



GENERAL PRACTICE DIGEST

State Bar of Texas

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ADMINISTRATIVE LAW

AEP Texas Central Co. v. P.U.C., 286 S.W.3d 450 (Tex. App.—Corpus Christi 2008)

Agency Interpretation of Statute Outside of its Expertise: The judiciary does not defer to administrative interpretations in regard to questions which do not lie within administrative expertise or deal with non-technical questions of law.

SIGNIFICANT DECISION

City of Desoto v. White, 288 S.W.3d 389 (Tex. 2009)

Is a Statutory Requirement Jurisdictional?: The failure of a jurisdictional requirement deprives the Court of the power to act (other than to determine that it has no jurisdiction) and ever to have acted, as a matter of law. If the requirement is not jurisdictional, however, the tribunal may hear the case, although other consequences may flow from a party's failure to comply with the requirement. This Court recognized in **Dubai Petroleum Co. v. Kazi**, 12 S.W.3d 71, 75-77 (Tex. 2000) that deeming a provision jurisdictional opens the way to making judgments vulnerable to delayed attack for a variety of irregularities that perhaps ought to be sealed in a judgment. The modern direction of policy is to reduce the vulnerability of a final judgment to an attack on the ground that the tribunal lacked subject matter jurisdiction. Because of these consequences, the judiciary has been reluctant to conclude that a provision is jurisdictional, absent clear legislative intent.

The holding in **Dubai** applies to tribunals of very limited jurisdiction and the Court's focus is to avoid a result that leaves the decisions and judgments of the hearing examiner in limbo and subject to future attack, unless that was the Legislature's clear intent. The Supreme Court held that it had directly applied **Dubai's** reasoning to the administrative context in **Igal v. Brightstar Info. Tech. Group, Inc.**, 250 S.W.3d 78, 83 (Tex. 2008). Thus, consistent with **Dubai**, the Court begins with the presumption that the Legislature did not intend the statutory requirements to be jurisdictional, which can only be rebutted by a clear legislative intent to the contrary.

Just because a statutory requirement is mandatory does not make it jurisdictional. It is true that the Legislature provided in §311.034 of the Texas Government Code that "statutory prerequisites to suit, including the provision of notice, are jurisdictional in all suits against a governmental entity." The Court held that this provision only applied to a waiver of sovereign immunity and only to requirements that were a statutory prerequisite to suit. Further, the Court looks for the presence or absence of specific consequences for noncompliance in determining whether a provision is jurisdictional.

Employment Retirement Syst. of Texas v. Duenez, 288 S.W.3d 905 (Tex. 2009)

Exclusive Jurisdiction: When an agency has exclusive jurisdiction of a dispute, the Courts have no jurisdiction until the administrative procedures are exhausted. In deciding whether an agency has exclusive jurisdiction, the Court looks to its authorizing legislation for an express grant of exclusive jurisdiction or for a pervasive regulatory scheme

indicating that it was the Legislature's intention. Of course, legislation must be granted by the Legislature; an agency cannot grant exclusive jurisdiction to itself.

Further, relegating common law claims to administrative remedies implicates the Texas Constitution Open Courts Provision. The Court has rejected Open Courts complaints when a grant of exclusive jurisdiction involved claims that did not exist at common law. However, the Court declined to allow the delegation of common law claims to an administrative agency.

CIVIL PROCEDURE

CA Partners v. Spears, 274 S.W.3d 51 (Tex. App.—Houston [14th Dist.] 2008, *pet. denied*)

Permanent Injunction Reviewed on Appeal Under Abuse of Discretion Standard: The court of appeals reiterated the standard of review for a permanent injunction: “We review the trial court’s grant of permanent injunctions for an abuse of discretion.” The court of appeals upheld the trial court’s grant of a permanent injunction. **See also Hot Rod Hill Motor Park v. Triolo**, 276 S.W.3d 565 (Tex. App.—Waco 2008, *pet. filed*) (“We review a trial court’s decision to grant a permanent injunction for abuse of discretion”; the court of appeals affirms the trial court’s grant of a permanent injunction).

In re TCW Global Project Fund II, Ltd., 274 S.W.3d 166 (Tex. App.—Houston [14th Dist.] 2008, *orig. proceeding*)

Failure to Raise Challenge to Ground for Denial of Motion Until Reply Brief in Mandamus Proceeding Waived That Challenge and Warrants Denial of Mandamus Relief: The defendants moved to dismiss based on a forum selection clause in a contract between the parties, and the trial court denied the motion. The defendants sought a petition for writ of mandamus in the court of appeals, but did not challenge one of the possible grounds relied on by the trial court, concerning the scope of the forum selection clause, in their petition, and raised this ground for the first time in their reply brief. **Held:** Construing Texas Rule of Appellate Procedure 52.5, providing for reply briefs in original proceedings, and the Court concluded that the defendants waived the argument that the scope of the forum selection clause was sufficiently broad to include all of the plaintiff’s claims. Accordingly, the court of appeals denied the petition for writ of mandamus.

Kerlin v. Arias, 274 S.W.3d 666 (Tex. 2008)

Plaintiffs’ Summary Judgment Affidavit Insufficient to Raise Fact Issue: The plaintiffs sued Kerlin for fraud over title to a substantial part of Padre Island. Kerlin acquired title in 1942, but the plaintiffs alleged fraud in an 1847 deed by one of the original owners of Padre Island. Kerlin moved for summary judgment relying on the 1847 deed and an English translation filed in the deed records the same year. These documents established that the original owner was a minor, his lawful guardian was his father, and the father signed the deed on his son’s behalf. The plaintiffs did not contest the authenticity of the document relied on by Kerlin, but instead relied on a 2003 affidavit by Eva Castillo, in which she alleged that the original owner was not a minor. The trial court granted summary judgment for Kerlin, but the court of appeals reversed, finding that Castillo’s affidavit raised a fact issue. **Held:** The Supreme Court disagreed with the court of appeals. First, the only representation Castillo made about the truth of her affidavit was that “[a]ll statements contained herein are true and correct to the best of my personal knowledge and belief.” To have probative value, an affidavit must swear that the facts presented reflect the affiant’s personal knowledge, an affiant’s belief about the facts was legally insufficient. Second, Castillo stated that she was competent to make the affidavit because she “heard testimony” in a related trial, “reviewed documents” related to the plaintiffs’ claims, and “read historical accounts about Padre Island.” This testimony was hearsay. “Third, nothing in the affidavit affirmatively shows how Castillo could possibly have personal knowledge about events occurring in the 1840s.”

Gardner v. U. S. Imaging, Inc., 274 S.W.3d 669 (Tex. 2008)

Taking of Default Judgment Causes Facts Alleged to be Deemed Admitted: The Supreme Court reiterated that, where the claim was for unliquidated damages, “once a default judgment is taken, all factual allegations contained in the petition, except the amount of damages, are deemed admitted.”

In re International Profit Associates, Inc., 274 S.W.3d 672 (Tex. 2009, orig. proceeding)

Mandamus Available to Enforce Forum Selection Clauses: The Supreme Court held that the trial court abused its discretion by refusing to enforce a forum selection clause. Forum-selection clauses are generally enforceable, and a party attempting to show that such a clause should not be enforced bears a heavy burden. . . . A trial court abuses its discretion if it refuses to enforce a forum-selection clause unless the party opposing enforcement clearly shows that (1) the clause is invalid for reasons of fraud or overreaching, (2) enforcement would be unreasonable or unjust, (3) enforcement would contravene a strong public policy of the forum where the suit is brought, or (4) the selected forum would be seriously inconvenient for trial. . . . Mandamus relief is available to enforce forum-selection agreements because there is no adequate remedy by appeal when a trial court abuses its discretion by refusing to enforce a valid forum-selection clause that covers the dispute.”

No Undue Delay in Seeking Mandamus Relief: The Supreme Court noted that, although mandamus was not an equitable remedy, “its issuance is controlled largely by equitable principles.” One of these principles was that “equity aids the diligent and not those who slumber on their rights.” The Supreme Court examined several alleged periods of undue delay in the trial court and between the time the court of appeals denied mandamus relief and the time the relator sought relief in the Supreme Court. The Supreme Court concluded that none of these time periods was sufficiently long to support a finding of laches.

Badiga v. Lopez, 274 S.W.3d 681 (Tex. 2009)

Supreme Court Has Jurisdiction to Determine Court of Appeals’ Jurisdiction: The court of appeals dismissed an interlocutory appeal. The Supreme Court held, as it had in the past, that it had jurisdiction to decide whether the court of appeals lacked jurisdiction. This ground for Supreme Court jurisdiction was in addition to the statutory grounds.

SIGNIFICANT OPINION

Southwestern Bell Telephone Company, L.P. v. Mitchell, 276 S.W.3d 443 (Tex. 2008)

Stare Decisis Rejected: In a 2002 opinion, the Texas Supreme Court construed a provision in the Workers’ Compensation Act in a manner at odds with the interpretation adhered to by the Workers’ Compensation Commission, but the Legislature immediately thereafter enacted an amendment to restore the rule the Commission previously had applied. Under these circumstances, the Supreme Court declined to apply the doctrine of *stare decisis* and instead overruled its previous opinion. “Generally, the doctrine of *stare decisis* dictates that once the Supreme Court announces a proposition of law, the decision is considered binding precedent, but we have long recognized that the

doctrine is not absolute. [W]e adhere to our precedents for reasons of efficiency, fairness, and legitimacy, and when adherence to a judicially-created rule of law no longer furthers these interests, and the general interest will suffer less by such departure, than from a strict adherence, we should not hesitate to depart from a prior holding. [U]pon no sound principle do we feel at liberty to perpetuate an error, into which either our predecessors or ourselves may have unadvisedly fallen, merely upon the ground of such erroneous decision having been previously rendered. We have observed that in the area of statutory construction, the doctrine of *stare decisis* has its greatest force because the legislature can rectify a court's mistake, and if the legislature does not do so, there is little reason for the court to reconsider whether its decision was correct. But when the legislature does not acquiesce in the court's construction, when instead it immediately makes clear that the proper construction is one long adopted by the agency charged with enforcing the statute, judicial adherence to the decision in the name of *stare decisis* may actually deserve the interests of efficiency, fairness, and legitimacy that support the doctrine. It is hardly fair or efficient to give effect to a judicial construction of a statute for a brief period of time when the legislature has reinstated for future cases, the same rule that had been followed before the court's decision. The doctrine of *stare decisis* does not justify inequity and confusion in such a narrow gap of time."

ETC Katy Pipeline, Ltd. v. FLR Pipeline Corridor No. 1, LLC, 276 S.W.3d 577 (Tex. App.—Waco 2008, no pet.)

When Merits Not Reached, Dismissal Should be Without Prejudice: Katy Pipeline filed five condemnation proceedings with the district court. Before the special commissioners met or made an award, Katy Pipeline filed a motion to dismiss, asserting that the matters had been settled between the parties. The trial court dismissed with prejudice, and refused to modify the order in accordance with Katy Pipeline's request that the dismissal be without prejudice. **Held:** The court of appeals held that dismissal with prejudice was improper. "Generally, an order dismissing a proceeding with prejudice is improper when there has not been an adjudication of the merits of the claims. . . . When a dismissal does not implicate the claims' merits, the trial court should dismiss the claims without prejudice."

In re Coppock, 277 S.W.3d 417 (Tex. 2009)

Contempt Order Unenforceable Because Judgment Failed to Order or Command Performance: The trial court's final decree of divorce incorporated a mediated settlement agreement between the husband and the wife which permanently enjoined them from communicating with each other "in a coarse or offensive manner." The order referred to a "permanent injunction granted below," and listed 21 different prohibited behaviors, but contained no injunctive language commanding or ordering the parties not to engage in the described conduct. Over the next two years, the former wife communicated numerous times with the former husband by telephone and e-mail in a manner the former husband considered violative of the decree concerning "coarse or offensive" communications. The trial court held the former wife in contempt. **Held:** The court of appeals denied relief, but the Supreme Court granted the former wife's petition for habeas corpus. The former wife argued that the injunctive provision violated her constitutional rights, but the Supreme Court did not reach the constitutional issues. Instead, the Supreme Court held that the contempt order was unenforceable because the divorce decree did not contain "language commanding or ordering the parties not to engage in the described conduct." "Without decretal language making clear that a party is under order, agreements incorporated in divorce decrees are enforced only as contractual obligations. . . . Obligations that are merely contractual cannot be enforced by contempt."

Merck & Company, Inc. v. Garza, 277 S.W.3d 430 (Tex. App.—San Antonio 2008, *pet. granted*)

Jury Misconduct Supports Granting of New Trial: The deceased's wife and children brought suit against Merck following deceased's death, allegedly caused by his consumption of a drug manufactured by Merck. During voir dire, juror Rios stated that he knew the plaintiff's wife "from school," that is, from a school where both the wife and Rios were employed. After the jury trial that resulted in a verdict for plaintiffs, Merck discovered that Rios had received a number of interest free loans from the wife, including a final loan for \$2,500 six months before trial. Merck also discovered several calls from Rios' cell phone to the wife, including one within days after Rios' receipt of the jury summons, another the night before jury selection, and four calls on the day after Merck filed a post-trial motion to take Rios' deposition. Rios voted with the 10 to 2 majority in rendering a verdict against Merck. Merck filed a motion for new trial, but the trial court denied the motion. **Held:** The court of appeals reversed and remanded for a new trial, based on jury misconduct. "A new trial for jury misconduct is warranted if (1) the misconduct occurred, (2) it was material, and (3) probably caused injury." All three elements were satisfied, the court of appeals concluded.

Retamco Operating, Inc. v. Republic Drilling Company, 278 S.W.3d 333 (Tex. 2009)

Personal Jurisdiction, Based on Specific Jurisdiction Doctrine, Satisfied Where Out of State Company Purchased Texas Oil and Gas Interests: Retamco, a Texas corporation, sued Paradigm Oil, another Texas Corporation, over unpaid royalties for oil and gas interests in several Texas counties. After a finding of discovery abuse, the trial court assessed sanctions against Paradigm and rendered a \$16 million interlocutory default judgment. Thereafter, Retamco amended its petition to include a claim against Republic Drilling Company, a California corporation, for violation of the Uniform Fraudulent Transfer Act. Retamco claimed that during the pendency of the litigation, Paradigm fraudulently assigned to Republic a 72% interest in oil and gas properties in several Texas counties. Retamco alleged that these transfers led to Paradigm's insolvency, rendering it unable to satisfy Retamco's claims. Republic filed a special appearance, contending that because the allegedly fraudulent assignment of the Texas interests occurred entirely outside of Texas, Texas courts did not have personal jurisdiction over it. The trial court denied Republic's special appearance, but in an interlocutory appeal the court of appeals reversed, holding that Republic is not subject to personal jurisdiction in Texas. **Held:** The Supreme Court reversed the judgment of the court of appeals. The Supreme Court's opinion reviews numerous principles governing personal jurisdiction in general and specific jurisdiction in particular. The fact that the transaction concerned Texas oil and gas interests looms large in the court's analysis and conclusion that the exercise of personal jurisdiction over Republic was proper.

