TADC

TEXAS ASSOCIATION OF DEFENSE COUNSEL

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

SUMMER 2021

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From the Editor

We all hope 2021 will be remembered as a year of recovery, renewal and revival. My sincerest thanks and utmost gratitude hails to co-chairman Mitch Moss, the Publications Committee, Executive Director Bobby Walden (no publication without his untiring efforts), the Executive Committee and all TADC members and others who have voluntarily contributed their time to complete this publication. Special thanks also to Stephen F. Austin student Brady Wells in my office as this was his third magazine as the unidentified, but well-deserved assistant editor. I hope and pray the rest of this year continues in a positive and "opening back up" direction and wish all of you, your families, friends and co-workers well in that regard.

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TADC CALENDAR OF EVENTS

August 13-14, 2021	**2021 TADC West Texas Seminar** Inn of the Mountain Gods – Ruidoso, New Mexico *Registration information available at www.tadc.org*
September 22-26, 2021	**2021 TADC Annual Meeting** Peabody Hotel – Memphis, Tennessee *Registration information available after July 1, 2021*
October 7, 2021	**Virtual Deposition Boot Camp – via Zoom** *Registration information available after August 15, 2021*
January 26-30, 2022	**TADC Winter Seminar** Westin Snowmass Resort – Snowmass, Colorado *Registration information available after November 15, 2021*
March 25-26, 2022	**TADC Trial Academy** Texas Tech University School of Law - Lubbock *Registration information available after January 15, 2022*
May 4-8, 2022	**2022 TADC Spring Meeting** Omni Grove Park Inn – Asheville, North Carolina *Registration information available after March 1, 2022*
July 13-17, 2022	**2022 TADC Summer Seminar** Big Sky Resort – Big Sky, Montana *Registration information available after April 15, 2022*

President's Message

By: Slater C. Elza, TADC President
Underwood Law Firm, P.C., Amarillo

Greetings to all as we move from Spring into Summer. We had an outstanding Spring meeting in Chicago, and it was nice to see everyone. Mitzi and Arlene had a fabulous program with some of the best substantive topics we have seen in recent memory. Most importantly it was great to see old friends and make new ones. Attendance was great and we are excited to continue in-person meetings this Summer in Jackson Hole, WY and Fall for our Annual Meeting in Memphis, TN.

This year has focused on monitoring the Texas Legislature for bills that affect our members, clients and the civil justice system. Wise Mike Hendryx once said it is much easier to kill a bill than author one and get it through the craziness of Austin. He was correct – but killing bad bills is still difficult, frustrating and time consuming. Your Legislative Committee, George Scott Christian, the Executive Committee and numerous volunteers have worked hard this session. I will not focus on the individual bills and their details (those are addressed in detail elsewhere in this issue), but we were successful in working with other stakeholders to hold back a reorganization of our intermediate appellate courts and multiple approaches to establishing specialized business courts. We also worked hard on influencing and monitoring medical affidavit legislation prior to the Texas Supreme Court ruling in *In re Allstate Indemnity*. We can expect continued maneuvering in these areas in the months and years to come.

I would like to also show our appreciation for our Amicus Committee who continues to monitor developments in cases around the state. They are an invaluable resource for our members and clients and remain on the cutting edge of developing law. Special thanks to Roger Hughes who heads up this group of special lawyers as well as your Executive Committee who review the recommendations of the Amicus Committee and make final decisions on which matters TADC will support.

Finally, I am proud to report that our young lawyer virtual lunches are going great and seem to be well received. We have had our first two and appreciate David Chamberlain and Mike Bassett sharing their wisdom on civility in the practice of law and the importance of associates understanding law firm economics, respectively. Please let us know if you have an idea for our luncheons or would like to volunteer for one.

Overall, TADC is having a great year. See you soon.

TADC'S 87TH SESSION LEGISLATIVE WRAP-UP

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

When the 87th Legislature adjourned *sine die* on May 31, legislators left town battered and bruised by a series of contentious partisan debates on a wide range of social issue bills. Most of the "red meat" proposals ended up on the Governor's desk: prohibiting abortion after six weeks (including an outright abortion ban if the U.S. Supreme Court overturns *Roe v. Wade*), constitutional carry, cracking down on local governments that "defund" law enforcement, punishing businesses that discriminate against the firearm, ammunition, and oil and gas industries (including the NRA), mandating professional sports teams play the national anthem, banning vaccine passports, and restricting the governor's power during a pandemic emergency. A few didn't: election procedures, punishing social media companies for "censoring" political speech, outlawing teaching of systemic racism in schools, and barring transgender kids from playing on sports teams of the opposite biological sex. Governor Abbott, however, has promised to bring the legislature back to finish the job, while at the same time threatening to veto the budget for the *entire* legislature (which really means legislative offices and staff, since legislators don't get paid anything).

When not engaged in endless partisan debate, the legislature did manage to pass a budget by a nearly unanimous vote, make some significant changes to the regulation of the electric grid, take the first steps toward expanding access to broadband services, and pass some meaningful access to health care legislation. A session that began slowly at the height of the pandemic picked up speed and passed 3,776 bills, about a 20% reduction from 2019.

Just as in 2019, the civil justice arena saw a substantial amount of activity. Two major bills—pandemic liability and trucking litigation reform—received low bill numbers (SB 6 and HB 19, respectively). At least four bills would have made significant changes to the courts, though none passed: SB 11 (courts of appeals reorganization), SB 1529 (statewide court of appeals), SB 690 (remote jury trials), and HB 1875 (business courts).

The paid or incurred/§18.001 medical expense affidavit complex of issues (SB 207/HB 1617) moved forward in the legislative process and likely would have passed in some form if SCOTX had not pre-empted the need for the bill in two huge opinions. Your TADC Legislative Committee was deeply involved at the Capitol, particularly with respect to HB 19 and SB 207/HB 1617. Mitch Smith and David Brenner braved the perils of testifying at House and Senate committee hearings on TADC's behalf. Your TADC leadership—Slater Elza, Mike Shipman, Christy Amuny, Mitzi Mayfield, Bud Grossman, Mark Stradley, Trey Sandoval, Doug Rees, Michele Smith and Robert Booth—always responded when we needed to get on a Zoom call to make a quick decision. And, as always, many thanks to Bobby Walden, TADC Executive Director, for keeping the ship afloat every time we hit a mine and had to make repairs.

Now to the details of the enacted legislation:

JUDICIAL REFORM

SJR 47 by Huffman/Leach: Raises the eligibility standard for Chief Justice and Justice of the Supreme Court to a Texas resident licensed to practice law in Texas with at least ten years of practice experience in the state or a combined total of at least ten years of Texas law practice or judicial service on a state court or statutory county court. Disqualifies a lawyer whose license has been suspended, revoked, or subject to a probated suspension during that ten-year period for the bench. Requires a candidate for district court to have eight

years of practice in Texas, rather than the current four. Disqualifies a district court candidate for any revocation, suspension, or probated suspension of the candidate's Texas law license during the eight-year period. Election date 11/2/21.

TORT LIABILITY

SB 6 by Hancock/Leach:

- Amends §51.014, CPRC, to authorize an interlocutory appeal if a trial court overrules an objection to or fails to grant relief to a defendant on account of the plaintiff's failure to file an expert report pursuant to Chapter 148, CPRC, as added by this Act.
- Adds §74.155, CPRC, to exempt a physician, health care provider, or first responder from liability for an injury or death arising from care, treatment, or failure to provide care or treatment related to or impacted by a pandemic disease, except in a case of reckless conduct, intentional, willful, or wanton misconduct;
- Requires the physician, provider, or first responder to show, by a preponderance of the evidence that a pandemic disease or disaster declaration related to a pandemic disease was a producing cause of the care, treatment, or failure to provide care or treatment that allegedly caused death or injury, **or** the individual who suffered death or injury was diagnosed or reasonably believed to be infected with the disease at the time of the care, treatment, or failure to provide treatment;
- Bars the physician, provider, or first responder from using the showing above as a defense to a negligence claim if the claimant proves by a preponderance of the evidence that the diagnosis, treatment, or reasonable belief of infection at the time of the care, treatment, or failure to treat was not a producing case of the injury;
- Enumerates nine specific examples of care, treatment, or failure to provide care or treatment;
- Requires a physician, provider, or first responder who intends to raise a defense to provide a claimant with specific facts supporting the defense not later than 60 days after the claimant files the expert report or 120 days after filing of the original answer;
- Applies only to a claim arising from care, treatment, or failure to provide care or treatment that occurred during the period beginning on the date the president or governor declared a pandemic-related disaster (March 13, 2020) and ending on the termination of the declaration.
- Adds Chapter 148, CPRC, to limit the liability of a person who designs, manufactures, labels, sells, or donates enumerated products for personal injury, death, or property damage;
- Imposes liability only if the person had actual knowledge of a product defect when the product left the person's control, acted with actual malice in designing, manufacturing, selling, or donating the product, *and* the product presents an unreasonable risk of substantial harm to an individual using or exposed to the product;
- Provides immunity for a failure to warn or provide adequate instructions unless the person acted with actual malice *and* the failure to warn or provide adequate instructions presents an unreasonable risk of substantial harm;
- Provides immunity for the selection, distribution, or use of a product unless the person had actual knowledge of the defect, acted with actual malice, *and* the product presents an unreasonable risk of substantial harm to an individual using or exposed to the product;
- Provides immunity for injury or death caused by exposing an individual to a pandemic disease during a pandemic emergency unless the claimant proves that the person:
    - knowingly failed to warn the claimant of or failed to remediate a condition that the person knew or should have known was likely to result in the exposure, provided that the person: (1) had actual control over the condition, (2) knew that the claimant was more likely than not to come into contact with the condition, and (3) had a reasonable opportunity and ability to remediate the condition or warn the claimant of the condition; or

- knowingly failed to implement or comply with applicable government-promulgated standards, guidance, or protocols, provided the person: (1) had a reasonable opportunity or ability to comply with the standards, (2) refused to implement or comply with or acted with flagrant disregard of the standards; and (3) that the government-promulgated standards that the person failed to comply with did not on the date of the exposure conflict with standards the person did comply with;

- Requires the claimant to produce reliable scientific evidence showing that the failure to warn of or remediate the condition, or implement or comply with government-promulgated standards was a cause-in-fact of the claimant contracting the disease;
- Requires the claimant to serve a complying expert report not later than the 120th day after the defendant files an original answer;
- Provides that if, during a declared pandemic emergency, neither a gubernatorial or state agency order nor a local governmental entity has established or applied standards that apply to the person, the person is deemed to be in compliance with government-promulgated standards at the time of the exposure;
- Clarifies that if a person in good faith substantially complies with at least one conflicting government-promulgated order, rule, or declaration;
- Provides immunity for an educational institution (defined as an institution or program that facilitates learning or the acquisition of knowledge, skills, values, beliefs, or habits) for damages or other monetary equitable relief arising from a cancellation or a modification of a course, program, or activity that arose during and was caused in whole or in part by the pandemic emergency;
- Applies only to an action commenced on or after March 13, 2020, for which a judgment has not become final before the effective date.

HB 19 by Leach/Taylor

- Adds Subchapter B, Chapter 72, CPRC, to require a court to provide for a bifurcated trial on motion of a defendant in an action involving a commercial vehicle;
- Requires the defendant to move for bifurcation on or before the later of the 120th day after the movant's original answer or the 30th day after the claimant files a pleading adding a claim or cause of action against the movant;
- Directs the trier of fact to determine liability and compensatory damages in the first phase of the trial and liability for and amount of exemplary damages in the second phase;
- Provides that a finding in the first phase that the defendant driver was negligent in operating the vehicle may serve as the basis in the second phase on a claim against the employer defendant, such as negligent entrustment, that requires a predicate finding of the driver's negligence (does not apply to a claimant who has pursued a negligent entrustment claim in the first phase);
- Provides that a defendant's failure to comply with a standard or regulation *is admissible in the first phase* only if: (1) the evidence tends to prove that the failure to comply was a proximate cause of the claimant's injuries; (2) the standard or regulation *is specific and* governs, or is an element of a duty of care applicable to, the defendant, the defendant's employee, or the defendant's property or equipment when any of those is an issue in the action;
- Provides that if the employer defendant stipulates course and scope, the claimant may not in the first phase of a bifurcated trial present evidence on an ordinary negligence claim against the employer defendant, such as negligent entrustment, that requires a finding that the employee was negligent as a predicate to finding the employer negligent in relation to the employee's operation of the vehicle (except for evidence of specific regulatory violations listed below);
- Allows a claimant to introduce evidence in the first phase of a bifurcated trial in regard to an employer defendant who is regulated by the Motor Vehicle Safety Improvement Act of

1999 or Chapter 644, Transportation Code, limited to whether the employee driver at the time of the accident:

- (1) was licensed to drive the vehicle at the time of the accident;
- (2) was disqualified from driving the vehicle under 49 CFR §§383.51, 383.52, or 391.15;
- (3) was subject to an out-of-service order, as defined by 49 CFR §390.5;
- (4) was driving the vehicle in violation of a license restriction imposed under 49 CFR §383.95 or §522.043, Transportation Code;
- (5) had received a certificate of driver's road test from the employer defendant as required by 49 CFR §391.31 or had an equivalent certificate or license as provided by 49 CFR §391.33;
- (6) was medically certified as physically qualified to operate the vehicle under 49 CFR §391.41 (deleted "or corresponding state law");
- (7) was operating the vehicle when prohibited to do so under 49 CFR §§382.201, 383.205, 382.207, or 382.215, 395.3, or 395.5 or 37 TAC §4.12, as applicable, on the day of the accident;
- (8) was texting or using a handheld mobile telephone while driving the vehicle in violation of 49 CFR §392.80;
- (9) provided the employer defendant with an application for employment as required by 49 CFR §391.21(a) if the accident occurred on or before the first anniversary date after the date the employee began employment with the employer defendant; and
- (10) refused to submit to a controlled substance test as required by 49 CFR 383.303, 382.305, 382.307, 382.309, or 383.311 during the two years preceding the date of the accident; **and** whether the employer defendant:
  - (1) allowed the employee to operate the employer's commercial vehicle on the day of the accident in violation of 49 CFR §§382.201, 382.205, 382.207, 382.215, 382.701(d), 359.3, or 359.5 or 37 TAC §4.12;
  - (2) had complied with 49 CFR §382.301 in regard to controlled-substance testing of the employee driver if the employee driver was impaired because of the use of a controlled substance at the time of the accident, and the accident occurred on or before the 180th day after the date the employee driver began employment with the employer defendant;
  - (3) had made the investigations and inquiries as provided by 49 CFR §391.23(a) in regard to the employee driver if the accident occurred on or before the first anniversary date after the date the employee driver began employment with the employer defendant; and
  - (4) was subject to an out-of-service order, as defined by 49 CFR §390.5.

- Limits the admissibility of evidence of the above regulatory violations in the first phase to prove *only* ordinary negligent entrustment by the employer defendant to the employee defendant who was operating the vehicle and specifies that it is the *only* evidence that may be presented on negligent entrustment claim in the first phase;
- Clarifies that the bill does not preclude the claimant from bringing a negligence claim against the employer, such as negligent maintenance, that does not require a predicate finding of the employee's negligence, or from presenting evidence supporting that claim in the first phase; *or* a claim for punitive damages arising from the employer's conduct in relation to the accident, or from presenting evidence on that claim in the second phase;
- Bars the court from requiring expert testimony

to support the introduction into evidence of a photograph or video of the vehicle or an object involved in the accident;
- Provides that if a photo or video is properly authenticated it is presumed admissible, even if it supports or refutes an assertion about the severity of the damages or injury to an object or person involved in the accident.
- Effective date: September 1, 2021.

HB 365 by Murr/Springer: Limits civil liability for negligence of a farm animal activity sponsor, farm animal professional, farm owner or lessee livestock producer, livestock show participant, livestock show sponsor, or other persons arising from property damage, death, or injury resulting from dangers or conditions that are an inherent risk of farm animals or farm animal activities. The committee substitute amends Chapter 87, CPRC, relating to liability arising from farm animals, to extend liability protections to a farm owner or lessee. Adds to the definition of "engages in a farm animal activity" to include feeding, vaccinating, exercising, weaning, transporting, producing, herding, corralling, branding, or dehorning of, or assisting in or providing health management activities. Adds to the same definition "engagement in routine or customary activities on a farm to handle or manage farm animals." Adds a definition of "farm." Adds to the definition of "farm animal activity" owning, raising, or pasturing a farm animal; transporting a farm animal; assisting in or providing animal health management activities, including vaccination; assisting in or conducting customary tasks on a farm concerning farm animals; and transporting or moving a farm animal. Makes similar changes to the definition of "farm animal professional." Adds to the definition of "livestock producer" a person who handles, buys, or sells livestock. Adds to the definition of "participant" an independent contractor or employee. Adds to the limitation of liability the new categories of protected persons and activities, including the raising or handling of livestock on a farm. Effective September 1, 2021.

HB 2850 by Kacal/Springer: Adds Chapter 91B, CPRC, to provide immunity from liability for a certified veterinary assistant, licensed veterinary technician, or veterinarian who in good faith and in a volunteer capacity provides veterinary care or treatment to an injured animal providing the care or treatment is provided: (1) during a man-made or natural disaster that injures or endangers the animal, (2) at the request of the owner or an authorized representative of a federal, state, or local agency; and (3) is within the scope of practice of the provider. Does not imply if the provider acted with gross negligence or intentional misconduct. Further waives veterinarian-client privilege to the extent necessary to refute false information published by an owner or client in a public forum, or if a veterinarian provides information to an appropriate governmental entity regarding the prescribing of a controlled substance or cruelty to or an attack of an animal. Effective September 1, 2021.

HB 1788 by Hefner/Hughes: Adds §37.087, Education Code, to extend immunity from liability to a school district, open-enrollment charter school, or private school for any damages resulting from any reasonable action taken by security personnel to maintain the safety of a school campus, including action relating to the use or possession of a firearm. Extends the same immunity to a school employee who has written permission from the school's governing body to carry a firearm on campus. Extends the same immunity to security personnel. Does not preempt common law doctrine of official and governmental immunity. Effective September 1, 2021.

MEDICAL LIABILITY

HB 1914 by Schofield/Kolkhorst: Provides immunity from civil liability for a children's isolation unit that treats children with highly contagious infectious diseases unless the act or omission that proximately causes personal injury or death constitutes gross negligence or willful misconduct. Effective September 1, 2021.

HB 2064 by Leach/Hughes: Amends §55.004(b), Property Code (hospital lien statute), to add a third option for attachment of the lien: the amount awarded by the trier of fact for the services provided to an injured individual by the hospital less the *pro rata* share of attorney's fees and expenses incurred by the individual in pursuing the claim. Further deducts the *pro rata* share of attorney's fees and

expenses from the amount of the lien in the existing options: the amount of hospital charges in the first 100 days of the injured person's hospitalization or 50% of the person's recovery. Immediate effect.

SB 232 by Johnson/Davis: Adds §74.353, CPRC, to authorize a court, on motion of a claimant filed not later than 30 days after the date the defendant's original answer is filed, to make a preliminary determination of whether the claim is a health care liability claim for purposes of the expert report requirement of §74.351. Provides that if the court determines that the claim is a health care liability claim, the claimant must serve an expert report not later than the later of: (1) 120 days after the date the defendant's original answer is filed; (2) 60 days after the court makes the determination that the claim is a health care liability claim; or (3) the date agreed to in writing by the affected parties. Provides that the court's determination only applies for purposes of §74.351 and is subject to an interlocutory appeal. Provides that if the court does not issue a preliminary determination prior to the 91st day after the claimant files a motion, the court shall determine that the claim is a health care liability claim. Provides that if on interlocutory appeal a court of appeals reverses the trial court's preliminary determination that a claim is not a health care liability claim, the claimant shall serve an expert report not later than 120 days after the court of appeals' opinion is issued. Effective September 1, 2021.

