

THE MELTING POT OF APPELLATE LAW

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The Melting Pot of Appellate Law

Crucible (krōd'si bl) *n.*

1. A pot of earthenware in which metals and ores are melted.
2. Chamber at bottom of furnace for melted metal.
3. A severe test of endurance or character.

Webster's Illustrated Dictionary
(Books, Inc. 1961)

When a case transitions from the trial level to endure further review, it is placed in the crucible of appellate law. Anything non-essential for appellate purposes burns away, and we're left with the crux of the matter. For lawyers who don't often find themselves in appellate courts, the process can be excruciating (*e.g.*, excruciatingly difficult, excruciatingly frustrating, excruciatingly detailed).

At the same time that appellate law is a smelting pot, it's also a melting pot. Trial and appellate lawyers work together to bring forth the strongest points and the best presentation. The appellate arena itself mixes all levels of litigation, encompassing not only regular appeals but interlocutory disputes, mandamus, and error preservation in the trial court. Indeed, some lessons learned in appellate courts can assist transactional lawyers in drafting contracts and structuring deals, long before litigation is a twinkle in any trial lawyer's eye.

This paper, like appellate law, is a melting pot of different resources. In the beginning, we provide a smattering of information, from rules amendments to online resources. Next, we give you a sampling of recent cases that illuminate potential appellate traps and issues that arise at the trial level. Finally, we offer some practical tips and advice in two particular "lower court" areas: jury charges and arbitrations.

Although a case moving forward from trial or arbitration necessarily goes through the appellate crucible, the trial lawyer shouldn't have to. Consider the information provided in the paper and at our presentation as a bit of fireproofing to keep you cool as you deal with appellate issues in the course of everyday litigation.

I. AMENDMENTS TO THE TEXAS RULES OF APPELLATE PROCEDURE

Effective September 1, 2008, amendments to the Texas Rules of Appellate Procedure took effect. If you don't regularly perform appellate work, you may not have had a chance yet to use the "new" rules. Here's an overview of some of the changes:

Rule 9.3(b): In the Texas Supreme Court, you need only file an original and 2 copies of a motion for extension of time or a response to the motion.

Rule 10.1(a)(5): You are no longer required to include a certificate of conference on motions for rehearing or *en banc* reconsideration.

Rule 10.2: The list of the types of supporting facts that require a motion to be verified is now conjunctive, rather than disjunctive.

Rule 10.5(b)(3): A motion to extend time to file a petition for review (or petition for discretionary review) must include information regarding motions for rehearing or *en banc* reconsideration, as set forth in Rule 10.5(b)(3)(D).

Rule 19.1: The rule regarding courts of appeals' plenary power now expressly addresses the impact of a motion for *en banc* reconsideration, which is treated consistently with motions for rehearing.

Rule 20: Several changes were made to the rule addressing indigent parties.

Rule 24.2(c): The section of the supersedeas rule regarding the "Determination of Net Worth" was changed to clarify the scope of the debtor's affidavit of net worth as *prima facie* evidence. It is *prima facie* evidence of the debtor's net worth "for the purpose of establishing the amount of the bond, deposit, or security required to suspend enforcement of the judgment." The rule was also changed to clarify that a trial court clerk is required to receive and file the debtor's net worth affidavit without making a determination of whether it complies with the rule. In addition, Rule 24.2(c)(3) was changed to afford a judgment debtor 20 days to comply with any additional or other security ordered by the trial court.

Rule 24.4: The changes to this rule clarify that a party may seek relief from a trial court order regarding supersedeas: (1) from the court of appeals in which the appeal is (or presumably will be) pending; and then (2) by mandamus to the Texas Supreme Court.

Rule 28.1: The rule regarding accelerated appeals was largely rewritten. The first part of the rule addresses various types of accelerated appeals and sets forth a uniform timetable that governs unless there is a deadline provided by statute. The second part of the rule, which is entirely new, provides a procedure for an agreed appeal of an interlocutory order permitted by statute. Currently, such appeals are allowed under Texas Civil Practice and Remedies Code section 51.014(d).¹

¹ Section 51.014(d) allows a district court, county court at law, or county court to issue a written order for an interlocutory appeal in a civil action not otherwise appealable under section 51.014 if: (1) the parties agree that the underlying order involves a controlling

Rule 38.1(e): The rules now officially provide the option to include a “Statement Regarding Oral Argument” in a court of appeals’ brief. The statement, which explains why oral argument should or should not be permitted, must not exceed one page. It should address how the court’s decisional process would, or would not, be aided by oral argument. This optional statement does not absolve the party from the requirement of noting “oral argument requested” on the front cover of the brief.

Rule 41.3: Rule 41.3 provides that, in cases transferred to a different court of appeals, the court of appeals to which the case is transferred must decide the case in accordance with the precedent of the *transferor* court under principles of stare decisis if the transferee court’s decision otherwise would have been inconsistent with the precedent of the transferor court. The court’s opinion may state whether the outcome would have been different had the transferee court not been required to decide the case in accordance with the transferor court’s precedent.

Rule 47.7: Rule 47 has been amended to clarify how courts designate, and how practitioners cite, “unpublished” or “memorandum” opinions.

Rule 49: Rule 49 has been amended to clarify the procedures for filing “further” motions for rehearing and motions for *en banc* reconsideration.

Rule 52.3: The mandamus rule has been changed in several ways. One piece of information has been added to the laundry list of items to be included in a Texas Supreme Court petition for writ of mandamus. The page limits for mandamus replies has been made consistent with the page limits for regular briefs. But the biggest change has to do with the verification of facts. You are no longer required to verify the petition for writ of mandamus. However, the following requirements now apply:

- (1) every statement of fact in the petition must be supported by citation to competent evidence included in the appendix or record; and
- (2) the person filing the petition must certify that he or she has reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

Despite these changes to the manner in which the facts in the *mandamus petition* are verified, you are still required to verify the *mandamus record* to the same extent as before.

question of law as to which there is a substantial ground for difference of opinion; (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and (3) the parties agree to the order.

II. AMENDMENTS TO THE FEDERAL APPELLATE RULES

A. Changes to the Federal Rules of Appellate Procedure

On December 1, 2009, amendments to the Federal Rules of Appellate Procedure will take effect. Here are some of the highlights:

Changes in the time periods set by various appellate rules are being made in tandem with amendments to the federal rules of civil procedure, also effective December 1, 2009. These changes stem from a fundamental shift in the method of calculating time deadlines. The amended rules adopt a “days are days” approach. Accordingly, all deadlines will be measured in calendar days, rather than the current system where deadlines of less than 11 days do not count intermediate Saturdays, Sundays and holidays.

Under the amended appellate rules, time periods of:

- three and five days are extended to seven days (Rules 27, 28.1, 31);
- seven and eight days are extended to 10 days in some rules (Rules 5(b)(2), 19, and 27);
- seven and 10 days are extended to 14 days in other rules (Rules 4(a)(5), 4(a)(6), 4(b), 5(d)(1), 6, 10, 12, 30, and 39);
- 10 days are extended to 30 days (Rule 4(a)(4)(A)(vi)); and
- 20 days are extended to 21 days (Rule 5).

In addition, Rule 26 is amended to clarify some of the ambiguities in computing time generally. The amended rule provides instructions for periods of time stated in days or “a longer unit,” and separate instructions for periods of time stated in hours. FED. R. APP. P. 26(a)(1)-(2) (as amended eff. Dec. 1, 2009). The amended rule defines “last day” in relation to various filing methods and also defines “next day.” *Id.* at 26(a)(4)-(5). The amended rule also clarifies the operation of the “three day” rule when the original period (to which the three days are being added) ends on a weekend or holiday. *Id.* at 26(c).