In re Bank of America, N.A., 278 S.W.3d 342 (Tex. 2009, *orig. proceeding*)

Contractual Waiver of Jury Trial Enforceable; No Presumption Against Waiver: The plaintiff, the purchaser in a real estate contract, sued the defendant seller. When the plaintiff demanded a jury trial, the defendant moved to enforce a contractual waiver of the right to a jury trial. The court of appeals reversed, holding that the defendant did not meet its burden of producing prima facie evidence that the plaintiff knowingly and voluntarily waived its right to a jury trial. The court of appeals imposed this burden by inferring a presumption against a contractual jury waiver purportedly arising from the Supreme Court's opinion in **In re Prudential Insurance Company of America**, 148 S.W.3d 124 (Tex. 2004, *orig. proceeding*). **Held:** The Supreme Court reversed, holding that the court of appeals' inference was erroneous for two reasons. "First, a presumption against waiver would incorrectly place the initial burden

of establishing a knowing and voluntary execution on [defendant], which is inapposite to our burden-shifting rule as articulated in **In re General Electric**, 203 S.W.3d 314, 316 (Tex. 2006) (*per curiam*) (“[A] conspicuous provision is prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut it.”). Second, a presumption against waiver would create an unnecessary distinction between arbitration and jury waiver clauses, even though we have expressed that our jurisprudence ‘should be the same for all similar dispute resolution agreements.’ **Prudential**, 148 S.W.3d at 134.”

In re Lovito-Nelson, 278 S.W.3d 773 (Tex. 2009, *orig. proceeding*)

Motion for New Trial Granted Only by Written, Signed Order: Following a bench trial in a family law matter, the defendants timely moved for a new trial. The court heard the motion and initialed a handwritten entry on the docket sheet stating, “new trial granted.” The same date the trial court and counsel for all parties signed an agreed “pre-trial scheduling order” that set various pretrial deadlines and a final date and time for trial. The scheduling order also stated: “Trial on the merits is hereby set on this date.” Lovito-Nelson petitioned for a writ of mandamus in the court of appeals, but that court denied relief without an opinion. **Held:** The Supreme Court granted Lovito-Nelson’s petition for writ of mandamus. The Supreme Court reiterated prior rulings that a new trial can be granted only by a written, signed order in accordance with Texas Rule of Civil procedure 329b(c), which stated: “In the event an original or amended motion for new trial or a motion to modify, correct or reform a judgment is not determined by written order signed within seventy-five days after the judgment was signed, it shall be considered overruled by operation of law on expiration of that period.” “It is important that the requirement of a written order granting a motion for new trial be a bright-line rule. Otherwise, one might argue that all sorts of conduct should be given the same effect—a trial setting or other setting, a status conference, a hearing on a discovery motion, a request for discovery—the list is endless.”

In re Stonebridge Life Insurance Company, 279 S.W.3d 360 (Tex. App.—Austin 2008, *orig. proceeding*)

Failure to Consolidate Cases Warrants Mandamus Relief: Over a several year period, the plaintiff purchased 11 accidental death and dismemberment insurance coverage from Stonebridge, and the coverage language and exceptions in all 11 policies were essentially identical. The plaintiff made a claim under all the policies due to the amputation of his left hand and wrist that he alleged resulted from an automobile accident. Stonebridge denied coverage, alleging that at least some of the injury leading to the amputation was due to an earlier chain saw accident. The plaintiff brought 11 separate suits against Stonebridge and alleged in each suit that damages did not exceed \$75,000, apparently to avoid removal to federal court. Stonebridge moved to consolidate the 11 suits, but the trial court denied the motion and Stonebridge sought appellate relief through a petition for writ of mandamus. **Held:** The court of appeals granted the petition. “Texas trial courts have broad discretion regarding the severance and consolidation of cases—but that discretion is not unlimited. . . . One well-established limitation on that discretion is the single-action rule, or the rule against splitting claims. . . . Purposes served by this rule include ‘preventing vexatious and oppressive litigation . . . where a single suit would suffice.’ . . . A trial court abuses its discretion—and is subject to correction by mandamus—by severing a single cause of action into two or more parts. . . . A trial court also abuses its discretion by severing a cause that is so interwoven with the remaining action as to involve the same facts and issues. . . . We view the failure to consolidate the eleven lawsuits here, which are pursuing essentially eleven pieces of a single claim for a single injury, as analogous to a trial court’s improper severance of a single lawsuit into eleven separate suits. The difference

here being that [plaintiff] unilaterally severed the claims at the time of filing rather than filing one suit and then obtaining a severance. Whether the claim is split at the time of filing or after filing, the effect is the same from the standpoint of the single-action rule.”

In re Labatt Food Service, L.P., 279 S.W.3d 640 (Tex. 2009, orig. proceeding)

Wrongful Death Claim by Beneficiaries Must Be Arbitrated; Claim of Invalidity of Entire Agreement Containing Arbitration Clause Must Be Decided by Arbitrator: The deceased employee was a participant in Labatt’s occupational injury plan, offered in lieu of workers’ compensation insurance, and the plan provided for arbitration of claims. The deceased employee died while working, and his beneficiaries brought suit against Labatt for wrongful death. Labatt moved to arbitrate the wrongful death claim under the Federal Arbitration Act, but the trial court denied the motion and the court of appeals denied mandamus relief. **Held:** The Supreme Court granted Labatt’s petition for writ of mandamus to compel arbitration. First, the Supreme Court held that the beneficiaries, though nonsignatories to the contract containing the arbitration agreement, were required to arbitrate. “Several rules of law and equity may bind nonsignatories to a contract. For example, we have held that the principles of equitable estoppel and agency may bind nonsignatories to an arbitration agreement.” Here, the court held that the nonsignatories were bound by the agreement because of the derivative nature of a wrongful death claim. “Under the Wrongful Death Act as it applies here, wrongful death beneficiaries may pursue a cause of action ‘only if the individual injured would have been entitled to bring an action for the injury if the individual had lived.’ **Tex. Civ. Prac. & Rem. Code §71.003(a)**. . . . And we have consistently held that the right of statutory beneficiaries to maintain a wrongful death action is entirely derivative of the decedent’s right to have sued for his own injuries immediately prior to his death.” Second, the Supreme Court held that the beneficiaries’ contention that the entire contract containing the arbitration agreement was invalid was a claim that must be decided by the arbitrator, not the trial court. “There are two types of challenges to an arbitration provision: (1) a specific challenge to the validity of the arbitration agreement or clause, and (2) a broader challenge to the entire contract, either on a ground that directly affects the entire agreement, or on the ground that one of the contract’s provisions is illegal and renders the whole contract invalid. . . . A court may determine the first type of challenge, but a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”

Ford Motor Company v. Castillo, 279 S.W.3d 656 (Tex. 2009)

Defendant Entitled to Discovery on Issue of Possible Outside Influence on Presiding Juror: The plaintiffs sued Ford in a products liability action, and the parties reached a settlement agreement after the presiding juror sent a note to the judge asking the maximum amount that could be awarded to the plaintiffs. Based on later discussions with jurors, Ford suspected that outside influence on the presiding juror may have occurred. When Ford was denied permission by the trial court to obtain discovery on the outside influence issue, it withdrew its consent to the settlement. The plaintiffs then moved for summary judgment against Ford for breach of the settlement agreement. Ford renewed its request for discovery, but the trial court rendered summary judgment for the plaintiffs for breach of the settlement agreement. The court of appeals affirmed. The Supreme Court reversed the judgment of the court of appeals and remanded the case to the trial court. The Supreme Court first reviewed principles governing settlement agreements. Written settlement agreements may be enforced as contracts even if one party withdraws consent before judgment was rendered on the agreement. But if consent was withdrawn, the agreed judgment that was part of the settlement may not be rendered. The party seeking enforcement of the settlement agreement must pursue a separate claim for

breach of contract. "Like any other breach of contract claim, a claim for breach of settlement agreement is subject to the established procedures of pleading and proof. . . . Parties are 'entitled to full, fair discovery' and to have their cases decided on the merits. . . . A trial court abuses its discretion when it denies discovery going to the heart of a party's case or when that denial severely compromises a party's ability to present a viable defense. . . . Because the trial court denied discovery, Ford was unable to develop facts relevant to the presentation of its defense. Therefore, the trial court abused its discretion by denying Ford the right to conduct discovery on the breach of settlement agreement claim."

In re Baylor Medical Center at Garland, 280 S.W.3d 227 (Tex. 2008, orig. proceeding)

Mandamus Proceeding Abated to Allow New Judge to Reconsider Order Granting New Trial; Supreme Court Overrules Prior Opinion Preventing Trial Judge From "Ungranting" New Trial Order More Than 75 D After It Is Signed: In this medical malpractice suit, the jury found for the defendant hospital, but the trial judge granted a new trial, allegedly based on juror affidavits prohibited by the rules. The hospital filed a petition for writ of mandamus in the court of appeals that was denied. The Supreme Court first addressed Texas Rule of Appellate Procedure 7.2, which provided for the substitution of a party in an official capacity and which further stated, "If the case is an original proceeding under Rule 52, the court must abate the proceeding to allow the successor to reconsider the original party's decision." In accordance with this rule, "[m]andamus will not issue against a new judge for what a former one did." Because a new trial judge replaced the judge who granted a new trial, the Supreme Court was obligated to abate the mandamus proceeding to permit the new judge to reconsider the granting of a new trial. "But another rule prevents a trial judge from 'ungranting' (i.e., vacating) a new trial order more than 75 days after it is signed." This rule originally derived from a provision in Rule 329b, which established a deadline for deciding motions for new trial. In 1981, however, Rule 329b was amended to eliminate the limit on plenary power if motions for new trial are granted. Nonetheless, in **Porter v. Vick**, 888 S.W.2d 789 (Tex. 1994), the Supreme Court had reiterated the "ungranting" deadline. Now, the Supreme Court overruled **Porter v. Vick** and abated the mandamus proceeding to allow the new district judge to reconsider the order granting a new trial.

Wagner & Brown, Ltd. v. Sheppard, 282 S.W.3d 419 (Tex. 2008)

In Equity Action, Jury Decides Disputed Facts, But Court Decides Whether to Grant Relief: "As with other equitable actions, a jury may have to settle disputed issues about what happened, but 'the expediency, necessity, or propriety of equitable relief' is for the trial court, and its ruling is reviewed for an abuse of discretion."

Ginn v. Forrester, 282 S.W.3d 430 (Tex. 2009)

Restricted Appeal Dismissed Because No Error Apparent On Face of Record: The trial court dismissed the case for want of prosecution. Six months later, the plaintiff filed a notice of restricted appeal. At the plaintiff's request, the district clerk included in the clerk's record a notation that the clerk's office was unable to locate documents indicating notice was sent or a hearing was held concerning the dismissal. The court of appeals reversed, relying on the district clerk's notation. **Held:** The Supreme Court reversed the judgment of the court of appeals and rendered judgment dismissing the case. Texas Rule of Civil Appellate 165a(1) provided that before a trial court may properly dismiss a case for want of prosecution, "[n]otice of the court's intention to dismiss and the date and place of the dismissal hearing shall be sent by the clerk to each attorney of record." The Supreme Court then summarized governing

principles. “When extrinsic evidence is necessary to challenge a judgment, the appropriate remedy is by motion for new trial or by bill of review filed in the trial court so that the trial court has the opportunity to consider and weigh factual evidence. . . . Accordingly, we have held that affidavits filed for the first time in the appellate court from the district clerk and its counsel averring, respectively, that notice was neither given nor received constituted extrinsic evidence and did not support a restricted appeal. . . . As to what does constitute error on the face of the record, we have clearly said that silence is not enough. The rules governing dismissals for want of prosecution direct the district clerk to mail notice containing the date and place of hearing at which the court intends to dismiss the case, **Tex. R. Civ. P. 165a(1)**, and a similar notice of the signing of the dismissal order, **see Tex. R. Civ. P. 306a(3)**. But the rules do not impose upon the clerk an affirmative duty to record the mailing of the required notices; accordingly, the absence of proof in the record that notice was provided does not establish error on the face of the record. . . . We fail to see the distinction . . . between a record that is silent and a record that contains a written notation that the record is silent; either way, proof of error is absent.”

CONSUMER LAW

Robertson v. Odom, W.L. 2370980; LEXIS 5960 (*Tex. App.—Houston [14th Dist.] 2009*)

“Previous Structural or Roof Repair” as Used in Texas Association of Realtors’ Seller’s Disclosure Notice Means Work Performed on Load-Bearing Portions of Residence: Prior to the sale to the plaintiffs, the defendant’s town home was “reclad” with a “hard-coat” stucco exterior. Rain water entered the town home during the recladding process, causing damage to the kitchen sink, cabinets, sheetrock, and bathroom fixtures. The defendant made repairs to these items, continued with the recladding process (which later failed) and, a year later, listed the town home for sale. In completing the Texas Association of Realtors standard Seller’s Disclosure Notice (required by Texas Property Code §5.008), the defendant checked the box stating he was “Not Aware” of “Other Structural Repairs.” In this suit for real estate fraud and DTPA misrepresentations, the plaintiff asserted that the rain storm repairs to the sink, cabinets, bathroom fixtures and drywall were misrepresented on the Seller’s Disclosure and should have been disclosed as “structural repairs.” **Held:** Since the repairs were not done to the load-bearing portions of the town house, they did not meet the definition of “structural repairs” as a matter of law and were not misrepresented.

Okland v. Travelocity.com, Inc., W.L. 1740076; LEXIS 4646 (*Tex. App.—Ft. Worth 2009*) (*mem. op.*)

Consumer Status: Business Owner’s Wife Was Not a Consumer When She Used the Corporation’s Credit Card to Purchase Hotel Rooms on Internet: In this class action, the plaintiffs alleged that Travelocity.com misrepresented it was collecting amounts for “taxes” on internet hotel reservations which were not the true taxes paid and collected by taxing entities in violation of the DTPA. In a plea to the jurisdiction, Travelocity.com challenged the plaintiff Carolee Okland’s status as a “consumer” under the DTPA because she did not use her own funds to purchase the hotel rooms. The evidence developed reflected that Ms. Okland stayed in the hotel rooms with her family but used her husband’s corporate credit card to pay for them. Her husband’s corporation, Okland Construction, paid the credit card bill. The hotel reservations were also made using an office computer. Okland rationalized that her husband was the owner of Okland Construction, so it “came out of the same pocket.” The trial court dismissed the case for lack of subject matter jurisdiction. **Held:** In affirming, the Court rejected the Plaintiff’s claims that she was a “consumer” under the DTPA because she “acquired” the hotel reservation services by making the reservations and using the hotel rooms she booked. In denying consumer status, the Court held that the Plaintiff was merely an “incidental beneficiary” and not a true “intended beneficiary” of the transaction. The Court likewise rejected the “same pocket” argument, noting that its acceptance would require the Court to disregard the corporate entity, Okland Construction, contrary to basic principles of corporate law.