OIL AND GAS LITIGATION

SB 1259 by Birdwell/Smith: Provides that the payee of a royalty does not have a cause of action for breach of contract against the payor for withholding royalty payments in the event of a title dispute, unless the contract requiring payment requires otherwise. Effective 5/24/21.

EMPLOYMENT LAW

HB 21 by Neave/Zaffirini: Amends §21.201(g) and §21.202(a), Labor Code, to extend the limitations period for filing a complaint alleging sexual harassment with the Texas Workforce Commission from 180 to 300 days. Effective September 1, 2021.

SB 45 by Zaffirini/Zwiener: Adds Subchapter C-1, Chapter 21, Labor Code, to make it an unlawful employment practice if sexual harassment of an employee occurs and the employer or the employer's agents or supervisors knows or should have known that the conduct constituting sexual harassment was occurring and fail to take immediate and appropriate corrective action. Effective September 1, 2021.

CONSTRUCTION LAW

HB 2116 by Krause/Powell: Amends §130.002, CPRC, to void a provision in a contract for engineering or architectural services to the extent that it requires a licensed engineer or architect to defend another party against a claim based wholly or partly on the owner's negligence or breach of contract. Provides that a covenant in such a contract may provide for the reimbursement of the owner's reasonable attorney's fees in proportion to the engineer or architect's liability. Provides that the owner may require in the contract that the engineer or architect name the owner as an additional insured on any of the engineer or architect's insurance coverage to the extent that additional insureds are allowed under the policy and provide any defense to the owner provided by the policy to the named insured. Exempts contracts in which the owner contracts with an entity to provide both design and construction services. Exempts a covenant to defend a party, including a third party, against a claim for negligent hiring of the architect or engineer. Adds §130.0021, CPRC, to prohibit a contract for engineering or architectural services from requiring an engineer or architect to perform professional services to a level of professional skill and care beyond that which would be provided by an ordinarily prudent engineer or architect with the same professional license under the same or similar circumstances. Effective September 1, 2021.

HB 3069 by Holland/Hughes: Amends §16.008, CPRC, to require a governmental entity to bring suit for a design defect against a registered or licensed engineer, architect, interior designer, or landscape architect who designs, plans, or inspects the construction of an improvement to real property or equipment attached to real property not later than five years (current law is ten years) after the

substantial completion of the improvement or the beginning of the operation of the equipment arising out of a contract entered into by TXDOT, a project that receives funds from state or federal highway funds and mass transit spending, or a civil works project. Extends limitations one year if the claimant presents a request for indemnity before the expiration of limitations. Makes the same change in §16.009, CPRC. Immediate effect.

SB 219 by Hughes/Leach:

- Provides 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 a person other than the contractor's agents, contractors, fabricators, or suppliers, or its consultants, of any tier.
- Prohibits waiver of this provision.
- Exempts a contract entered into by a person for the construction or repair of a critical infrastructure facility owned or operated by the person or any improvement to real property owned or operated by the person that is necessary to the critical infrastructure facility.
- Defines "critical infrastructure" to include refineries, electric generating facilities, chemical manufacturing, water and wastewater plants, liquid natural gas terminals or storage facilities, natural gas compressors, telecommunications facilities, ports, railroad switching yards, truck terminals, gas processing plants, radio or television transmission stations, steel mills, dams, animal feed operations, above-ground pipelines, oil and gas drilling sites and wellheads, oil and gas facilities with active flares, pipelines, electric transmission and distribution facilities, transportation fuel production facilities, and commercial airports.
- Holds a contractor responsible under a design-build contract in which the contractor provides all or part of the plans or specifications (limited to defects in the part of the design specs provided by the contractor).
- Provides that if a contractor agrees to provide input and guidance regarding the plans or specifications, and the contractor's input is incorporated into plans provided by a registered professional, the contractor may be liable for a defective design. Requires that if a contractor learns of a design defect, the contractor must disclose in writing a known design defect that is discovered by the contractor or reasonably should have been discovered using ordinary diligence.
- Provides that a contractor who fails to disclose the defect may be held responsible for the consequences of the failure to disclose.
- Provides that a construction contract for architectural or engineering services may not require a standard higher than the same exercise of professional skill and care ordinarily provided by competent architects and engineers practicing under the same or similar circumstances with the same professional license;
- Prohibits waiver of the standard of care provision.
- Effective September 1, 2021.

HB 3416 by Darby/Lucio: Amends Chapter 127, CPRC, relating to indemnity provisions in mineral agreements, to make it apply to agreements pertaining to oil, gas, or water wells or a mine for a mineral that requires a subcontractor to provide any part of a contractor's services required under a separate contract with a third party or for a mutual or unilateral indemnity obligation between the contractor, subcontractor, and third party, unless the contractor before entering into the agreement provides written notice to the subcontractor that: (1) describes the subcontractor's indemnification obligations to the contractor and third party; (2) is provided as a separate document from the agreement; and (3) is written in plain English. Also requires a statement to the third party of the subcontractor's insurance coverage and dollar limits. Effective September 1, 2021.

PROCEDURE/DISCOVERY/PRIVILEGES/ LIMITATIONS

HB 549 by S. Thompson/Zaffirini: Authorizes a professional to disclose a patient's confidential information to mental health personnel (in addition to medical personnel or law enforcement) if the

professional determines that there is a probability of imminent physical injury by the patient to the patient or another person or there is a probability of immediate mental or emotional injury to the patient. No cause of action exists against a person for disclosing confidential information under these circumstances. Does not create an independent duty or requirement to disclose any information. Effective September 1, 2021.

HB 1939 by Smith: Adds §16.013, CPRC, to require a person to bring suit for damages or other relief arising from an appraisal or appraisal review conducted by a real estate appraiser or appraisal firm not later than the earlier of: (1) two years after the day the person knew or should have known the facts on which the action is based; or (2) five years after the date the appraisal or review was completed. Does not apply to a suit based on fraud or breach of contract. Effective September 1, 2021.

HB 2086 by Morales/Hughes: Amends §51.014(a), CPRC, to authorize an interlocutory appeal from the grant or denial of a motion for summary judgment under §97.002(b), CPRC (immunity of TXDOT highway contractors who are in compliance with contract documents material to the condition or defect giving rise to a claim for personal injury, death, or property damage). Immediate effect.

SB 1137 by Kolkhorst/Oliverson: Requires a hospital to make public: (1) a digital file containing a list of standard charges for all hospital services and items; and (2) a consumer-friendly list of shoppable charges. The list must contain a description of each service or item, the gross charge, the de-identified minimum negotiated charge, the de-identified maximum negotiated charge, the discounted cash price, the payer-specific negotiated charge by the name of the payer and plan associated with the charge, and any code used by the hospital for purposes of accounting or billing the service or item. The list must be posted in a prominent place on the hospital's website, be free to use, and searchable. Establishes requirements for the consumer-shoppable list. Gives the Health and Human Services Commission enforcement authority, including auditing and imposing administrative penalties for non-compliance. Effective September 1, 2021.

INSURANCE

HB 1787 by Lambert/Menendez: Amends §1952.060(d), Transportation Code, to require liability coverage under a personal automobile insurance policy for a temporary vehicle provided to the insured by a repair facility to specifically name a person excluded in a named driver exclusion. Effective September 1, 2021.

HB 3433 by Smithee/Hughes: Prohibits an insurer from discriminating against a person because of the person's political affiliation. Provides enforcement authority by the commissioner of insurance. Effective September 1, 2021.

SB 1602 by Taylor/E. Thompson: Requires an insurer to notify a policyholder of cancellation for failure or refusal to cooperate and may cancel the policy on the 10th day following the policyholder's receipt of the notice. Effective September 1, 2021.

WORKERS COMPENSATION

SB 22 by Springer/Patterson: Amends §607.052, Government Code, to add state and local government detention officers and custodial officers (defined as a member of the retirement system employed by the Board of Pardons and Paroles or TDCJ as a parole officer or caseworker, or an employee of TCJL with a prescribed level of contact with inmates) to the list of first responders entitled to a presumption that certain cancers were contracted in the course and scope of employment and thus compensable under the workers' compensation system. Establishes a presumption that a firefighter, EMS technician, peace officer, correctional officer, or detention officer contracted SARS-CoV-2 or COVID-19 resulting in death or total or partial disability in the course and scope of employment if: (1) the responder is working in the area of a declared disaster; and (2) contracts the disease during the disaster. Applies the presumption only to full-time employees who were last on duty not more than 15 days before testing positive. For deceased employees, applies the presumption to full-time employees last on duty not more than 15 days before: (1) the date of diagnosis following positive test; (2) the date on which the person began showing symptoms as determined by a licensed

physician; (3) the date of hospitalization for symptoms; or (4) the date of death, if the virus was a contributing factor. Provides that a rebuttal of the presumption may not be based solely on evidence relating to the risk of exposure of an individual with whom the responder resides but may be rebutted based on evidence that an individual with whom the responder resides had a confirmed diagnosis. Establishes a reimbursement process for health care expenses paid by the responder if the insurer accepts coverage. Establishes the procedure for challenging the insurer's denial of coverage. Grandfathers claims filed on or after the date the Governor declared a disaster for COVID-19. Sunsets the COVID-19 presumption on September 1, 2023. Immediate effect.

HB 1752 by Oliverson/Schwertner: Amends §410.005, Labor Code, to permit the Workers' Compensation Division to conduct a benefit review conference telephonically, by video conference, or in person on a showing of good cause as determined by the division. Requires an in-person benefit review conference to be held at a location 75 miles or less from the claimant's residence at the time of the injury, except for good cause shown as determined by the division. Effective June 4, 2021.

COURT RECORDS, FILING FEES, AND COSTS

SB 41 by Zaffirini/Leach: Consolidates and allocates state civil court costs. Does not appear to increase existing filing fees or impose new fees. Effective January 1, 2022.

JUDICIAL MATTERS

HB 4344 by Jetton/Zaffirini: Amends Chapter 33, Government Code, to require the staff of the Judicial Conduct Commission to prepare and file with each member of the commission a report detailing the investigation of a complaint and recommendations not later than the 120th day after the date the complaint is filed (with a possible extension of up to the 270th day after the complaint filed under extenuating circumstances; at the request of the executive director, an additional 120 days may be added, with notice to the legislature). Requires the Commission to take action on a report not later than the 90th day following the date the report is filed. Requires that once a complaint is filed, each commission member be briefed about the complaint. Requires the Commission to file an annual report with the legislature. Directs the Commission to make recommendations for statutory changes to the next legislature. Effective September 1, 2021.

HJR 165 by Jetton/Zaffirini: Adds Art. V, 1-a (13-a), Texas Constitution, to authorize the Judicial Conduct Commission to accept complaints or reports, conduct investigations, and take any other authorized action regarding a candidate for judicial office in the same manner the Commission has authority to take against a holder of that office. Election date 11/2/21.

SB 1339 by Zaffirini/T. King: Authorizes a county employee who serves as the head of a county's civil legal department to request the attorney general's advice regarding a matter in which the state is interested. Effective 5/24/21.

HB 2950 by Smith/Huffman: Amends §74.161(a), Government Code, regarding the judicial panel on multidistrict litigation, to change the appointment authority from the chief justice of the supreme court to the court as a whole, and to permit the appointment of former or retired court of appeals justices. Amends §74.1625 to prohibit the panel from transferring a case brought by the consumer protection division of the attorney general's office under Subchapter E, §17.50, Business & Commerce Code. Immediate effect.

HB 3774 by Leach/Huffman: This is the biennial court administration omnibus bill. The committee substitute:

- Adds new civil district courts in Bell, Harris, Tarrant, Williamson, Denton, Hays, Cameron, Smith, McLennan, and Hidalgo Counties;
- Adds a statutory probate court in Denton County and expands the jurisdiction of County Court at Law No. 2 in Denton County to include, regardless of the amount in controversy, eminent domain cases and direct and inverse condemnation cases;
- Establishes a statutory county court in Kendall County with concurrent jurisdiction with the

district court in state jail, third degree, and second degree felony cases on assignment from the district judge;

- Adds a statutory county court in McLennan County and, upon request of a district judge presiding in McLennan County, authorizes the regional presiding judge to assign a county court at law judge to the district court to hear any matter pending in the requesting judge's court (excludes from county court at law jurisdiction suits on behalf of the state to recover penalties or escheated property, misdemeanors involving official conduct, and contested elections);
- Adds a statutory county court in Montgomery County;
- Expands the jurisdiction of a county court at law in Reeves County to family law cases and proceedings;
- Adds a statutory county court in San Patricio County and excludes from San Patricio County Court at Law jurisdiction in felony criminal matters and civil cases exceeding the statutory limit provided by §25.0003, Government Code ($250,000);
- Adds a County Criminal Court in Tarrant County;
- Adds a statutory county court in Williamson County;
- Bars a justice or judge from accepting a plea of guilty or plea of *nolo contendere* from a defendant in open court unless it appears to the justice or judge that the defendant is mentally competent and the plea is free and voluntary;
- Allows a judge exercising jurisdiction over a child in a suit under Subchapter E, Title 5, Family Code, to refer a "dual status child" (defined as certain children referred to the juvenile justice system with respect to child abuse or neglect) to the appropriate associate judge appointed under Subchapter C, Chapter 201, serving in the county with the associate judge's consent;
- Grants criminal jurisdiction to magistrates in Collin County, Brazoria County, and Tom Green County, and expands the jurisdiction of a magistrate in Burnet County to municipal court matters if approved by an MOU between the municipality and Burnet County;
- Establishes County Criminal Magistrate Courts in Brazoria and Tom Green Counties, appointed by the commissioner's court with prescribed jurisdiction and powers;
- Expands the OCA's responsibility for the state electronic filing system to include public access to the site and allows OCA to charge a reasonable fee for optional services;
- Standardizes procedures for the electronic transfer of cases between courts;
- Permits an applicant for a writ of habeas corpus to serve the state's attorney by electronic service or a secure electronic transmission to the attorney's email address;
- Amends §64.101(c), CPRC, to require citation for a receivership to be published on the public information website, as well as a newspaper of general circulation;
- Requires the Texas Forensic Science Commission to adopt a code of professional responsibility to regulate the conduct of persons, laboratories, facilities, and other entities regulated by the commission and to investigate any allegation of misconduct or professional negligence or misconduct with respect to a forensic examination or test conducted by an unaccredited crime laboratory;
- Bars a commissioner's court from using a juror donation to the county's veteran county service office either to determine the budget for the office or to supplant amounts budgeted for the office;
- Makes changes regarding the appointment of judges or magistrates to a regional specialty court program for certain criminal cases;
- Makes certain changes regarding confidentiality of vacated protective orders;
- Amends §52.001(a), Government Code, to define "shorthand reporter" and "court reporter" to require certification by the Texas Supreme Court as a court reporter, apprentice court reporter, or provisional court reporter;
- Amends §52.011, Government Code, to require a court reporting firm representative or court reporter to complete and sign a further certification stating that: (1) the deposition transcript was submitted to the witness or the witness's attorney for examination and signature, (2) the date of submission, (3)

whether the witness returned it and date of return, (4) that any changes by the witness are attached to the transcript, (5) that the transcript was delivered in accordance with Rule 203.3, TRCP, (6) the amount of the charges for preparing the transcript, and (7) that a copy of the certificate was served on all parties and the date of service;

- Amends §52.041, Government Code, to authorize a certified shorthand reporter to be appointed by more than one judge of a court of record to serve more than one court, including an employee of more than one county or serving as an official court reporter under contract with more than one county;
- Amends §52.042, Government Code, to make the same change with respect to a deputy certified shorthand reporter;
- Adds §52.060, Government Code, to direct the Office of Court Administration to develop a model interlocal agreement that may be used by counties or courts to share the compensation and expenses of an official court reporter or deputy court reporter;
- Amends 154.001, Government Code, to conform the prior change in the definition of shorthand reporter or court reporter;
- Amends §154.105, Government Code, to authorize a shorthand reporter to administer oaths and witnesses in a jurisdiction outside of Texas and to administer an oath to a person who is or may be a witness in a case filed in Texas without being located with a party or the witness if the reporter is physically located in this state at the time the oath is administered *or* the witness is located in a state with which Texas has a reciprocity agreement and the reporter is located in the same jurisdiction as the witness;
- Further specifies the ways to prove the identity of a deposition witness who is not in the presence of a certified shorthand reporter;
- Amends §154.112, Government Code, to allow the employment of a noncertified shorthand reporter pending the availability of a certified shorthand reporter.
- Effective September 1, 2021.

ATTORNEY'S FEES

HB 1428 by Huberty/Huffman: Amends §2254.102(e), Government Code, which requires a political subdivision to get approval from the comptroller for contingency fee contracts, to exempt contracts to collect a delinquent obligation. Does not apply to fines or penalties arising from an action of a political subdivision under Chapter 7, Water Code. Effective September 1, 2021.

HB 1578 by Landgraf/Hughes: Amends §38.01, CPRC, to add "organization," as defined by §1.002, Business Organizations Code, to the list of persons from whom a party may recover attorney's fees in an enumerated action. Exempts a quasi-governmental entity authorized to perform a function by state law, a religious organization, a charitable organizational, or a charitable trust. Effective September 1, 2021.

HB 2416 by Gervin-Hawkins/Powell: Adds §38.0015, CPRC, to permit a person to recover attorney's fees from an individual, corporation, or other entity from which recovery of attorney's fees is permitted as compensatory damages for breach of a construction contract as defined by §130.001, CPRC. Does not create or imply a private cause of action or an independent basis to recover attorney's fees. Effective September 1, 2021.

SB 484 by Hinojosa/Leach: Allows a member of the state military forces who is ordered to state active duty, training, or other duties by the governor or another appropriate authority to hire a private attorney to bring a civil action in district court for the same benefits and protections afforded to federal military service members. A court may award to a prevailing service member equitable and injunctive relief, other relief, including monetary damages, reasonable attorney's fees and costs of the action. Effective September 1, 2021.

LANDLORD-TENANT

HB 900 by Huberty/Springer: Adds §24.0061(i), Property Code, to exempt a landlord from liability for damages to a tenant resulting from the execution of a writ of possession. Effective September 1, 2021.

Prioritizing Mentorship Post-Pandemic

By: Cindy M. Vazquez
Moss Legal Group, PLLC, El Paso

Happy hours, luncheons, and CLEs. These events took up whatever free time young lawyers had before COVID-19 and gave them the opportunity to make connections, learn, and strengthen their professional development. But the onset of the pandemic put these events on the back burner, as people understandably feared getting sick and unknowingly transmitting the virus to their loved ones. The unfortunate reality is that during the COVID-19 pandemic, there was little to no mentorship to be had for the benefit of young lawyers in the state. Many law firms shut their doors from the early onset to the peak of the pandemic, and while attorneys adjusted to the practice of law from their home offices or master bedrooms, young lawyers were left without meaningful mentorship from colleagues and supervising attorneys. What little mentorship could be had was available in a general sense from secondary sources on the Internet and from articles discussing how the practice of law had changed during the pandemic, written by authors who, like other attorneys, were learning as they went.

The lack of mentorship through the pandemic set young lawyers back in their training, professional development, trial experience and board certifications. A lack of trials and even hearings caused by back-ups in court dockets further stunted professional growth and trial experience. The later stages of the pandemic offered little, if any relief. If a practitioner in a county that happened to end its lockdown orders early was lucky enough to return to the office, most mid to large firms still had Covid restrictions in place that could make it difficult to seek mentorship from experienced attorneys. Workplace capacity restrictions, mask requirements, and closed-door policies disincentivized young attorneys from pursuing mentorship opportunities that would have otherwise been more available pre-pandemic.