Another significant amendment is a new rule: 12.1. This rule provides a procedure to be followed when: (1) an appeal has been filed while motions are still pending in the district court; (2) the district court lacks authority to grant the motion while the appeal is pending; and (3) the district court states either that it would grant the motion or that the motion raises a substantial issue. FED. R. APP. P. 12.1 (as amended eff. Dec. 1, 2009).

The amended Federal Rules of Appellate Procedure will govern all appeals filed on or after December 1, 2009, and also will govern all pending appeals to the extent it is “just and practicable.” The

amended rules can be viewed online at http://www.supremecourt.us/orders/courtorders/fra_p09.pdf.

B. Proposed Changes to the Fifth Circuit Rules

In light of the amendments to the Federal Rules of Appellate Procedure, the Fifth Circuit has proposed amendments to its local rules. Amendments to Fifth Circuit Rules 8.1.1, 8.10, 9.1, 9.5, 15.3.3(b), 15.3.4, 15.3.5, 15.5, 26.1, 27.3, 31.3, 31.4.1, 32.4, 32.5 and 34.3 will make those rules consistent with the new method of calculating deadlines under the federal rules.

In addition, amendments will change the word “shall” to “will” within the Fifth Circuit rules, to be consistent with earlier changes to the Federal Rules. Finally, the Fifth Circuit has proposed new rules to govern electronic filing.

The proposed amendments to the Fifth Circuit Rules are available online at [http://www.ca5.uscourts.gov/news/news/Notice%2009%20Proposed%20Changes.pdf](http://www.ca5.uscourts.gov/news/news/Notice%202009%20Proposed%20Changes.pdf).

III. ONLINE RESOURCES

Appellate courts have entered the 21st century and provide a good bit of information online. In addition to answers to frequently asked questions and any local rules, you can find the following scoop online:

A. Internal Operating Procedures

Various courts have posted their internal operating procedures and preferences online.

Houston First Court of Appeals. This court provides information and preferred procedures regarding “Filing Documents (and Motions),” available at http://www.1stcoa.courts.state.tx.us/rules/mot_sheet.asp, or by clicking “Filing Documents” under “Practice Before the Court” on the right-hand side of the court’s homepage. The Court also provides tips on common problems with civil filings, available at <http://www.1stcoa.courts.state.tx.us/rules/problems.asp>, or by clicking “Civil Filing Problems” under “Practice Before the Court.”

Fort Worth Court of Appeals. This court posted internal operating procedures in July 2008. The procedures are available at <http://www.2ndcoa.courts.state.tx.us/forms/2ndcoa-IOPs.pdf> or by clicking “Internal Operating Procedures” on the court’s homepage. The procedures include a chart covering frequently asked questions about case assignment and oral argument, as well as various filings, and also provides basic information about the court’s appellate mediation program.

Austin Court of Appeals. This court does not have local rules, but has posted a memorandum online detailing its general procedures and guidelines. The memorandum is available at <http://www.3rdcoa.courts.state.tx.us/rules/procedures.a>

[sp](#), or by clicking “Local Practices” under “Practice Before the Court” on the right-hand side of the court’s homepage.

San Antonio Court of Appeals. This court has drafted a seventeen-page document describing its internal operating procedures. This is a wealth of information that you should mine if you have an appeal in this court. The IOPs are available at <http://www.4thcoa.courts.state.tx.us/forms/iopforcases.pdf>, or by clicking “Procedures-IOPs” under “Practice Before the Court” on the right-hand side of the court’s homepage.

Dallas Court of Appeals. In September 2008, this court added a document outlining its internal operating procedures, as well. The IOPs are available at <http://courtstuff.com/5th/Internal%20Procedures.pdf> or by clicking the link to “5th Court Internal Operating Procedures” on the court’s homepage. Among the topics covered by the procedures are after-hours filing and visiting judges.

Texarkana Court of Appeals. This court does not have local rules, but has published its internal policies for dealing with motions for extensions of time. The policies are available online at <http://www.6thcoa.courts.state.tx.us/rules/tips.asp>, or by clicking “Tips & Guidelines” under “Practice Before the Court” on the right-hand side of the court’s homepage.

Amarillo Court of Appeals. The court has included its IOPs at <http://www.7thcoa.courts.state.tx.us/forms/7thcoa-IOPs.pdf>, or by clicking “Internal Operating Procedures” on the court’s homepage. Among the helpful information provided, the court informs readers that an electronic copy of the clerk’s record, reporter’s record and briefs facilitate disposition of the appeal. Thus, the court requests, but does not require, that the party responsible for filing the respective documents also provide the court with an electronic copy on a CD with a searchable PDF format if possible.

El Paso Court of Appeals. This court includes internal operating procedures at <http://www.8thcoa.courts.state.tx.us/forms/8thcoa-IOPs.pdf>, or by clicking “Internal Operating Procedures” on the court’s homepage. The procedures provide information on a variety of internal policies, including the court’s liberal “publication” policy. According to the procedures, the court generally issues memorandum opinions only in *Anders* cases and dismissals or when denying mandamus relief.

Beaumont Court of Appeals. This court generated IOPs in January 2008. The procedures are posted at <http://www.9thcoa.courts.state.tx.us/forms/9thcoa-IOPs.pdf>, or by clicking “Internal Operating Procedures” on the court’s homepage. According to

the IOPs, this court is the polar opposite of the El Paso court in terms of publication: about 85% of the Beaumont court's opinions are memorandum opinions.

Waco Court of Appeals. This court includes helpful references to its local rules in the IOPs, which are posted at <http://www.10thcoa.courts.state.tx.us/forms/10thcoa-IOPs.pdf>, or by clicking “Internal Operating Procedures” on the court’s homepage. Among the additional information provided by the IOPs, the court generally issues orders on motions on Tuesdays and opinions on Wednesdays.

Eastland Court of Appeals. This court does not have local rules, and indeed, discourages any variances from the Texas Rules of Appellate Procedure. Its internal operating procedures are posted at <http://www.11thcoa.courts.state.tx.us/forms/11thcoa-IOPs.pdf>, or by clicking on the “Internal Operating Procedures” link on the court’s homepage. One tip provided in the IOPs: use of multiple fonts in the body of a brief is discouraged.

Tyler Court of Appeals. This court has drafted some “Helpful Tips and Guidelines” to aid lawyers in the absence of local rules. My personal fave is Tip #7 – “Extension Motions: When Requesting Brief Extensions, Give the Court More than a Handful of Kibbles N’ Bits.” Check these out at <http://www.12thcoa.courts.state.tx.us/court/tips.asp>, or by clicking “Tips & Guidelines” under “Practice Before the Court” on the right-hand side of the court’s homepage.

Also, be aware that the Tyler Court of Appeals charges a filing fee (currently \$10) for motions, *responses*, and *replies*. This requirement is *not* listed online.

Corpus Christi-Edinburg Court of Appeals. This court provides a lot of useful information in its IOPs, which are available online at <http://www.13thcoa.courts.state.tx.us/forms/13thcoa-IOPs.pdf>, or by clicking “Internal Operating Procedures” on the court’s homepage. Some minutiae includes the court’s preference that a party “pick a color and stick with it for the first brief and succeeding briefs,” and the general rule that no re-argument is granted in connection with an *en banc* rehearing.

Houston Fourteenth Court of Appeals. This court’s internal operating procedures are available at <http://www.14thcoa.courts.state.tx.us/forms/14thcoa-IOPs.pdf>, or by clicking “Internal Operating Procedures” on the court’s homepage. The court also posts helpful information about its appellate mediation program at <http://www.14thcoa.courts.state.tx.us/rules/adr.asp>. You also can pull up this page by clicking “Mediation ADR” under “Practice Before the Court” on the right-hand side of the court’s homepage.

B. Webcasts of Texas Supreme Court Argument

The Supreme Court of Texas continues its live video webcasts of oral arguments. The live stream is available at <http://www.stmarytx.edu/law/index.php?site=supremeCourtWebcasts>. The video arguments will be archived through St. Mary’s website.