Whitcotton v. Silver Lake Homes, L.L.C., W.L. 2045224; LEXIS 5428 (*Tex. App.—Beaumont 2009*) (*mem. op.*)

Homeowner’s Refusal to Accept Contractor’s Tardy Offer to Make Repairs of Construction Defects Nevertheless Negated Homeowner’s Breach of Warranty Claim: In this home construction dispute under the Texas Residential Construction Commission Act (“TRCCA”) and Texas Residential Construction Liability Act (“TRCLA”), the homeowners refused to pay their builder after discovering multiple warranty defects in the construction. The homeowners pursued relief through the Texas Residential Construction Commission, and the state inspector appointed by

the Commission confirmed 21 warranty defects. After the state inspector's report was received, the builder offered to make the repairs and correct the defects found. However, the builder did not make that offer within the 45-day time limit of the TRCLA's notice and offer of settlement provisions (Texas Property Code §27.004). The homeowners then refused to let the builder make the repairs. **Held:** The Court affirmed the trial court's judgment in favor of the builder on the breach of warranty claims brought under the DTPA, implicitly finding that the homeowners did not give the builder a reasonable opportunity to "cure" the warranty defects as required by common law warranty law. In so doing, the Court held that the notice and settlement offer provisions of the TRCLA did not establish, as a matter of law, a time limit for a "reasonable opportunity to cure" for common law warranties, and an offer to cure made after those time limits had expired may still be found to be timely for a "reasonable opportunity to cure." (**Note:** The TRCCA and the Texas Residential Construction Commission expired effective September 1, 2009 pursuant to the Texas Sunset Act. Consult the TRCC website and legislative history to determine applicability of TRCCA to ongoing residential construction defect claims.)

Featherston v. Weller, W.L. 1896072; LEXIS 5110 (Tex. App.—Austin 2009) (*mem. op.*)

DTPA §17.506 Affirmative Defense (Based Upon Reliance on Third Party Information) Was Established Despite Affirmative Misrepresentations From Seller: In this case against an auctioneer, the plaintiff purchased an historical pistol at an auction in reliance on written and oral claims that it had belonged to William F. "Buffalo Bill" Cody. The pre-auction catalog contained a description of the pistol and a "provenance," the collection of documents that described the pistol's lineage and authenticity. These documents were later shown to be false and possibly even forged. However, the bid card provided to buyers included, among other disclaimers, a statement that "all descriptions of items are believed to be correct as described by owner." The catalog and bid agreement signed by the buyer also disclaimed any warranties or guarantees. During the auction, the auctioneer paused to allow an antique firearms expert to describe the pistol. The expert made several oral statements about the pistol's heritage which also turned out to be false. The plaintiff paid \$22,000.00 for the pistol, but later determined that it was not authentic and was worth only \$2,000.00. The jury found that the pistol was misrepresented but without any distinction as to whether the misrepresentations were oral or written. In response to a jury question submitted by the defendant, they also found that the auctioneer had notified the plaintiff buyer in writing of his reliance on *written* representations by third parties, thus raising the rarely-used affirmative defense of DTPA §17.506. **Held:** In affirming a defense verdict on the plaintiff's DTPA claims, the Court of Appeals observed that §17.506 would not have been a bar to the plaintiff's DTPA claims based upon the *oral* misrepresentations made during the auction if the jury had separately found those oral misrepresentations to be a producing cause of the plaintiff's damages. However, it was the plaintiff's burden to submit and obtain a jury finding to that effect. Because the plaintiff did not submit a jury question establishing that the oral misrepresentations were a producing cause of his damages, his DTPA claim was barred by the positive jury finding on the "reliance on third party information" affirmative defense. The written disclaimer was found to be sufficient to support the jury's finding under §17.506 even though it did not track the exact language of that section.

Fogal v. Stature Construction, Inc., 294 S.W.3d 708 (Tex. App.—Houston [1st Dist.] 2009)

Arbitration Agreement: Arbitrator's Finding of Fraudulent Inducement as to the Contract as a Whole Does Not Vitiating the Arbitration Clause Contained Within That Agreement: The plaintiffs were home buyers who contracted with the defendant builder to purchase a newly-constructed town home. The earnest money contract they signed contained a binding arbitration clause. After moving into the home and discovering a roof leak, the plaintiffs sued,

asserting DTPA violations and statutory and common law fraud claims. On the defendant's motion, the trial court compelled the parties to submit their dispute to binding arbitration through the American Arbitration Association. In the arbitration, the plaintiffs prevailed and obtained a finding from the arbitrator "granting" their common law fraud claim. Presumably because they did not obtain all of the relief they had sought, the plaintiffs then asked the trial court to vacate the arbitration award and vacate its order compelling arbitration so that they could proceed to trial by jury. They claimed that, among other things, the arbitrator's finding of fraud in the inducement into the earnest money contract rendered the arbitration clause contained in the earnest money contract void and unenforceable. **Held:** In affirming the trial court's judgment on the arbitration award, the Court of Appeals held that the arbitrator's finding of common law fraud did not establish that the arbitration clause itself was obtained by fraud as required by Texas law in order to defeat an arbitration agreement. The court observed that the proper procedure for challenging an arbitration agreement on the basis of fraud was to present evidence of fraud specific to the arbitration agreement in the trial court in response to the motion to compel arbitration.

CRIMINAL LAW

I. PRE-TRIAL

A. INDICTMENT

No cases decided

B. SEARCH AND SEIZURE

Chism v. State, *W.L. 2948580; LEXIS 7278 (Tex. App.—Texarkana 2009)*

Search for Weapons: An officer received a report of a person panhandling. He found the defendant and detained him. The officer searched the defendant, stating his normal practice was to always search for weapons for his safety. He also stated the transient population generally had weapons, and often had needles because they abuse narcotics. **Held:** There was no reasonable suspicion to justify a search for weapons; generalized suspicion about the homeless population was not sufficient.

Foster v. State, *W.L. 2410580; LEXIS 6166 (Tex. App.—Austin 2009)*

Attempting to Change Lanes: The officer was stopped at light and the defendant pulled in behind. The officer heard a revving sound and saw the defendant lurch forward a couple of times like he was trying to move into an empty lane to the left. Another officer pulled up, and basically blocked the defendant in. The two officers got out and approached the defendant. After detecting an odor of alcohol, they eventually ended up arresting him. The trial court denied the defendant's motion to suppress, holding there was reasonable suspicion to detain him. **Held:** The defendant's action did not constitute reasonable suspicion, comparing it to a prior holding where it held spinning tires was also not sufficient.

C. CONFESSION

Thai Ngol Nguyen v. State, *292 S.W.3d 671 (Tex. Crim. App 2009)*

Statements Following Arrest: Following a traffic stop, the officers found methamphetamine. Both the appellant and his passenger were arrested and placed in the back of the patrol car. The appellant was given the statutory warnings and requested a lawyer. While in the back of the car, the appellant and the passenger argued about taking responsibility for the drugs, and the appellant told the officer they were his. Additional drugs were found, and the appellant

also took responsibility for those. **Held:** The appellant's statements should have been excluded; he was in custody, and the statements were not spontaneous or volunteered.

D. MISCELLANEOUS

Scott v. State, *W.L. 1789240; LEXIS 4726 (Tex. App.—San Antonio 2009)*

Constitutionality of Harassment Statute: The court held a part of the harassment statute was unconstitutional. The phrase, "in a manner reasonably likely to annoy, alarm, abuse, torment, embarrass or offend another" was vague on its face.

II. TRIAL

A. JURY SELECTION

No cases decided

B. EVIDENCE

Saavedra v. State, *W.L. 3616842; LEXIS 1560 (Tex. Crim. App 2009)*

Hearsay and Interpreters: The appellant was questioned at the police station through an interpreter and made some admissions. At trial, the police officer testified about what the interpreter said. The appellant argued that it presented an additional level of hearsay, and was therefore inadmissible. **Held:** An interpretation can be used if the party authorized the interpreter to speak for them, or otherwise adopted the interpreter as their agent. The case was remanded for the court to make that determination.

Cuadros-Fernandez v. State, *W.L. 2647890; LEXIS 6896 (Tex. App.—Dallas 2009)*

Excluding Witness: The state claimed that the defendant slammed a child's head into a cabinet door. The door was damaged, and the state argued the damage was a result of the injuries to the child. The defendant offered an expert who would have testified that the damage was the result of either someone leaning against the door, or it was damaged during installation. **Held:** The court excluded the testimony, which the court held was error. The court also found harm, holding that the court effectively prevented the defendant from presenting a defense.

Hall v. State, W.L. 2949746; LEXIS 1205 (Tex. Crim. App. 2009)

LIDAR Technology: The appellant filed a motion to suppress in which he attacked the reliability of the LIDAR technology. The court of appeals found there was no probable cause for the stop because the State failed to prove the LIDAR was reliable. **Held:** Such technology was novel, scientific testimony which can only be admitted after a full-blown hearing. The court erred in holding Rule 702 applied to a suppression hearing. Therefore, the court did not have to hold a hearing before it could consider evidence during the suppression hearing. There was no evidence to show the LIDAR technology provided reasonably trustworthy information, and therefore they did not establish probable cause for the stop.

Morales v. State, 293 S.W.3d 901 (Tex. App.—Texarkana 2009)

Extraneous Offense: The defendant presented a witness who testified he had not threatened an officer. When asked whether he used any abusive language, she stated he didn't, and added that he was not that type of person. The state argued that opened the door, and it was allowed to ask the witness if she was aware of her prior arrests for violent crimes. They were allowed to ask about several incidents, including several assaults and an assault on a police officer. **Held:** The probative value of such evidence was not substantially outweighed by its prejudicial effect and should not have been admitted.

C. EXAMINATION OF WITNESSES

Hamilton v. State, W.L. 2762487; LEXIS 6923 (Tex. App.—San Antonio 2009)

Testimony About DNA Results: Foster testified about DNA findings made by another analyst—Graham. The court held the results were testimonial, and therefore the holding in **Melendez-Diaz v. Massachusetts**, 129 S. Ct. 2527 (2009) controlled. However, it did not prohibit Foster from giving her own opinions based on work done by Graham. The court noted that the confrontation clause implicated statements made by persons and not machines.

Cuadros-Fernandez v. State, W.L. 2647890; LEXIS 6896 (Tex. App.—Dallas 2009)

Testimony About DNA Results: The state admitted a report and the notes of DNA analysis of a cabinet door. The report was prepared by someone who didn't testify. Instead, the report was admitted through a non-DNA analyst, who could not testify as to whether the testing was done properly. **Held:** The admission of the report violated the defendant's right to confrontation.

McMillon v. State, 294 S.W.3d 198 (Tex. App.—Texarkana 2009)

Impeachment: The defendant wanted to question the former DPS officer on the reasons for his termination. Outside the jury's presence, the officer admitted he issued dozens of phantom warning tickets, and when his supervisor found

out, he resigned. **Held:** Impeachment was not proper because it did not bear on his general reputation for truthfulness. Neither did it show a bias on his part toward the defendant or create a motive to testify falsely.

D. ARGUMENT

No cases decided

E. INSTRUCTIONS

Mills v. State, *W.L. 2837639; LEXIS 7046 (Tex. App.—Austin 2009)*

Jury Instruction on Legality of Stop: An officer stopped the defendant for not signaling a turn within 100 feet of intersection. The officer admitted the defendant signaled, but claimed he only did so once before he got to the intersection. The defendant tried to admit testimony from an investigator that the officer could not have seen whether the defendant signaled from where he was located. The court excluded the testimony, holding the witness was not disclosed as required by a discovery order. The defendant also requested an instruction under Art. 38.23, which was denied. **Held:** That was error.

F. SENTENCING

Griffith v. State, *W.L. 2914128; LEXIS 7206 (Tex. App.—Amarillo 2009)*

Probation Revocation: Probation conditions prohibited the defendant from frequenting locations where children were present. The evidence was that the defendant went to library one time, and used a computer located across from a 15-year old girl. **Held:** The definition of frequent was not so broad as to cover a one-time trip to the library.

Pelache v. State, *294 S.W.3d 248 (Tex. App.—Corpus Christi 2009)*

Notice of Enhancement: The defendant was indicted for robbery; the indictment included an enhancement for aggravated robbery. The appellant entered a plea, and after he did so the State sought leave to amend the indictment so they could add additional convictions. The defendant objected, arguing he was not given sufficient notice. **Held:** Reversed, and it was remanded for a new punishment hearing.

G. SUFFICIENCY

Bailey v. State, *W.L. 3460324; LEXIS 8236 (Tex. App.—San Antonio 2009)*

Obstruction of Highway: The defendant wrecked his truck and left it at the scene. He went home and called a wrecker driver. When deputies arrived, they were unable to get much information about the driver; they eventually identified who was driving and charged him with obstructing a highway. **Held:** Obstruction was a result oriented crime. There was no evidence that the defendant intentionally obstructed the highway and, therefore, the evidence was insufficient.

Burns v. State, *W.L. 2413692; LEXIS 6018 (Tex. App.—San Antonio 2009)*

DWI—Extrapolation: A technical supervisor testified there was a 10-percent chance the alcohol concentration was rising and a 90-percent chance it was decreasing. He did not attempt to extrapolate to the time of arrest, admitting he did know the individual facts necessary to make that determination. **Held:** The testimony should not have been admitted, but it was harmless in light of the other evidence.

Smiles v. State, *W.L. 2568336; LEXIS 6561 (Tex. App.—Houston [14th Dist.] 2009)*

Evidence of Amount of Loss: The defendant was convicted of stealing an exterior air conditioning unit from a trailer. The air conditioning system also had an interior unit which was not stolen. The State offered value of replacing both interior and exterior because the interior unit was no longer available and would have to be replaced. **Held:** The value was not the amount necessary to make the victim “whole.” Since only the exterior unit was stolen, the evidence was insufficient to prove the value.

Menefee v. State, *287 S.W.3d 9 (Tex. Crim. App. 2009)*

Sufficiency of Evidence on Guilty Plea: The defendant pled guilty and subsequently argued the evidence was insufficient to support a finding of guilt. The sworn affirmation that the defendant was pleading guilty to the charges in the indictment did not constitute a judicial confession. There must be other evidence to support the plea under Art. 1.15.

Jones v. State, *W.L.3401136; LEXIS 8182 (Tex. App.—Texarkana 2009) (memo. op.)*

What Constitutes a Drug Free Zone: The court held a playground was not a drug free zone.

H. MISCELLANEOUS

Ex Parte Wolf, *W.L. 2365589*; *LEXIS 6152 (Tex. App.—Houston [14th Dist] 2009)*

Voluntariness of Plea: The defendant was a college student at the time who pleaded guilty to theft and received a deferred adjudication. After graduation, he got a job, but was terminated after his employer found out about the case. He was subsequently unable to obtain a job in the banking and securities industry because of the arrest. The defendant filed a writ of habeas corpus, arguing his lawyer was ineffective because his lawyer did not request pre-trial diversion or a Class C special expense, and told him that his record would be sealed when his supervision was successfully completed. The State argued that the court did not have jurisdiction because the defendant was not confined or restrained. **Held:** The defendant was suffering collateral consequences as a result of state agencies making the information available to other governmental entities. Counsel's performance was deficient, and if the defendant had been properly advised, the result would have been different.

State v. Bounhiza, *294 S.W.3d 780 (Tex. App.—Austin 2009)*

Ineffective Assistance: The defendant filed an application for probation before trial started. He also elected to have the court assess punishment if he was found guilty. After the jury found him guilty, counsel discovered that the court could not grant probation. He advised the court that he incorrectly advised the defendant to go to the court for punishment, and the defendant accepted that advice. The trial court granted a mistrial based on ineffective assistance. **Held:** The court had no problem finding counsel's performance was deficient, and the defendant was prejudiced by it.

