies relocating o Texas from other states. According to *Investor's Business Daily*, in 2016 alone, 1,800 companies left California.[7] The leading destination for those businesses was Texas. The most common reason given for leaving California was the "business-unfriendly" laws, cited even more than taxes, labor and utility costs, and housing affordability for employees. And according to a Nerdwallet analysis of U.S. domestic migration, more Californians relocate to the Dallas/Fort Worth area each year than residents of any other state, with an average of 8,300 Californians moving to north Texas each year between 2012 and 2016.[8] With large employers like Toyota, Core-Mark Holding Company, and pharmaceutical distributor McKesson leading the exodus from California in pursuit of a more business-friendly environment, some have feared that more liberal political ideologies have accompanied the influx of new residents. Even Governor Abbott, who has courted California businesses to move to Texas, has urged voters "Don't California My Texas."

Corporations making relocation or other geographically influenced major business decision usually take stock of the legal landscape. For example, Apple recently confirmed its plans to close retail stores located in the Eastern District of Texas, a move designed to allow the company to better protect itself from patent infringement lawsuits. In the Eastern District, which had become one of the most popular venues for plaintiffs to bring patent infringement suits, Apple was sued in 8 lawsuits in 2018 alone in the district. It has been rocked by sizable verdicts in the plaintiff-friendly venue, including a $502.6 million verdict in April 2018 in a patent infringement case brought by Viruetx.[9]

What will Democratic control of Texas' biggest, busiest, and most influential intermediate appellate courts mean for corporations that have long relied on the appellate courts to faithfully apply laws drafted and passed by a conservative, pro-business legislature? Will the shift that took place in November result in reluctance by appellate panels to serve as a check on "runaway" jury verdicts or even patently incorrect rulings by trial judges? Veteran appellate lawyer and blogger David Coale points out, "Dallas and Houston are both home to Forbes 100 companies. A lot of corporations that have moved [to these areas] in recent years will be watching the courts very carefully." Only time will tell if the "Beto effect" and straight ticket voting contributed to a "one-off" electoral hiccup, or if the long-term ongoing demographic changes mean that the shift in the judicial balance of power is no fluke, but rather a harbinger of a changing Texas.

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[7] *California Companies Flee Business-Hostile State in Droves*, INVESTOR'S BUSINESS DAILY (Dec. 17, 2018); https://www.investors.com/politics/editorials/california-companies-leave-taxes.

[8] Dom Difurio, *The West Coast Just Might Be California-ing Your North Texas*, DALLAS MORNING NEWS (Apr. 4, 2018).

[9] David Yates, *Apple Bolting from Eastern District of Texas Venue a Favorite of Patent Trolls*, SOUTHEAST TEXAS RECORD (Mar. 5, 2018); https://setexasrecord.com/stores/512106032-apple-bolting-from-eastern-district-of-texas-venue-a-favorite-of-patent-trolls.

2019 TADC ANNUAL MEETING

September 18-22, 2019 ~ Hotel Emma ~ San Antonio, Texas

Program Co-Chairs: Trey Sandoval, Mehaffy Weber, P.C., Houston & Mitzi Mayfield, Riney & Mayfield LLP, Amarillo

CLE Approved for: 9.5 hours, including 1.5 hours ethics

Wednesday, September 18, 2019

6:00-8:00pm TADC Welcome Reception

Thursday, September 19, 2019

7:00-9:00am Buffet Breakfast

7:45-8:00am Welcome & Announcements
Pam Madere, TADC President
Jackson Walker, L.L.P., Austin
Trey Sandoval, Mehaffy Weber, P.C., Houston
Mitzi Mayfield, Riney & Mayfield LLP, Amarillo

8:00-8:35am *THE GOOD THE BAD AND THE UGLY: CONSTRUCTION PROVISIONS THAT CAN MAKE OR BREAK YOUR CONSTRUCTION-DEFECT LAWSUIT*
Joshua W. Mermis, West Mermis, Houston

8:35-9:10am *EVIDENTIARY ISSUES AND THE ADMISSIBILITY OF DIGITAL EVIDENCE: TEXT, E-MAIL, WEBSITES AND SOCIAL MEDIA*
Laura Kugler, Beard Kultgen Brophy Bostwick & Dickson, PLLC, Dallas