A schedule of upcoming oral arguments is available at <http://www.supreme.courts.state.tx.us/Opinions/Submissions.asp>. Although all oral arguments are initially slotted for webcasting, the Court has issued a policy allowing motions to opt out of webcasting for a particular argument. The Court also posts audio recordings (in MP3 format) of all oral arguments, usually within a few hours. Audio files are available online at <http://www.supreme.courts.state.tx.us/oralarguments/audio.asp>.

IV. THE CASE LAW EQUIVALENT OF REALITY TV

Case law, not unlike reality television, can provide a healthy dose of “there but for the grace of the appellate gods go I.” If you’re a “glass half empty” person, you may view this section as an attempt to keep you up at night. But, those of you who are “glass half full” folks will recognize that, once you identify these pitfalls and learn how to avoid them, the end result can be a good night’s sleep.

These cases are divided by court system and topic so that you can use the materials more efficiently as issues arise in your day-to-day practice.

A. Texas State Cases

Agency

The single business enterprise liability theory set out in *Paramount Enterprises* will not support the imposition of one corporation’s obligations on another. For the first time, the Texas Supreme Court addressed the viability of the “single business enterprise” theory first set forth in *Paramount Petroleum Corp. v. Taylor Rental Ctr.*, 712 S.W.2d 534 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.). *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 450-51 (Tex. 2008). The “single business enterprise” theory does not entail the level of agreement required for joint enterprise liability or the abuse required before the law disregards the corporate structure to impose liability. *Id.* After discussing *Paramount Petroleum* and its progeny, and examining the Court’s previous litany of abuses that provide a basis to disregard the corporate structure, the Court concluded that the “single business enterprise” theory does not support the imposition of one corporation’s obligations on another. *Id.* at 456.

Appellate Procedure

Error in an interlocutory order is not necessarily waived if the interlocutory order is not expressly mentioned in the notice of appeal or the issues in the court of appeals that challenge the final order. The Texas Supreme Court addressed this issue in the context of an interlocutory order sustaining special exceptions and the final order dismissing the suit. *Perry v. Cohen*, 272 S.W.3d 585, 588 (Tex. 2008). The appellants filed a notice of appeal that expressly mentioned the order dismissing the suit, but not the earlier order sustaining the special exceptions. *Id.* In their brief, appellants included an issue challenging the dismissal of their suit. *Id.* The body of the brief addressed the merits of the interlocutory order sustaining the special exceptions. *Id.* However, the appellee contended that the omission of the special exceptions order from the notice of appeal, and the absence of a separate issue challenging the special exceptions order, waived any challenge to the special exceptions order. *Id.* The appellee argued that, because the appellants were required to challenge both the dismissal order and the special exceptions order, their appeal must fail. *Id.* The court of appeals agreed and, without addressing the merits, affirmed the trial court's dismissal. *Id.* at 586.

The Texas Supreme Court agreed with the court of appeals that the appellants were required to challenge both orders, but disagreed with how the court of appeals applied that rule. *Id.* at 588. The Court concluded that the appellants were not required to expressly name the interlocutory order in their notice of appeal, and that the appellants had challenged the interlocutory special exceptions order through the issue challenging the dismissal, combined with the briefing challenging the special exceptions order. *Id.* Accordingly, the Court remanded the case to the court of appeals for further proceedings. *Id.*

Civil Procedure

A trial court should rule on motions to strike interventions before considering other matters such as severance. After a motion to strike an intervention was filed, the trial court conducted a hearing but did not rule on the motion. *In re Union Carbide Corp.*, 273 S.W.3d 152, 154 (Tex. 2008) (per curiam). Instead, the court severed the intervenors' claims into a separate suit and directed that the severed suit be docketed and maintained on the court's own docket. *Id.* In a mandamus proceeding, the intervenors argued that, even if they did not properly intervene, the trial court had discretion to sever, rather than strike, their claims. *Id.* at 155. The Texas Supreme Court disagreed, noting that permissive joinder (which allows severance) and intervention are authorized and governed by different rules with different processes. *Id.* at 155-56. Interventions by uninvited participants

have potential for disrupting pending suits. *Id.* at 156. Therefore, trial courts should rule on motions to strike interventions before considering other matters, like severance. *Id.* Because the decision to sever in this case circumvented the applicable random-assignment-of-cases local rule, and because of the benefit of establishing the priority of rulings for trial courts, the Court held that Union Carbide did not have an adequate remedy by appeal. *Id.* at 157.

Costs

When the stated "good cause" for otherwise apportioning costs is improper, but the record contains other information that could support "good cause," the matter may be remanded for reconsideration of the taxable costs allocation. Although courts generally must tax costs against the unsuccessful party, they may tax costs otherwise for good cause stated on the record. *Rankin v. FPL Energy, LLC*, 266 S.W.3d 506, 515 (Tex. App.—Eastland 2008, pet. denied) (citing Texas Rules of Civil Procedure 31 and 141). A party's emotional distress at having to pay costs, an inability to pay costs, and a trial judge's perceived "fairness" do not constitute good cause. *Id.* However, conduct unnecessarily prolonging and obstructing a trial can constitute good cause. *Id.* In *Rankin*, the trial court's stated reason (inability to pay) for taxing each party with its own costs (despite the defendants' success) was improper. *Id.* But, the court of appeals noted that the record indicated additional possible reasons for "good cause" to otherwise tax the costs. *Id.* These included allegations of unnecessary depositions, multiple depositions of the same witnesses, and costs incurred in responding to groundless motions. *Id.* Because the trial court had attempted to "otherwise" apportion costs, and because the record contained information could support a "good cause" determination, the court of appeals remanded the case to the trial court solely to reconsider the allocation of taxable costs. *Id.* at 515-16.

Default Judgments

The difference between the formal version and diminutive form of a first name is not a "slight variance," and use of the different versions in a petition and return of service fails to establish proper service to support a default judgment. If a petition states that service can be effected on "Chris Lytle," and the return of service states that citation was delivered to "Christopher Lytle," does the record affirmatively show proper service to uphold a default judgment? *See Lytle v. Cunningham*, 261 S.W.3d 837, 840 (Tex. App.—Dallas 2008, no pet. h.). If the record does not affirmatively show strict compliance with the rules governing issuance, service, and return of citation, a default judgment is void. *Id.* When the information on a return of service of process varies from the information contained in the petition, the question

arises whether the variance is “slight,” such that the return is sufficient to show proper service. *Id.*

Texas courts have held that the omission of a middle initial, of the corporate designation “Inc.,” of an accent mark from the name of a corporate defendant, or the substitution of “@” for “at” are slight variances that do not destroy proof of proper service. 261 S.W.3d at 840 (collecting cases). Furthermore, in a 1983 opinion, the Tyler Court of Appeals concluded that service was not fatally defective where the citation directed service on “Jim” Stephenson and the return showed delivery to “James” Stephenson. *Id.* (citing *Stephenson v. Corporate Servs., Inc.*, 650 S.W.2d 181, 184 (Tex. App.—Tyler 1983, writ ref’d n.r.e.)). However, in a 2006 *per curiam* opinion, the Texas Supreme Court offered an example of a situation in which the record is conclusive on proper service: when the petition directs service to “Henry Bunting, Jr.” but the citation and return reflect service on “Henry Bunting.” *Id.* (citing *Fidelity & Guar. Ins. Co. v. Drewery Constr. Co.*, 186 S.W.3d 571, 573 (Tex. 2006)).