Moore v. State, *286 S.W.3d 371 (Tex. Crim. App. 2009)*

Involvement of Court in Plea: The defendant pled guilty pursuant to plea agreement for a sentence of 25 years. The court gave the defendant time before sentencing to take care of his affairs. He failed to appear as required, and when he came back, the court sentenced him to 40 years. The defendant argued the court erred by treating his plea as an open one, and not giving him the option to withdraw it. **Held:** The defendant failed to preserve error by not moving to withdraw his plea at sentencing or objecting to the conditions imposed by the court.

Sumrell v. State, *W.L. 2274094*; *LEXIS 5869 (Tex. App.—Dallas 2009)*

Presence of Defendant: Because of his behavior, the defendant was not present during questioning of seven jurors who stated that they had formed a bias against the defendant because of his behavior. The State argued there was no indication that the defendant's presence was not voluntary. **Held:** It will not be presumed the absence was voluntary, and therefore the defendant's right to be present during jury selection was violated. The defendant wanted to participate in jury selection and consult with his lawyer. The court also held it cannot conclude his absence did not contribute to his conviction, and reversed the conviction.

Ex Parte Miller, W.L. 3446468; LEXIS 1486 (Tex. Crim. App. 2009)

Ineffective Assistance: The trial court found counsel was ineffective because he failed to locate and use evidence that the victim had been convicted of misdemeanor assault. **Held:** The court accepted the factual findings, but rejected the legal conclusions. The evidence of assault would not have been admissible because the issue at trial was not who initiated the fight, but whether the defendant had a duty to retreat. The defendant also alleged his lawyer was ineffective on appeal because he failed to challenge a prior conviction on the basis there was not sufficient evidence to prove the first prior conviction was final prior to the commission of the second. **Held:** The court agreed, finding the point of error would have been a “lead pipe cinch.” The sentence was vacated, and the defendant was granted permission to pursue a new appeal to challenge the sufficiency of evidence to support the enhancement. **Note:** This was an unusual case because the appellate lawyer had died, and therefore could not explain why he did not challenge the prior conviction. There could have been a valid reason for not doing so because the defendant was sentenced to 30 years, and could have been sentenced up to life. Without the second enhancement, it would still be a first degree felony. Thus, even if the appeal was successful, the defendant could go back to court and receive more than 30 years.

III. POST TRIAL

A. APPEAL

State v. Moreno, 294 S.W.3d 594 (Tex. Crim. App. 2009)

Appeal by State: After jury was selected, the defendant asked the judge to hear a motion to suppress the defendant’s statement. The officer was not present, and the State told the judge he was on his way. After waiting for over 30 minutes, the court told the State it needed to move on. The State said they had no more witnesses, but refused to rest. The defendant then moved for a directed verdict, which the court granted. The State appealed, arguing the court’s action should not be considered an acquittal. **Held:** Affirmed.

B. HABEAS

In Re Escareno, W.L. 2949740; LEXIS 1207 (Tex. Crim. App. 2009)

Processing Writ of Habeas Corpus: The defendant filed a writ of habeas corpus. After 35 days had passed with no action, he sought leave to file a writ of mandamus. The court held the application in abeyance and ordered the clerk to respond within 30 days. In the meantime, the trial court entered an order designating issues. Although the clerk forwarded that order, they failed to forward the application for writ of habeas corpus until after a show cause order had been entered. **Held:** The court held the clerk in contempt and fined her \$500.00. In doing so, the court noted that where the order designating issues was not timely filed, the clerk had no authority to hold the writ.

C. MISCELLANEOUS

Jacobs v. State, 294 S.W.3d 192 (Tex. App.—Texarkana 2009)

DNA Testing: The defendant filed a subsequent request for DNA testing. In that motion, he alleged there were new techniques available. **Held:** The standard for reviewing such motions had been lowered. However, the defendant still could not meet the lower standard because the only evidence available was two hairs.

DEBTOR-CREDITOR LAW

There were no significant decisions rendered during this reporting period.

EMPLOYMENT LAW

Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343 (2009)

Age Discrimination—ADEA: Gross filed suit, alleging that FBL Financial Services (FBL) demoted him in violation of the Age Discrimination in Employment Act of 1967 (ADEA), which made it unlawful for an employer to take adverse action against an employee “because of such individual’s age,” 29 U. S. C. §623(a). At the close of trial, and over FBL’s objections, the district court instructed the jury to enter a verdict for Gross if he proved, by a preponderance of the evidence, that he was demoted and his age was a motivating factor in the demotion decision, and told the jury that age was a motivating factor if it played a part in the demotion. It also instructed the jury to return a verdict for FBL if it proved that it would have demoted Gross regardless of age. The jury returned a verdict for Gross. The Eighth Circuit reversed and remanded for a new trial, holding that the jury had been incorrectly instructed under the standard established in **Price Waterhouse v. Hopkins** 490 U. S. 228 (1988) for cases under *Title VII of the Civil Rights Act of 1964* when an employee alleges that he suffered an adverse employment action because of both permissible and impermissible considerations i.e., a “mixed-motives” case. **Held:** A plaintiff bringing an ADEA disparate-treatment claim must prove, by a preponderance of the evidence, that age was the “but-for” cause of the challenged adverse employment action. The burden of persuasion did not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. **Note:** Under Texas law, Texas Labor Code §21.052, age discrimination was prohibited along with discrimination based on race, color, disability, religion, sex, or national origin. Also TLC 21.125 specifically provided that the claimant only needs to show that age was a “*motivating factor for an employment practice, even if other factors also motivated the practice...*”. Therefore, a claimant should always consider whether it would be easier to make an age case under Texas state law, rather than the more difficult burden now pronounced by the U.S. Supreme Court.

Marsh USA, Inc., vs. Cook, 287 S.W.3d 378 (Tex.App.–Dallas 2009, pet. filed)

Employment Agreement – Covenant Not to Compete: A former employer filed suit against a former employee and his new employer alleging breach of a non-solicitation agreement. The former employee filed motion for partial summary judgment on ground that agreement was unenforceable. The court granted the motion and the employer appealed. **Held:** The non-solicitation agreement signed in exchange for receipt of stock options from former employer was not enforceable. For a covenant not to compete to be ancillary to or part of an otherwise enforceable agreement between employer and employee, it must comply with §15.50 of the Tex. Bus. & Com. Code. For the covenant to be enforceable, it must give rise to the employer’s interest in restraining the employee from competing, and the covenant must be designed to enforce the employee’s consideration or return promise in the otherwise enforceable agreement. The financial benefits offered by the employer to the employee in this case did not give rise to the employer’s interest in restraining employee from competing, as required for a covenant not to compete to be enforceable. The consideration given by the employer in this case, the stock options in the company, must give rise to the employer’s interest in restraining the employee from competing. The “give rise” requirement may be met only if the consideration given by the company created the interest in restraining competition. This, in turn, will occur only where the interest in restraining competition did not exist before the consideration was given. Under the facts of this case, the employer’s interest in restraining the employee from competing did not change or arise at the time that it transferred the stock

to the employee. The employer offered the stock option to the employee because he was a valuable employee. The employee did not become any more valuable to the employer after the employee exercised the option and the stock was transferred to him.

Family Medical Leave Act—National Defense Authorization Act for Fiscal Year 2010—Veteran Coverage

On October 28, 2009, the President signed the *National Defense Authorization Act for Fiscal Year 2010* (Pub. L. 111-84) (NDAA). The NDAA includes provisions that expand the two types of military-related leave that became available under the *Family and Medical Leave Act* (FMLA) in January 2008: “qualifying exigency” leave and “military caregiver” leave. Although this portion of the NDAA does not have an effective date, according to the staff of the Subcommittee on Military Personnel of the House Armed Services Committee, the NDAA took effect when the President signed it. Under the FMLA, eligible employees may take leave for a “qualifying exigency” arising out of a spouse’s, child’s or parent’s active duty or call to active duty as a member of the Reserves or National Guard in support of a “contingency operation” declared by the U.S. Secretary of Defense, the President, or Congress. Employees are entitled to take up to 12 workweeks of unpaid leave in any rolling 12-month period under this provision. Now, “qualifying exigency” leave must be extended not only to eligible families of members of the National Guard and Reserves, but also to eligible families of any member of the Armed Forces who is on active duty in a foreign country or is called to active duty in a foreign country.

The U.S. Department of Labor defines a “qualifying exigency” to include things such as preparing for a short-notice deployment, arranging for child care, making or updating financial or legal arrangements, attending counseling, resting and recuperating, post-deployment activities, and similar activities. Under the military caregiver provisions of the FMLA, eligible family members may take leave to care for a current member of the Armed Forces, National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in out-patient status, or is on the temporary disability retired list for serious injury or illness. An eligible employee may take a combined total of 26 workweeks of military caregiver leave in a single 12-month period that begins on the date the employee first uses the leave and ends 12 months later. The NDAA extends the entitlement to military caregiver leave to the families of veterans. Congress incorporated the definition of “veteran” that is used by the Department of Veterans Affairs: “[A] person who served in the active military, Naval, or Air Service, and who was discharged or released therefrom under conditions other than dishonorable.”

Congress also expanded the definition of “serious injury or illness” for purposes of the military caregiver provisions of the FMLA. It now is defined as: “an injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member’s active duty and was aggravated by service in line of duty on active duty in the Armed Forces), and that may render the member medically unfit to perform the duties of the member’s office, grade, rank or rating”. Since veterans, by definition, do not have a current “office, grade, rank, or rating,” this requirement is replaced with the simple requirement that the serious injury or illness be one “that manifested itself before or after the member became a veteran.” The entitlement to take military caregiver leave for the care of veterans extends only to family members of veterans when the veteran was a member of the Armed Forces at some point in the five years preceding the date on which the veteran undergoes the medical treatment or receives the therapy that necessitates the leave.

ENVIRONMENTAL LAW

Blue Skies Alliance v. Tex. Comm. On Env. Quality, 283 S.W.3d 525 (Tex. App.—Amarillo 2009)

TCEQ Granting Air Permit Application Affirmed: In an opinion related to a controversy over a new coal fired power plant in McLennan County, the appellate court affirmed the district court's judgment affirming a final order of TCEQ to approve the plant permit application. Two environmental protection organization plaintiffs challenged the TCEQ's order after participating in the administrative process and related contested case hearing at the State Office of Administrative Hearings. Particular challenges related to allegations that: (i) the new plant would impact ozone levels in the Dallas Ft. Worth metropolitan area, a downwind ozone non-attainment area (*i.e.*, an air quality control region not meeting federal ozone standards under the federal Clean Air Act), and (ii) TCEQ failed to require more stringent technological pollution control standards for the plant. The court overruled the plaintiffs' /appellants' issues based on applicable evidentiary review considerations. The opinion included a good review of certain Clean Air Act ozone standards, permitting programs, and the respective roles of EPA and TCEQ.

Tex. Comm. on Env. Quality v. Kelsoe, 286 S.W.3d 91 (Tex. App.—Austin 2009)

Permit Applicant's Filing Deadline for Petition for Judicial Review Keyed to Executive Director's Determination: This appellate court opinion replaced the court's prior March 2009 opinion (which was withdrawn). Kelsoe applied for a TCEQ solid waste landfill permit from TCEQ. TCEQ's Executive Director determined that the application was administratively incomplete. Kelsoe filed his petition for judicial review to challenge TCEQ's decision with the district court more than thirty days after Kelsoe's administrative motion to overturn TCEQ's decision was overruled as a matter of law. In its opinion, the court cited relevant provisions of Texas Water Code (Chap. 5) and the Texas Health & Safety Code (Chap. 361) indicating that the Executive Director determined when an application was administratively complete and that a person affected by "a ruling, order, decision or other act" of TCEQ must file a petition for review not later than 30 days after such act (Tex. Health & Safety Code §361.321(a) and (c)). The court rejected arguments of the petitioner to the contrary, including that Executive Director actions (as opposed to TCEQ commissioner actions) should not fall within statutory judicial review provisions. Thus, the court reversed the district court's ruling in favor of Kelsoe and dismissed the action for lack of jurisdiction.

Canyon Reg. Water Auth. v. Guadalupe-Blanco River Auth., 286 S.W.3d 397 (Tex. App.—Corpus Christi 2008)

Court Construes TCEQ Rules as It Does Statutes: This opinion relates to a water supply contract dispute that started as a rate appeal before the TCEQ. In this context, the appellate court stated that it interpreted TCEQ rules with the force and effect of law in the same manner as it interpreted statutory provisions. In this regard, the court utilized a rule of statutory construction (words and phrases are read in context and per grammatical rules and common usage) to construe a TCEQ rule.

Severance v. Patterson, 566 F.3d 490 (5th Cir. 2009)

Fourth Amendment Claim Related to “Rolling Beach Easement” Doctrine Ripe for Adjudication: This opinion relates to an enforcement controversy over migration of Gulf of Mexico shoreline caused by Hurricane Rita in 2005. The plaintiff was a California resident and owner of rental property on Galveston Island. She brought suit for declaratory and injunctive relief after the State of Texas notified her that her rental houses were subject to a removal order under the Texas Open Beaches Act (“OBA”). *See* Tex. Nat. Res. Code Ann. Chap. 61. The opinion included a review of certain aspects of Texas legal principles related to beaches, including potential public acquisition of easements and (per judicial interpretation) the shifting of boundaries over time. The Fifth Circuit found that the plaintiff’s Fifth Amendment taking claim was not ripe but that her Fourth Amendment seizure claim (applicable to civil as well as criminal seizures) was ripe for adjudication. Importantly, the Fifth Circuit certified certain questions for the Texas Supreme Court related to uncertainties connected with the rolling beach doctrine. There was a lengthy dissenting opinion with an introduction critical of Pacific Legal Foundation representation of the plaintiff and its alleged “Libertarian crusade” against laws such as OBA.

United States v. Viking Resources, Inc., 607 F.Supp.2d 808 (S.D. Tex. 2009)

Defendant Entitled to Jury Trial for Natural Resource Damage Claim under Oil Pollution Liability Act: The United States brought an action against an oil and gas lessee (corporation) and its sole owner, officer, and director under the Oil Pollution Liability Act (“OPA”) related to impact of waters of the United States from a tank battery oil spill. The government sought to impose strict liability under OPA for removal costs (*i.e.*, cleanup of the spill) and resulting natural resource damages. This opinion addressed several motions and requests, including the defendants’ requests for a jury trial. Analyzing the right to trial by jury under the Seventh Amendment and analogous CERCLA cases, the court found that there was a right to a jury trial for the natural resource damage claim (because it was equivalent to monetary damages) but not for the removal cost claim (because it was an equitable remedy as restitution). Among the other rulings and analyses related to OPA, the court outlined elements of OPA strict liability, interpreted the meaning of a “facility” under OPA (the tank battery itself), discussed veil piercing potentially to reach the individual defendant, and utilized by analogy portions of the Supreme Court’s 1998 *Bestfoods* CERCLA opinion (related to a parent corporation’s CERCLA liability as an owner of operator).