Mentorship is rarely a one-size fits all approach. Although young lawyers may assume that they can select a mentor or will be plucked to be a mentee by a seasoned partner looking for a young vessel to absorb war stories and dos and don'ts, the process is very rarely that easy. Finding a mentor with the time, interest and patience can be a daunting prospect for a young lawyer. Lawyers, especially those with ample experience and clients, tend to be busy and are more likely to foster a mentor-mentee relationship if they are personally interested in the young lawyer's development, which may be a tall order in larger firms.

Experienced attorneys should prioritize post-pandemic efforts to mentor their young counterparts any way that they can. This includes using a team-focused approach, such as Zoom conferences with their firm's young lawyers to discuss tips and tricks to improve their practice or targeting individual weaknesses during a virtual "open door" hour. Many seasoned lawyers have had important mentors in their past and should strive to leave the same mark on the future. This is an investment in the future and a method of giving back to a profession that has given to them. In this way the profession can attempt to assuage the often-unnoticed effects COVID-19 has had on young lawyers in Texas.

Young lawyers too are especially advised that finding a mentorship opportunity requires an intentional commitment on their part now that happy hours, luncheons, and in-person CLEs are not as common as they were pre-pandemic. Setting up brief calls with other lawyers inside and outside the firm to discuss a topic of interest may help. Personal experience dictates that most experienced lawyers are more than eager to help when a young lawyer has a question about an area of law the experienced lawyer has mastered over time and are more than happy to go above and beyond answering the question. Sometimes, they will send articles and templates to provide a framework for the young attorney. While some of these calls may just provide helpful tips, others may blossom organically into long-lasting professional relationships.

By: Roger W. Hughes, Adams & Graham, L.L.P., Harlingen

In re Allstate Indemnity Levels the Playing Field on Past Medical Expenses

Texas Civil Practice and Remedies Code section 18.001 was intended to simplify proving uncontested medical expenses, but instead became an obstacle to jury trials on legitimate challenges to inflated medical costs. To prevent admission of the §18.001 expense affidavit, §18.001(f) required the opponent timely serve a counter-affidavit (1) that gave reasonable notice of the basis on which the defendant intends to controvert the billing affidavit, (2) made by an expert who was qualified by knowledge, skill, training, education, or other experience to testify against all or any part of the billing affidavit. Tex. Civ. Prac. & Rem. Code §18.001(f).

However, under a judge-made sanctions rule, failure to serve a proper counter-affidavit barred the opponent from challenging the expenses at trial. To invoke the sanction, plaintiffs urged a narrow view of who qualified as an expert and an expansive view of what the affidavit had to contain. As a result, the difficulty in offering a proper counter-affidavit from a qualified expert effectively deprived defendants of the right to a jury trial on past medical expenses.

The Texas Supreme Court has removed the roadblocks and restored a level playing field on past medical expenses. *In re Allstate Indemnity Co.*, 2021 WL 1822946, 2012 Tex. LEXIS 375 (Tex. 2021).

A. Expense affidavits were intended to provide an inexpensive alternative for proving undisputed past medical expenses.

In a personal injury case, a claim for past medical expenses must be supported by evidence that (1) the plaintiff's injuries were caused by the defendant's negligence, and (2) the medical treatment was necessary to treat the injuries and the charges for that treatment were reasonable. *See generally Texarkana Mem. Hosp., Inc. v. Murdock*, 946 S.W.2d 836, 840 (Tex. 1997). A plaintiff can present evidence concerning the reasonableness and necessity of past medical expenses through (1) expert testimony, or (2) an affidavit from the plaintiff's medical provider made pursuant to §18.001. *Ten Hagen Excavating, Inc. v. CastroLopez*, 503 S.W.3d 463, 490-91 (Tex. App.Dallas 2016, pet. denied); Tex. Civ. Prac. & Rem. Code § 18.001. The medical provider's §18.001 affidavit could save the plaintiffs the expense of having to hire an expert to testify that their medical expenses were reasonable and necessary. *See Turner v. Peril*, 50 S.W.3d 742, 747 (Tex. App.—Dallas 2001, pet. denied) ("Section 18.001 provides a significant savings of time and cost to litigants, particularly in personal injury cases, by providing a means to prove up the reasonableness and necessity of medical expenses."). Absent §18.001, the claimants must obtain live testimony from the service provider or an expert on both reasonableness and necessity.

Texas Civil Practice and Remedies Code §41.0105 limited recovery for past medical expenses to the amounts actually paid or incurred. In *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011) the Texas Supreme Court addressed charges reduced by Social Security/Medicare. It held under §41.0105 that:

a) only evidence of recoverable expenses is admissible;
b) charges that the health care provider could not legally charge or recover were not "actually incurred"; and,
c) only expenses the provider has a legal right to be paid are "actually incurred."

After *Haygood*, Texas Civil Practice and Remedies Code §18.002 was amended to add §§(b-1), a new form affidavit for medical expenses that included the amount paid or incurred. Acts 2013, 83rd Leg., ch. 560, §2. It was believed the §§(b) form affidavit was insufficient to prove medical expenses because it did not address the amount actually paid or to which the provider had a legal right to be paid. SRC Bill Analysis, SB 679, July 11, 2013.

Unless a controverting affidavit is served as provided by section 18.001(f), the expense affidavit was sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable and the services were necessary. Tex. Civ. Prac. & Rem. Code §18.001(b). A counter-affidavit is sufficient if (1) the affiant is qualified by training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit, and (2) it gives reasonable notice of the basis on which the opponent intends to controvert the initial affidavit. Tex. Civ. Prac. & Rem. Code §18.001(f).

Section 18.001 was intended to streamline proving the necessity for the services and the reasonableness of the amount charged for them. *Gunn v. McCoy*, 554 S.W.3d 645, 672-73 (Tex. 2018); *Haygood*, 356 S.W.3d at 397. The person making the affidavit need not have knowledge about the services or the reasonableness of the prices charged. *Gunn*, 554 S.W.3d at 674. Section 18.001(b) allowed for an otherwise inadmissible affidavit to be offered as evidence of the reasonableness and necessity of charges and permitted the use of otherwise inadmissible hearsay to support findings of fact by the trier of fact. *Beauchamp v. Hambrick*, 901 S.W.2d 747, 749 (Tex. App.—Eastland 1995, no writ). The billing expense affidavits are purely procedural and not intended to be conclusive. *Gunn*, 554 S.W.3d at 672; *Haygood*, 356 S.W.3d at 397. They did not dispense with the need that reasonableness be proven in fact by legally sufficient evidence. *Gunn*, 554 S.W.3d at 672-73.

B. Instead, it became a roadblock to challenging past medical expenses.

By 2020, Texas Civil Practice and Remedies Code §18.001 had become a roadblock to challenging excessive medical charges. The roadblock was at the crossroad of challenging expense affidavits for 'list price' and the difficulty to submit a proper counter-affidavit.

Courts have recognized that 'list prices' for medical services are inflated figures that medical providers know they will not collect, and no one will pay. List or full price is not dispositive of whether the charge is reasonable in amount, regardless of whether the patient has insurance. *In re North Cypress Med. Operating Co.*, 559 S.W.3d 128, 133 (Tex. 2018). Few patients today pay a hospital's full charges. *Daughters of Charity Health Servs. of Waco v. Linnstaedter*, 226 S.W.3d 409, 410 (Tex. 2007). Providers set the 'list price' expecting that they will be paid only a portion. *Gunn*, 554 S.W.3d at 673. The list or full price is often charged to uninsured patients and goes uncollected. *North Cypress*, 559 S.W.3d at 132. It has lost any direct connection to what the provider expects to receive. *Id*. It is dubious at best to assume billed charges reflect market rates for similar services.

The roadblock rested on three arguments that that encouraged motions to strike and set a

high burden for a proper counter-affidavit. First, there was a judicially created exclusionary rule. If the opposing party failed to file a controverting affidavit or filed a defective one, then the opposing party could not controvert at trial the amounts charged or the necessity of the billed services to treat the condition. *Beauchamp*, 901 S.W.2d at 749.

Second, it was frequently argued only a medical professional that practiced in the same medical specialty as the billing provider was competent to testify both on the reasonableness of the charges and the need for the services billed. A companion argument was that nonmedical billing-professionals were unqualified to give opinions on reasonableness.

Third, it was also frequently argued that the counter-affidavit must state facts showing the opinions were reliable under Texas Rule of Evidence 702, i.e., the expert's data and methodology were reliable, there were no analytical gaps, etc.

As a result, legally sufficient counter-affidavits were both expensive to obtain and difficult to defend. They were often challenged because (1) the expert was not a medical professional practicing in the same specialty as the provider, and (2) the expert failed to state facts establishing the reliability of their opinions under Rule 702. Court approval was required to amend deficient affidavits. If the affidavit were struck, the opponent could not controvert the affidavit trial, no matter how excessive the charges.

In short, as Justice Huddle observed, *Beauchamp*'s exclusionary rule converted section 18.001 into a death penalty sanction on the issue of past medical expenses. *In re Allstate Indemnity Co.*, 2021 WL 1822946, 2012 Tex. LEXIS 375, *22- 23 (Tex. 2021).

C. *In re Brown*: The Tyler Court strikes down the roadblocks and allows mandamus review.

The Tyler Court of Appeals concluded a counter-affidavit passes muster if it established the expert's qualifications for medical billing and identified the reasons for disputing the amounts charged. *See In re Brown*, No. 12-18-0295-CV, 2019 WL 1032458, *2 (Tex. App.—Tyler Mar. 5, 2019, orig. proc.) (mem. op.), *dism'd as moot*, 2019 WL 1760103, (Tex. App.—Tyler Apr. 19, 2019, orig. proc.) (mem. op.). In *Brown*, the trial court struck Nurse Schieber's counter-affidavit in response to objections that she was unqualified and she failed to provide her opinions were reliable.

The Tyler Court held Nurse Schieber was competent because she established her experience and training in auditing medical expenses. *Brown*, 2019 WL 1032458 at *4. A counter-affidavit was sufficient if (1) the affiant was qualified to testify about all or part of the matters in the billing affidavit, and (2) it gave reasonable notice of why the opponent intended to controvert the initial affidavit. *Id.* at *2-3. Mandamus was available because Brown lacked an adequate remedy by appeal; striking the counter-affidavit created reversible error per se and an appeal was a waste of judicial resources. *Id*. at *5.

D. In the wake of *In re Brown*, the other courts of appeal agree the door is shut on mandamus review.

Thereafter, motions to strike argued *Brown* was an outlier and wrong on its merits. The Houston Court of Appeals ducked the merits and denied mandamus for procedural reasons – the opponent had an adequate remedy by appeal. *In re Flores*, 597 S.W.3d 533, 536-37 (Tex. App.—Houston [1st Dist.] 2020, orig.

proc.). Justice Kelly concluded the opponent could nonetheless ask the jury to award less and could cross-examine the plaintiff on his injuries. *Id*. Therefore, mandamus was unavailable. The other courts of appeal were quick to agree mandamus was unavailable to cure the error. *In re Parks*, 603 S.W.3d 454 (Tex. App.—Dallas 2020, orig. proc.) (Schenck, J., dissenting); *In re Liberty County Mutt. Ins. Co.,* 612 S.W.3d 137, 141 (Tex. App.—Houston [14th Dist.] 2020, orig. proc.); *In re Savoy*, 607 S.W.3d 120, 129 (Tex. App.—Austin 2020, orig. proc.).

In *Parks*, Justice Schenck wrote an important dissent. The 'adequate remedy by appeal' was begging the jury to disregard incompetent, uncontroverted evidence, which Justice Schenck correctly observed is asking for jury nullification. *Parks*, 603 S.W.3d at 461-62. The effect of the striking the counter-affidavit was a *de facto* directed verdict, yet the standard of review was abuse of discretion. Justice Schenck argued this afforded the trial judge discretion to strike all opposing evidence, discretion that was shielded on appeal from the legal sufficiency standard of review. *Id*. at 459-60, 462-63. Further, Justice Schenck's dissent questioned whether section 18.001 precludes offering evidence to controvert the billing affidavit. *Id*. at 458-59. Justice Schenck made the compelling argument that the judge-made exclusionary rule raised Due Process and Open Courts issues. *Id*. at 463-65, 467.

E. *In re Allstate Indemnity Co.* resolves the split in authorities and removes the roadblocks.

Norma Alaniz sued her insurer for UIM benefits. She served billing affidavits totaling $41,000.00; three providers alone charged $37,000.00. Allstate tendered counter-affidavits from Nurse Dickison. She had a professional background: an associate's degree in Nursing and a bachelor's degree in the Science of Nursing, a registered nurse, and a Certified Professional Coder. Dickison was also certified as a Professional Medical Auditor by the AAPC (formerly the American Association of Professional Coders). She identified the charges she considered excessive in comparison to an online database.

Alaniz objected that: (1) Dickison was unqualified because medical coders were not competent on medical expenses, (2) her data was unreliable, (3) her opinions were conclusory and unsupported by reliable evidence. The trial judge agreed and ordered:

1) The counter-affidavits were stricken and Allstate could not use her affidavit to contest the medical expenses;
2) Dickison was stricken as an expert and neither she nor her affidavit could be used at trial; and,
3) Allstate was prohibited from examining witnesses, offering evidence, or to arguing in any way the expenses were unreasonable.

The Corpus Christi Court denied mandamus relief, principally because Allstate failed to adequately brief whether the order hamstrung its ability to contest past medical expenses. *In re Allstate Indemn. Co.*, 2019 WL 5866592, 2019 Tex. App. LEXIS 9795, *4-5 (Tex. App.—Corpus Christi Nov. 8, 2019, orig. proc.)(mem. op.).

The Supreme Court disagreed and granted mandamus relief. *In re Allstate Indemnity Co.*, 2021 WL 1822946, 2012 Tex. LEXIS 375 (Tex. 2021). First, Nurse Dickison was competent to give a counter-affidavit. Section 18.001(f)'s standard tracked Texas Rule of Evidence 702's qualification to give expert opinions. *Id*. at *11. Her affidavit recited years of experience in medical billing, coding, and interpreting national databases. Owing to the complexity of

today's health system, the reality of the system no longer required limiting opinion testimony on reasonableness to medical providers. *Id*. at *12 n.5. Non-doctors may be qualified by training and experience on specific medical issues. *Id*. at *15.

Second, §18.001 required the affidavit give reasonable notice of the basis the party serving it intends to controvert the charges at trial. Id. at *16. "Reasonable notice" was akin to the notice pleading standard in Texas Rule of Civil Procedure 47. *Id*. The affidavit unquestionably fulfilled that standard by identifying each disputed charge and describing the reasons for the dispute. *Id*. at *16-17.

Nothing in §18.001 required a counter-affidavit establish the opinion would be admissible at trial. *Id*. at *17. Whether the expert is qualified is distinct from whether the opinions expressed are reliable under Rule 702. *Id*. at *18. It was error to import reliability standards into the requirements for a counter-affidavit. *Id*. at *18-19.

Third, it was error to prohibit Allstate from offering Dickison's opinions at trial or other to offer evidence controverting the affidavit. Nothing in §18.001 supported the exclusionary rule. *Id*. at *19-20. In the absence of a proper counter-affidavit, Alaniz could offer the billing affidavits into evidence, but the affidavits were not conclusive and there was no impact on Allstate's ability at trial to controvert them. *Id*. at *20-21.

Fourth, the Court stopped short of holding that mandamus review was available whenever a court erroneously struck a counter-affidavit. *Id*. at *27 n.9. Here, the trial court expressly forbid Allstate from arguing against the bill, offering any expert testimony, cross-examining about expenses, etc. *Id*. at *26. This effectively forbid adversarial adjudication on past medical expenses, thereby crippling Allstate's defenses. *Id*. The possibility of alternative and less compelling avenues of attack did not avoid the crippling ability to challenge the critical issue of $41,000.00 for past medicals. *Id.*

The Supreme Court did not agree with *In re Brown* or *In re Flores* on the availability of mandamus review for striking counter-affidavits. It stopped short of holding that erroneously striking a counter-affidavit did or did not cripple the defense on past medicals. However, the necessity for mandamus review is far less urgent. Without an exclusionary sanction, the opponent remains free to controvert past medical expenses at trial. The opponent can concentrate on defending the expert's opinions for summary judgment motions or at trial.

Conclusion

Allstate Indemnity restores §18.001's role to streamline the process while maintaining a level field. If the charges are not contested, the claimant gets an inexpensive means to prove them. If reasons exist to dispute the charges, defendants have a simple means to obtain a right to present that reason at trial and have a jury decide.

2021 TADC Spring Meeting

April 28 – May 2, 2021 – InterContinental Hotel – Chicago, IL

The TADC held its 2021 Spring Meeting in Chicago at the historic InterContinental Hotel, April 28-May 2, 2021

Mitzi Mayfield, with Riney & Mayfield LLP in Amarillo and **Arlene Matthews** with Crenshaw, Dupree & Milam, L.L.P. in Lubbock did a masterful job as the Meeting Program Chairs. The program included many great subjects for the practicing trial lawyer including "The Choice of Law and Why it Matters" and "What are your Go To Moves for Client Deposition Prep". A highlight included a luncheon presentation, "Operation Greylord: A Legal System Corrupted" by **Brad Nahrstadt,** Donohue Brown Mathewson & Smyth LLC, Chicago, IL

Hayes Fuller, Mark Stradley with President Slater and Shanna Elza

Doug Rees and Darin Brooks

Bear Ferguson, Karen Gann, Michael Golemi and Brad Adatto

Sofia Ramon, Trey Sandoval and Roger Hughes

Amy and Edward Stewart with Christy Amuny

2021 TADC Spring Meeting

Rusty Beard and Lars Daniel

Sarah Nicolas, Dan Worthington with Rich and Emily Phillips

Arlene Matthews, Britt Pharris with Mitzi & Todd Mayfield

Scott Stolley

Getting Educated!

Arlene Mathews, Sofia Ramon, Amy Stewart, Liz Cantu, Liz Larson, Jennie Knapp, Michele Smith and Christy Amuny

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The Dewey Way

By: Michele Y. Smith, MehaffyWeber, PC, Beaumont &
James R. Old, Jr., Hicks Thomas LLP, Austin

This article is a tribute to a recently passed TADC President by two former TADC Presidents. Author Michele Y. Smith is a shareholder at MehaffyWeber law firm in Beaumont and has represented clients in litigation matters for over 25 years. She is a past president of the TADC, a past president of the Jefferson County Bar Association, and a past president of the Jefferson County Young Lawyers' Association. Smith attended high school with Dewey, Jr. and church with the Gonsoulin family.

Jay Old is a partner at the Hicks Thomas law firm and lived next door to the Gonsoulin household for most of his childhood. He has practiced law in and along the Gulf Coast and across Texas since 1988. He is a former president of TADC, former Chair of the Construction Law Section of the State Bar of Texas and a member of DRI and the FDCC (Federation of Defense & Corporate Counsel.)

Michele Smith's Reflections

It is hard to describe a person who impacts a firm the way Dewey impacted MehaffyWeber in Beaumont, Texas. Anyone can read the words written in his legacy, a few of which I will share here, but he was so much more in real life.

Dewey was born in 1929 in Houston but spent many summers with his grandparents in Jeanerette, Louisiana. His Cajun heritage was important to him and he shared it. He was the valedictorian of St. Thomas High School in Houston, attended Rice University where he was a member of Phi Beta Kappa, and graduated from the University of Texas Law School where he served on the Texas Law Review.

You had to know Dewey only five seconds to realize how important his biological and firm families were to him. He and his wife Jean were married 56 years before her death. They were the proud parents of three children – Jean, Anne and Dewey, Jr. I had the pleasure of attending high school with Dewey, Jr. Jean and Dewey were pillars of MehaffyWeber, attending every firm function, hosting many of them, and serving as the welcome wagon for so many newly minted MehaffyWeber families including my husband, Mitch, and me. Although I had attended high school with Dewey, Jr., Dewey, Sr. never treated me like I was just a kid.