Guided by this example, the Dallas Court of Appeals concluded that the variance between “Chris” and “Christopher” was not slight and that proper service was not affirmatively shown. *Lytle*, 261 S.W.3d at 840-41. The court limited its review on this issue to the petition, citation, and return of service. *Id.* at 841

Expert Testimony

The Property Owner Rule applies to corporations that own property, and a corporate representative familiar with the property’s market value may testify under the Rule without being designated as an expert witness. A longstanding rule in Texas allows a property owner who is familiar with the market value of his property to testify regarding that market value, even if he is not qualified or designated as an expert witness. *Speedy Stop Food Stores, Ltd. v. Reid Road Mun. Util. Dist. No. 2*, 282 S.W.3d 652, 653 (Tex. App.—Houston [14th Dist.] Feb. 3, 2009, pet. filed). This rule is called the Property Owner Rule. *Id.* The Houston Fourteenth Court of Appeals recently addressed whether the Rule applies to corporations through an appropriate corporate representative. *Id.* The Texas Supreme Court has not directly addressed the issue, and there is a split among the courts of appeals as to how the Rule applies. *Id.* at 653, 656-57. After discussing these intermediate appellate opinions, as well as cases from other jurisdictions, and the purposes of the Rule, the Houston Court concluded that the Rule applies to corporate entities owning property. *Id.* at 658. Accordingly, a corporate representative who is familiar with the property’s market value may testify as to the property’s market value without being designated as an expert witness. *Id.*

Insurance

An insurer’s duty to defend does not include a duty to defend a claim that might have been alleged but was not, or a claim that more closely aligns with the actual facts but has not been asserted. An insurance policy required the insurer to defend “any ‘suit’” seeking damages for bodily injury or property damage covered by the policy. *Pine Oak Builders, Inc. v. Great Am. Lloyd’s Ins. Co.*, 279 S.W.3d 650, 655 (Tex. 2009). “Suit” is defined as “a civil proceeding in which damages because of [property damage or other injuries] to which this insurance applies are alleged.” *Id.* Under the policy, the insurer did *not* have a duty to defend a claim that might have been alleged but was not, or a claim that more closely tracks the true factual circumstances surrounding the third-party claimant's injuries but which, for whatever reason, has not been asserted. *Id.* at 655-56. To hold otherwise would impose a duty on the insurer that is not found in the language of the policy. *Id.*

Judgment Nunc Pro Tunc

Errors in a proposed judgment become judicial errors when the judgment is signed, unless the record before the signing reflects that the judge intended to do something other than grant relief exactly as proposed. If a proposed judgment contains an inadvertent mistake (e.g., 2004 instead of 2003, or “with prejudice” instead of “without prejudice”), can it be corrected by a *nunc pro tunc* judgment after the trial court’s plenary power expires. The Houston First Court of Appeals addressed this question in *Hernandez v. Lopez*, --- S.W.3d ---, 2009 WL 793635 (Tex. App.—Houston [1st Dist.] Mar. 26, 2009, no pet. h.) (on reh’g). In January 2004, the trial court signed a proposed agreed final order stating that the father was in arrears on child support payments “as of December 31, 2004.” *Id.* at *1 (emphasis added). Two years later, the trial court issued a judgment *nunc pro tunc*, changing the date in the agreed order from 2004 to 2003. *Id.* However, an error in the rendition of judgment is always a judicial error that cannot be corrected by *nunc pro tunc* judgment. *Id.* at *5.

When a trial court signs a proposed or agreed final order, the judgment is rendered. *Id.* at *4. The presumption is that the trial court intended to render the judgment as requested. Thus, the “error” is not a mistake, but rather what the trial court intended to do. *See id.* at *5. This presumption could be rebutted by evidence in the record at some point before the order was signed, showing that the trial court actually intended to do – or did do – something different than what was stated in the proposed order. 2009 WL 793635 at *5-6. In the case at bar, the majority found nothing in the record indicating that the trial court had intended to grant relief different from the proposed agreed order. *Id.* at *6. Therefore, the judgment *nunc*

pro tunc was vacated. *Id.* at *7. The dissent would have affirmed the judgment *nunc pro tunc* based on evidence that the terms of the agreed order stipulated to in open court before the master – which oral terms were then incorrectly transcribed in the original written order the court signed – stated the arrearage as of 2003 (*i.e.*, the correct date). *Id.* at *9 (Keyes, J., dissenting) (on reh’g).

Jury – Outside Influence

Discovery regarding outside influence on the jury is permissible, but it should be limited in scope. In a products liability case, the jury deliberated for two days before the presiding juror sent out the question, “What is the maximum amount that can be awarded?” *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 659 (Apr. 3, 2009). The parties promptly settled. *Id.* The jurors were dismissed, but some stayed and voluntarily spoke with the defendant, Ford. *Id.* From these discussions, Ford learned that some of the jurors were unaware of the presiding juror’s note and that she sent the note over the objection of other jurors. *Id.* At the time the note was sent out, the jurors had decided the first liability question in Ford’s favor, and eight jurors had voted in Ford’s favor on the second liability question, with two jurors undecided. *Id.*

Ford moved the trial court to delay settlement and allow discovery on the issue of outside influence in the drafting of the question, attaching affidavits from four jurors regarding the presiding juror’s behavior. 279 S.W.3d at 659-60. The trial court denied the request for discovery but encouraged Ford to conduct its own investigation. *Id.* at 660. Ford later withdrew its consent to settlement and an agreed judgment, and requested a new trial. *Id.* The trial court struck the juror interview transcripts Ford attached to its filings, and denied Ford’s motions. *Id.* at 661. The plaintiff filed a summary judgment motion for breach of the settlement agreement, and after striking the juror affidavits Ford had attached to its initial motion for discovery, the trial court granted summary judgment. *Id.*

After concluding that Ford had preserved its complaint regarding the denied discovery on outside influence (279 S.W.3d at 661-63), the Court turned to the question of whether the discovery Ford sought was permissible. The plaintiff argued that Texas Rules of Civil Procedure 327(b) and 606(b) precluded any discovery about any aspect of jury deliberations. *Id.* at 665. Because Ford had not sought the discovery in connection with a motion for new trial (even though a new trial would result if Ford succeeded on its request to set aside the settlement agreement), the rules did not strictly apply. *Id.* at 665-66. Moreover, even when the rules apply, their plain language allows jurors to testify about outside influence brought to bear on any of them. *Id.* at 666. The Court opined that “[d]iscovery

involving jurors will not be appropriate in most cases, but in this case there was more than just a suspicion that something suspect occurred—there was some circumstantial evidence that it did.” *Id.*

In finding that the discovery sought by Ford was, in general, permissible, the Court also recognized that there is a difference between jurors choosing to talk about their service and their being compelled to do so in discovery depositions and court hearings. 279 S.W.3d at 666. The Court “believe[s] the better policy, in general, is to conform discovery involving jurors to those matters permitted by Rule of Civil Procedure 327 and Rule of Evidence 606. That is, discovery involving jurors should ordinarily be limited to facts and evidence relevant to (1) whether any outside influence was improperly brought to bear upon any juror, and (2) rebuttal of a claim that a juror was not qualified to serve.” *Id.* The Court also clarified that the trial court retained discretion to reasonably control the limits of discovery and the manner in which the discovery may be obtained. *Id.*

Justice Wainwright, joined by Justice Medina, wrote a concurring opinion in which he provided an additional reason he believed supported the Court’s decision. Justice Wainwright also wrote to address the limited circumstances to which he believes the Court’s opinion would apply.

Jury Waivers

Prudential does not impose a presumption against a contractual jury waiver. In *In re Bank of Am., N.A.*, 278 S.W.3d 342 (Tex. 2009) (per curiam), the Texas Supreme Court clarified that its holding in *In re Prudential Ins. Co.*, 148 S.W.3d 124, 130-33 (Tex. 2004), does not create a presumption against waiver that places the burden on the party seeking enforcement to prove that the opposing party knowingly and voluntarily agreed to waive its constitutional right to a jury trial. *Bank of Am.*, 278 S.W.3d at 343. The Court gave two reasons for its rejection of such a presumption. First, a presumption against waiver would incorrectly place the initial burden of establishing a knowing and voluntary execution on the party seeking to enforce the waiver, which is inapposite to the Court’s burden-shifting rule as articulated in *In re General Electric*, 203 S.W.3d 314, 316 (Tex. 2006) (per curiam). *Bank of Am.*, 278 S.W.3d at 343. Second, a presumption against waiver would create an unnecessary distinction between arbitration and jury waiver clauses, even though the Court has expressed that our jurisprudence “should be the same for all similar dispute resolution agreements.” *Id.* at 343-44.