United States v. BP Products North America, Inc., 610 F.Supp.2d 655 (S.D.Tex. 2009)

Clean Air Act Felony Guilty Plea Accepted: In a seventy-five page opinion related to the largest criminal fine to date under the federal Clean Air Act (“CAA”) against a corporation, the court accepted the guilty plea to a felony information. Technically, the plea related to federal enforcement of knowing violation of CAA accidental release prevention requirements and applicable EPA rules requiring a Risk Management Plan. *See* 42 U.S.C. Sec. 7413(c)(1) and 7412(r) (7) and 40 CFR Part 68. Enforcement keyed to a March 2005 explosion at BP’s Texas City refinery that, according to the opinion, killed fifteen people and injured at least 170 people. The accepted plea agreement imposed a \$50 million fine and three years probation conditioned on compliance with an OSHA settlement agreement and TCEQ Order. Such agreement and Order added millions of dollars for additional regulatory fines as well as corrective actions. The opinion also noted that BP had paid over \$ 1.6 billion to settle thousands of civil cases. The lengthy opinion included extensive analysis, including of objections to the plea from victims of the explosion.

EVIDENCE LAW

Boleware v. U.S. Bank National Association, 293 S.W.3d 315 (Tex. App.—Dallas 2009)

Waiver of Objection: Boleware and Hyter appealed from the trial court's judgment in a forcible detainer action awarding possession of property to U.S. Bank National Association, which was the trustee for the structured asset investment loan trust. Boleware and Hyter contended on appeal that the evidence was legally insufficient to support the trial court's judgment. Specifically, Boleware and Hyter contend that the evidence admitted at trial was insufficient because it constituted inadmissible hearsay. **Held:** Affirmed. When the trial court asked whether there were any objections to the admission of the three exhibits, Hyter's attorney replied: "No objection, Your Honor." The court of appeals held: "Because no objection was raised to the admission of the exhibits, Boleware and Hyter have waived the right to complain about the evidence on appeal."

Reed v. State, WL 3050825, LEXIS 7472 (Tex. App.—Houston [1st Dist.] 2009)

Confrontation Clause and Hearsay: The appellant appealed from a judgment convicting him of murder and argued that the trial court's decision to admit the transcript of an absent witness's prior testimony was error because the testimony was inadmissible hearsay and its admission violated the appellant's rights under the Confrontation Clause of the Sixth Amendment. The transcript admitted at trial was of the absent witness's testimony provided at the appellant's prior murder trial, which had ended in a mistrial. **Held:** The transcript satisfied the "former testimony" exception to the hearsay rule, which provided that a statement of an unavailable declarant was not inadmissible if it was "testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." See TEX. R. EVID 804(b)(1). The court also held that the trial court's decision to admit the evidence did not violate the appellant's rights under the Confrontation Clause. The appellant conceded that he had a prior opportunity to examine the hearsay declarant, but he argued that the prosecution had not established that the declarant was unavailable for trial and that, therefore, neither the former testimony exception nor the "necessity prong" of the Confrontation Clause were satisfied. The Court determined that the prosecution had established the unavailability of the witness. In a criminal case, unavailability was established under both Rule 804 and the Confrontation Clause where the prosecution demonstrated that it "has made a good-faith effort to obtain the witness's presence at trial." The Court determined that this standard had been met, even though no writ of attachment had been issued for the witness, where repeated unsuccessful efforts by an investigator were made to locate the witness and the investigator had "exhausted" his contacts. The Court said, "a writ of attachment would have been futile because the writ would not have brought the witness to trial."

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)

Confrontation Clause: The petitioner was convicted in Massachusetts of distributing and trafficking in cocaine. The Massachusetts trial court admitted into evidence affidavits reporting the results of forensic analysis which showed that the plastic bags the officers seized from the petitioner contained cocaine. A Massachusetts statute provided that the notarized forensic reports were admissible, in lieu of the live testimony of the analysts, as "prima facie evidence of the composition, quality, and the net weight of the narcotic . . . analyzed." The petitioner objected to the

admission of the notarized report because it would violate his rights under the Confrontation Clause and argued that the Supreme Court's decision in **Crawford v. Washington**, 541 U.S. 36 (2004), required the analyst to testify live at trial. **Held:** The Supreme Court held that analysts were "witnesses" and that the notarized forensic reports were "testimonial statements" for purposes of the Confrontation Clause and that, therefore, the petitioner had a right to confront the analyst at trial. **Note:** Article 38.41 of the Texas Code of Criminal Procedure provided that Certificates of Analysis may be used under certain circumstances and after meeting certain requirements in lieu of live testimony, but objection by the defendant to the use of the certificate required live testimony by the analyst at trial. Unlike the statute in **Melendez-Diaz**, Texas courts have held that the statute satisfied the requirements of the Confrontation Clause, even though the statements in the certificate were "testimonial" because the defendant, by objection, can require live testimony. *See, e.g., Deener v. State*, 214 S.W.3d 522 (Tex.App.-Dallas 2006, *pet. ref'd*).

FAMILY LAW

In re J.O.A., 283 S.W.3d 336 (Tex. 2009)

Parental Termination and Post-trial Procedure; Ineffective Counsel: Following a parental rights termination trial, the party seeking appeal had only 15 days after a judgment was signed to request a new trial or to file a statement of points for appeal. See Texas Family Code §263.405(b), §263.405(i) precluded raising an issue in the appellate court that was not specifically presented to the trial court in the points for appeal. The parents whose rights were terminated failed to file the required statement of points within the time required by the statute. The parents were indigent and thus entitled to appointed trial counsel as well as appellate counsel. Five days after the trial court entered judgment against the parents, the respective trial counsel for each of them filed notices of appeal and additionally moved to withdraw. The trial court never ruled on the withdrawal motions, although it did appoint new counsel for the parents' appeals, but not before the 15-day deadline for filing the statement of points for appeal. Moreover, neither of the trial counsel ever filed a statement of points. Consequently, when on appeal the parents raised an ineffective assistance of counsel claim as well as challenged the sufficiency of the evidence and the constitutionality of §263.405. The Department of Family Protective Services argued that the appellate court could not consider their claims. The appellate court nonetheless did review the case, concluding that both Mom's and Dad's attorneys were ineffective for failing to file the statement of points, but that the failure deprived only the Dad of due process. The appellate court concluded that the evidence was both factually and legally insufficient to support termination of the Dad's parental rights. On the other hand, the appellate court held that there was sufficient evidence to support termination of the Mom's rights, and she did not appeal that holding.

Held: The Supreme Court agreed that the appellate court acted properly in considering the Dad's claim of ineffective assistance of counsel. The Department did not specifically address the Dad's constitutional challenge. Rather, it argued that the right to appeal was a statutory right that could be denied entirely should the legislature choose to do so. The Department further had the audacity to argue that while indigent individuals were entitled to appointed counsel, those counsel need not be competent, notwithstanding the court's opinion in *In re M.S.*, 115.S.W.3d 534, 544 (Tex. 2003), which directly conflicted with the Department's argument. In fact, in *In re M.S.*, the lawyer's failure to preserve factual sufficiency claims was characterized as ineffective assistance of counsel. That was essentially what occurred in this case: the trial counsel failed to preserve the sufficiency of evidence claims by filing the statement of points. The Texas Supreme Court cautioned that not every failure to preserve sufficiency issues was automatically grounds for finding ineffective assistance of counsel. In this case, however, the failure was neither strategic nor a concession of lack of merit, and during the critical period, trial counsel had not yet been relieved of their duty of representation by either the court's ruling on their motion to withdraw or by appointment of appellate counsel. According to the Court, "Trial counsel's failure to follow through with his representation until relieved of that duty was tantamount to abandoning his client at a critical stage of the proceeding." The Court thus held that Dad's claim of ineffective counsel raised due process claims, and to the extent §263.405 would prevent a court from considering that claim, it was unconstitutional.

Establishing ineffective assistance of counsel was only the first step, however. An appellant must further show that his lawyer's deficient representation prejudiced his rights and were so serious as to deprive the appellant of a fair trial. The appellate court concluded that had trial counsel preserved error by filing the statement of points, it would have reversed on the grounds that the evidence was both legally and factually insufficient to support termination of the

Dad's parental rights. The Court disagreed with the appellate court regarding the legal sufficiency of the evidence. However, it remanded the case based on factual insufficiency because only the appellate court was authorized to consider those insufficiency claims. As such, remand for a new trial, based on the appellate court's holding that the evidence was factually insufficient was appropriate.

The Court, for good measure, also threw in some words of advice for trial courts in parental rights termination cases, urging them to take a proactive approach to avoid indigent parents inadvertently waiving their rights under the accelerated process set out in §236.405. **Note:** Justice Willett, who concurred in the opinion, wrote separately to emphasize specifically what trial courts must do to avoid a concern raised by the Department, that is, that calculating trial counsel might deliberately fail to file the statement of points to give their clients an advantage on appeal. He suggested that trial judges be more proactive in informing the parties and their attorneys of the steps that must be taken to preserve their appeal; reminding trial counsel that their duties do not end with the trial; and referring such cases for disciplinary action. Kudos to Judge Willett for the reference to poet Robert Browning.

In the Interest of M.V.G., 285 S.W.3d 573 (Tex.App.—Waco 2009)

Parental Termination—Withdrawal of Counsel: Following the trial court's termination of a mother's parental rights, the trial court appointed new counsel to handle the appeal. Consequently, Mother's appointed trial counsel moved to withdraw. However, Mother's appeal had been perfected by the time her trial counsel moved to withdraw. Therefore, the trial counsel's withdrawal motion was addressed to the appellate court. The appellate court, however, concluded that the trial court should rule on the withdrawal motion, relying on **Enriquez v. State**, 999 S.W.2d 906 (Tex.App.—Waco 1999), in which a similar issue arose in a criminal case. In **Enriquez**, the court reasoned that relevant statute provided for the trial court to appoint counsel to represent indigent defendants and to relieve appointed counsel of their duties. In **Enriquez**, the court also noted that appointed counsel were paid from the prosecuting county's general funds. As such, the trial court should make all rulings regarding appointed counsel. The court adopted the same reasoning in deciding this issue in the parental rights termination context. The court noted, however, that in this context, it had an issue that it did not face in the criminal context, namely that it appeared that the trial court's plenary jurisdiction expired by the 36th day following judgment in a parental rights termination case, pursuant to Texas Family Code §263.405. In this case, the trial court's plenary power had expired, but to permit the trial court to consider the withdrawal motion, the appellate court opted to abate its appeal. **Note:** Justice Gray dissented from what he characterized as the appellate court rewriting the law, but he did not write a dissenting opinion. Rather there was only a cryptic footnote following his noted dissent.

In re Tieri, 283 S.W.3d 889 (Tex.App.—Tyler 2008)

Jurisdiction Regarding Conservatorship Orders: The opinion in this case, which implicated the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), set out the full chronology of the various pleadings, orders, and interstate moves by the parties and their children. The short version was that Mom, Dad, and the children initially all resided in New Jersey until Mom and the children moved to Texas in January 2006. In March 2006, Dad filed for divorce in New Jersey, and that court entered a temporary order giving Dad custody of the children in April 2006. Several weeks later, the New Jersey court appointed Dad as the primary custodian of the children. Although the children were living in Texas when Dad filed the New Jersey divorce petition, New Jersey would have had jurisdiction to enter an initial custody and visitation order under the UCCJEA, which both Texas and New Jersey have adopted,

based on extended home state jurisdiction inasmuch as New Jersey had been the children's home state, six months had not yet passed since the children last resided in New Jersey, and Dad still resided there. *See* Texas Family Code §152.201 for the Texas equivalent. Less than a week after the custody order, Mom and Dad agreed to dismiss their divorce case in New Jersey due to their reconciliation. The family moved to Texas the next day. Their reconciliation was short-lived, however. In August 2006, Dad returned to New Jersey and Mom filed her divorce proceeding in Texas. In connection with the divorce petition, she also filed a Suit Affecting the Parent-Child Relationship (SAPCR) in which she sought to be appointed the sole managing conservator. Dad challenged the Texas court's jurisdiction regarding the children, and the Texas district court held a hearing to decide the issue. Mom testified that she and the children moved to Texas in January 2006. She also testified that she and the children lived in Chicago for a week in March 2006 and lived in New Jersey approximately three weeks in April 2006, until they returned to Texas on April 29, 2006.

The Texas court concluded that it had jurisdiction to decide the conservatorship issues based on the children having resided in Texas seven months, measured from January 2006 until August 2006 when Mom filed her divorce petition and SAPCR. To its credit, the trial court consulted with both parents' Texas and New Jersey lawyers as well as with the New Jersey court before reaching its conclusion. The New Jersey court seemed willing to defer to the Texas court's determination, notwithstanding Dad having reopened the divorce case he had previously filed. The New Jersey court granted Dad's divorce, but stayed any determination of the jurisdictional issue related to custody of the children. Following the Texas court's conclusion that it had jurisdiction, Dad sought mandamus relief, claiming that the Texas court abused its authority in claiming jurisdiction. The appellate court agreed, based on the UCCJEA.

It is not clear whether the Texas court considered whether it was entering an initial order or modifying an existing order. If a court was to enter the initial order, it needed to consider whether it had jurisdiction based on any of the four grounds listed in Texas Family Code §152.202. On the other hand, if the court was called on to modify an existing order, it could do so only if it had exclusive continuing jurisdiction (ECJ) or the court that had ECJ had lost it and the new court had a jurisdictional basis under §152.202. A court acquired ECJ by entering an order of custody or visitation when it had jurisdiction. Prior to Mom and Dad's reconciliation attempt, the New Jersey court had appointed Dad the primary custodian, giving that court ECJ. According to the appellate court, the dismissal of the divorce decree did not affect the New Jersey court's ECJ. The UCCJEA did not require that the divorce be ongoing for the court's ECJ to exist. Consequently, only the New Jersey court could modify its order unless that court had lost ECJ. Because in August 2006, when Mom filed her petition in Texas, Dad was living in New Jersey, only the New Jersey court could determine that it had lost ECJ because neither the children nor the children and a parent had a significant connection with New Jersey and substantial evidence regarding the children was no longer available there. The New Jersey court never made such a determination. Rather, the New Jersey court only refused to act unless and until the Texas court relinquished jurisdiction. As such, the New Jersey court had not made the necessary finding that would result in its loss of ECJ. Moreover, Texas would not have had jurisdiction to enter an initial order, at least not based on home state jurisdiction. Although the children had resided mostly in Texas over a period of seven months with the exception of the four weeks they spent living in Chicago and New Jersey, the UCCJEA required six *consecutive* months of residency in the state to qualify it as a child's home state. Temporary absences of the *parent* do not affect the determination, but here, of course, the children were the ones who Mom would have had to acknowledge were temporarily living outside of Texas. *See* Texas Family Code §152.102(7). It is possible that if Texas had been called on to enter an initial custody order, it might have had jurisdiction based on the children having no other home state, but having a significant connection to Texas. *See* Texas Family Code §152.201(a)(2). Ultimately, however, the appellate court directed the trial court to dismiss the SAPCR or face a writ of mandamus.

Note: The UCCJEA was designed to avoid the situation where two courts claim jurisdiction to enter a custody or visitation order. In this case, neither court seemed particularly intent on wresting jurisdiction from the other court. Rather, they seem to have settled which court should have jurisdiction, at least at the outset. However, the appellate court made clear that the courts must comply with the provisions of the UCCJEA; they cannot simply agree about jurisdiction if their agreement was inconsistent with the UCCJEA. The New Jersey court could very well decline to exercise jurisdiction on the grounds that it was an inconvenient forum and that Texas was a more appropriate forum. See Texas Family Code §152.207 for the Texas provision. The court, however, could not simply omit this step.