9:10 -9:45am *COMMERCIAL LITIGATION FOR THE PRACTICING TRIAL LAWYER*
Asher B. Griffin, Scott Douglas & McConnico LLP, Austin

9:45-10:20am *A PICTURE IS WORTH 1000 WORDS: MAKE COMPLEX ISSUES SIMPLE FOR THE JURY WITH TECHNOLOGY*
Dennis E. Shelp, PE, AEI Corporation, Denver, CO

10:20-10:35am *B R E A K*

10:35-11:10am *ERROR PRESERVATION AMBUSHES: INFLICTION AND PREVENTION*
Steven K. Hayes, The Law Offices of Steven K. Hayes, Fort Worth

11:10-11:45am *DEFENDING TRAUMATIC BRAIN INJURY CLAIMS: WHAT YOU NEED TO KNOW*
Oscar A. Lara, The Rincon Law Group, El Paso

11:45-1:15pm LUNCHEON SPEAKER: *CIVILITY MATTERS: A JUDICIAL PERSPECTIVE (1.0 ethics)*
Justice Patricia O. Alvarez, Fourth Court of Appeals: San Antonio

1:15-2:00pm *THE "SPEARIN DOCTRINE" A CONTRACTOR'S DEFENSE YOU DON'T NEED TO KNOW, BUT WILL WISH YOU DID.*
James R. Old, Jr., Hicks Thomas LLP, Austin

Thursday Afternoon free to enjoy San Antonio!

Friday, September 20, 2019

7:00-9:00am Buffet Breakfast

7:45-8:00am Welcome & Announcements
Pam Madere, TADC President
Jackson Walker, L.L.P., Austin
Trey Sandoval, Mehaffy Weber, P.C., Houston
Mitzi Mayfield, Riney & Mayfield LLP, Amarillo

8:00-8:45am *WHAT ACTUALLY HAPPENED TO YOUR PRACTICE IN THE 85TH LEGISLATURE: AN UPDATE (.25 ethics)*
George S. Christian, The Christian Company, Austin

8:45-10:15am *VOIR DIRE: THE MOST IMPORTANT PART OF YOUR CASE*
Mark Murray, Stevenson & Murray, Houston
Lamont Jefferson, Jefferson Cano, San Antonio

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

10:30-11:15am *UPDATE FROM THE SUPREME COURT (.25 ethics)*
Justice Paul Green, Texas Supreme Court, Austin

11:15-11:50am *DEFENDING CLAIMS OF OFF-TARGET DRIFT PESTICIDES*
Robert L. Soza, Jr., Jackson Walker, L.L.P., San Antonio

11:50-12:35pm *DEFENDING THE CONTROVERSIAL CASE*
David Isaak, Smyser Kaplan & Veselka, L.L.P., Houston

12:35-12:45pm TADC Business Meeting

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

Saturday, September 21, 2019

7:00-9:00am Buffet Breakfast

Saturday free to enjoy San Antonio!

Sunday, September 22, 2019

Annual Meeting Adjourned

2019 TADC ANNUAL MEETING

September 18-22,2019 ~ Hotel Emma

136 E Grayson St, San Antonio, TX 78215

Pricing & Registration Options

Registration fees include Wednesday through Saturday group activities, including the Wednesday evening welcome reception, hospitality room, all breakfasts, 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 meeting materials and breaks.

Spouse/Guest CLE credit for Annual Meeting	$75.00

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For hotel reservations, **CONTACT HOTEL EMMA DIRECTLY AT 210-448-8300 and reference the TADC 2019 Annual Meeting.** The TADC has secured a block of rooms at the FANTASTIC rate of $285 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 F0R HOTEL RESERVATIONS IS AUGUST 19, 2019

TADC Refund Policy Information

Registration Fees will be refunded ONLY if a written cancellation notice is received at least SEVEN (7) days prior (SEPTEMBER 11, 2019) to the meeting date. A $75.00 Administrative Fee will be deducted from any refund. Any cancellation made after SEPTEMBER 11, 2019 IS NON-REFUNDABLE..

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September 18-22, 2019

For Hotel Reservations, contact Hotel Emma DIRECTLY at* 210-448-8300 *option #1

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- ☐ **$ 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 19, 2019. If registering online, use discount code EB50 and register by August 19, 2019.**

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

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

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In order to ensure that we have adequate materials available for all registrants, it is suggested that meeting registrations be submitted to TADC by August 19, 2019.

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