Although a valid contractual jury waiver may be invoked by a signatory’s agent, it will not be extended to a nonsignatory that is merely alleged to be the signatory’s agent. A developer and Credit Suisse First

Boston Mortgage Capital, L.L.C. (“Mortgage Capital”) signed a loan agreement containing a jury waiver. *In re Credit Suisse First Boston Mortgage Capital, L.L.C.*, 273 S.W.3d 843, 846 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding). Credit Suisse First Boston, L.L.C. (“CSFB”) was not a party to the loan agreement. *Id.* The developer sued Mortgage Capital and CSFB for alleged fraud. *Id.* Among other things, the developer contended that CSFB employees were authorized to act on behalf of Mortgage Capital. *Id.* Mortgage Capital and CSFB moved to quash the developer’s jury demand based on the contractual waiver. *Id.*

In a second mandamus proceeding, two questions were presented. 273 S.W.3d at 845, 848, 851. First, the court of appeals concluded that, when a valid contractual jury waiver applies to a signatory corporation, the waiver also extends to nonsignatories that seek to invoke the waiver as the corporation’s agents. *Id.* at 848. However, in this case, Mortgage Capital and CSFB had neither admitted any agency relationship, nor detailed the legal relationship between them. *Id.* at 848. Instead, Mortgage Capital and CSFB described themselves simply as “affiliates.” *Id.* Although the developer had alleged an agency relationship, the court of appeals concluded that allegations were not enough to allow a nonsignatory to invoke a contractual jury waiver. *Id.* at 850-51. Because CSFB did not admit to being Mortgage Capital’s agent, and because the agency had not been proved, the court declined to extend the jury waiver to CSFB. *See id.* at 851.

Post-Judgment Motions

The rule requiring a written order to grant a motion for new trial is a bright-line rule without exception. The Texas Supreme Court has clarified that the rule requiring a written order to grant a motion for new trial is a bright-line rule. *In re Lovito-Nelson*, 278 S.W.3d 773, 775 (Tex. 2009). An oral pronouncement accompanied by a written docket sheet entry will not suffice. *Id.* at 774-75. An oral pronouncement made at the same time the court signs an order granting a preferential (new) trial setting (*i.e.*, a written order implying the grant of a motion for new trial) will not suffice. *Id.* at 775. Because of the uncertainty in appellate deadlines that would be caused by a pliable rule, the rule must be strictly enforced. *Id.* at 774-75.

Sanctions

Provisions in a court order that are incorporated from the parties’ agreement cannot be enforced by contempt unless the order contains decretal language actually ordering the parties to perform or refrain from particular conduct. The trial court’s final decree of divorce incorporated a mediated settlement agreement between the parties which, among other things, permanently enjoined them from communicating with

each other “in a coarse or offensive manner.” *In re Coppock*, 277 S.W.3d 417, 418 (Tex. 2009). The trial court later held the ex-wife in contempt of this provision. *Id.* The divorce decree grants a “permanent injunction” that included “communicating with the other party in person or in writing in vulgar, profane, obscene, or indecent language or in a coarse or offensive manner,” and recited that the injunction was “binding on both parties.” *Id.* at 419. However, the decree did not include language that required the parties to refrain from the listed conduct or that mandated compliance with the injunction. *Id.* Without such language, the provisions in the order – incorporated from the parties’ agreement – were enforceable only as contractual obligations. *Id.* at 420. Because contractual obligations cannot be enforced by contempt, these provisions could not be so enforced, either. *Id.* The Court also noted that the provision regarding “coarse or offensive communication” was “less than clear,” but did not reach this specific issue due to the lack of decretal language. *Id.* at 418.

Service of Process

A court order for service under Rule 106 must specify the particular method of substitute service. Some time after granting a Rule 106 motion for substitute service, the trial court granted a no-answer default judgment. *Steinke v. Mann*, 276 S.W.3d 608, 609 (Tex. App.—Waco Dec. 10, 2008, no pet. hist.). Under the procedures set forth in Rule 106, a trial court may authorize service in any manner that the supporting affidavit or other evidence shows will be reasonably effective to give the defendant notice of the suit. *Id.* In this case, the trial court stated that the Rule 106 motion had come on for consideration and that, after consideration, the court was of the opinion that the motion should be granted in all respects. *Id.* It did not expressly authorize service by any particular manner. *Id.* Because the manner of service was left to the process server’s discretion, service was defective and the default judgment was improper. *Id.* at 610.

Service of process on a subsidiary constitutes service on an alter ego parent corporation, sufficient to uphold a default judgment against the parent, without any pleading or proof of alter ego in the default judgment case. A plaintiff named and served Consolidated Employment Benefits Corporation (Consolidated), an Illinois corporation. *Cebcor Serv. Corp. v. Landscape Design & Const., Inc.*, 270 S.W.3d 328, 330 (Tex. App.—Dallas 2008, no pet. hist.). Consolidated was served through the Texas Secretary of State, but after the secretary of state forwarded the original petition to the address on file, it was returned with the notation “No Forwarding Order On File.” *Id.* Consolidated did not answer, and the plaintiff moved for a default judgment. *Id.* On the day of the hearing, plaintiffs filed a first amended petition that alleged the

defendant was Consolidated “a/k/a Cebcor Service Corporation,” without pleading or alleging alter ego. *Id.* No party was served with the amended petition, and the court signed a default judgment at the hearing. *Id.* at 331. The judgment awarded damages and attorneys’ fees against Consolidated “a/k/a Cebcor Service Corporation.” *Id.* Three years later, plaintiff-judgment creditor attempted to have the judgment executed with regard to Cebcor’s assets. *Id.* Cebcor filed suit alleging a bill of review against the default judgment and requesting declaratory judgment that the default judgment is void. *Id.* As a defense, the judgment creditor alleged alter ego, and an alter ego question was submitted to the jury, which answered “yes.” *Id.* The court of appeals determined that service of the amended petition in the first lawsuit was not required before obtaining a default judgment because “the original and amended petitions sought the same relief.” *Id.* at 332. The court further determined that alter ego was relevant to the second lawsuit because, to prevail on its bill of review, Cebcor had to prove it was not served. *Id.* Service on Cebcor’s subsidiary constituted service on Cebcor if it was the subsidiary’s alter ego. *Id.* at 332-33. Finally, the court of appeals found that Cebcor waived its argument that the judgment creditor was required to plead the alter ego relationship in the underlying case. *Id.* at 333. However, the court also noted that a party is entitled to obtain a judgment against one entity and later pursue a finding that another entity is the judgment debtor’s alter ego. *Id.* at 333-34.

Trifurcation of Trial

The Texas Supreme Court tangentially discussed the “trifurcation” of a trial in *Columbia Medical Center of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 245-47 (Tex. 2008) & 257 (Brister, J., concurring [“concurring op.”]). The trial court “trifurcated” trial into three phases: (1) first phase on the defendant’s alleged negligence and gross negligence; (2) second phase on exemplary damages; and (3) third phase on the plaintiff’s contributory negligence. *Id.* at 257 (concurring op.). Although the petitioner presented the issue of whether the trial court erred by submitting the contributory negligence question in a third phase (rather than the first phase), the majority did not reach this question because it determined the evidence did not support submission of the contributory negligence question to the jury at all. *See id.* at 247-48, 256. The majority did state its “serious reservations about the trial court’s decision to trifurcate the trial” *Id.* at 257. Justice Brister (along with Justice Medina) joined in the majority opinion, but wrote that “[r]ather than merely expressing ‘serious reservations’ about this ‘unusual’ procedure, I would say, ‘Don’t do it.’” *Id.* at 257 (concurring op.).