In re J.W.L., 291 S.W.3d 79 (Tex.App.—Fort Worth 2009)

Grandparents' Rights: This case pits the grandparents of M.W.L. against her father, J.W.L., following the death of M.W.L.'s mother. When M.W.L.'s parents divorced, they agreed that both parents would be appointed joint managing conservators, but that Mom would have the exclusive right to designate the primary residence of M.W.L. Subsequently, Mom was diagnosed with terminal cancer, and due to her impending death, she, along with her parents (M.W.L.'s grandparents), sought to modify the original order to have the grandparents appointed joint managing conservators with the right to designate the primary residence upon Mom's death. In that petition, the grandparents claimed to have standing based on their having had actual care, control and possession of the child for at least six months. See Texas Family Code §102.003(a)(9). Mom died a week after the petition to modify was filed, but prior the trial court's hearing on the modification issue. The court did hold a hearing. Ultimately, however, the parties reached an agreement whereby Dad would have primary custody of M.W.L. with no geographic limitation on his right to designate M.W.L.'s primary residence. The grandparents were named possessory conservators. They would have visitation with M.W.L. on a schedule set out in their agreement. The parties' agreement also required each party to give at least 60 days advance notice of a change of address. Consequently, the court entered an agreed order to that effect. The Agreed Order specifically stated that the trial court had made certain rulings regarding standing of the parties. Trouble began when the grandparents appeared for a schedule visit with M.W.L. only to find that the house where she had been living with her Dad abandoned, although Dad had not given notice of an address change as required by the Agreed Order. Despite an attempt by Dad to mislead the grandparents about his and M.W.L.'s whereabouts, the grandparents located M.W.L. in Idaho. The grandparents were able to obtain *habeas corpus* relief which allowed them to return M.W.L. to Texas for an emergency hearing to enforce the Agreed Order. Following a hearing on the matter, the trial court entered a temporary order giving the grandparents temporary custody of M.W.L. and limiting Dad's access to her to only supervised visits. Dad sought mandamus relief as a result, alleging that the grandparents did not have standing at the time of the Agreed Order and as such the trial court abused its discretion in approving the Agreed Order.

Held: The appellate court properly characterized Dad's mandamus petition as a collateral attack on the Agreed Order, thus raising a question of the validity of that order. The appellate court found that the Agreed Order was in fact valid. While there was no evidence in the record to support the grandparents' claim of actual care, control and possession of the child for the minimum six months, the court held that the grandparents had standing based on the consent of a managing conservator. See Texas Family Code §102.004(a)(2). The court concluded that M.W.L.'s mom, the primary joint managing conservator at the time, had in fact consented to the grandparents' standing when she joined with them in filing the petition to modify. Thus the Agreed Order was valid, and the trial court did not abuse its discretion. Justice Cayce filed a concurring opinion in which he cautioned the trial court about its temporary order that severely limited Dad's access to M.W.L. Citing *Troxel v. Granville*, 530 U.S. 57 (2000), Justice Cayce noted that

a fit parent was presumed to act in the best interest of his child. Arguably, Dad acted wrongly in moving without giving the grandparents notice and trying to conceal his whereabouts, but there was little more than nonspecific claims that he was otherwise unfit. As such, Justice Cayce characterized the trial court's temporary orders as treating the grandparents' right to visitation as paramount to Dad's constitutional rights as a parent.

In re S.B.S., 282 S.W.3d 711 (Tex.App.—Amarillo 2009)

Child Support: The reversible error in this case could have been easily avoided by simply reading and complying strictly with the applicable Family Code provision. The court entered a child support order that varied from the amount that would have been payable under the Child Support Guidelines. §154.130 required the court to make specific findings when it deviated from the Guidelines, including findings about the net monthly resources of the obligor and obligee, the percentage applied by the court to the obligor's net resources to yield the child support ordered by the court, and the specific reasons why the court deviated from the Guidelines. While the court specifically stated that the amount varied from guidelines, the court made none of the required findings. **Held:** The appellate court acknowledged that the necessary findings could be contained in a separate document contained in the record. However, the notation in the trial court's Civil Docket supplied only one of the required findings, namely that the upward adjustment was due to the unmet needs of the child. There was no separate document that contained the other findings. Perhaps the court and the obligee assumed that the findings were unnecessary because the obligor failed to appear, and thus a default judgment was entered against him. Nonetheless, while the court found a default judgment was valid, it reversed the child support order and remanded to the trial court to make the necessary findings.

Chavez v. McNeely, 287 S.W.3d 840 (Tex.App.—Houston (1st Dist.) 2009)

Spousal Support: There was little surprise about the outcome of this case. Because of her husband's paralysis, Chavez, the wife in this divorcing couple, agreed to pay spousal support to her ex-husband. The contract provided that she would "provide *as much* toward the care and providing for *the needs* [McNeely] *as possible, limited only by her personal financial situation.*" McNeely subsequently sued Chavez for breach of contract, notwithstanding that Chavez paid the mortgage and taxes on McNeely's house and paid what she claimed she could for McNeely's care until her business began to fail. McNeely alleged that Chavez's personal spending habits did not reflect a decline in her ability to pay. The trial court concluded that it had jurisdiction of the case although the divorce decree in which the parties' agreement was included was entered by a court in another county. The trial court also found that Chavez was in breach and entered a judgment of \$950,000 for a breach that had continued for several years. **Held:** The appellate court agreed that the trial court did have jurisdiction, having characterized the dispute as a breach of contract claim for which the trial court had jurisdiction to hear. Moreover, the appellate court concluded that Texas Family Code §§9.001 and 9.002, which addressed enforcement of the divorce decree, did not create exclusive jurisdiction in the court that issued the decree. Rather, that court's jurisdiction to enforce its divorce decree was merely permissive. The appellate court, however, concluded that the contract was unenforceable due to indefiniteness. The court seemed to accept Chavez's characterization that the contract was "indefiniteness cubed," given the three sections italicized above. Chavez's performance did nothing to clarify the provision at issue. The court thus reversed the trial court's judgment and entered a take-nothing judgment against McNeely.

Smith v. Deneve, 285 S.W.3d 904 (Tex.App.—Dallas 2009)

Informal Marriage: Smith and Deneve cohabited some 14 years before breaking up. During their time together, they moved into a house that was titled solely in Deneve's name. The boat they acquired was similarly titled only in Deneve's name. When the couple separated, Smith filed for divorce, clearly in an attempt to make a claim to the property acquired during Smith's and Deneve's time together. Because they had never been formally married, he relied on Texas Family Code §2.401 to claim an informal marriage. Deneve moved for summary judgment on the basis that no informal marriage existed, and the trial court granted her motion. **Held:** The case turned on whether the couple had held themselves out as being married. There was summary judgment evidence of several contracts in which the two were listed as husband and wife. Smith further claimed in his affidavit that they introduced each other as husband and wife and neither objected when others introduced them as a married couple. The appellate court, however, found the evidence lacking. The court noted that isolated references to each other as husband and wife were insufficient. Moreover, a couple's reputation in the community as being married is a significant factor. The court concluded that with respect to the contracts on which Smith relied, there was no evidence that Deneve caused those representations, that Deneve was aware of them, or than anyone in the community was aware of those contractual representations. As to the evidence of the introductions, there was insufficient evidence for the court to gauge whether those occurrences were rare or frequent. As such, the appellate court affirmed the trial court's no evidence summary judgment. Smith also raised, as alternative theories, the existence of a constructive trust, the existence of a resulting trust, and the existence of a partnership or joint venture. The trial court granted summary judgment on most of these claims as well, but Smith did get some relief when the appellate court sustained his appeal with respect to the resulting trust.

GOVERNMENTAL ENTITIES

State v. Central Expressway Sign Associates, WL 1817305; LEXIS 456 (Tex. 2009)

Condemnation—Adequate Compensation—Method of Valuation: The Texas Constitution provides that “[n]o person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person.” TEX. CONST. Art. I, §17. The State condemned an easement that was leased to an advertising company for the purpose of erecting a billboard and selling advertising space. The trial court struck the State’s expert witness as unreliable for failing to include in his estimate of fair market value the income the billboard generated from advertising sales. The trial court entered a jury verdict in favor of the property owners, valuing the property interest at \$1,850,000. The court of appeals affirmed, relying on long-established precedent. **Held:** Reversed. The Supreme Court declared that adequate compensation did not include profits generated by a business located on condemned land. Because the State’s expert applied an accepted methodology for valuing the condemned property, the Supreme Court concluded the trial court reversibly erred in excluding his testimony.

State of Texas v. Lueck, 290 S.W.3d 876 (Tex. 2009)

Whistleblower Act—Plea to the Jurisdiction—Elements of Cause of Action: The Texas Whistleblower Act waived the immunity of the State and its political subdivisions by permitting a public employee to sue his government employer for retaliation on the basis of reporting a violation of law to an appropriate law enforcement authority. A report is made to an appropriate law enforcement authority if the authority is a part of a state or local governmental entity or of the federal government that the employee in good faith believes is authorized to: (1) regulate under or enforce the law alleged to be violated in the report; or (2) investigate or prosecute a violation of criminal law. **Held:** The elements of an action under the Whistleblower Act determine both a court’s jurisdiction and a government defendant’s liability. Thus, the employee must include these elements in his pleading in order to establish a court’s jurisdiction. Because the employee’s pleadings showed that he did not believe he was reporting a violation of the law to an appropriate law enforcement official, the lower court should have dismissed the employee’s claim for lack of jurisdiction.

Jordan v. Ector County, 290 S.W.3d 404 (Tex. App.—Eastland 2009)

Whistleblower Act—Jurisdictional Prerequisites—Internal Grievance: An employee filed a grievance concerning her employer’s failure to post a job opening in which she was interested. She was subsequently discharged. Without filing a grievance relative to the discharge, she filed suit, alleging that her complaints about the violation of the job opening policy were the motivation for her discharge. **Held:** The employee failed to satisfy the prerequisites for a cause of action under the Whistleblower Act because she failed to file an internal grievance with her employer relative to the discharge before filing suit. *See* Tex. Gov’t Code §554.006(a).

Turner v. Perry, 278 S.W.3d 806 (Tex. App.—Houston [1st Dist.] 2009)

Due Process—Property Interest in Employment: School district police officers were terminated based on complaints by unidentified parties. Held: Texas Government Code §614.022 created a property interest in employment for peace officers and fire fighters by setting out requirements for disciplinary actions based on complaints. In this case, the employer accepted and acted on complaints that did not identify the true complainant. Instead, the complaints provided to the officers expressed the conclusions of other officers based on unidentified people. Thus, the officers' due process rights were violated.

INSURANCE LAW

In re Liberty Mut. Fire Ins. Co., 295 S.W.3d 327 (Tex. 2009)

Workers' Compensation; "Bad Faith"; Exhausting Administrative Remedies: The insured sought bad-faith damages against his workers' compensation carrier, for denying preauthorization of medical treatment. However, the insured only alleged that the carrier turned down office visits (for which preauthorization was not required) and possible back surgery (for which preauthorization was not sought). **Held:** The Workers' Compensation Act vests the Workers' Compensation Division with exclusive jurisdiction to determine a claimant's entitlement to medical benefits. The claimant's bad-faith claim depended upon whether he was entitled to further medical care, thus that issue must first be addressed administratively. By demanding preauthorization when it was not required and failing to request it when it was, the insured avoided all the administrative remedies that governed his claims. As the insured did not have his claim addressed administratively, the trial court should have granted the insurer's plea to the jurisdiction and dismissed the suit and failure to do so was correctable by mandamus.

Leigh v. Kuentler, W.L. 3126538; LEXIS 7633 (Tex. App.—Houston [14th Dist.] 2009) (memo op.)

Agent Liability; Duty; Insurance Code Violations; Misrepresentation: What is an insurance agent's duty to his insured in connection with making sure that the uninsured/underinsured policy limits match the primary limits of liability coverage? Stated a bit differently, does an insurance agent have a duty to recommend or procure UM/UIM coverage in an amount equal to the coverage limits of the primary liability policy? **Held:** Under well-established Texas law, an insurance agent who undertook to procure insurance for another owed his client the common-law duties to use reasonable diligence in attempting to place the requested insurance and to inform the client promptly if he was unable to do so. An agent had no duty to extend the client's insurance protection merely because the agent may know of the client's need for additional insurance, especially in the absence of evidence of prior dealings in which the agent customarily had attended to the client's insurance needs without consulting her. "According to the uncontroverted summary-judgment evidence, Leigh requested from Kuentler only that he procure insurance coverage in an amount at least equal to the coverage provided to Leigh's parents under their automobile insurance policies. Leigh's parents had \$ 20,000 in UM/UIM coverage; Kuentler procured \$ 50,000 in UM/UIM coverage for Leigh. Thus, he fulfilled his common-law duty to Leigh, and as a matter of law, he had no duty to do more." In regard to the Insurance Code violation claims, the insured identified no statements by the agent that were misleading absent explanations of the coverage provided by the umbrella policy and the availability of UM/UIM insurance with higher policy limits; to the contrary, the insured testified that she "just thought" that the umbrella policy would provide coverage for the same expenses covered by the UM/UIM policy, and she admitted that this was simply an assumption on her part. **Note:** "In the absence of some specific misrepresentation by the insurer or agent about the insurance, a policyholder's mistaken belief about the scope or availability of coverage is not generally actionable" under the DTPA or the Insurance Code."

Alexander v. Hartford Life & Accident Ins. Co., W.L. 906786; LEXIS 27210 (N.D. Tex. 2008)

ERISA; Disability Insurance; Claim Denial; Abuse of Discretion: The Court reviewed the summary judgment in this ERISA case *de novo*, reviewing an administrator's denial of ERISA benefits for abuse of discretion as the administrator had discretionary authority with respect to the claim decision. The Court found that Hartford had a financial conflict

of interest because it was responsible both for determining eligibility for benefits and for paying benefits. Thus, although the standard of review wasn't changed, it was one factor that courts must consider in deciding whether the administrator abused its discretion. A denial of benefits was not an abuse of discretion if it "is supported by substantial evidence and is not arbitrary and capricious." "Substantial evidence is 'more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,'" and must be considered "in the light of all the evidence." A decision was arbitrary if it was "made without a rational connection between the known facts and the decision." **Held:** Hartford abused its discretion because there was not a rational connection between its conclusion that Alexander was not disabled and the information on which it relied to support that conclusion.