He was enormously supportive of my career and took particular interest because I was a female, having raised two daughters who had careers of their own. I vividly recall discussions with him as I advanced in TADC and the personal pride he took when I became President. He also took inactive status in the IADC so I could become a member of that organization.

He was legendary for his brilliant writing (and messy office in which he could locate anything) and returning associate assignments full of red ink. With enormous trepidation I handed in my first writing assignment fearing the expected blistering critique; I do, after all, hold an undergraduate degree in Accounting, not English. The return product was not only much better than I expected, he spent time explaining his analysis to me and we discussed the strategy of arguing the brief from his and my (the female) perspective.

I was not alone in receiving support and kindness from Dewey. His kind heart was one of his most beloved qualities. He knew (at all times) the name of every MehaffyWeber employee at the firm. And if he did not, he learned, by introducing

himself to every lawyer, secretary, assistant, runner, file clerk, scanner, etc. He knew them, and he cared about them. He delighted in making others feel good about themselves and in making them laugh. My father and Dewey attended morning Mass at the same time for years. If Dad was not there for more than a couple of mornings, Dewey checked on him through me. At our firm Christmas party, he dressed up as Santa Claus, entered the room skipping and proceeded to read "Cajun Claus." It was the highlight each year. He also looked forward to being the head chef of the crawfish boil at our annual summer clerk beach party.

Dewey practiced with MehaffyWeber nearly 60 years. One of his most memorable trials was in Judge Joe J. Fisher's federal court in Beaumont in April 1980. This was a three-party commercial litigation case that lasted three weeks in trial with numerous exhibits and over 25 witnesses. The jury returned a verdict in less than an hour and awarded $7 million in damages against his client, the principal defendant. Five years later and after two oral arguments before the Fifth Circuit Court of Appeals, the case was reversed and rendered in favor of his client. He had been promised a free trip to Europe by his German client if he won, but by the time the case was reversed in our favor, the president of the company had retired so he never got to collect. He loved to share the details of that experience and smiled about the ending.

He argued over 80 cases on appeal, including five cases before the Texas Supreme Court and several precedent-setting cases. He served as President of both the Jefferson County Bar Association and the Texas Association of Defense Counsel, a role he loved. Dewey also received many honors and accolades throughout his distinguished career. The two of which he was most proud were being inducted into the American College of Trial Lawyers in 1985 and receiving the 1999 Blackstone Award from the Jefferson County Bar Association.

Yet, with all of his success, he never lost his humility. The name of the firm for many years was Mehaffy, Weber, Keith & Gonsoulin. At his own recommendation, however, the firm rebranded itself in keeping with a growing trend of two-name firms to MehaffyWeber. This is just one example of how Dewey was a kind and selfless man. He put the well-being of the firm before his personal pride and ego. Dewey treated others the same, and he was held in the utmost respect in return. It was a characteristic Dewey did not try to achieve; it was a characteristic that was natural.

We lost Dewey on November 3, 2020. We still miss him.

Jay Old's Reflections

I never used the front door to Dewey Gonsoulin's house, always the back door and always welcome. I can't remember it being locked when the family was at home. I walked in whenever I wanted, especially when I knew there were fresh cookies to eat.

Just off that back door was Dewey's "study" which was little more than a nook in the hallway, with a squeaky chair and cluttered desk – much like Dewey's office desk at the MehaffyWeber law firm in Beaumont. I know he used that desk a lot, and I have vague memories of seeing him in that office. However, that's not the Dewey Gonsoulin I first knew, that's a later person I grew close to and was mentored by as I began my law career.

Living next door to the Gonsoulin household most of my childhood gave me a special view of Dewey Gonsoulin. We used to pick dewberries together. He would bring sugar cane home from Jeanerette, Louisiana, and always had plenty for my sisters and me. We did not have any fences separating us as neighbors or our lives.

My favorite activity was going with Dewey to his hunting lease in Labelle, Texas. I remember going before duck season to clean out and fix his duck blinds. He had an old grey-blue Jeep Wagoneer that ran sporadically and caused lots of fuss. He also had a Labrador Retriever (Black Bart) that was just as much fuss, if not more. Bart

may have been well trained, but he did not show it much – at least not in his early years. Bart could test boundaries with the best of them. Bart loved to escape the kennel Dewey had built in the back yard. The neighbors all knew when that happened, as Dewey would wander up and down the street shouting "Bart, oh Bart! Come back, Bart!" The pleading seldom had any effect. Bart left, and returned, on his own terms. Dewey was as loyal to Bart as only Dewey could be. Dewey loved that dog with all of Bart's faults, just like he loved his family, his partners and as I would like to think, even me.

My first duck was killed on a hunt with Dewey. It was just the two of us on a blue bird day, with no clouds and there were no birds, except this one. That duck was flying at least 50 yards high and had no plans to slow down for our decoys. There was no reason to shoot at it, but Dewey knew I was bored. So, he let me take a shot using his old double-barreled .410 shotgun. One pellet must have hit that duck just right in the head and sure enough, he locked his wings and started to sail, dead in flight. That duck sailed with wings locked in a gradual descent for at least a few hundred yards, until he finally crash-landed on the other side of a marsh. Dewey tried to talk me out of going to look for that duck. The bottom of that marsh was thick, gumbo mud; the water was almost waist deep; and the salt grass offered a near impenetrable barrier. The duck was going to be near impossible to find, yet I had to have that duck. I was maybe 9 years old and determined to find my first duck. Dewey marched out across the marsh, leaving me in the duck blind alone. About a half hour later, he brought me my first duck. That's just how Dewey rolled!

Dewey reached out to my dad and helped him select a shotgun as a gift for me one Christmas so I could nurture my love of hunting. It was the last gift my dad ever gave me, as he died that next summer in a plane crash. I always credit Dewey with that special moment shared with my own father. Memories of that moment bring tears to my eyes even now as I type this note, almost five decades later.

Then, there was the time that Dewey was to give his daughter Anne away in marriage. Anne and I were born 30 minutes apart (I'm older) and have a life-long abiding friendship. So, there I was at her rehearsal dinner, held in their home. Dewey proudly gave Anne his wedding gift: a 9 mm Glock pistol. You see, Anne was a brand-new FBI agent, and that's what she wanted. Dewey was all too pleased to oblige. I can't remember what he said, but I can still see him beaming with pride in that moment.

When I went to law school, Dewey was clearly pleased with my decision. Later, he followed my career at a gentle distance, never expressing judgment or disappointment in my decisions, like choosing to begin my career in Houston or joining a rival firm when I moved back to Beaumont years later. He always welcomed me and offered honest, frank and positive guidance no matter what. I will never forget being in trial in Beaumont once and there he was in the gallery, just watching me and smiling. His pride was palpable. His approval meant the world to me.

Once, I had to discuss some difficult legal issues with him. All the sudden we were not "father and son" types, but were literally adversaries, discussing some serious personal matters that were not easy for me or him. Yet, when it was over, we were sitting on his den couch next to one another, shaking hands, and sharing warmth just like we always had. We never mentioned that moment again.

Later, some 20 years into my law practice, and near the end of his career, I became president of the Texas Association of Defense Counsel. Dewey, a prior president of the TADC himself, made the trip to Santa Fe, New Mexico, to celebrate with me when I presided over our annual meeting. Dewey and his wife Jean were not traveling much then, and he had not attended a TADC meeting in years. However, he was there for me, smiling and offering his joyful, generous support, as he always did for everyone he encountered, whether law partners, opposing counsel, summer interns, or just friends. Dewey Gonsoulin will always be a father to me, not just a mentor. I can honestly say I am still learning from him to this day.

By: Megan H. Schmid, Thompson & Knight LLP, Houston

TUFTA:

Will We See a Rise in Texas Uniform Fraudulent Transfers Act Claims in this Seventh-Inning Stretch of the Global Pandemic? Who Knows! But Here Are the Basics

As the United States slowly climbs its way out of the global pandemic that took the country and its economy by storm in 2020, many individuals and businesses are still feeling the financial effects of the economic shutdown in 2021. People and businesses may be maintaining higher levels of debt than they can sustain long-term and looking to re-organize their assets and liabilities in search of a way out. This re-organization could be well-intended and well-meaning, like when a business chooses to shut down its operations and start fresh with a new business and a new look. Or this could come from a nefarious place, like when a person trying to escape debt collectors transfers their boat, jewelry or other property to a cousin for "safe keeping" until the heat dies down.

Regardless of a debtor's intentions, plaintiffs and creditors alike are likely to track down every asset they can reach because they, too, are feeling the harsh economic effects of the past year. As a result, it will be interesting to observe whether there is an increase of claims filed under the Texas Uniform Fraudulent Transfers Act ("TUFTA") in this phase of the global pandemic— where courts are reopening and plaintiffs seem primed and ready to sue to collect their money. Unfortunately, this author does not have a crystal ball to make a reliable prediction. But this article will cover the core foundation of TUFTA claims and defenses so that you can be ready to defend your clients when the time comes.

I. WHAT IS TUFTA?

TUFTA is the statutory framework in Texas providing creditors with a statutory tort cause of action against debtors alleged to have fraudulently transferred assets to avoid payment of its debts. *See* TEX. BUS. & COM. CODE § 24.001, *et seq.*[1] The focus of TUFTA is to ensure the satisfaction of a creditor's claim when the elements of a fraudulent transfer are proven.[2] TUFTA specifically sets forth: (1) what types of transfers and obligations are fraudulent, (2) the remedies available to a creditor, (3) the measure of liability of a transferee, and (4) the defenses and protections afforded a transferee.[3] Many lawyers associate TUFTA

[1] *In re Tex. Am. Exp., Inc.*, 190 S.W.3d 720, 725 (Tex. App. Dallas 2005, no pet.). *See also Arriaga v. Cartmill,* 407 S.W.3d 927, 931 (Tex. App. Houston [14th Dist.] 2013, no pet.) ("UFTA is intended to prevent a debtor from defrauding his creditors by moving assets out of reach"); *Yokogawa Corp. of Am. v. Skye Int'l Holdings, Inc.,* 159 S.W.3d 266, 269 (Tex. App. Dallas 2005, no pet.) (same).

[2] *Challenger Gaming Solutions, Inc. v. Earp,* 402 S.W.3d 290, 298 (Tex. App.–Dallas 2013, no pet.).

[3] *Sargeant v. Al Saleh*, 512 S.W.3d 399, 411 (Tex. App.—Corpus Christi 2016, no pet.).

claims with bankruptcies, but a TUFTA claim can be asserted as a cause of action in either state or federal court.

II. WHO IS A PROPER PLAINTIFF UNDER TUFTA?

A plaintiff who can bring a TUFTA claim is more broadly defined than one might think. Under TUFTA, a "creditor" is a "person" who has a "claim." TEX. BUS. & COM. CODE § 24.002(4). A "person" includes the entire gamut of individuals, partnerships, corporations, associations, organizations, governmental entities, trusts, estates, and "any other legal or commercial entity." TEX. BUS. & COM. CODE § 24.002(9). The definition of a "debtor" under TUFTA is equally as broad, meaning "a person who is liable on a claim." TEX. BUS. & COM. CODE § 24.002(6). The more interesting question is: "What constitutes a claim"?

An actionable "claim" under TUFTA "means a right to payment or property, **whether or not** the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." TEX. BUS. & COM. CODE § 24.002(3) (emphasis added). Under this broad definition, our typical understanding of a "creditor" with a debt to collect can certainly assert a claim under TUFTA. But so can a plaintiff in a tort case who has not yet obtained a judgment against the tort-defendant.[4]

TUFTA does distinguish, however, between current and future creditors. A future creditor is one whose claim arose "within a reasonable time after the transfer was made or the obligation was incurred." TEX. BUS. & COM. CODE § 24.005(a). Under TUFTA, a future creditor can only bring a fraudulent transfer claim based on either: (1) actual fraud; or (2) constructive fraud that does not involve insolvency. *See* TEX. BUS. & COM. CODE § 24.005(a)(1)–(2). A present creditor, whose claim arose "before" the alleged fraudulent transfer, can bring any type of fraudulent transfer cause of action that exists under the statutory framework, including actual fraud and constructive fraud involving insolvency. *See* TEX. BUS. & COM. CODE § 24.005 ("Transfers Fraudulent as to Present and Future Creditors") and § 24.006 ("Transfers Fraudulent as to Present Creditors").

III. WHAT IS A "TRANSFER" SUBJECT TO TUFTA?

One of the key questions in a TUFTA case is whether there was a "transfer" of any assets to begin with. If there was no transfer, then there can be no viable fraudulent transfer claim. But the definition of a "transfer" under TUFTA is very broad and encompasses "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." *See* TEX. BUS. & COM. CODE § 24.002(12).

If there was in fact a transfer of *something* from a debtor to a transferee, another key question that should be answered early in a TUFTA matter is whether it was the transfer of an "asset" subject to the TUFTA statutory framework. "Asset" under TUFTA means "**property** of a debtor," with only three exceptions.[5] Property is broadly defined as "**anything** that may be the **subject of ownership**." TEX. BUS.

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[4] *See Redmon v. Griffith*, 202 S.W.3d 225, 241 (Tex. App.—Tyler 2006, pet. denied), *disapproved of on other grounds by Ritchie v. Rupe*, 443 S.W.3d 856 (Tex. 2014) (citing *Blackthorne v. Bellush,* 61 S.W.3d 439, 443–44 (Tex.App.—San Antonio 2001, no pet.)). *See also Nwokedi v. Unlimited Restoration Specialists, Inc.*, 428 S.W.3d 191, 205 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) ("a tort claimant is entitled to file causes of action under the UFTA based on pending, unliquidated tort claims.").

[5] The term "asset" does not include: "(A) property to the extent it is encumbered by a valid lien; (B) property to the extent it is generally exempt under nonbankruptcy law; or (C) an interest in property held in tenancy by the entireties to the extent it is not

& COM. CODE § 24.002(10) (emphasis added). This includes tangible and intangible property, including money, intellectual property, accounts receivable, goodwill, customer lists, customer contracts requiring payments in a termination period, etc.[6]

IV. WHO IS A PROPER TUFTA DEFENDANT?

Generally, the recipient of the property (referred to as the "transferee")—and the property itself—will be the targets of a TUFTA claim.[7] More specifically, the statute provides that the creditor may recover a judgment against the following parties: (1) the first transferee of the assets; (2) any subsequent transferee of the assets who did not take the assets in good faith; or (3) the person for whose benefit the transfer was made, such as the debtor. TEX. BUS. & COM. CODE § 24.009(b).

To recover against a transferee, the creditor does not need to show that the transferee actually benefited from the transfer. Because the fraudulent transfer doctrine does not depend on assigning fault, recovering successfully against the transferee merely requires a showing that the ***transferee received the property***. *See, e.g.*, *Trigeant Holdings, Ltd. v. Jones*, 183 S.W.3d 717, 726 (Tex. App. Houston [1st Dist.] 2005, pet. denied) (holding that a defendant that purchased a refinery was a "transferee" under TUFTA regardless of whether the purchase benefited the defendant).

Furthermore, there is no statutory requirement that the creditor join the debtor in order to recover against the transferee. That said, mandatory joinder rules may dictate such a result depending on the facts of the case.

V. ACTIONABLE CLAIMS UNDER TUFTA

Claims under TUFTA often get classified into one of two categories: (1) actual fraud claims; or (2) constructive fraud claims. These can be summarized as follows:

Actual Fraud	Constructive Fraud
TEX. BUS. & COM. CODE § 24.005(a)(1)	TEX. BUS. & COM. CODE §§ 24.005(a)(2), 24.006(a)-(b)
• Transfer made "with actual intent to hinder, delay, or defraud any creditor of the debtor"	• Transfer made while insolvent, without receiving reasonably equivalent value • Transfer made while insolvent to an insider

subject to process by a creditor holding a claim against only one tenant, under the law of another jurisdiction." TEX. BUS. & COM. CODE § 24.002(2).

[6] *See Airflow Houston, Inc. v. Theriot*, 849 S.W.2d 928, 932 (Tex. App.—Houston [1st Dist.] 1993, no writ); *see also Hometown 2006-1 1925 Valley View, L.L.C. v. Prime Income Asset Mgmt., L.L.C.*, 847 F.3d 302, 309 (5th Cir. 2017).

[7] *In re Mortgage America Corp.*, 714 F.2d 1266, 1272 (5th Cir. 1983) ("The remedy afforded a successful claimant relates entirely to the debtor's fraudulently transferred property and entails no personal liability on the part of those responsible for the transfer.").

A. *Actual Fraud:*

TUFTA makes it actionable for a debtor to make a transfer with "**actual intent**" to "hinder, delay, or defraud" a creditor, often referred to as an "actual fraud" TUFTA claim. TEX. BUS. & COM. CODE § 24.005(a)(1). Very rarely will a plaintiff be able to uncover direct proof of a debtor's actual intent. For that reason, TUFTA sets forth a list of nonexclusive, circumstantial factors called "badges of fraud" that it considers indicative of actual intent. The badges of fraud include the following:

1. the transferee or subsequent transferee was an insider;
2. the debtor retained control of the property afterwards;
3. the transfer or obligation was concealed by the debtor;
4. the debtor had been sued or threatened with suit beforehand;
5. the transfer was of substantially all the debtor's assets;
6. the debtor removed or concealed assets;
7. the debtor absconded;
8. the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
9. the debtor was insolvent or became insolvent shortly afterwards; and
10. the transfer occurred shortly before or after a substantial debt was incurred.[8]

TEX. BUS. & COM. CODE § 24.005(b).

There is "no magic number of factors that must exist," for there to be actual fraud.[9] The presence of *several* badges may support an inference of fraud, but courts have held that there is no requirement that even a majority of badges must exist.[10] It is fairly certain, however, that evidence of a single badge of fraud does not conclusively demonstrate actual intent under TUFTA.[11] Because the determination of actual intent is very fact intensive and often left to the fact-finder at trial, it is not typically a successful subject matter for a motion for summary judgment from the defense perspective.

There is only one defense to an actual fraud claim under TUFTA – the transferee's good faith. More specifically, a transfer is not voidable "against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee." TEX. BUS. & COM. CODE § 24.009(a). Good faith is an objective inquiry that assesses whether an ordinary person would have been made alert of the fraudulent

[8] TEX. BUS. & COM. CODE § 24.005; *see also In re Ritz*, 567 B.R. 715 (Bankr. S.D. Tex. 2017) (recognizing two additional badges of fraud not delineated in the statute: (1) debtor's lack of credibility; and (2) debtor's falsifications in bankruptcy schedules).
[9] *Wohlstein v. Aliezer*, 321 S.W.3d 765, 777 (Tex. App. Houston [14th Dist.] 2010, no pet.).
[10] *See, e.g., Tel. Equip. Network, Inc. v. TA/Westchase Place, Ltd.*, 80 S.W.3d 601, 607 (Tex. App. Houston [1st Dist.] 2002, no pet.); *Mladenka v. Mladenka*, 130 S.W.3d 397, 407 (Tex. App.--Houston [14th Dist.] 2004, no pet.); *Tex. Custom Pools, Inc. v. Clayton,* 293 S.W.3d 299, 314 (Tex. App.-El Paso 2009, orig. proceeding) (holding trial court abused discretion in rendering judgment on actual fraud based on presence of only three factors).
[11] *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560, 566 (Tex. 2016).

nature of the alleged transfer.[12] Accordingly, this defense only applies if the transferee: (1) was honest in fact (i.e., she did not know the transfer was fraudulent); (2) the transfer was reasonable in light of known facts (i.e., the transfer was not too good to be true); and (3) she was not willfully ignorant of the fraud (i.e., she did not stick her head in the sand to avoid discovering the fraud). Notably, good faith is an affirmative defense.[13]

B. *Constructive Fraud:*

There are four types of constructive fraud actionable under TUFTA that can be further broken down into which type of creditor can bring the claim:

Applicable Only to Present Creditors:
1. The debtor makes a transfer without receiving reasonably equivalent value in return[14] AND the debtor is insolvent or becomes insolvent as a result of the transfer.[15] TEX. BUS. & COM. CODE § 24.006(a).
2. The debtor makes a transfer to an insider for an antecedent debt, the debtor is insolvent, and the insider has reasonable cause to believe that the debtor was insolvent.[16] TEX. BUS. & COM. CODE § 24.006(b).
Applicable to Both Present and Future Creditors:
3. The debtor makes a transfer without receiving reasonably equivalent value in return AND the debtor intended to incur, or believed or reasonably should have believed that he would incur debts beyond his ability to pay as they became due. TEX. BUS. & COM. CODE § 24.005(a)(2)(B).
4. The debtor makes a transfer without receiving reasonably equivalent value in return AND the debtor was about to engage in a business or a transaction for which the debtor's remaining assets were unreasonably small in relation. TEX. BUS. & COM. CODE § 24.005(a)(2)(A).