Venue

In an action against a county, the mandatory venue prescribed by Section 15.015 of the Texas Civil Practice and Remedies Code is not trumped by Section 15.016, and the county is not required to challenge venue facts. The plaintiffs brought a premises defect case against Fort Bend County and other defendants under the Texas Tort Claims Act. *In re Fort Bend County*, 278 S.W.3d 842, 843 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding). The plaintiffs sued in Harris County, where the accident occurred. *Id.* Fort Bend County moved to transfer venue to Fort Bend County, under section 15.015, which provides that “[a]n action against a county shall be brought in that county.” *Id.* at 843, 844. The plaintiffs argued that section 15.015 was trumped by section 15.016, which provides that “[a]n action governed by any other statute prescribing mandatory venue shall be brought in the county required by that statute.” *Id.* at 844. The Tort Claims Act contains such a mandatory venue provision. *Id.* However, the court of appeals concluded that section 15.015 controls, and required venue in Fort Bend County. *Id.* Although Fort Bend County had not complied with the general requirement of specifically denying the plaintiffs’ venue facts, the court of appeals held that the County was not required to do so in light of the mandatory and controlling nature of section 15.015. *Id.*

B. State and Federal Cases Regarding Texas Tolling Statute

Section 16.063 of the Texas Civil Practice and Remedies Code provides that “[t]he absence from this state of a person against whom a cause of action may be maintained suspends the running of the applicable statute of limitations for the period of the person’s absence.” The first version of the statute was adopted by the legislature in 1841. Art. 997 § 22 (Act of Feb. 5, 1841). Over its long history, Texas courts have generally refused to apply section 16.063 to a nonresident defendant unless he was in the state when he contracted the debt at issue in the lawsuit or was in the state when the cause of action accrued. *See Jackson v. Speer*, 974 F.2d 676, 679 (5th Cir. 1992) (“the tolling provision applies to nonresident defendants who were present in the state when they executed a promissory note or otherwise contracted a debt” [and] “to nonresident defendants who were present in the state when the cause of action accrued”). As a result, section 16.063 has been interpreted to effectively eliminate “the defense of limitations in all suits against nonresidents who incur an obligation in Texas and go back to their home state without returning to Texas. In such cases, the statute is tolled indefinitely.” *Dicker v. Binkley*, 555 S.W.2d 495, 497 (Tex. App.—Dallas 1977, writ ref’d n.r.e.). Under this interpretation, section 16.063 places an individual that

enters Texas to conduct business on the horns of a dilemma—either stay in Texas until limitations run for any potential claim or give up the valuable limitations defense.

Significantly, since its 1968 decision in *Vaughn v. Deitz*, 430 S.W.2d 487 (Tex. 1968), the Texas Supreme Court has held that section 16.064 tolls the limitations period when a defendant leaves Texas even if he is amenable to out-of-state service under the Texas statute providing for out-of-state service through the Chairman of the State Highway Commission. *Id.* at 490.

Over the years, similar tolling statutes in other states have been held unconstitutional under the Commerce Clause of the United States Constitution. U.S. CONST. art. I, § 8, cl. 3. Specifically, in *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988), the United States Supreme Court struck down an Ohio tolling statute nearly identical to section 16.063 because it violated the Commerce Clause. *Id.* at 889. The Supreme Court held in that case that “[t]he State [of Ohio] may not withdraw [statute of limitations] defenses on conditions repugnant to the Commerce Clause.” *Id.* at 893. The Ohio tolling provision in *Bendix* impermissibly burdened interstate commerce by forcing “a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense, remaining subject to suit in Ohio in perpetuity.” *Id.* at 893. Rejecting Ohio’s argument that the tolling statute was valid because it protected Ohio residents from corporations committing actionable claims in Ohio and then leaving the state, the Supreme Court pointed out that the plaintiff could have served the defendant via the Ohio long-arm statute during the limitations period. *Id.* at 894. The Court focused on the fact that there was a less burdensome means in place (the long-arm statute) to protect Ohio citizens from corporations who commit actionable claims in Ohio and then leave. *Id.*

Following the Supreme Court’s decision in *Bendix*, numerous courts have struck down similar tolling statutes as violating the Commerce Clause. See *Juzwin v. Asbestos Corp., Ltd.*, 900 F.2d 686, 692 (3d Cir. 1990); *Crespo v. Stapf*, 128 N.J. 351, 362 (N.J. 1992); *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064, 1074 (8th Cir. 1992); *Muller v. Custom Distribs.*, 487 N.W.2d 1, 3 (N.D. 1992); *Guyton v. J.M. Mfg., Inc.*, 894 F. Supp. 252, 255 (D.S.C. 1995). Courts have also expanded the *Bendix* holding to individual defendants. See *Tesar v. Hallas*, 738 F. Supp. 240 (N.D. Ohio 1990); *Abramson v. Brownstein*, 897 F.2d 389, 393 (9th Cir. 1990); *Rademeyer v. Farris*, 284 F.3d 833, 839 (8th Cir. 2002).

However, only recently has the Texas tolling statute been challenged. Specifically, in *Cadles of*

Grassy Meadows II, L.L.C. v. Goldner, No. 3:06-CV-1542-M, 2007 WL 1701839 (N.D. Tex. June 12, 2007), the defendants challenged section 16.063 as unconstitutional under the Commerce Clause. The district court agreed, holding that the state of Texas could not “justify its statute as a means of furthering its interest in protecting domestic creditors given the state’s long-arm jurisdiction over nonresidents.” *Id.* at *8. The court explained that, “[a]lthough the state’s interest may have been best served by the tolling statute when it was first passed in 1841, when the state was unable to exert personal jurisdiction over nonresidents when they were not physically present in the state of Texas, that rationale is no longer furthered by the tolling statute given modern personal jurisdiction law.” *Id.*

The plaintiff in *Goldner* appealed the district court’s holding of unconstitutionality to the Fifth Circuit Court of Appeals. However, on August 29, 2008, between the time the Fifth Circuit heard oral argument in *Goldner* (in June 2008) and the time of its decision (September 8, 2008), the Texas Supreme Court issued *Kerlin v. Saucedo*, 263 S.W.3d 920 (Tex. Aug. 29, 2008). In *Kerlin*, the supreme court held that the statute of limitations barred the plaintiffs’ claims because neither fraudulent concealment nor the tolling statute saved the claims from expiring. The plaintiffs in *Kerlin* argued that section 16.063 tolled limitations for the time the defendants were out of the state. The Texas Supreme Court rejected this argument, but *not* on constitutionality grounds. The Court declined to address the constitutionality of the tolling statute under the Commerce Clause. Instead, the Court held:

[I]f a nonresident is amenable to service of process under the long[-]arm statute and has contacts with the state sufficient to afford personal jurisdiction, as was the case with *Kerlin*, then we can discern no reason why a nonresident’s “presence” in this state would not be established for purposes of the tolling statute.

263 S.W.3d at 927.² See *Goldner*, 2009 WL 1393074, at *1. Accordingly, after *Kerlin*, “a nonresident is

² The Texas Supreme Court originally decided *Kerlin* on August 29, 2008, but issued a revised opinion on October 10, 2008, in response to an amicus curiae brief filed by the State of Texas. The original *Kerlin* opinion stated:

But if a nonresident’s contacts with the state are sufficient to afford personal jurisdiction under the general long[-]arm statute, as it is undisputed *Kerlin*’s were, then we can discern no reason why a nonresident’s “presence” in this state would not be established for purposes of the tolling statute.

deemed ‘present’ in the State if (1) he is amenable to service of process under the long-arm statute, and (2) he has sufficient contacts with the State to afford personal jurisdiction.” *Goldner*, 2009 WL 1393074, at *1. “If both preconditions are met, then the nonresident is deemed ‘present,’ and the tolling statute will not apply.” *Id.*

Notably, the supreme court in *Kerlin* did not expressly overrule *Deitz*, because the issue in *Deitz* was whether the tolling statute applied to an out-of-state defendant despite the existence of a Texas statute providing for out-of-state service through the Chairman of the State Highway Commission. In *Kerlin*, the supreme court recognized that *Deitz* did not address the effect of the general long-arm statute, only the impact of amenability to service through the Chairman of the State Highway Commission. 263 S.W.3d at 927 (citing TEX. CIV. PRAC. & REM. CODE § 17.062).