Nat'l Union Fire Ins. Co. V. McMurray, *W.L. 2710076; LEXIS 19366 (5th Cir. 2009)*

Life Insurance; "Common Carrier"; Undefined terms: The insureds went on a honeymoon cruise purchased with a credit card that included a \$1,000,000 accidental death or dismemberment insurance policy. Among the covered hazards for which accidental death benefits were provided was injury or death that occurred while an insured person was "riding as a passenger in or on (including getting in or out of, or on or off of) any Common Carrier." The policy defined "common carrier" as "any licensed land, water or air conveyance operated by those whose occupation or business is the transportation of persons for hire." "Passenger" was defined as "a person not performing as a pilot, operator or crew member of a conveyance." While on the cruise, the insureds purchased a whitewater rafting excursion, charged to the insureds credit card account. During the rafting trip, the husband insured was thrown from the raft and drowned. The insurer denied the claim, concluding that the raft in which the insureds were riding was not a common carrier, and they were not passengers under the policy. Insured contended that a rafting trip necessarily involved transportation from one place to another, and even if such transportation incorporated entertainment, the policy did not exclude transportation in which entertainment was offered. **Held:** "We disagree with characterizing the district court's analysis as looking beyond the contract definition to impose a requirement not included in the policy. Instead, the court looked to common law for assistance in interpreting undefined terms within the policy's common carrier definition. There were some definitions. The policy defined common carrier as "any licensed land, water or air conveyance operated by those whose occupation or business is the transportation of persons for hire." It did not define, though, what it meant to be in the "occupation or business" of "transportation" for hire. We also conclude that undefined terms are not per se ambiguous terms. Undefined policy terms are given their plain, ordinary meaning, if such a meaning can with some clarity be determined. Accordingly, the district court properly looked to Texas common law to seek the ordinary meaning of these undefined terms, citing **Tenaska Frontier Partners, Ltd. v. Sullivan**, 273 S.W.3d 734, 737 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("In determining the ordinary meaning of an undefined term, Texas courts have consulted the term's common-law usage, interpretation when used in other statutes, and definitions in secondary source

Nat'l Union Fire Ins. Co. v. Puget Plastics Corp., *450 F. Supp. 2d 682 (S.D. Tex. 2009)*

Property Coverage; Concurrent Causation: "Texas law recognizes the doctrine of concurrent causes, which provides that where covered and non-covered perils combine to create a loss, the insured is entitled to recover only that portion of the damage caused solely by the covered peril. The damages recited in a judgment must be apportioned between claims covered by the policy and those that are not. Since the insured bears the burden on coverage, when there are covered and non-covered perils, the insured must present evidence upon which the fact-finder on coverage can

allocate and segregate covered losses from non-covered losses. Because allocation is central to the claim for coverage, an insured's failure to carry its burden of proof on allocation is fatal to the claim. The insured is not required to establish the amount of its damages with mathematical precision, but there must be some reasonable basis upon which the jury's finding rests. As this Court has found that economic damages were awarded in the Underlying Case, at least in part, due to covered and uncovered property damage related to the leaking chambers, Puget bears the burden of presenting evidence by which this Court can reasonably apportion the economic damages awarded due to the leaking chambers between covered and uncovered property damage."

MINERAL LAW

City of Houston v. Trail Enterprises, *W.L. 3494980; LEXIS 872 (Tex. 2009)*

Inverse Condemnation, City Ordinance Prohibiting Drilling for Minerals: A City Ordinance prohibited drilling for minerals in an area in the City's extraterritorial jurisdiction near Lake Houston. Owners of the minerals in that area were unsuccessful in getting a variance in 1994, and their suit for inverse condemnation was dismissed as barred by limitations. In 1996, the City annexed the area which removed it from the extraterritorial jurisdiction ordinance. The owners again wrote the City about the possibility of drilling and the City responded by amending its ordinance to include the drilling control provisions on land within the city limits. The owners, without seeking a variance, filed claims for regulatory takings or inverse condemnation. The jury awarded damages of approximately \$17,000,000 to the land owner. However, the trial court granted summary judgment against the landowner because of the absence of a variance request. The Court of Appeals reversed on the basis that the action was ripe for decision and that a futile variance request or reapplication was not required. Rather than remanding the case, however, the Court of Appeals rendered judgment on the jury verdict based on the trial court's finding of liability. **Held:** The Supreme Court held it was improper for the Court of Appeals to have entered judgment based on the jury verdict, rather than remanding the case for additional findings by the trial court, *i.e.*, whether additional exploration was warranted and whether the owners have met their burden of proof demonstrating a taking under the balancing test, and other issues.

Bomar Oil & Gas v. Loyd, *W.L. 3319849; LEXIS 8007(also see prior opinion in W.L. 2136404; LEXIS 5505)*
(Tex. App.—Waco 2009)

Cotenants' Right to Produce, Liability for Costs: This case reconfirmed a cotenant's right to extract minerals from common property without first obtaining the consent of his cotenants; however, he must account to them on the basis of the value of any minerals taken, less the necessary and reasonable costs of production and marketing. In the earlier opinion published in *W.L. 2136409; LEXIS 5505*, the Court of Appeals explained that the right of a cotenant to mine or acquire the minerals was sanctioned because the nature of the mineral estate was such that the rights of one cotenant must be interfered with if another cotenant was permitted to exercise his rights in those properties. The rule of accountability of the mining cotenant required his payment of a proportionate part of the market value of the product less the proportionate necessary and reasonable costs of producing and marketing. The Court stated that in cases like this it was implied that the person seeking contribution for expenses had authority from his cotenant to expend the money that was actually spent, just like he had been actually instructed by his cotenant to expend that much money for the cotenant in improving the property. That right of the cotenant to recover a proportionate part of the expenses incurred did not include the right to a personal judgment against the cotenant for reimbursement, as the right to reimbursement was limited to reimbursement out of production if and when production resulted. The case also discussed issues for reasonable expenses, including interest, expense, administrative overhead, supervision fees, etc., and the necessity for such expenses.

ERG Resources v. Merlon Texas, Inc., *W.L. 3491049; LEXIS 8346 (Tex. App.—Houston [1st Dist.] 2009)*
(*memo. op.*)

Oil and Gas Assignment, Personal Property, Production: The assignment in question included the “right, title and interest in the land. . . , together with. . . the personal property thereon, appurtenant to, or used or obtained in connection with said properties and/or oil and gas units.” Oil, once severed from the land by production, is personal property. Therefore produced oil was personal property and was conveyed by that portion of the assignment.

Houchins v. Devon Energy Production, *W.L. 3321406; LEXIS 8064 (Tex. App.—Houston [1st Dist.] 2009)*
(*memo. op.*)

Mineral Deed, Reservations: The grantor conveyed the land, subject to a reservation or exception which provided “to the extent that Grantor maintains any mineral rights to the subject property, Grantor expressly retains such mineral rights to the subject property and exempts same from the conveyance herein.” The grantees claimed that the provision was merely an exception to warranty of title and not a reservation, or at least the language was ambiguous. **Held:** The Court discussed the Four Corners Doctrine, and confirmed that a reservation of minerals must be made by clear language to be effective as courts do not favor reservation by implication. Nevertheless, the Court determined that the language was sufficient to reserve all mineral rights in the warranty deed, as any other interpretation would not reasonably harmonize and give effect to all provisions of the contract. The Court concluded that the deed unambiguously included a reservation of the mineral rights for the Grantor.

Grisham v. Lawrence, *W.L. 3287585; LEXIS 7977 (Tex. App.—Tyler 2009)*

Will Interpretation, Mineral Bequest: The testator owned a 1/2 interest in a mineral estate that he and his wife had reserved in a 500 acre tract of land. Section 7 of his will provided for a bequest of two tracts of land containing 1000 acres “. . . Save and Except from said two tracts of land that certain five hundred (500) acre tract of land conveyed by. . . to. . . , by deed dated. . . , which said five hundred acre (500) acre tract of land is described as follows. . .” **Held:** The Court noted it was significant that the Testator used the word “conveyed” in this Save and Except clause. The Court felt that wording confirmed Testator’s intent to except the “land” that had actually passed under the deed. The Court also noted the term “land” in its legal sense, included minerals in place; therefore the “land” previously conveyed including the surface and 1/2 interest of the mineral estate, but not the ½ interest in the minerals reserved by the Testator and the wife. The Testator’s intent to devise the ½ minerals he owned in the 500 acre tract under the provisions of Section 7 was further confirmed by another provision in Section 7 of the will stating “it being my intention. . . to give, bequeath and devise to. . . all interest I have in and to said tracts of land herein described that has not heretofore been sold by Anna McKnight and me.” Section 9 of the will was held to be a residuary clause covering all minerals owned and not disposed of by the other provisions in the will. Since the interest in question was devised in Section 7; it would not pass under Section 9.

Enerlex, Inc. v. Amerada Hess, Inc., *W.L. 3212554; LEXIS 7827 (Tex. App.—Eastland 2009)*

Mineral Deed, Warranty, Quitclaim: The controlling issue was whether or not the mineral deed was a warranty deed or a quitclaim deed. It conveyed “all right, title and interest in and to all the oil, gas. . . including any future or

reversionary interest, in and under and that may be produced from the . . . described land. . .” as well as confirming the intent of Grantor to convey all interests in. . . said county whether or not the section or surveys are specifically described herein” or not. The deed also contained a provision that warrants “said title to Grantee. . . against every person whomsoever claiming or to claim the same or any part thereof.” **Held:** The Court recognized that the deed contained a general warranty, but said that the deed contained no specific representation concerning title as it did not purport to convey any specific interest, but instead just broadly conveyed all of Grantor’s interest.

Texas Independent Exploration, LTD., v. Peoples Energy Production, W.L. 2767037; LEXIS 6941 (Tex. App.—San Antonio 2009) (memo. op.)

Farmout, Depth Limitation: This case involved a controversy arising over whether there was a depth restriction on some overriding royalty interest in an assignment. It would need to be read in full to understand. It did include a number of cites regarding the interpretation of “subject to” clauses” and confirmed that they did not convey an interest nor do they reserve or retain an interest.

Rosenthal v. Railroad Commission of Texas, W.L. 2567941; LEXIS 6522 (Tex. App.—Austin 2009) (memo. op.)

Surface Estate, Right to Use Subsurface: This was an administrative appeal of a Railroad Commission order authorizing the operation of a commercial disposal well on a tract of land over the objections of the owner of the mineral estate. The Court recognized it’s review of the Commission’s final order was governed by the substantial evidence standard of the Administrative Proceeding Act and their review was limited to determination as to whether the mineral owners’ substantial rights had been prejudiced because of (1) the violation of any statutory or constitutional provision, (2) any order in excess of the Commission’s statutory authority, (3) made through unlawful procedure, (4) affected by some other error of law, (5) are not reasonably supported by substantial evidence, or (6) are capricious or characterized by abusive discretion or clearly unwarranted exercise in discretion. **Held:** The Court recognized the Railroad Commission’s assertion that the interest between surface owners and mineral owners was not simply defined along rigid lines of what was above ground and what was below ground, and recognized that Texas Courts have a long history of balancing the competing interests of surface and mineral owners and requiring reasonable accommodation between them. After discussing the applicable rules, the Court upheld the Railroad Commission order determining that the surface owner possessed a good faith claim of the right to use the well for disposal of salt water “into non-productive zones.”

H&S Production, Inc. v. Dorchester Minerals, LP, W.L. 2478089; LEXIS 6386 (Tex. App.—Dallas 2009) (memo. op.)

Compensatory Royalty, Lease Termination: The lease had several provisions which were discussed at length in the opinion. One of the provisions gave the Lessor, in the event of Lessee’s failure to pay compensatory royalty due, the option to “(i). terminate the lease, (ii) terminate the lease and collect from Lessee all monies due hereunder or (iii) collect from Lessee all moneys due hereunder.” **Held:** The Court held that the contract showed the parties provided a specific provision for breach of the obligation to pay compensatory royalties which was enforceable.

Pounds v. Jurgens, et al., W.L. 2232070; LEXIS 4729 (Tex. App.—Houston [14th Dist.] 2009)

Ad Valorem Taxes, Tax Foreclosure: The Trial Court declared a 1986—87 judgment of foreclosure and tax sale void to the extent the judgment and sale purported to convey the mineral interest in a 20-acre tract. The issue was whether the tax foreclosure judgment and order of sale gave the sheriff authority to sell the royalty interest for delinquent taxes on the surface estate, but not on the royalty interest. **Held:** The Court pointed out that minerals in place were realty and that a grant or reservation of the mineral interest by the fee owner affected a horizontal severance and created two separate and distinct estates, which could be done by a regular deed or by a lease, leaving the Lessor only the possibility of reverter and the right to receive royalty. The Court noted that a Lessor's right to receive royalties was non-possessory but nevertheless considered an interest in real property and was taxable as such. (The possibility of reverter was nontaxable interest.) While Texas Courts have held that rents or royalties payable under oil and gas leases and the right of reverter were property rights and were severable from the ownership of the surface estate, in this case the owner's interest in the royalty and the possibility of reverter were never severed from the surface estate. The Court stated that to say that the royalty and the possibility of reverter had not been severed from the surface estate did not, however, resolve the question as to whether the royalty interest and possibility reverter were subject to foreclosure and covered by the sheriff's deed. The tax lien extended only to the particular realty against which the taxes had been assessed. Under the tax law, the mineral interest of the property would have had to have been taxed with the surface in order to be subject to the foreclosed tax lien. Those circumstances were not present in this case. The court therefore concluded that the judgment of foreclosure and order of sale did not extend to the royalty interest in this case. However, the surface estate carried with it the unsevered, nontaxable possibility of reverter in the mineral estate.

PROBATE LAW

Smith v. O'Donnell, 288 S.W.3d 417 (Tex. 2009)

Attorney for Decedent May Be Sued by Executor for Legal Malpractice Committed Outside of the Estate Planning Context: Denney served as independent executor of his wife's estate. He retained a law firm to advise him on the estate administration as well as separate versus community character of the couple's assets. According to Denney, he and his wife orally agreed that certain stock would be his separate property and certain stock would be her separate property. The law firm prepared a memorandum advising Denney of the community property presumption and stating that additional information was necessary before classifying the assets. The law firm also advised him to pursue a declaratory judgment action to properly classify the stock and he declined to do so. The law firm relied on the analysis of Denney's accountant and prepared an estate tax return that omitted the stock Denney claimed was his separate property. Denney died 29 years later and left the bulk of his estate to charity, and approximately one month after his death, the Denney children as beneficiaries of his wife's trust sued Denney's estate alleging that Denney misclassified the stock as his separate property and underfunded his wife's trust. The executor of Denney's estate (O'Donnell) settled with the children for approximately \$12.9 million and then sued the law firm for legal malpractice. O'Donnell alleged that the attorneys failed to properly advise Denney about the serious consequences of mischaracterizing assets, and that their negligence caused damage to Denney's estate. As a general rule, an executor may bring the decedent's survivable claims on behalf of the estate under Texas Probate Code §233A. At common law, actions for damage to real or personal property survive the death of the owner. Thus, in **Belt v. Oppenheimer, Bland & Tate, Inc.**, 192 S.W.3d 780 (Tex. 2006), the Court held that legal malpractice claims alleging pure economic loss survived in favor of a deceased client's estate. The law firm argued that **Barcelo v. Elliott**, 923 S.W.2d 575 (Tex. 1996) barred all legal malpractice suits brought by non-clients, with the exception of estate planning malpractice claims brought by executors under **Belt**. The Court disagreed and reasoned "To adopt the rule the law firm suggests would place us alone among the states, and would unnecessarily immunize attorneys who commit malpractice." **Held:** An executor should not be prevented from bringing the decedent's survivable claims on behalf of the estate. Affirmed. **Note—Interesting Point from Justice Willett's Dissent:** "If the only prerequisite to suit against a deceased client's attorney is that it must be brought by the executor, an endless variety of claims could be brought. . . Every lawyer who advised a client to plead guilty or not, file for bankruptcy or not, settle a dispute or not, incorporate a business or not, and so on, would be fair game."