Where constructive fraud is found to exist, it will operate to render the transfer **automatically** actionable without a finding that the debtor possessed actual intent to hinder, delay, or defraud creditors.[17]

Unfortunately, there are not many defenses available to a constructive fraud claim under TUFTA. An "insider" can assert the defenses that a transfer is not voidable: (1) to the extent the insider gave new

[12] *Hahn v. Love*, 321 S.W.3d 517, 527 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).
[13] *See Flores v. Robinson Roofing & Constr. Co., Inc*., 161 S.W.3d 750, 756 (Tex. App.—Fort Worth 2005, pet. denied). Accordingly, the debtor and transferee bear the burden to prove their good faith in receiving the transfer, and that it was for reasonably equivalent value. *Id.*
[14] The "reasonably equivalent value" standard is both a requirement for proving constructive fraud AND is one of the badges of fraud considered in the context of proving actual fraud. TUFTA defines "reasonably equivalent value" as including, without limitation, "a transfer or obligation that is within the range of values for which the transferor would have sold the assets in an arm's length transaction." TEX. BUS. & COM. CODE § 24.004(d).
[15] TUFTA defines "insolvency" in TEX. BUS. & COM. CODE § 24.003.
[16] *See, e.g., In re Slamdunk Enterprises, Inc.*, 17-60566, 2021 WL 389081, at *1 (Bankr. E.D. Tex. Jan. 29, 2021).
[17] Karen C. Burgess, et al., State Bar of Texas, IV. WHAT CONSTITUTES ACTUAL AND CONSTRUCTIVE "FRAUD"?, 2018 TXCLE-BD 11-IV, 2018 WL 6712896.

value to the debtor (unless the insider also secured that value with a valid lien); (2) if the transfer was made in the ordinary course of business between the debtor and the insider; or (3) if the transfer was made pursuant to a good faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor. TEX. BUS. & COM. CODE § 24.009(f).

For a non-insider transferee, good faith is not a complete defense. But a good faith purchaser is entitled to a credit to the extent of any value the transferee gave for the transfer (including a lien or a reduction in the amount of liability on the judgment). *See* TEX. BUS. & COM. CODE § 24.009(d).

VI. AVAILABLE REMEDIES UNDER TUFTA:

TUFTA provides a wide-range of remedies to a creditor, which are cumulative and are grounded in "principles of law and equity."[18] Those remedies include as follows: (1) **avoidance** of the transfer or obligation to the extent necessary to satisfy the creditor's claim; (2) **money damages** measured by the *lesser* of the "value of the asset transferred" or the amount of the creditor's claim, if the transfer is voidable,[19] (3) **attachment** or other provisional remedy against the asset transferred; (4) **injunction** against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property; (5) **receivership** to take charge of the asset transferred or of other property of the transferee; (6) **execution** of the asset transferred or its proceeds if creditor has obtained a judgment on the claim against the debtor; and (7) "***Any other relief*** *the circumstances may require*." TEX. BUS. & COM. CODE §§ 24.008, 24.009 (emphasis added).

Additionally, the court may award costs and reasonable attorney's fees. TEX. BUS. & COM. CODE § 24.013.

VII. CONCLUSION

TUFTA is a fascinating and complicated statutory scheme that feels surprisingly under-used in Texas state courts given its breadth and depth available to creditors. This article covers the basics of TUFTA and provides the lay of the land for an initial analysis of a TUFTA case should one land on your desk. Only time will tell if the global pandemic may increase the number of TUFTA claims asserted as creditors begin to double their collection efforts as the country's re-opening continues.

[18] TEX. BUS. & COM. CODE § 24.011 ("Unless displaced by the provisions of this chapter, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.").
[19] TEX. BUS. & COM. CODE § 24.009(b); *see also Enshikar v. Zaid*, 14-18-00933-CV, 2020 WL 6203348 (Tex. App.—Houston [14th Dist.] Oct. 22, 2020, no pet.).

TEXAS ASSOCIATION OF DEFENSE COUNSEL

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June 20, 2021

TO: Members of TADC

FROM: Slater C. Elza, TADC President
Bud Grossman, Nominating Committee Chair

RE: Nominations of Officers & Directors for 2021-2022

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 – July 30, 2021

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

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budg@cthglawfirm.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

2021 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:

Slater C. Elza
Underwood Law Firm, P.C.
P.O. Box 9158
Amarillo, TX 79105
PH: 806/376-5613
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UIM Law After *Allstate v. Irwin*

By: Josh Mullin,
Orgain, Bell & Tucker, L.L.P., Beaumont

In filing suit against a UIM insurer, "when the claimant sits down and drafts his original petition, and lays out jurisdiction and venue and everything else and then, Roman numeral one, first cause of action, what should the claimant plead?" Justice Boyd recently asked that question to counsel for Allstate during oral arguments in Allstate Ins. Co. v. Irwin, No. 19-0885, 2021 Tex. LEXIS 415, at *6 (May 21, 2021). So, what is all the confusion about?

1. Brainard

The standard uninsured/underinsured ("UIM") insurance policy provides coverage to an insured for damages which the insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury or property damage caused by an automobile accident. See Tex. Ins. Code § 1952.106; Mid-Century Ins. Co. v. Kidd, 997 S.W.2d 265, 271 (Tex. 1999). Construing this language, the Texas Supreme Court noted that "[t]he UIM contract is unique because, according to its terms, benefits are conditioned upon the insured's legal entitlement to receive damages from a third party. Unlike many first-party insurance contracts, in which the policy alone dictates coverage, UIM insurance utilizes tort law to determine coverage. Consequently, the insurer's contractual obligation to pay benefits does not arise until liability and damages are determined." Brainard v. Trinity Universal Ins. Co., 216 S.W.3d 809, 818 (Tex. 2006). In the years since Brainard, attorneys and courts alike have grappled with, and split on, the proper UIM cause of action and the availability of attorneys' fees, leading up to Justice Boyd's foregoing question.

In Brainard, the Court was not addressing the proper cause of action for a UIM claim. Rather, the question before the Court was whether a plaintiff awarded UIM benefits on a breach of contract claim was properly awarded attorneys' fees under Chapter 38 of the Texas Civil Practice & Remedies Code. Id., at 811. However, in upholding the court of appeals' reversal of the award of attorneys' fees, the Court implicitly held that a breach of contract claim on a UIM policy is not ripe until after the insured obtains a judgment establishing the liability of the tortfeasor and the plaintiff's resulting damages. Id., at 818 (a UIM carrier "is under no contractual duty to pay benefits until the insured obtains a judgment establishing the liability and underinsured status of the other motorist"). This is because there must first be a determination of the amount of damages the insured is "legally entitled" to recover as a condition precedent to coverage under the UIM contract. Irwin, 2021 Tex. LEXIS 415, at *6 (citing Brainard, 216 S.W.3d at 814-815). Thus, "a claim for UIM benefits is not presented until the trial court signs a judgment establishing the negligence and underinsured status of the [underinsured] motorist." Brainard, 216 S.W.3d at 818. If a claim cannot be presented and the insurer's contractual duty to pay is not triggered until the insured obtains a judgment establishing liability and damages, a breach of contract claim, or the generic claim for UIM benefits, cannot be ripe until such judgment is obtained, right?

2. Breach of Contract

The answer to that question has generally depended on whether the case was pending in state

or federal court. In Texas state courts, challenges to the ripeness of a plaintiff's breach of contract claim, brought for various reasons, have been almost uniformly unsuccessful. See In re Hamilton, No. 13-20-00254-CV, 2020 Tex. App. LEXIS 7378, at *12-15 (Tex. App.—Corpus Christi Sep. 10, 2020, orig. proceeding) (mem. op.) (because plaintiff pleaded facts which, if true, would establish insurer's liability under the UIM policy, the claim was ripe and the deposition of insurer's corporate representative was permissible); In re Perry, No. 13-18-00676-CV, 2019 Tex. App. LEXIS 3176, at *19 (Tex. App.—Corpus Christi Apr. 18, 2019, orig. proceeding) (mem. op.) ("Perry has pled facts which, if true, would establish [the UIM] was liable for the accident, is underinsured, and State Farm refused to pay UIM benefits. Perry has alleged a ripe claim against State Farm."); Bretado v. Nationwide Mut. Ins., No. 04-18-00014-CV, 2018 Tex. App. LEXIS 10213, at *2-3 (Tex. App.—San Antonio Dec. 12, 2018, no pet.) (mem. op.) (concluding plaintiff's breach of contract claim was ripe, and thus barred by statute of limitations, despite not having obtained a judgment establishing the liability of the tortfeasor and plaintiff's damages); State Farm Cty. Mut. Ins. Co. of Tex. v. Diaz-Moore, No. 04-15-00766-CV, 2016 Tex. App. LEXIS 11534, 2016 WL 6242842, at *1-2 (Tex. App.—San Antonio Oct. 26, 2016, no pet.) (mem. op.) (rejecting insurer's ripeness objection and holding insured's pleading of ripe cause of action for UIM benefits supported default judgment against insurer); In re Reynolds, 369 S.W.3d 638, 649 (Tex. App.—Tyler 2012, orig. proceeding) (holding insured's UIM claim was ripe, allowing the mandatory venue provision of Section 1952.110 of the Texas Insurance Code to fix venue in the county of the insured's residence); but see Weber v. Progressive Cty. Mut. Ins. Co., No. 05-17-00163-CV, 2018 Tex. App. LEXIS 784, at *8 (Tex. App.—Dallas Jan. 26, 2018, no pet.) (upholding trial court's sustaining of insurer's special exceptions on the ground that insured's breach of contract claim was premature and failed to state a claim because insured did not plead that a judgment had been obtained establishing the liability of the UIM and the insured's resulting damages).

The district courts of the Fifth Circuit have taken a different approach, with nearly every court that has considered the issue concluding a breach of contract claim for UIM benefits is not ripe and thus fails to state claim until the plaintiff obtains the requisite judgment. See Peche v. Wavle, No. SA-19-CA-1217-FB (HJB), 2020 U.S. Dist. LEXIS 246862, at *13 (W.D. Tex. 2020) ("[b]ecause Plaintiffs have not pleaded the existence of any judgment establishing the tortfeasor's liability, the conditions precedent entitling them to UIM benefits from Columbia have not been met. Thus, their cause of action against Columbia for breach of contract fails to state a claim upon which relief can be granted."); Rodriguez v. Allstate Fire & Cas. Ins. Co., 5:18-CV-1096-OLG, 2019 WL 650438, at *2 (W.D. Tex. Jan. 10, 2019); Adedipe v. Safeco Ins., 4:17-CV-347-ALM-CAN, 2017 WL 6811798, at *4 (E.D. Tex. Oct. 18, 2017), report and recommendation adopted sub nom. Adedipe v. Safeco Ins., 4:17-CV-347, 2018 WL 295428 (E.D. Tex. Jan. 4, 2018) ("until Plaintiff litigates the third-party driver's liability, his breach of contract claim is not ripe"); Owen v. Employers Mut. Cas. Co., CIV. 3:06-CV-1993-K, 2008 WL 833086, at *3 (N.D. Tex. Mar. 28, 2008) ("because there is no such judgment here, the Court cannot conclude that Employers breached a contractual duty that never was triggered"); Schober v. State Farm Mut. Auto. Ins. Co., 3:06-CV-1921-M, 2007 WL 2089435, at *4 (N.D. Tex. July 18, 2007) (without evidence of a judgment establishing the liability of the underinsured driver and the plaintiff's damages, the insurer "cannot legally be held to have breached a contractual duty that never arose"); Love v. Geico Indemnity Co., 6:16-CV-354-RP, 2017 WL 8181526, at *3 (W.D. Tex. Oct. 2, 2017).

3. Declaratory Judgment

As the federal district courts led the charge in correctly applying the holding of Brainard and finding UIM breach of contract claims unripe, or at least premature, before the insured has obtained the requisite judgment, those courts have also consistently pointed to declaratory judgment as the proper vehicle to bring a UIM claim in this context. See Vasquez v. Liberty Mut. Fire Ins. Co., No. 7:18-CV-44, 2018 U.S. Dist. LEXIS 232693, at *6 (S.D. Tex. 2018) (denying insurer's motion for summary judgment on insured's UIM declaratory judgment claim because said claim can be used to establish the conditions precedent to UIM coverage, i.e., the liability of the UIM and the plaintiff's resulting damages); Borg v. Metro. Lloyd's of Tex., No. W:12-CV-256, 2013 U.S. Dist. LEXIS 192614, at *6 (W.D. Tex. 2013) ("[d]ue to the unique terms of UM/UIM coverage, the Court is persuaded that the proper vehicle to bring such a claim is through a declaratory judgment action, not a breach of contract claim").

While forcing a plaintiff to bring a declaratory judgment rather than a breach of contract claim should more easily preclude the attachment of extracontractual claims under the Texas Insurance Code, Texas Deceptive Trade Practices – Consumer Protection Act ("DTPA"), and common law bad faith, see Rodriguez, 2019 U.S. Dist. LEXIS 40737, at *6, attorneys' fees are not recoverable under either theory in federal court. See Brittany Angiel & Koriangiel v. Allstate Fire & Cas. Ins. Co., No. SA-18-CA-1285-FB (HJB), 2020 U.S. Dist. LEXIS 132449, at *9 (W.D. Tex. 2020) (citing Utica Lloyd's of Texas v. Mitchell, 138 F.3d 208, 210 (5th Cir. 1998) (holding Section 37.009 of the Texas Civil Practice & Remedies Code "functions solely as a procedural mechanism" and cannot be relied on to support an award of attorneys' fees for a claim pending under the Federal Uniform Declaratory Judgment Act).

In state courts, however, both the appropriateness of a declaratory judgment action for UIM benefits and the availability of attorneys' fees for such an action were in flux until the Court's recent decision in Irwin, 2021 Tex. LEXIS 415. Compare Allstate Ins. Co. v. Jordan, 503 S.W.3d 450, 455-57 (Tex. App.—Texarkana 2016) (holding a declaratory judgment action is a proper vehicle for a UIM claim but overturning trial court's award of attorneys' fees on the ground the insurer had not breached any duty to its insured) with Allstate Ins. Co. v. Irwin, 606 S.W.3d 774, 780 (Tex. App.—San Antonio 2019) (holding declaratory judgment action is appropriate and upholding award of attorneys' fees on the ground the UDJA is "to be liberally construed and administered").

4. Allstate v. Irwin

In a 5-4 decision, the Irwin Court resolved the split among the courts of appeals, holding that a declaratory judgment can properly be brought to determine a carrier's liability on the UIM policy and that attorneys' fees were properly awarded to the insured for prosecuting his declaratory judgment action. Irwin, 2021 Tex. LEXIS 415, at *14-18. Perhaps the challenges to ripeness to avoid corporate depositions or to sneak in a procedural victory were not worth putting attorneys' fees back on the table for UIM claims; nevertheless, this is where we are. So where do we go from here?

For defense attorneys who handle UIM claims, most of your pending cases are likely plead as breach of contract or the more generic "claim for UIM benefits." After Irwin, these claims are explicitly improper. See id., at *6 ("the litigation between the insured and his carrier is on the UIM contract but not for its breach, which cannot occur until the underlying conditions precedent of liability and damages are established"). While these claims are subject to special exceptions or summary judgment, the odds are high the plaintiff will simply replead as a declaratory judgment action, putting attorneys' fees in play. One option

is to let those sleeping dogs lie and live in the pre-Irwin world as long as you can.

The other option is to get to federal court where, as noted, attorneys' fees are available for neither a breach of contract nor a declaratory judgment for UIM benefits. When the insurer is sued in the same suit as the tortfeasor, the UIM claims are generally severable and, once severed, might be removable within thirty days. Due to the standard consent clause in UIM contracts, a UIM insurer is not bound by a judgment rendered against the tortfeasor unless the carrier has agreed to be bound in writing. See Reynolds, 369 S.W.3d at 654. The consent clause, together with the problem of conflicting evidence regarding insurance, thus operates to make UIM claims severable from those brought in the same suit against the tortfeasor. See id., at 655 ("we cannot conclude that the joinder of the UIM and UIM insurer in the same action negates the consent clause"); In re Progressive County Mut. Ins. Co., 03-17-00088-CV, 2017 WL 2333308, at *2 (Tex. App.—Austin May 26, 2017, no pet.); In re Arcababa, 10-13-00097-CV, 2013 WL 5890109, at *8 (Tex. App.—Waco Oct. 31, 2013, no pet.); In re Koehn, 86 S.W.3d 363, 369 (Tex. App.—Texarkana 2002) (trial court had "no choice" but to grant severance because without UIM insurer's consent to be bound, the issues of the tortfeasor liability and plaintiff's damages would have to be litigated twice).

Once the claim is severed, removability likely depends on the plaintiff's actions (or inactions) in opposing or having the opportunity to appeal the severance and whether removal would be precluded by the voluntary-involuntary rule. See e.g., Flores v. Nat'l Van Lines, Inc., No. EP-17-CV-00003-KC, 2017 U.S. Dist. LEXIS 226574, at *11 (W.D. Tex. 2017); but see Hodge v. Stallion Oilfield Servs., No. H-07-CV-2255, 2007 U.S. Dist. LEXIS 70051, at *4 (S.D. Tex. 2007) ("the action became removable after the Panola court issued orders for severance and transfer").

If the plaintiff settles with the tortfeasor within one year of filing, the case becomes removable and is not affected by the voluntary-involuntary rule. See Estate of Martineau v. ARCO Chem. Co., 203 F.3d 904, 912 (5th Cir. 2000) ("we find it clear that the drafting, signing, and filing of letters regarding settlement were voluntary acts by [the plaintiff]."); Vasquez v. Alto Bonito Gravel Plant Corp., 56 F.3d 689, 692 (5th Cir. 1995) ("[b]ecause a settlement agreement necessarily would entail a voluntary act of the plaintiff, we assume that the "voluntary-involuntary" rule that applies to the removal of cases under § 1446(b) is not at issue in this appeal.").

Another concern to be aware of is the amount in controversy. When the plaintiff sues the tortfeasor and the UIM insurer in the same suit, the amount of damages on the face of the plaintiff's pleading will not necessarily be controlling for the amount in controversy if the case becomes removable by severance or settlement. See Manschott v. S. Farm Bureau Cas. Ins. Co., No. V-07-65, 2007 U.S. Dist. LEXIS 108053, at *6 (S.D. Tex. 2007) ("[w]hile this claim for damages accurately represents each cause of action plead in Plaintiff's Original Petition, it is not the cause of action that was removed to this Court"). The amount may be restricted to the limits of the UIM policy and other damages and fees that can be applied.

5. Conclusion

Irwin brings some clarity to the world of UIM law and probably represents a natural, equitable correction in the law that became necessary in the years after Brainard. The good news for attorneys who handle UIM claims is that these claims are likely to become much more frequent in the near future and, with the availability of attorneys' fees, will likely get resolved at a faster rate.