Unfortunately, because of hurricane Gustav, which hit the gulf coast in late August 2008 and resulted in the court’s closure for one week, the Fifth Circuit issued its opinion in *Goldner* on September 8, 2008, without the benefit of Texas Supreme Court’s August 29, 2008, opinion in *Kerlin*. In *Goldner*, the Fifth Circuit affirmed the district court’s ruling that section 16.063 is unconstitutional under the Commerce Clause. However, on November 14, 2008, in light of *Kerlin*, the Fifth Circuit withdrew its opinion and remanded the case for determination in light of *Kerlin*. *Cadles of Grassy Meadows II, L.L.C. v. Goldner*, 549 F.3d 348, 348 (5th Cir. 2008).

As the final nail in the tolling-statute coffin, on June 26, 2009, the Texas Supreme Court decided *Ashley v. Hawkins*, No. 07-0572, 2009 WL 1817241 (Tex. June 26, 2009). In *Ashley*, the supreme court addressed the effect of the general long-arm statute on the operation of the tolling statute. The Court held:

[W]e overrule *Deitz* and hold, as we did in *Kerlin*, that a defendant is “present” in Texas, for purposes of the tolling statute, if he or she is amenable to service under the general long[-]arm statute, as long as the defendant has “contacts with the state sufficient to afford personal jurisdiction.” In most cases, the general long[-]arm statute will establish this “presence,” as its “broad doing-business language ‘allows the statute to reach as far as the federal constitutional requirements of due process will allow.’”

Id. at *1-2 (citations omitted).

C. United States Supreme Court and Fifth Circuit Cases

Abatement for State Proceeding

When determining the type of declaratory proceeding for purposes of applying the proper abstention standard, the court may consider all pleadings in the action – including a counterclaim by the defendant – in determining whether the action involves a request for coercive relief. When reviewing a district court’s decision to stay a federal declaratory proceeding based on a parallel state action, different standards apply depending on whether the proceeding involves declaratory relief alone or also coercive relief. *New England Ins. Co. v. Barnett*, 561 F.3d 392, 394-95 (5th Cir. 2009). In the Fifth Circuit, if a declaratory proceeding also involves a request for coercive relief, the *Colorado River* abstention standard applies. *Id.* at 396. However, the Court had never addressed whether, in deciding whether the proceeding involves a request for coercive relief, the inquiry was limited to the plaintiff’s pleadings. *Id.* In the case at bar, the request for coercive relief was found in a counterclaim by the defendant. *Id.* at 397. The Court determined that the proper inquiry was whether the action as a whole contained any claim for coercive relief. *Id.* The Court indicated that potential exception would arise if the non-plaintiff’s request for injunctive relief is either frivolous or is made solely to avoid application of the non-“coercive” standard. *Id.*

Covenants Not to Compete

In a covenant not to compete, the term “termination” may have a meaning different than “expiration” when applied to the employment. An employment contract set the period of a noncompete provision as “the second anniversary of the Date of Closing or on the second anniversary of the termination of [the employee’s] employment by [the employer], whichever occurs later” *Specialty Rental Tools & Supply, LP v. Shoemaker*, 553 F.3d 415, 416-17 (5th Cir. 2008) (emphasis omitted, bracketed text changed). The contract further defined the employment period as “five (5) years, beginning on March 1, 2002 and ending on March 1, 2007” *Id.* at 417. Finally, the contract defined “termination” as permitted by either party upon 14 days written notice. *Id.*

Toward the end of the five-year employment period, the employer notified the employee by letter that his employment contract would expire and not be renewed. 553 F.3d 417-18. The employer’s letter made clear that it was not a notice of termination, but rather a notice of non-renewal. *Id.* Within days after the employment period ended, the employee went to work for a direct competitor of the employer. *Id.* at 418.

Based on the wording of the contract, the Court held that “termination” was unambiguously limited to affirmative acts of the contracting parties and did not include “expiration” of employment at the end of the five-year period. 553 F.3d at 421-22. Thus, the employer was not entitled to enforcement of the noncompete provision in the employment contract when it expired. *Id.* at 422.

Diversity Jurisdiction

The Texas Declaratory Judgment Act is not “substantive law” in a diversity case and will not support an award of attorneys’ fees. The Federal Declaratory Judgment Act authorizes an award of attorney’s fees “where ‘controlling [state] substantive law’ permits such recovery.” The Texas Declaratory Judgment Act authorizes a court to award reasonable and necessary attorney’s fees as are equitable and just. TEX. CIV. PRAC. & REM. CODE § 31.009. However, the Texas Declaratory Judgment Act is not “substantive law” in a federal diversity case. *AG Acceptance Corp. v. Veigel*, 564 F.3d 695 (5th Cir. 2009). Therefore, an attorney’s fees award is not supported by the Texas act in a federal declaratory judgment case brought as a diversity action. *Id.*

For purposes of federal diversity, a limited liability company’s citizenship is determined by the citizenship of all its members. A question of first impression in the Fifth Circuit was decided in *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077 (5th Cir. 2008): for purposes of federal diversity jurisdiction, is a limited liability company a citizen of the state where it is organized (like a corporation), or a citizen of the states of which its members are citizens? The eight other federal circuit courts that had addressed the issue concluded that the citizenship of an LLC is determined by the citizenship of all its members. *Id.* at 1080 (collecting cases). The Fifth Circuit concluded that this approach was consistent with United States Supreme Court jurisprudence on the distinction between limited partnership associations and corporations, as well as with applicable statutory language and interpretation. *Id.* Therefore, the Fifth Circuit joined the other circuits in holding that an LLC’s citizenship is determined by the citizenship of all its members. *Id.* at 1080-81.

Interlocutory Appeal

28 U.S.C. § 1292(b) authorizes certification of orders, not questions, for interlocutory appeal, and in certifying an order, district courts are advised to include more “reasoning” than an abstract description or bare finding. In *Linton v. Shell Oil Co.*, 563 F.3d 556, 557 (5th Cir. 2009) (per curiam), the district court denied a summary judgment motion and certified for a section 1292(b) interlocutory appeal “the issues raised” in that motion. The Fifth Circuit began by noting that section 1292(b) authorizes certifications of orders for

interlocutory review, not certifications of questions. *Id.* And, although the district court had helpfully identified the specific legal issues that were involved, it did not certify the order for review or include in that order its reasoning as to how the questions were resolved or why that resolution led to the motion’s denial. *Id.* at 558. In denying the application for leave to appeal, the Fifth Circuit “strongly suggest[ed] to district judges the advisability of stating more than an abstract description of the legal questions involved or a bare finding that the statutory requirements of section 1292(b) have been met.” *Id.*