Holmes v. Beatty, 290 S.W.3d 852 (Tex. 2009)

Joint Tenancy with Right of Survivorship Accounts: The husband and wife held over ten million dollars in brokerage accounts and securities certificates. The executor of the wife's estate sued the executor of the husband's estate for declaratory judgment that brokerage accounts and securities in certificate form were not owned by the wife and the husband with a right of survivorship and thus did not pass to the husband upon the wife's death. The executor of the husband's estate counterclaimed. The accounts and certificates were listed as "JT TEN", "JT TEN" defined as "joint tenants as right of survivorship and not as tenants in common", "JTWROS" and "Joint (WROS)". The account agreements for the securities accounts with a "JT TEN" designation did not define "JT TEN" and did not include any discussion of survivorship rights. Also, the husband and the wife did not select the options to strike through language relating to joint tenants with right of survivorship and not as tenants in common or payable on death designations

in the account agreement. The Court reasoned that a joint tenancy carried a right of survivorship. The Court also distinguished joint tenancy from a tenancy in common arrangement. The Court held that a “joint tenancy” or “JT TEN” designation on an account was sufficient to create rights of survivorship in community property under Texas Probate Code §452. Therefore, the accounts that included this designation were held with rights of survivorship. The Court also analyzed an investment account held as husband and wife “JTWROS”. The Court analyzed the account agreement and held that “Joint (WROS)” meant “joint tenancy with rights of survivorship”. As a result, the couple’s intent to obtain rights of survivorship applied to this account. The Court also analyzed securities certificates that had various designations such as “JT TEN”, “JT TEN-as joint tenants with right of survivorship and not as tenants in common”, and “JT WROS”. The Court held that the agreement survivorship language conferred survivorship rights in the certificates until the couple disposed of them and the certificates passed to husband pursuant to those rights. **Held:** The accounts and certificates passed to the husband as the survivor. A “joint tenancy” or “JT TEN” designation on an account was sufficient to create rights of survivorship in community property under Texas Probate Code §452, and account agreement survivorship language conferred survivorship rights in securities certificates. Affirmed in part and reversed and rendered in part.

Estate of Marquez, Deceased, 2009 *Tex. App. W.L.* 3385318; *LEXIS* 8164 (*Tex. App.—Corpus Christi* 2009) (*memo op.*)

Alleged Holographic Will Must Meet the Requirements for a Will Under Texas Law: The decedent allegedly wrote a letter in Spanish and it was offered for probate. The probate court denied an application to probate the alleged holographic Will. The appellant argued the probate court erred in denying her application because she met the requirements for probating a holographic will under Texas Probate Code §84(c). The record reflected that the judge was convinced that the handwriting on the letter belonged to the decedent but concluded that the letter did not constitute a will under Texas law. The Court analyzed the letter in light of the testamentary intent requirements of a will. The Court reasoned that the decedent did not write the letter with the requisite intent because the decedent referenced his execution of a formal written will in which he left some property to the appellant in the letter. Although the formal written will was never located, the reference to it in the letter indicated that the decedent did not intend for the letter to dispose of his property after his death. **Held:** An alleged holographic will must meet the testamentary intent requirements of a will. Affirmed.

REAL ESTATE LAW

Denmon v. Atlas Leasing, 285 S.W.3d 591 (Tex. App.—Dallas 2009)

Homestead Protection—Wrongful foreclosure: The homeowner brought an action against the lender for fraud and wrongful foreclosure of her homestead. Sarah Denmon bought the property in her name in July of 2003 using money from the sale of her and her husband's prior homestead. Although her husband visited the property on several occasions, he bought a trailer home in his sole name in Giddings, Texas in July 2003. He did not, however, file a homestead exemption for his property until after he and Sarah divorced in 2004. The loan for improvements to the property was made in November 2003 when the couple was still married and the property qualified as the family homestead.

To fix a lien on a homestead, the person who is to furnish material or perform labor and the owner must execute a written contract setting forth the terms of the agreement. If the owner is married, the contract must be signed by both spouses. It is not necessary for a spouse to be listed on real property documents in order for homestead status to attach. Texas law is clear that possession of a homestead interest is not dependent upon ownership; a person is permitted to hold homestead rights in his or her spouse's separate property. Likewise, it has been held that no specific writing is needed to claim a homestead; therefore, the fact that Sarah did not file a homestead exemption is not proof that she did not intend it as such. To assert that the homestead protection of the Texas Constitution could be voided by mere failure to designate the property as a homestead for tax purposes would render the constitutional protection meaningless.

Held: Once a property has been dedicated as a homestead, it can only lose such designation by abandonment, alienation, or death. Here, it is undisputed the Shenandoah property was Sarah's homestead, despite her failure to file an exemption. By reaching the conclusions that Sarah had the ability to place a valid lien on the home and the lien was not in violation of the homestead protections of the Texas Constitution, the trial court essentially determined that either (1) the property was her single person homestead, or (2) despite being married, the property was not Carnell's homestead. As the court of appeals explained in the opinion, neither conclusion could be correct; therefore, the lien on the property was void.

Grant v. Clouser, 287 S.W.3d 914 (Tex. App.—Houston [14th Dist.] 2009)

Homestead—Partition: Real property was owned by Shawna Clouser (25%), Mark Jamison (25%) and Ernest Clouser (50%). Shawna Clouser occupied the property as her homestead up until the time of this case. At the time of the dispute, a judgment creditor of Ernest Clouser had taken the property through a constable sale. Dr. Grant took title to the 50% interest at the sale and then filed an application for partition and an order of sale since the real property was not capable of partition in kind. Shawna Clouser objected to the application for partition arguing such action was barred since she had been using the property as her urban homestead since 1989.

Held: The trial court denied the partition by sale, but on appeal the court of appeals determined that the partition was proper. While homestead rights enjoy strong protection and are liberally construed in favor of the property owner, partition rights are also well-established. A homestead right must accommodate the right to partition in some circumstances. Courts have already held that in the context of divorce, the family homestead may be sold with the

proceeds distributed and protected. Additionally, after the death of a surviving spouse, the heirs may partition the property even if the property is the homestead of another heir. In reaching its decision, the court of appeals stated that homestead rights can attach to property interests held by tenancy in common; however, such homestead rights cannot prejudice the rights of a cotenant. The general rule is that homestead rights attaching to property interests held by cotenants are subordinate to another cotenant's right to partition. It was irrelevant how Dr. Grant obtained the 50% interest. What was relevant was that he became a co-tenant and opted for partition. Shawna's homestead right was subordinate to Dr. Grant's right to partition by sale.

State of Texas v. Bristol Hotel Asset Co., 293 S.W.3d 170; (Tex. 2009) (*per curiam*)

EMINENT DOMAIN: When the State of Texas widened part of Loop 410 in San Antonio, the State used its eminent domain power to condemn a part of the property owned by the Bristol near the airport. Before the road project, there were three entrances to the hotel. After the road project, only two entrances remained available and only after significant renovation. During the renovation of the entrances, parking spots were unavailable in different numbers. In the testimony regarding damages, in addition to the diminished fair market value of the land as a result of the taking, the expert also testified as to temporary damages to be awarded. The temporary damages were based on the unusable parking spaces during the renovation of the hotel entrances. **Held:** The Texas Supreme Court pointed out that in fixing damages in a condemnation proceeding, one should "consider the effect of the condemnation on the value of the property owner's remaining property." The Court also stated that all damages associated with a taking were not necessarily compensable. Remainder property damages were calculated by the difference between the fair market value of the remaining property immediately before and after the condemnation. The Court finally stated that "it is well settled that damages to a condemnee's business which results merely from traffic being required to travel a more circuitous route to reach the condemnee's property are not compensable." The case was remanded for a new trial on the damages question.

Kazmir v. Benavides, 288 S.W.3d 557 (Tex. App.—Houston [14th Dist.] 2009)

ADVERSE POSSESSION: Mr. and Mrs. Benavides entered lot 13 under a contract for deed. Upon entering the land and occupying the home thereon, they believed they were purchasing everything within the fences that were already erected. However, the fence that had been erected by the prior owner of lot 13 was actually four feet onto lot 12 owned by the Kazmirs. Additionally, right next to the fence line was a sidewalk, patio and several trees, all of which encroached onto lot 12. The Kazmirs, the owners of lot 12, both testified that they knew the fence and other improvements were on their property. They also both testified that they never requested that any of the improvements be moved. The fence and improvements were in place since 1967 and the Kazmirs did not take steps to remove the fence and improvements until there were efforts to sell the neighboring properties in late 2004 and early 2005.

Held: However, as the court ultimately determined, the owners of lot 13 had acquired the 4 foot area of lot 12 using the ten year adverse possession statute. Even though the Benavides no longer resided in the home on lot 13 after 1978, they continually rented the property and the tenants used the property in the same manner that the landlords had. Additionally, as to the dispute regarding the potential impact of the Benavides purchase via contract for deed, the court determined that situation was not comparable to a landlord-tenant relationship because in the contract for deed setting the purchasers were not tenants of the sellers. They achieved exclusive possession of lot 13 by virtue of

the contract for deed in 1973. Finally, there was no problem with the Benavides' intent to claim and visibly appropriate the disputed area. The Benavides testified that they believed everything within the fences around 13 to be theirs. They used the entire yard up to the fences, including the improvements. They also installed additional improvements in the disputed area, planted trees and bushes and maintained the yard up to the fences. The court determined that was legally sufficient evidence of their hostile intent to possess and was visible appropriation of the disputed area.

TORT LAW

Jones v. City of Houston, 294 S.W.3d 917 (Tex. App.—Houston [1st Dist.] 2009)

Negligent Infliction of Emotional Distress; Bystander Recovery: Brother and sister siblings of 13-year-old Logan Jones heard that Logan had been swept away down a storm drain and that rescuers were attempting to find him. They went to the scene and, after waiting there about an hour, saw Logan's body float out of a different culvert. He was already deceased at that point. They alleged great mental anguish in having witnessed his body floating in the water and sought recovery against the defendant City of Houston for its negligence in permitting the drowning to occur and causing their emotional distress. The trial court granted the City's summary judgment on the ground that the plaintiffs did not satisfy the elements of a bystander claim in Texas. **Held:** The Court of Appeals affirmed the summary judgment distinguishing prior intermediate Texas appellate case law relied upon by the plaintiffs. Although there has previously been some confusion in Texas law, Texas courts have made fairly clear that a bystander's claim for emotional distress is only cognizable in a negligence context when the three-part **Freeman v. City of Pasadena**, 744 S.W.2d 923, 923-24 (Tex. 1988) (citing **Dillon v. Legg**, 441 P.2d 912, 922 (Col. 1968) test has been satisfied—(1) death or serious injury to a close relative; (2) the bystander's close physical proximity to the scene of the accident; and (3) the bystander's contemporaneous sensory observation of the accident. The purpose of these requirements is to help weed out legitimate claims for emotional injury from other possible claims and to help define the otherwise broad parameters of a claim for negligently inflicted emotional distress. There have been some prior cases involving accidents with injuries that took awhile to unfold and relative bystanders who came upon the scene while the events were still unfolding. The Court here distinguished those cases. Here the plaintiffs' brother had already passed away and they came upon the scene after hearing about the brother's disappearance from others. They did not contemporaneously witness either the accident or his injuries as they were being inflicted upon him. For these reasons, the trial court's entry of judgment as a matter of law was appropriate.

Sepaugh v. LaGrone, W.L. 2902711; LEXIS 7195 (Tex. App.—Austin 2009)

Parental Immunity; Negligence Per Se: This was a wrongful death and survivorship claim brought by a boy's mother after the son was killed in a home fire. The Defendant was the boy's father. The parents had previously been divorced and the mother had been awarded sole managing conservatorship of the son. During a stay at the father's house several years later, per the father's visitation rights, the house caught on fire and the son was killed (along with several other children not related to the plaintiff-mother). The plaintiff asserted that the father had failed to maintain smoke alarms in the bedrooms in violation of an Austin city ordinance. The father, however, asserted that even if his conduct violated the city ordinance—and thus might give rise to proof of negligence through the doctrine of negligence per se—he was still entitled to summary judgment due to parental immunity. The trial court granted the summary judgment on this ground. The trial court likewise entered summary judgment on the mother's claim for loss of parental consortium, saying that the immunity for the estate's claim likewise barred the derivative claim belonging to the mother. **Held:** The Court of Appeals affirmed the summary judgment applying the doctrine of parental immunity. According to the Court, Texas recognized the continued vitality of the parental immunity doctrine due to the need to maintain the traditional discretion afforded parents (even when only having visitation rights over the child) in making decisions about how to provide nurture, care, and discipline for their children. Recognizing that the Texas Supreme Court had previously created an exception to this immunity when the parent had engaged in careless

driving of an automobile that injured the child, the Court refused to extend that exception beyond allegations of negligent driving. In dissent, one member of the Court took the position that there was no room for the exercise of parental discretion given the Austin ordinance mandating smoke alarms for the bedrooms in the house—the violation of which gave rise to criminal fines.

FPL Farming v. Environmental Processing Systems, *W.L. 3460710; LEXIS 8268 (Tex. App.—Beaumont 2009)*

Trespass; Subsurface Injections; TNRCC Approval of Operations: The plaintiff was a property owner who owned property near a site of the defendant's operations. The defendant had obtained a permit from the Texas Natural Resource Conservation Commission for construction of two wells that would be injected with commercial, nonhazardous industrial waste more than a mile below the surface of land. There was knowledge by the defendant and the TNRCC that a waste plume from the well would migrate into the deep subsurface of the plaintiff's property eventually. The plaintiff sued for trespass seeking injunctive relief to stop defendant's subsurface operations and the trial court granted defendant's summary judgment. **Held:** The Court of Appeals affirmed the dismissal of the case finding that there was no actionable trespass in these circumstances. The court noted that historical concepts of the full breadth of a property owner's rights—that the rights ran from the heavens to the center of the earth above and below the property—had been modified in light of modern demands. Just as an airplane flying over one's property did not normally give rise to a trespass cause of action any longer, neither should the defendant's deep subsurface operations conducted with the permission of the TNRCC give rise to a trespass claim.

Brazoria County v. Van Gelder, *W.L. 3109912; LEXIS 7579 (Tex. App.—Houston [14th Dist.] 2009)*

Negligence; Governmental Immunity; Texas Tort Claims Act; Special Defects: The plaintiff was injured when the car in which she was riding as a passenger lost control on a county road. The road had a sharp rise immediately before it connected to a bridge. The county installed a sign that warned "hump ahead." The plaintiff claimed the sign did not adequately warn of the dangers actually confronting drivers at that spot on the road. The county asserted a plea to the court's jurisdiction relying upon governmental immunity. The trial court denied this plea and an interlocutory appeal was taken to the Court of Appeals. **Held:** The Court of Appeals reversed the trial court's refusal to grant the plea to the court's jurisdiction holding that governmental liability protected the county from suit as no statutory waiver applied. Although the Texas Tort Claims Act (TTCA) provided for a waiver of immunity for "special defects" the Court held that the design of the road and the warning sign chosen by the county did not constitute a special defect. Such defects were generally considered to be things such as excavations on a roadway or other obstruction. Bumps and rises in a roadway were not generally considered to be special defects. Furthermore, the fact that the road's condition had been unchanged for several decades evidenced the fact that it was neither unusual nor an unexpected danger. The TTCA also provided a waiver for immunity for premises defects. However, even if the road design could be considered a premises defect, the government retained immunity for discretionary acts. The design of a roadway involved many policy decisions and would be an exercise of the government's discretionary function. Accordingly, sovereign immunity was not waived and the trial court should have granted the plea to its jurisdiction.