Jury Trial by Zoom

By: James H. Hunter, Jr. & Liliana Elizondo
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As the authors of this paper we do not profess to be experts on Zoom trials. Like most trial lawyers, we do the best we can to prepare for every scenario that could play out at trial – then we wing the rest. That being said, the initial idea of holding a trial entirely in the digital space sent out waves of uncertainty. We went in to our first Zoom trial not knowing what technical difficulties could arise or what challenges we would face— but we were ready to see it through to the verdict. In the end the most unexpected outcome occurred. The virtual trial went much smoother than anticipated. In fact, the remote presentation of exhibits and witnesses was much more effective than we, as two skeptical lawyers, thought it would be. Having experienced it for ourselves, we can attest that parties and their lawyers now have an alternative and effective means of resolving their differences through remote proceedings – if the case is the right case.

1. Legal Authority for Remote Proceedings

Since the Texas Governor originally declared a State of Disaster due to the COVID-19 Pandemic, the Texas Supreme Court has issued thirty-eight (38) Emergency Orders relating to the conduct of judicial proceedings. At the time this paper was prepared, the following Order – like the many that preceded it for over a year – provided as follows:

ORDERED that:

2. *Subject only to constitutional limitations, all courts in Texas **may** in any case, civil or criminal – **and must to avoid risk** to court staff, parties, attorneys, jurors, and the public – without a participant's consent:*
   *b. except as this Order provides otherwise, allow or **require anyone** involved in any hearing, deposition, or proceeding of any kind – **including** but not limited to a party, attorney, witness, court reporter…or **petit juror** – **to participate remotely**, such as by teleconferencing, video conferencing, or other means.* (emphasis ours).

Thirty-Eighth Emergency Order Regarding the Covid-19 State of Disaster, Texas Supreme Court, May 26, 2021.

In short, subject only to Constitutional limitations, Texas trial Judges have the power to require parties, attorneys, witnesses, and jurors to participate remotely in jury trials. Under the literal wording of the order, a health or safety risk is not a prerequisite for a Judge to exercise the power to conduct a remote jury trial; a remote jury trial is simply mandatory if a risk is a mere possibility.

If your experiences over the last year and a half have been anything like ours, case after case has been continued and re-set multiple times; you have geared up for several tri-

als, anticipating or hoping the Pandemic would subside, only to have your cases re-set. Some courts have probably even waved you off, telling you that no trial dates are being scheduled at all and to check their website for Covid-19 updates. But a few courts have offered an alternative – the Zoom jury trial. The Courts offering Zoom jury trials have been sensitive to the wishes of many lawyers and parties who do not wish to experiment with virtual justice and would rather just wait until the Courts reopen. However, when the Webb County, 111th District Judge Monica Notzon presented us with an opportunity to have a Zoom jury trial for a trucking accident case pending in her court for almost two years, we did not feel it was necessary to delay trial until the courts reopened. It was not an overly complicated case; the Defendant truck driver rear-ended the Plaintiff after he merged into the truck driver's lane on a rural stretch of I-35 near Laredo. Both vehicles were totaled. We took the position that the Plaintiff failed to yield the right of way; the Plaintiff took the position that the Defendant truck driver was speeding, not paying attention, and had plenty of time to slow down to avoid striking the Plaintiff's vehicle. There were only a handful of witnesses – the parties, the investigating officers, a couple of doctors and a medical billing expert. The case was not document intensive. The documentary evidence consisted of accident reports, photos, medical records and billing records. It was just one of those cases that would not get better or worse for either party over time. We thought it was the perfect case for a Zoom trial, and the Plaintiff's attorneys agreed. We tried the case in November 2020 – the week before Thanksgiving.

3. Pretrial Preparation & Proceedings

Because this was the first virtual jury trial for the Court, the Clerk, the parties, the witnesses, and the lawyers involved, the Court asked everyone, in advance, to do their part to prevent technical issues that would interrupt and delay the trial. The Court and the Clerk's staff did a marvelous job of working with the jury panel that was summoned. In some cases – even during trial – the Clerk's staff worked as a help-desk to jurors who had trouble logging on or were getting kicked off. We did the same on our side – working with our own system, having a back-up plan, and working with the technical circumstances of each witness we planned to call remotely.

The trial Judge was also sensitive to delays caused by bench conferences during the trial. Her Honor wanted to minimize jury wait-time when the lawyers needed to raise *limine* issues and argue objections to evidence. Otherwise, the jury would have to be continually sent to a virtual breakout room to wait, which, it is worthwhile to note, had to be done very carefully each time. The Court's staff was tasked with keeping track of the participants within the virtual Courtroom to ensure no jurors were accidentally left behind while the parties discussed issues. Consequently, to be respectful of the jury's time, the Judge strongly encouraged the lawyers to agree on pre-admitting as much of each other's evidence as possible, even if it required redacting some exhibits. The lawyers on both sides understood the importance of the task, and neither side wanted to risk having jurors annoyed with us. As a result, by the time the trial started, each side was left with only a handful of *real* objections to certain exhibits which the judge carried along.

Other preparation was required to make sure we imparted the smoothest possible presentation for this virtual trial experiment. Like any other trial, our exhibits were locked, loaded, and ready to be share-screened when

we were ready for an exhibit to be displayed during the course of a direct or cross-examination of a witness. We provided our paralegal with the identification of each exhibit we planned to use with each witness ahead of time, and she was ready to share screen on a second's notice when we gave her the cue.

We and Plaintiff's attorneys planned to call all our witnesses live, although we had our depo cuts ready to play if they didn't appear for whatever reason. Our paralegal had multiple contact numbers and kept our witnesses updated about the projected day and time in which they might be called to testify. She maintained contact on a daily basis and sometimes at an hourly basis. Because they weren't physically outside of a courtroom waiting to be called, we had the additional responsibility of ensuring that our witnesses were somewhere professional, with a strong Wi-Fi connection, microphone, and video capabilities at the correct time. Imagine your witness didn't know it was his turn to testify and had to log on through his cell phone from aisle eight at H-E-B.

4. Image

Have you ever been in a Zoom hearing and focused not on what the lawyer was saying, but rather, what's behind the lawyer, or the quality of the image? We wanted to avoid that because we wanted the jury to focus on the evidence presented and the quality of our legal presentation. To achieve this goal, we experimented a little, had several practice sessions, and gladly received constructive criticism from all who offered. We also made sure no kitty filters were left on before trial day. If you have watched the viral video, you know.

Some of the basic things we focused on were the quality of lighting and our background. We ended up purchasing some relatively inexpensive HDL, commercial photography lamps that we aimed at ourselves so the jury could see our faces and expressions clearly. In our preparation, we found that drawing the shades in our conference room presented a more neutral and less distracting background. We also experimented with the positioning of our laptop cameras so that there was uniformity in our pictures. We found that propping our laptops up on a few books provided a direct line between our eyes and the center of the screen. We ensured that our faces and upper body were in the center of the screen – not too close and not too far. We wanted to ensure our cameras consistently captured the attorney doing the questioning or presenting an argument, so we each used our own laptops. This also allowed the jury to see us clearly as we sat next to each other, rather than seeing both of us from further away from one camera.

We worked with our witnesses to present their best image as well. We checked their backgrounds, asked a couple to reposition or face a different direction, and raise the height of their laptops or devices as well. There were a couple who didn't stick with the program when they logged on. But in the end, they testified as real people, credible witnesses.

One witness – the Plaintiff's pain management doctor – surprised everyone when he logged on. He was in the operating room in full scrubs, mask and face shield. Nurses were walking back and forth in the background, and the jury could hear the sounds of patient monitors, and medical bells and whistles of all sorts. The jury perked up and was very attentive. Because of the clinical environment

this doctor was in, he made an effective, and probably credible, witness for the Plaintiff. Truthfully, we would have preferred he was at H-E-B in aisle eight. So, for your next jury trial, we recommend you consider a *limine* item regarding the dress of a witness and the environment in which he or she testifies remotely. We know we will.

5. Jury Selection

The Court and the Clerk were initially concerned that a large number of potential jurors would not log in. As it turned out, there was a tremendous response to the summonses. We understand almost two-hundred (200) *venire* members logged in for the qualification process – many more than the Court and Clerk anticipated. Through Zoom, the Court was able to effectively manage a large number of *venire* members, excuse several, and qualify the others. To our surprise, we ended up with a panel of seventy (70) prospective jurors. We received their jury cards from the clerk by email, minutes after *voir dire* started. Because the prospective jurors' names were displayed on the screen, it was fairly easy to cross-check the information on their cards.

A panel of 70 prospective jurors was way too many for our trucking accident case. Although the Clerk named and numbered the jurors via their Zoom display names, which was very helpful, we still had to scroll through three (3) screens to see them all. For whatever reason, Plaintiff's attorney directed his questions to all 70 panel members. In our humble opinion, it was not an effective use of his time. When it was our turn, we told jurors 40 through 70 that they need not raise their hands in response to our questions; we just wanted to talk to the first 40. So, while the court was concerned we would have a lot of no shows, as it turned out, the convenience of appearing remotely is what drove the high rate of response.

We went into this trial with our doubts; we expected that many jurors would not be paying attention, would be distracted, or would be disengaged in general. We were dead wrong. There was great participation from the jurors, with many of them being quite outspoken. After *voir dire,* the panel was sent to a breakout room while we argued strikes. The Judge struck a number of jurors for cause.

After the bench conference, the Clerk emailed each side a revised list where we made and returned our strikes by email. Because of the concern about connectivity issues and because we were doing this for the first time and did not know what to expect in the way of participation, we had two alternates for a total of 14 jurors. The Judge and Clerk had each juror's email address and phone numbers, so they could be contacted and updated throughout trial.

6. Conducting the Trial

After the jurors were empaneled and sworn, the Judge asked if one juror, who was tech-savvy, would volunteer to email exhibits to the others when they were published during trial. A teacher, who was later selected as the foreperson, volunteered. That same juror acted as an intermediary for the Court and supplied all jurors with each party's exhibits at the close of evidence.

The Judge remained committed to ensuring the trial ran as smoothly as possible. Each morning, before evidence, we had bench conferences to discuss which witnesses would be called; bring up evidence admissibility

objections which hadn't been ruled on; and discuss *limine* issues we anticipated coming up that day. A great deal of our time was spent making sure the witnesses scheduled for the day would be ready and logged in by the time the preceding witness was finished testifying. On this topic, all witnesses had the login information, and we caught a doctor drop into trial before he was called to testify. We know the Clerk was ensuring that all jurors were logged in at all times during trial, but we recommend you have someone keeping an eye on who is "in" the courtroom at all times.

The Clerk did a wonderful job of managing breakout rooms for witnesses and breaking the jury out when we had bench conferences to argue objections or raise *limine* items with the judge during trial. And that's how it actually started each day – 30 minutes before the trial was scheduled to resume, the Judge, the reporter, and we lawyers would have our bench conference. If any juror logged in too early, they would immediately be sent to a breakout room. At the end of each day, 5:00 or 5:30, the Judge would release the jurors and keep the lawyers on to discuss witnesses and issues for the next day.

7. Effectiveness of Jurors Testifying Remotely

We had our doubts about how effective the witness testimony would be by Zoom. Credibility was a huge issue in our case: The Plaintiff and our truck driver had diametrically opposed versions of the accident. Our driver was a conscientious truck driver with a good track record. But he was very young, not the most experienced, and he was operating under a Mexican Federal license. On the other hand, we believed there were sensitive issues Plaintiff was untruthful about which affected his ability to drive at the time of the accident, as well as his past medical history. The investigating officer made a fantastic appearance in his deposition, but he made a couple of glaring errors in his report which we knew would be subject to attack. Finally, if the jury found our client responsible, damages rested in the hands of Plaintiff's treating physicians.

Each side was able to effectively put on their witnesses and cross-examine the opponent's witnesses. Because each witness's screen was expanded when testifying, the jury got to see them up close and personal – facial expressions, eye movements, etc. We were focused on the witnesses, but some of our staff was watching the trial on YouTube. Our staff gave us feedback in real time about jurors' reactions to testimony – some shaking their heads during particularly heated moments when a witness's believability was called in to question. This feedback was helpful for us moving forward with other witnesses.

It is important to remember that the jurors watch the lawyers via Zoom, just like they do in a courtroom. Perhaps not being there in person caused us to relax and forget at times that they had their eyes on us. During the Plaintiff's attorney's direct examination of the Plaintiff, Jim found himself thinking that the Plaintiff was lying through his teeth. At that instant, he received a text message from a staff member saying, "Jim, you're rolling your eyes, stop!" So be careful not to roll your eyes, mutter under your breath or pick your nose while the camera is rolling. As lawyers, the jury also sees us up close and personal via Zoom.

8. Evidence Preservation

The Judge ruled on objections during the trial and also during bench conferences outside the presence of the jury. There was

nothing extraordinary about that process. The charge conference was a little different though. We did not get some of the instructions we had asked for. Appellate lawyers always tell us that in order to preserve error, we have to do more than get a ruling from the bench. We must get the Judge to deny, in writing, our proposed written questions and instructions. That was not humanly possible due to the virtual nature of the proceedings. Consequently, to preserve error, we asked the Judge to confirm on the record that she was denying the specific written question or instruction we had filed days earlier on a certain date and that she would sign same when able. After that, we crossed our fingers and hoped the Appellate Court would cut us some slack if an instruction ever became an issue on appeal.

9. Closing Argument

Not unlike a live closing argument, our paralegal had our key exhibits and charge questions ready to share screen when we were ready to deliver closing arguments. We also had to get a couple other exhibits ready on the fly because Plaintiff's attorney raised issues in his closing that we had to address.

The jurors watched and listened intently. They seemed to respond better to arguments supported by visual images. And that's how we closed – a simple story based on the facts, the evidence, and an examination of the credibility of certain witnesses. Plaintiff's attorney took a different approach. He told a story, but it was more of a monologue without reference to images or documents. He spent a good deal of time going through the jury charge, which seemed to bore the jury to death.

After closing, the Judge asked the same volunteer tech-savvy juror, and future foreperson, to distribute the trial exhibits.

The jury returned a no-liability defense verdict in less than 15 minutes. It took some time, but eventually we got our hands on the fully signed jury charge. We would recommend going over the logistics of that with the court before you get to closing arguments.

10. Takeaways

The Judge would not allow us to ask the jurors questions after the trial, but she did ask them for some feedback. One Juror said she really liked the Zoom trial because it was easy to understand, and it was simple to navigate. Another said it was nice being able to wake-up, roll out of bed and eat some cereal in his pajamas while watching the trial. We found that some jurors were out of work due to the Pandemic, and most of the rest were working from home, so it wasn't a very big imposition. Zooming in from the comfort of one's home is much less of an imposition than having to get dressed, drive through traffic, and pay for parking at the courthouse. In short, remote jury service was convenient and user-friendly for the jurors. Perhaps keeping them happy in this way made them more receptive to our arguments and less distracted in general.

We came away from this experience believing remote jury trials can be very effective for the right case. In our opinion, the right case is one that is not overly complicated or document intensive. As a practical matter, we found it relatively hassle-free to call witnesses by remote video, rather than forcing them to travel and wait hours, or even days, to testify. Finally, for us traveling lawyers who would ordinarily live out of a suitcase and stay in a hotel for a long period of time, it sure was nice to be able to stay home. There is nothing quite like a familiar dinner and sleep routine to keep you fresh during trial.

By: Russell R. Smith
Fairchild, Price, Haley & Smith, L.L.P.,
Nacogdoches

2021: Renewal, Continuation or Both

A year and a half after the Coronavirus pandemic first wreaked havoc across the world and infiltrated every state in the nation, the Lone Star State is slowly but surely adopting measures to move toward normalcy - or at least normalcy as we will know it from this point forward. COVID has undoubtedly changed society in some ways, and its side effects persist. The State Bar of Texas urges its members now, more than ever, to live up to their civility oath and continue to be considerate of the pandemic-induced hardships still faced by many. However, it was recently announced that "in person" bar exams will be starting back in February 2022.

One of the main hallmarks of the pandemic, the mask mandate, came to an end in Texas on March 2nd when Governor Abbott issued an executive order that made masks no longer mandatory and opened all businesses and facilities to 100%. Of course, individual business owners may use discretion to impose regulations of their own accord concerning masks, social distancing, etc. At the time of the order, some 5.7 million Texans were vaccinated. The governor deemed it safe to restore Texans' livelihoods due to the advent of vaccines, the level of recoveries, and reduced hospitalizations. Abbott secured for Texans the "freedom to determine their own destiny."

Per the latest Texas Supreme Court orders, Texas attorneys' destinies will include in-person proceedings. Emergency Order 38 permits the modification or suspension of court deadlines and procedures through August 1, 2021. The order permits all courts to hold in-person proceedings. Even though in-person is permitted, it is still encouraged to continue holding them remotely.

The results of continued remote proceedings are different for various attorneys and firms. Those who had already embraced technology certainly have an advantage over those who had been operating traditionally up until the pandemic. The crisis, as bad as it may seem, was advantageous for certain lawyers who benefited from the advent of digital practice. However, certain sectors of the legal industry depend on physical proximity, such as those that require witnesses and notarial executions (though procedures were relaxed in these areas also). Thus, some transactions have been paused for a long time and remain on hold. Firms are left to find appropriate solutions to the many roadblocks posed by the Coronavirus; one attorney quipped that this demonstrates how much necessity truly is the mother of invention. The legal industry is notorious for adapting to progress at its own pace, so the recent events could either make or break those who practice law as they venture into uncharted territory.

In the last publication I included a quote from an attorney regarding the shift toward virtual proceedings that it would be hard to "put the genie back in the bottle." All these months later, it remains true. In fact, the bottle may be broken. Some attorneys continue to work from home

while most continue to embrace increased levels of technology. No doubt it is hard to argue any agreed to or uncontested proceeding should ever be held in person and many more minor contested proceedings could fall into the same category, reducing time and expense in those matters for all. These measures may have permanent effects on the legal industry, including the reduced number of staff that firms, as a whole, are employing in these unprecedented times.

And despite the fact that most legal proceedings came to a screeching halt and are now only in the beginning stages of regaining momentum, the pandemic has managed to give rise to additional areas of practice that were previously nonexistent or not widespread enough to attract much attention. For example, the advent of virtual proceedings and the general increase in remote work have paved the way for large scale cybercrime. Criminals are taking advantage of the ubiquity of digital platforms, and not just in the legal industry. Still, some attorneys have begun offering legal guidance and representation in matters involving cyber-stalking, counterfeiting, money laundering, embezzlement, and fraud - all of which are on the rise consistent with the increased use of electronic devices in the workplace. Cybercrime undoubtedly deserves consideration in the legal industry due to confidentiality concerns and the use of platforms that may include third parties. As an aside, it appears virtual medical appointments with doctors are here to stay, based on all the advertising and marketing.

Meanwhile, agencies at each level of government continue attempts to eliminate the threat of the virus. Several major pharmaceutical companies have rushed to produce Coronavirus vaccines. Pfizer and Moderna successfully created mRNA vaccines that have been widely distributed. Other companies such as Johnson & Johnson released adenovirus vaccines that are administered in a single shot. In Texas, 45% of the population has received at least one dose of the vaccine as of June 7th, while 36% of Texans are fully vaccinated. Since May 12th, everyone in Texas over the age of 12 has been eligible for a vaccine. Vaccination in Texas began December 14, 2020 with front-line healthcare workers and residents of long-term healthcare facilities and was extended to everyone over the age of 65 on December 29, 2020. All Texans over the age of 50 became eligible on March 15th, with schools and childcare personnel having been eligible as of March 3rd. By March 29th, all Texans over the age of 16 became eligible for the vaccine. Texas continues to distribute vaccine doses to hospitals, pharmacies, local health departments, and other clinics.

At this time, the Centers for Disease Control and Prevention (CDC) contends that vaccination and nonpharmaceutical intervention compliance are essential to control COVID-19 and to prevent hospitalizations and deaths in the near future. Data suggests that the United States will see a sharp decline in COVID cases by July, due to vaccination coverage and moderate adherence to guidelines regarding nonpharmaceutical intervention. The CDC warns that too much relaxation of such nonpharmaceutical intervention could interfere with the decline of Coronavirus cases. Yet, recently the national news networks were reporting less than 6,000 total cases currently in the United States.

Since the vaccine has become available to most people, Governor Abbott announced that Texas government entities are no longer allowed to mandate masks. Counties, cities, public health authorities and government officials are banned from requiring masks. As of May 21st, if these

government entities refuse to adhere to this, they are subject to a $1,000 fine. Of course, we all know it is highly unlikely any fines would even be levied, much less paid. There are a few exceptions to this restriction, including hospitals, long term care facilities, and correctional facilities. Public schools were also allowed to continue enforcing mask mandates through June 4th. The CDC recommended that masks continue to be used in K-12 schools through the current school year because the vast majority of children are still unvaccinated. The Pfizer vaccine recently became available for children 12 and older on May 12th, about one week before Governor Abbott banned mask mandates. The Johnson & Johnson and Moderna vaccines are still only available for people 18 and older. The Texas American Federation of Teachers has been critical of Abbott's decision because classes at the state's largest school district, Houston ISD, do not end until June 1th.

Some Texas government officials do not agree with Governor Abbott's new restriction and are strongly encouraging their constituents to continue wearing masks if they have not yet been vaccinated. Mayor Sylvester Turner of Houston says that he wants his city employees and anyone entering a city building to continue wearing a mask, but he is not mandating it. Mayor Steve Adler of Austin and Mayor Eric Johnson of Dallas are also still encouraging their residents to continue wearing masks. Governor Abbott says, "Texans, not government, should decide their best health practices, which is why masks will not be mandated by public school districts or government entities."

In Nacogdoches, Texas where our primary office is located with a city population of 33,200 and a county population of 65,204, our smaller, east Texas "world" really did not change much. Individuals, private companies and firms employed common sense practices and principles with respect to how business could and would be conducted and how to welcome and treat others and let the chips fall where they may. Of course, we had our own share of cases and no one can truly say from personal experience whether masks made any difference or not. Some businesses never required masks and did not become the origin of an exponential spread of the virus. Regardless, all are happy the world (at least in Texas and the United States) seem to be opening back up for more normal business and leisure travel now that summer has arrived. It could not have come at a better time, but earlier would have been nice!

El Paso Baseball & CLE

Southwest University Park – June 17, 2021 – El Paso, Texas

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

TADC President Slater Elza provided an update on "A Wrap-up of the 87th Texas Legislative Session." Look for this event to be back next baseball season

Amicus Curiae Committee Update

There have been several significant amicus submissions.

Roger Hughes (Adams & Graham, L.L.P., Harlingen), and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) submitted an amicus brief to support the petition for mandamus in *In re Allstate Indemnity Co.*, No. 20-0071, 2021 WL 1822946, 2021 Tex. LEXIS 375 (Tex. May 7, 2021). This is a major case about contesting medical billing affidavits under Texas Civil Practice and Remedies Code §18.001. First, the Court found that a registered nurse with experience in medical billing and auditing was a competent expert to challenge the bill; the Court rejected the argument that hospital or medical bills could be challenged by a health-care professional in the same field. Second, a counteraffidavit need give only reasonable notice of the basis to contest the bills, which is analogous to the 'fair notice' standard for pleadings. Third, §18.001 does not require trial courts assess or determine if the opinions are reliable under *Daubert/Robinson* or Tex. R. Evid. 702. Fourth, §18.001 has no exclusionary rule. An uncontroverted bill comes into evidence, but the failure to serve a compliant counteraffidavit has no impact on the opposing party's ability to challenge reasonableness or necessity at trial.

Henry Paoli (Scott Hulse, P.C., El Paso) submitted an amicus to support the petition for mandamus in *In re K & L Auto Crushers, LLC*, __ S.W.3d ___ (Tex. May, 2018). This is an important case that decided *In re North Cypress* extends to personal injury cases and permits discovery of third-party agreements on negotiated rates. The Court holds that a medical provider's negotiated rates with third parties is relevant on the reasonableness of the amounts charged to plaintiff, even if the plaintiff has agreed to pay an unreasonable amount. The request was not overbroad because it was limited to negotiated rates for same or similar services to those rendered the plaintiff. Any undue burden to produce the materials was mitigated by letters of protection that gave the providers a financial stake in the outcome of the lawsuit. Given the alleged medical expenses were $1.2 million, the requested discovery could be proportional to the issue. The trial court should have considered granting a protective order to protect confidentiality of the agreements. It was error to deny all discovery; the trial court retained discretion to issue a protective order and impose limits if the discovery is not proportionate. Nonetheless, it could not deprive K&L of all discovery on the narrowed categories of information.

Peter Hansen (Jackson Walker, L.L.P., Austin) filed an amicus to support Dr. Ojo's petition for review on *Mason v. Amed-Health, Inc.*, 582 S.W.3d 773 (Tex. App.—Houston [1st Dist.] 2019, pet. denied). The accident was patient Vance's oxygen tank exploded at Mason's home when Vance smoked a cigar; the question is the duty owed to bystanders by Dr. Ojo to warn patient more extensively and not to prescribe drugs that would make him forget all the warnings not to smoke around the tank. Also, there is a causation question if plaintiffs had already received warnings and of gross negligence. After merits briefing, the petition was denied.

J. Mitchell Smith (Germer PLLC) filed an amicus to support the petition for review on *Kenyon Ins. v. Elephant Ins. Co., LLC*, No. 04-18-0131-CV, 2020 Tex. App. LEXIS 2686 (Tex. App.—San Antonio Apr. 1, 2020, pet. filed) (*en banc*). This is a permissive interlocutory appeal on the issue of duty from a summary judgment (traditional and no evidence) on whether Elephant had a legal duty. The core issue is whether an insurer owes a

legal duty to an insured to prevent bodily injury to its insured when it asks the insured to photograph property damage to the insured vehicle to support a claim. While the insured husband was taking a photo of the insured vehicle for the claim, a driver ran off a wet road and hit him. After a divided panel affirmed summary judgment for Elephant, the San Antonio Court *en banc* reversed, and the original panel majority became the dissent. The Supreme Court has ordered merits briefs.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) submitted an amicus brief to support the petition for mandamus in *In re Parks*, Case No. 20-0345, which seeks to overturn *In re Parks,* No. 05-19-0375-CV, 2020 Tex. App. LEXIS 1329 (Tex. App.—Dallas Feb. 18, 2020, orig. proc.) (Schenck, J., dissenting). The panel majority held mandamus relief was unavailable because defendant had an adequate legal remedy for erroneously striking the counteraffidavit. Justice Schenck's thoughtful dissent challenged whether striking a counteraffidavit barred offering controverting evidence at trial. His dissent made a forceful case that such a rule impaired the right to trial by jury and posed due-course-of-law problems. TADC urged the Supreme Court follow *In re Brown*, 2019 WL 1032458 (Tex. App.—Tyler Mar. 5, 2109, orig. proc.) (mem. op.) and to decide whether striking counteraffidavits barred offering controverting evidence at trial. The Supreme Court requested a response to the petition.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) have been authorized to submit amicus brief to support the petition for mandamus in *In re Hub Group Trucking, et al.,* No. 20-0041, to overturn *In re Ben E. Keith*, No. 05-19-0608-CV, 2020 Tex. App. LEXIS 1357 (Tex. App.—Dallas Feb. 19, 2020, orig. proc.) and *In re Hub Group Trucking, Inc.,* No. 05-20-00082-CV, 2020 Tex. App. LEXIS 1329 (Tex. App.—Dallas Feb. 18, 2020, orig. proc.). In both cases, the trial court struck counteraffidavits by a forensic medical billing professional that challenged medical expense affidavits. In both cases, the Dallas Court denied mandamus based on *In re Parks*. The Supreme Court requested a response to the petition.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) submitted an amicus brief to support the petition for mandamus *In re Guevara*, No. 20-0343 to overturn the denial of mandamus by *In re Guevara.,* No. 05-19-1049-CV, 2020 Tex. App. LEXIS 1326 (Tex. App.—Dallas Feb. 18, 2020, org. proc.). The trial court struck counteraffidavits from a chiropractor because he did not practice in the same county as plaintiff's providers and he relied on third-party reimbursement databases. The Dallas Court denied relief based on its decision in *In re Parks*. The Supreme Court requested a response to the petition.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) submitted an amicus brief to support the petition for mandamus in *In re Flores*, No. 20-0602, to overturn the denial of mandamus relief denied by *In re Flores,* No. 05-19-1058-CV, 2020 Tex. App. LEXIS 4162 (Tex. App.—Dallas June 2, 2020, org. proc.)(Whitehill, J., dissenting). The trial court struck defendant's two counteraffidavits, the two medical experts, and an accident reconstruction expert. The majority held Flores had an adequate remedy by appeal; the dissent argued the experts went to heart of defendant's case and the ruling vitiated any defense on liability or damages. The Supreme Court requested a response to the petition.

Roger Hughes (Adams & Graham, L.L.P., Harlingen) and Mike Bassett and Sadie Horner (The Bassett Firm, Dallas) filed an amicus brief to support the petition for mandamus in *In re Savoy*, No. 20-0843, which seeks to overturn *In re Savoy*, No. 03-19-0361-CV, 2020 Tex. App. LEXIS 5954 (Tex. App.—Austin July 30, 2020, orig. proc.). The trial court struck counteraffidavits from a medical billing professional and a doctor that challenged medical expense affidavits and denied an IME. The panel granted mandamus relief to

order the IME, but denied mandamus striking the counteraffidavits. One of the counteraffidavits was from the doctor that will do the IME, leaving one to wonder if the IME results will be excluded along with the counteraffidavit. The Supreme Court requested a response to the petition.

R. Brent Cooper (Cooper & Scully, P.C., Dallas) has been authorized to file an amicus to support the petition for review on *Columbia Valley Healthcare System v. Andrade*, No. 13-18-0362-CV, 2020 Tex. App. LEXIS 5974 (Tex. App.--Corpus Christi July 30, 2020, Rule 53.7(f) mtn filed). This is a birth injury case in which the jury awarded $9M future medical expenses through age 18 and $1.2 future medical expenses after age 18. The judge ordered $7.3M be paid now in a lump sum and five periodic payments of $604K each. The core issues are (1) failure to submit jury questions on the minor's life expectancy and annual yearly future medical expenses, and (2) the limits of judicial discretion to award most of the medical expenses as a lump sum. The Supreme Court requested a response to the petition.

Michael Eady (Thompson, Coe, Cousins & Irons, L.L.P., Austin) has been authorized to file an amicus to support the petition for review in *Virlar v. Puente*, 613 S.W.3d 652 (Tex. App.—San Antonio 2020, pet. filed) (*en banc*). This is a med mal appeal for causing a debilitating condition – Wernicke's encephalopathy. The two critical issues are (1) allocating a $3.3 million settlement credit between the patient and her child under TCPRC chap. 33, and (2) awarding most of the $13 million in future medical expenses in a lump sum instead of periodic payments under TCRPC chap. 74, subch. K. After oral argument to a panel, the San Antonio Court *sua sponte* went *en banc* without waiting for a panel opinion; two justices on the original panel dissented and the third wrote the opinion for the *en banc* majority. The majority concluded the Tex. Civ. Prac. & Rem. Code chap. 33 definition of 'claimant' for the purpose of settlement credits was unconstitutional. The Supreme Court requested a response to the petition.

An amicus has been authorized to support the mandamus petition in *In Re SCS SP, LLC*, No. 20-0694, to overturn mandamus relief granted in *In re Smith*, No. 05-20-497-CV, 2020 WL 4669805, 2020 Tex. App. LEXIS 6413 (Tex. App.—Dallas Aug. 12, 2020, orig. proc.). This is a med mal case. The Dallas Court of Appeals held that plaintiff was entitled to discovery of defendant nursing home's policies and procedures despite the general stay of discovery until the initial expert report is provided. The Supreme Court has stayed the decision pending a decision on SCS's petition for mandamus to overturn the Dallas Court, and requested merits briefs.

TADC Amicus Curiae Committee

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The Prequel to Reptile Analysis

Witness Emotional Preconditions

By Alyssa Parker and Shane O'Dell

The preexisting emotional style of your witnesses may leave them more vulnerable to reptilian hijacking by plaintiffs' counsel.

Although you have met with your client, reviewed the process in depth, and prepared him or her for every conceivable scenario, your witness walks into deposition and immediately begins making the mistakes you repeatedly warned him or her against. How does this happen? One of the primary reasons is the tendency to focus on state emotional arousability, or getting emotional in the moment, during preparation (e.g., "go slow," "stay calm," "don't get upset"), while neglecting preexisting, persistent emotions that preclude a witness from giving effective, credible testimony in the first place.

Nuclear verdicts, or verdicts that exceed $10 million, have been a consistently increasing theme in the trucking industry over the past several years and appear to have no end in sight. Seth Holm, *Are Nuclear verdicts out of control?*, Freight Waves (January 13, 2020), **https://www.freightwaves.com**. In fact, a recent mock trial of a trucking case involving the death and serious injury of a family in a passenger vehicle resulted in juror awards upwards of $130 million, the majority of which were punitive damages. While the cause for this trend has been widely speculated, decades of post-trial juror interviews have found the most common response to the question, "When did you make up your mind?" has been "*I made up my mind while watching the witnesses.*" George Speckart, Bill Kanasky, Alyssa Parker, *What is a Litigation Psychologist and Why Should You Care?* (Unpublished manuscript), Courtroom Sciences, Inc. (2017). A more general treatment of the origins of nuclear verdicts has been discussed by Speckart and Kanasky, and not surprisingly, witness performance is at the top of the list of causative factors. George Speckart and Bill Kanasky, *The*

■ Alyssa Parker, Ph.D., is a litigation consultant at Courtroom Sciences, Inc., a full-service, national, litigation consulting firm. Anchored in the science-practitioner model, Dr. Parker integrates theory and acumen in litigation research and consultation. Her experience in evaluating complex psychological concepts and designing sound research methodology translates into powerful insights and informs maximally effective litigation strategies, bridging the gap between psychology and law. Dr. Parker is a published author and has been a speaker in a variety of venues nationwide. Shane O'Dell is a member at Naman Howell Smith & Lee PLLC in Ft. Worth, Texas. His clients and experiences span a large variety of industries and areas of the law, including construction, real estate, franchise, restaurant/hospitality, transportation, commercial general liability, commercial litigation, construction defect, workplace injury, nonsubscriber, landlord/tenant, professional liability, personal liability, first-party property, bad faith, entrepreneurs, and oil and gas.

Nuclear Verdict: Old Wine, New Bottles. For The Defense (April 2020).

In an era of neuropsychological manipulation and plaintiff reptile tactics, witnesses are even more susceptible to being thwarted by their own emotions. This has been demonstrated repeatedly in trucking litigation, where four, specific, high-risk, emotional styles have emerged among witnesses:

- The overly agreeable witness;
- The defensive witness;
- The angry, victim-role, or former employee witness; and
- The apathetic witness.

At times, witnesses may fall into one or more of these categories. During discovery, strong effective defense depositions decrease a client's financial exposure and costs, while weak, ineffective depositions result in higher damages during settlement negotiations or at trial, making it essential not only to identify your witness' emotional style accurately prior to deposition testimony, but also to address and control it effectively.

Witness Emotional Styles

The following emotional states, prevalent in many witnesses, can tip the scales to favor the plaintiff if the defense attorney isn't aware of how damaging these emotions can be.

Overly Agreeable

Overly agreeable witnesses readily, and often eagerly, agree with premises and assertions made by the plaintiff attorney during deposition, resulting in admissions of fault, negligence, egregious conduct, and/or causation. This tendency to agree with the plaintiff attorney's line of questioning is typically rooted in feelings of guilt or a perception of inadequacy.

Cases where witnesses feel significant amounts of guilt are frequently defensible but involve tragedy. Imagine a teenager on a bicycle flying out into oncoming traffic then getting struck and killed by a moving vehicle. The driver of the vehicle is readily willing to accept fault, despite eyewitness and police testimony to the contrary, simply because of the guilt he or she is experiencing over "killing a child." These feelings often arise due to a sense of betraying one's own rules for ethical behavior or code of moral conduct. Witnesses experiencing remorse and regret tend to play directly into the hands of the plaintiff's attorney because the attorney is asking all the same questions the witness has already been asking him- or herself (e.g., "What if I had been going slower, or had reacted differently, or had taken a different route, or had left earlier?"). To the extreme, some of these key witnesses even believe they should be punished for their actions—the only way to be "forgiven" is to admit fault.

Those witnesses experiencing a perception of inadequacy tend to have less education and feel intimidated by both the process and the questions being asked by people they may view as "intellectually superior" to themselves. These individuals become "flight witnesses," in that they are willing to agree to anything in an effort to end the deposition as quickly as possible and leave.

Defensive

Witnesses who feel they need to protect themselves, protect their employer, or defend their actions will try to "explain away" unfavorable case facts. During preparation, these witnesses frequently become frustrated and make comments such as, "I just need to explain how this works" or "you guys don't get it." These witnesses may or may not believe they have done something wrong, but a defensive response will always make them look guilty in the eyes of the jury. In deposition, they will become argumentative or give long-winded answers that can be used against them, since arguing or attempting to explain away an unfavorable fact is akin to attempting to diffuse a bomb that has already detonated. These are also the witnesses who believe it is their job to win the case and cannot see where they properly fit in on the trial team. Most importantly, "fight" witnesses respond from a place of emotion rather than rational cognition, making it highly unlikely for strong, effective testimony to ensue.

Angry / Victim Role / Former Employee

Witnesses who are angry or have taken on the role of a victim often feel like their lives have been negatively affected by the accident in question through no fault of their own. Sometimes, their innocence in the situation is real; other times, it is a personal defense mechanism in response to the ultimate outcome. If your witness is the truck driver, it is possible he or she has been fired as a result of the incident, making him or her much more likely to blame the defendant company or the defendant company's policies, procedures, or training when questioned. The witness may also blame the plaintiff during deposition if he or she believes the plaintiff is at fault or played a role in the incident.

During discovery, strong effective defense depositions decrease a client's financial exposure and costs, while weak, ineffective depositions result in higher damages during settlement negotiations or at trial, making it essential not only to identify your witness' emotional style accurately prior to deposition testimony, but also to address and control it effectively.

Angry witnesses are resistant to preparation sessions and are highly likely to become argumentative in deposition. They are perceived by jurors as being unlikeable and not credible. These witnesses may have trust issues with both the defendant company and the defense attorneys, who they perceive as only caring about the company. It is also possible, especially among truck drivers, that symptoms of depression are present and manifesting as anger rather than sadness.

Apathetic

Apathy is not uncommon among witnesses who actually feel quite badly about the outcome of the accident. Many of these individuals are unsure of how to, or have never, adequately expressed their negative internal states, including their thoughts and emotions. As a coping mechanism, they have hardened themselves to the incident.

Witnesses' mistakes are caused by inadequate pre-deposition preparation that focuses exclusively on substance and ignores the intricacies of the reptile strategy.

These witnesses are frequently described by mock jurors as "cold," "callous," or "uncaring." Similarly, a former employee may appear indifferent because they perceive the outcome of the litigation as no longer affecting them.

The negative, non-verbal message conveyed by apathy is powerful and memorable in a way that can override any quality verbal testimony provided by the witness. Consequently, an apathetic witness makes the plaintiff look more sympathetic and may increase damages, including punitive damages, even when jurors are unsure of the culpability of the defendant company.

Plaintiff Reptile Tactics and Amygdala "Hijack"

Witnesses in the trucking industry, especially truck drivers and safety directors, are notorious for falling victim to David Ball and Don Keenan's plaintiff reptilian tactics. David Ball and Don Keenan, *Reptile: The 2009 Manual of the Plaintiff's Revolution* (2009). Furthermore, witnesses cannot be faulted for this damaging testimony because reptile theory employs emotional and psychological tactics to manipulate them into admitting fault. Witnesses' mistakes are caused by inadequate pre-deposition preparation that focuses exclusively on substance and ignores the intricacies of the reptile strategy. Bill Kanasky, *Derailing the Reptile Safety Rule Attack: A Neurocognitive Analysis and Solution*, For The Defense, Apr. 2014.

Pre-deposition preparation that includes an in-depth review of the reptile strategy, however, may remain ineffective with these high-risk, emotional styles, as the witness will have difficulty acquiring and internalizing the critical information. There is a mood-memory cycle that has two important effects on memory. The first effect is a reciprocal feedback loop: your mood determines the memories that come to mind and the memories that come to mind influence your mood state. For example, a depressed individual, compared to a non-depressed peer, remembers more negative personal experiences when faced with even a neutral stimulus, which then maintains that negative emotional state. In other words, the more you focus on a case with a witness who falls into a high-risk emotional category, the more likely it is for him or her to become further entrenched within that negative state. The second, more powerful, effect of mood is its effect on concentration and one's ability to remember general rather than specific details. Ira Hyman, *Can You Break the Mood-Memory Cycle?,* Psychology Today (Mar 27, 2015), **https://www.psychologytoday.com**. Therefore, to truly be able to prepare these witnesses, their preexisting negative emotional state must be addressed before any education and practice can occur.

Similarly, inadequate assessment and management of these high-risk emotional styles makes witnesses more susceptible to an "amygdala hijack" in deposition. Bill Kanasky et al., *The Effective Deponent: Preventing Amygdala Hijack During Witness Testimony*, For The Defense, May 2018. A term coined by Daniel Goleman, amygdala hijack occurs when the amygdala (the area of the brain in which the fight or flight reaction is housed) overtakes the pre-frontal cortex (the area of the brain responsible for logic and judgement). Daniel Goleman, *Emotional Intelligence: Why It Can Matter More Than IQ* (1995). Our ability to experience distressing emotions (e.g., fear, anxiety, anger) is an inherited trait that historically gives human beings a survival advantage by giving an early warning of impending threat or danger in our external environment. Arne Öhman and Susan Mineka, *Fears, Phobias, and Preparedness: Toward an Evolved Module of Fear and Fear Learning.* 108.3 Psychological Review 483 (2001). That is to say, the brain is inherently wired to defend itself in the face of an adversary. This intuitive use of emotion, however, works against a witness when instinct forces him or her into survival mode in the face of a perceived threat, such as adverse examination or unfavorable case facts, rendering him or her incapable of relying on strategic responses learned in witness preparation sessions. A witness with a high-risk emotional style is especially primed to deliver defensive survival responses resulting from this subcortical amygdala activation. The amygdala hijack causes forced explanations designed to defeat the questioner (fight), attempting to reframe the issue (flight), or pivoting to a different issue (evade). Kanasky et al., 2018. A witness's ability to control emotion depends on having the capacity to modulate negative emotional responses through cognitive-emotional strategies.

Assessment of Witnesses

Prior to beginning preparation of the witness, it is important to assess the individual's strengths, weaknesses, and emotional style. Trust is key when it comes to a witness expressing vulnerabilities; therefore, the assessment can take some time and should be completed through both general conversation as well as pointed questions. In addition to the substance of his or her answers, the style in which the witness responds becomes crucial to your evaluation of his or her emotional predisposition. Meeting with your witness in person, early in the case, should be the beginning of the assessment. By speaking on the phone and interacting with the witness in person, counsel will gain insight into the emotional state of the witness. Often, speaking with the witnesses' supervisor may provide additional insight into the witness's emotional style.

An effective line of questioning includes an assessment of what the witness thinks of the case; what his or her understanding is of the claims being made; what his or her understanding of the litigation process is; how he or she is feeling about the process; and so on. Self-reflection may be encouraged by re-

questing specific feedback from the witness, "You said you are feeling fine about everything, but when I listen to you talk, it seems like you feel frustrated. Am I misreading that? From your perspective, what is it that is making you feel frustrated?"

Assessment can also be very effective during mock questioning, as the witness's answer style will provide a plethora of information regarding the individual's emotional state. Once again, feedback to the witness is required to facilitate and encourage conversation.

Addressing Preexisting Emotions—The Solution

The first step in addressing high-risk or preexisting emotion is having the witness be able to express said emotion. The ability to "dump" these toxic emotions, while simultaneously having the emotion acknowledged, can be extremely cathartic to many individuals in and of itself. Furthermore, and perhaps more critically, the more the witness expresses the emotion in the preparation environment, the less likely he or she is to express it during the deposition.

Emotional regulation skills must then be put into place. "Emotional regulation" is a term generally used to describe a person's ability to manage and respond to an emotional experience effectively. It is not the experience of an emotion in and of itself that leads to difficulties, it is the interpretation of the emotion, or negative thoughts, that are problematic. The use of cognitive insight skills allows the witness both to self-reflect and to evaluate the unhealthy thoughts that have led to their ongoing negative emotional state. Aaron T. Beck and Debbie M. Warman, *Cognitive Insight: Theory and Assessment*, 3–30.2 (X.F. Amador and A.S. David eds. 2004). Cognitive reappraisal skills are then taught to the witness so that he or she might reinterpret negative thoughts in general, and negative stimuli within the deposition environment more specifically. Active cognitive reappraisal is a careful, deliberate tactic to prevent the brain from an impulsive, spontaneous reaction to a negative stimulus, ultimately leading to high level cognitive processing and effective testimony. Kanasky et al., 2018.

The final, most important step is practice. The more mock questioning that can be done with a high-risk, emotional witness, the more comfortable he or she will become with the process and the more desensitized he or she will become to the associated emotion. Being able to provide strong, effective testimony while thwarting a plaintiff attorney's attempts at neuropsychological manipulation will become more like muscle memory to the witness with continued practice and use of learned skills.

Conclusion

This article is essentially the prequel to any analysis of reptilian theory from plaintiffs' counsel. Yes, we need to know and prepare against those tactics; however, answering the following questions may very well determine the effectiveness of your witness preparation.

- Who is your audience?
- Who is your witness at his or her core?
- How does he or she feel about this case?

These are imperative elements that will enable a successful witness preparation and resulting deposition. Without answering these questions, time may be wasted, the client frustrated, and the intended result will actually be less likely.

Your client may be predisposed to traps or tactics based on personal feelings or experiences. Without gaining the trust and building a connection with the client, defense counsel will not know of these potential pitfalls. This process can assist in targeting preparation topics, subjects, or emotions where the deponent is more susceptible to being manipulated by preexisting emotion. Just as defense counsel seeks to find out everything about the plaintiff and his or her preexisting conditions, so should counsel explore their client's emotional condition(s) and experiences. This insight takes time and should be developed over numerous interactions with the client, or when appropriate, with outside assistance. FD

TADC 2021 ANNUAL MEETING

September 22-26, 2021 ~ The Peabody ~ Memphis, Tennessee

Program Co-Chairs: Amy M. Stewart, Stewart Law Group PLLC, Dallas & Thomas E. Ganucheau, Beck | Redden LLP, Houston

CLE Approved for: 10.75 hours, including 2.75 hours ethics

Wednesday, September 22, 2021

6pm – 8pm TADC Welcome Reception - ***STAX Museum***

Thursday, September 23, 2021

7:00-9:00am Buffet Breakfast

7:25-7:30am Welcome & Announcements
Slater C. Elza, TADC President
Underwood Law Firm, P.C., Amarillo
Amy Stewart, Stewart Law Group PLLC, Dallas
Tom Ganucheau, Beck | Redden LLP, Houston

7:30-8:15am *LAWYER ETHICS IN THE CONFERENCE ROOM AND THE COURTROOM: NOT-SO-HYPOTHETICAL CASE STUDIES (1.0 hr ethics)*
Geoff Gannaway & Mary Kate Raffetto, Beck | Redden LLP, Houston

8:15-9:00am *DEFENDING THE DESIGN PROFESSIONAL IN A CONSTRUCTION DISPUTE*
John P. Cahill, Jr., Lanza Law Firm, PC, Houston

9:00 -9:45am *FMCSR'S: BACK TO THE BASICS*
Mike Bassett, The Bassett Firm, Dallas

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

10:00-10:45am *THE FUTURE OF THE DEFENSE BAR: WHAT IS OUR RESPONSIBILITY TO ENSURE FAIR JUSTICE FOR OUR CLIENTS*
Douglas Burrell, DRI President-Elect**,** Drew Eckl Farnham Law, Atlanta, GA

10:45-11:15am *THE ENGINEER AND THE DEFENSE LAWYER*
Bear Ferguson, ESi, Naperville, IL

1:15-11:45pm *TAX CONSEQUENCES OF SETTLEMENTS AND JUDGMENTS*
Joshua Smeltzer, Gray Reed & McGraw LLP, Houston

11:45-1:15pm LUNCHEON: *KEEPING IN-HOUSE COUNSEL HAPPY: WHAT YOU CAN DO TO HELP – A PANEL DISCUSSION*
Kathy Kassabian Reid, Moderator, McDonald Sanders, P.C., Fort Worth
Terrence Reed, Federal Express, Memphis, TN
Tiffanee Wade-Henderson, International Paper, Memphis, TN
Paul Sciubba, Autozone, Memphis, TN

1:15-2:00pm *NAVIGATING COURT BACKLOGS, RESOLVING CASES AND AVOIDING CREEP POST-PANDEMIC*
Kate Skagerberg, Nelson Mullins Riley & Scarborough LLP, Nashville, TN

2:00-2:30pm *AMICUS/APPELLATE UPDATE*
J. Mitchell Smith, Germer PLLC, Beaumont

Thursday Afternoon free to enjoy Memphis!

Friday, September 24, 2021

7:00-9:00am Buffet Breakfast

7:25-7:30am Welcome & Announcements

7:30-8:00am *TCRP 91a: THE BASICS, KEY CASES AND PRACTICE TIPS*
Stephen Edmundson, Greenberg Traurig, L.L.P., Houston

8:00-9:00am *87th LEGISLATIVE SESSION: HOW THE LAW CHANGED AND HOW IT AFFECTS YOUR PRACTICE (.25 hrs ethics)*
Slater C. Elza, Underwood Law Firm, P.C., Amarillo
Michael J. Shipman, Fletcher, Farley, Shipman & Salinas, LLP, Dallas
Trey Sandoval, MehaffyWeber PC, Beaumont

9:00-9:30am *RECENT CHANGES IN THE TEXAS DISCOVERY RULES*
Chantel Crews, Ainsa Hutson Hester & Crews LLP, El Paso

9:30-10:15am *TEXAS SUPREME COURT UPDATE (.25 hrs ethics)*
Justice Brett Busby., Texas Supreme Court, Austin

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

10:30-10:45am *TADC BUSINESS MEETING*

10:45-11:45am *LUDDITE OR TECHNOPHILE: WARNINGS ON TECHNOLOGY COMPETENCY (1.0 hr ethics)*
Baxter Drennon, Wright Lindsey & Jennings LLP, Little Rock, AR

11:45am-12:30pm *DUCKS IN A HOTEL, GOATS IN A BAR? MASKS AND SHIELDS IN COURTROOMS. OH MY! JURY TRIALS IN THE POST-COVID ERA (.25 hrs ethics)*
John Stone, Moderator, Stewart Law Group PLLC, Dallas
James Old, Hicks Thomas LLP, Austin
Pat Long-Weaver, Field, Manning, Stone, Hawthorne & Aycock, P.C., Midland

Friday Afternoon free to enjoy Memphis!

6:30pm-9:00pm
TADC Awards Dinner

Saturday, September 25, 2021

7:00-9:00am Buffet Breakfast

8:00-11:00am TADC Gives Back – FedEx Family House at Le Bonheur Children's Hospital – A Service Project

Saturday free to enjoy Memphis!

Sunday, September 26, 2021

Annual Meeting Adjourned

2021 TADC ANNUAL MEETING
September 22-26, 2021
The Peabody ~ 118 S. 2nd Street ~ Memphis, Tennessee 38103

Pricing & Registration Options
Registration fees include Wednesday through Saturday group activities, including the Wednesday evening welcome reception, Hospitality room, all breakfasts, CLE Program each day and related expenses. If you would like CLE credit for a state other than Texas, check the box below.

Registration for Member Only (one person)	$ 895.00
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

Service Project
TADC Gives Back: The TADC will participate in a service project at the Peabody Hotel to benefit the FedEx Family House at Le Bonheur Children's Hospital. Details to follow.

Hotel Reservation Information
For hotel reservations, **CONTACT THE PEABODY MEMPHIS DIRECTLY AT 800-732-2639 and reference the TADC 2021 Annual Meeting.** The TADC has secured a block of rooms at a FANTASTIC rate of $219 per night. It is **IMPORTANT** that you make your reservation as soon as possible ***as the room block will sell out***. Any room requests after the deadline date, or after the room block is filled, will be on a space available basis.

DEADLINE FOR HOTEL RESERVATIONS IS SEPTEMBER 3, 2021

TADC Refund Policy Information
Registration Fees will be refunded ONLY if a written cancellation notice is received at least SEVEN (7) days prior (SEPTEMBER 15, 2021) to the meeting date. A $75.00 Administrative Fee will be deducted from any refund. Any cancellation made after SEPTEMBER 15, 2021 IS NON-REFUNDABLE

2021 TADC ANNUAL MEETING REGISTRATION FORM
September 22-26, 2021
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2021 TADC WINTER SEMINAR ~ FORT WORTH, TX ~ FEBRUARY 11-12, 2021

The Texas Citizen's Participation Act – A Defense Lawyer's Friend or Foe? – Mary H. Barkley – 19 pgs.

Confronting the Stranger: The Judge, The Jury, The Witness – K. B. Battaglini – 55 pgs. PPT

Texas Discovery Changes 2021: Is This 1999 All Over Again or a New Era of Federalized State Court Discovery? – Alex J. Bell, Bill Gardner – 6 pgs. + 24 pgs. PPT

Lloyd's of London Demystified – Paige C. Jones – 28 pgs. PPT

Cutting Edge Cases from the TADC Amicus Committee – Richard B. Phillips, Jr. – 11 pgs.

Texas Uniform Fraudulent Transfers Act – Megan H. Schmid, Caitlin Gernert – 8 pgs.

How to Apply Settlement Credits and Ensure a Settling Defendant is Submitted to the Jury – David Speed, Michael Ackerman – 6 pgs.

Proving, Discovering, Defending, and Appealing Attorney-Fee Awards After *Rohrmoos* – The Honorable Mike Wallach, Scott Lindsey – 37 pgs. + 34 pgs. PPT

Lights, Camera, Ethics – Gayla Corley – 17 pgs. PPT

Assume Nothing, Believe Nothing and Check Everything – Looking for the Golden Needle in the Haystack – Christy Amuny – 38 pgs. PPT

Packing Heat: What Businesses and Employers Need to Know – M. Mitchell Moss – 42 pgs. PPT

Employment Law Update in the Age of Covid-19 – Diana Macias Valdez – 17 pgs. PPT

Changes in the Law Regarding Certificates of Merit – Shabaz A. Nizami – 19 pgs. PPT

2021 TADC SPRING MEETING ~ CHICAGO, IL ~ APRIL 28-MAY 2, 2021

2021 Business Immigration Update – April 2021 – Maggie Murphy – 18 pgs. PPT + Companies Prep to Return to Worksites as Temporary Flexibility for I-9 Compliance Extended – 2 pg. article + Six Changes in DHS, ICE Created by COVID-19 Pandemic – 3 pg. article

Avoiding Grievances – Rusty Beard – 13 pgs. PPT

Business Associate Agreements and Cybersecurity – Bradford E. Adatto – 8 pgs.

Choice of Law and Why It Matters – Michael A. Golemi – 17 pgs. PPT

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Papers Available

2021 TADC SPRING MEETING CONTINUED

Dealing with OSHA Investigations and Citations When Litigation is Anticipated – Matt D. Matzner – 23 pgs. + 41 pgs. PPT

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- Complete the TADC Expert Witness Research Service Request Form. Multiple name/specialty requests can be put on one form.
- If the request is for a given named expert, please include as much information as possible (there are 15 James Jones in the database).
- If the request is for a defense expert within a given specialty, please include as much information as possible. For example, accident reconstruction can include experts with a specialty of seat belts, brakes, highway design, guardrail damage, vehicle dynamics, physics, human factors, warning signs, etc. If a given geographical region is preferred, please note it on the form.
- Send the form via email to tadcews@tadc.org
- Queries will be run against the Expert Witness Research Database. All available information will be sent via return email transmission. The TADC Contact information includes the attorney who consulted/confronted the witness, the attorney's firm, address, phone, date of contact, reference or file number, case and comments. To further assist in satisfying this request, an Internet search will also be performed (unless specifically requested NOT to be done). Any CV's, and/or trial transcripts that reside in the Expert Witness Research Service Library will be noted.
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* Multiple names on a single request form and/or request for experts with a given specialty (i.e., MD specializing in Fybromyalgia) are billed at $80.00 per hour.

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

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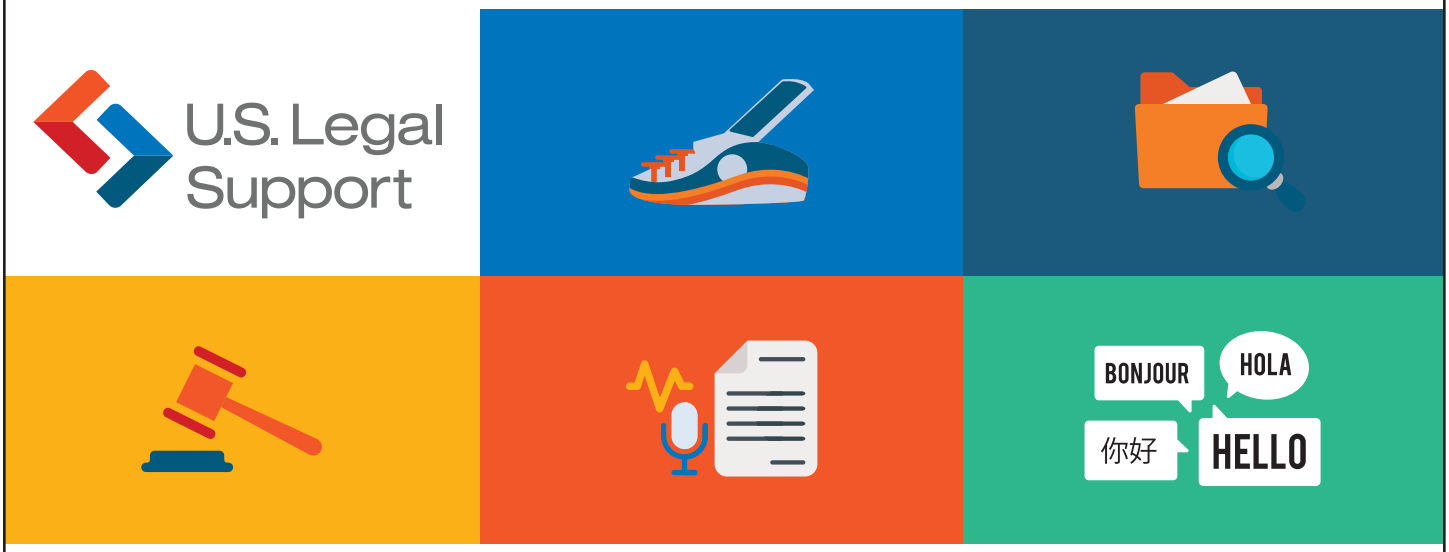

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