Pleading Requirements

If a False Claims Act pleading cannot allege the details of an actually submitted false claim under section 3729(a)(1), it may still survive by alleging particular details of a scheme to submit false claims, paired with reliable indicia leading to a strong inference that the claims were actually submitted. In the Fifth Circuit, a complaint filed under the False Claims Act must meet the heightened pleading standard of Rule 9(b). *Grubbs v. Kanneganti*, 565 F.3d 180, 185 (5th Cir. 2009). This standard requires only “simple, concise, and direct” allegations of the “circumstances constituting fraud,” which, after *Twombly*, must make relief plausible, not merely conceivable, when taken as true. *Id.* at 186. As opposed to a fraud claim, a False Claims Act claim does not require the elements of reliance or damages. *Id.* at 189. Thus, a claim under the False Claims Act and a claim under common law or securities fraud are not on the same plane in meeting the requirement of “stat[ing] with particularity” the contents of the fraudulent misrepresentation. *Id.* With regard to pleading presentment, this element requires proof only of the claim’s falsity, not of its exact contents. *Id.* Therefore, a plaintiff does not necessarily have to plead the exact dollar amounts, billing numbers, or dates of presentment. *Id.* at 190. To plead with particularity the circumstances constituting fraud for a False Claims Act § 3729(a)(1) claim, a relator’s complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted. *Id.*

Discussion with regard to sufficient pleading of loss causation, in the context of the Private Securities Litigation Reform Act. The Private Securities Litigation Reform Act provides that a private plaintiff who claims securities fraud has the burden of proving that the defendant’s fraudulent act or omission caused the loss for which the plaintiff seeks to recover. *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 255 (5th Cir. 2009). In order to satisfy Rule 8(a)(2) and *Twombly* in pleading loss causation, a plaintiff must

allege a facially “plausible” causal relationship between the fraudulent statements or omissions and plaintiff’s economic loss, including allegations of a material misrepresentation or omission, followed by the leaking out of relevant or related truth about the fraud that caused a significant part of the depreciation of the stock and plaintiff’s economic loss. *Id.* at 258. Put another way, the complaint must allege enough facts to give rise to a reasonable hope or expectation that discovery will reveal evidence of the foregoing elements of loss causation. *Id.* The Court’s opinion also contains a thorough discussion applying these principles to the pleading at issue.

Removal and Remand

A district court cannot remand federal claims conferring removal jurisdiction where those claims are part of a case “predominated” by state law. In cases in which a separate and independent claim is removable but joined with one or more otherwise non-removable claims, 28 U.S.C. § 1441(c), before its amendment in 1990, provided district courts with discretion to “remand all matters not otherwise within its original jurisdiction.” *Poche v. Texas Air Corps., Inc.*, 549 F.3d 999, 1001 (5th Cir. 2008). The Fifth Circuit interpreted this language as prohibiting remand of the federal claims conferring removal jurisdiction. As amended in 1990, section 1441(c) now permits a district court to “remand all matters in which State law predominates.” *Id.* The removed action at issue was remanded in full – including the FLSA claim conferring removal jurisdiction – after the trial court determined that state-law claims predominated. *Id.* at 1000. In order to affirm, the Fifth Circuit would have had to hold that the word “matters” in the current version of section 1441(c) refers to an entire action, including the removable federal claim. *Id.* at 1001. Although other federal courts had so held, the Fifth Circuit concluded that its precedent requires a different result. *Id.* After discussing this precedent, the Fifth Circuit concluded that the district court was without authority to remand the FLSA claim. *Id.* at 1005. The Court left the disposition of the remaining state law claims to the district court’s discretion. *Id.*

Sanctions

Attorneys’ fees are not a valid Rule 11 sanction issued sua sponte. Federal Rule of Civil Procedure 11 provides that a sanctions order directing payment of attorneys’ fees is available only “if imposed on motion” and warranted for effective deterrence. *Brunig v. Clark*, 560 F.3d 292, 298 (5th Cir. 2009). In the case before the Court, a party had moved for sanctions, but had not satisfied the Rule 11 safe-harbor requirements. *Id.* at 297. Therefore, the sanctions entered by the district court had been imposed “on its own initiative.” *Id.* The Court reversed the sanction of attorneys’ fees, expressly holding that “[a]ttorneys’

fees paid to another party are not a valid sua sponte sanction under the Rule.” *Id.* at 298.

Settlement Agreements

Limiting language in a settlement agreement that is not made part of an order dismissing the case will not be considered in determining the preclusive effect of the order dismissing the case with prejudice. Oreck and Dyson reached a settlement agreement in a false advertising suit. *Oreck Direct, LLC v. Dyson, Inc.*, 560 F.3d 398, 400 (5th Cir. 2009). They signed a binding term sheet, which ultimately was replaced by a complete written settlement agreement. *Id.* The term sheet and/or the settlement agreement allegedly limited the scope of the claims or disputes being settled. *See id.* at 400-01. The district court also signed an order of dismissal with prejudice. 560 F.3d at 400. The order did not incorporate the term sheet or include any language limiting the scope of the parties’ agreement or the dismissal. *Id.* Oreck later filed a second false advertising lawsuit against Dyson. *Id.* The district court dismissed that suit based on *res judicata*, finding that the claims were part of the same series of transactions at issue in the first suit. *Id.* The first three elements of *res judicata* were undeniably established, but the parties disputed whether the fourth element existed: that the same claim or cause of action is involved in both cases. *Id.* at 401. Oreck argued that the “transactional test” should be abandoned in favor of an examination of the parties’ actual intent, as shown by the terms of the settlement agreement. *Id.* at 402. The Court rejected this argument. In doing so, the Court noted that the final judgment in the first lawsuit simply dismissed the case with prejudice, without incorporating the settlement agreement (whose terms were not finalized until after judgment was entered) and without any reservations. *Id.*

Venue

A contract provision allowing venue in a specific county , without specifying state or federal court, permits venue in either federal or state court when there is a federal courthouse located in the specified county. An agreement provided that “exclusive venue for any litigation related hereto shall occur in Harrison County, Mississippi.” *Alliance Health Group, LLC v. Bridging Health Options, LLC*, 553 F.3d 397, 398 (5th Cir. 2008) (emphasis omitted). After disputes arose between the parties, the plaintiff filed a diversity action in a federal district court division located in Harrison County, Mississippi. *Id.* The defendant moved to dismiss for improper venue, arguing that the venue provision limited venue to Mississippi state courts in Harrison County. *Id.*

The Fifth Circuit distinguished the case from other cases in which no federal courthouse was located in the specified county. *Id.* at 399 (discussing, *inter alia*, *Collin County v. Siemens Bus. Servs., Inc.*, 250

Fed. Appx. 45 (5th Cir. 2007) (unpublished), and *First Nat'l of N. Am., LLC v. Peavy*, 2002 WL 449582 (N.D. Tex. Mar. 21, 2002)). For example, in *Collin County*, the contract specified venue in Collin County, Texas, but at the time, no federal courthouse was located in Collin County. 250 Fed. Appx. at 47. In this case, however, there was a federal courthouse located in Harrison County. *Alliance Health*, 553 F.3d at 400. The Court also noted that the “shall occur in” language suggested “a general lack of specificity” and supported the conclusion that any state or federal court in Harrison County was proper. *Id.* at 401.

V. PRACTICAL TIPS AND ADVICE, PART ONE: THE JURY CHARGE AND CHARGE CONFERENCE³

A. When to Start.

When should you start drafting the jury charge? The short answer is early—very early. Ideally, once you have live pleadings, start drafting the jury charge. When pleadings are amended, amend your draft. Why start so early? Several reasons. First, your draft of the charge is an outline of the case and reflects every element of every claim, counterclaim, defense, and damages each party needs to prove their case. As such, your draft of the charge is a ready-made guide for conducting discovery and preparing your case. Second, starting early forces you to think through the entire case and gain an understanding how all of the claims, counterclaims, defenses, etc. work together—or not. You will learn the case by preparing the jury charge and the earlier that happens, the better.

B. How and What to Prepare

Start with the live pleadings. Map out the claims, counterclaims, defenses, damages, attorney’s fees—everything. Mapping will force you to learn the legal theories in the case because, unless you thoroughly understand each theory and how it works with the others, you will not be able to map them out. Take the scenario where the plaintiff pleads claims for fraudulent inducement and breach of contract and the defendant asserts a laundry list of affirmative defenses (waiver, estoppel, ratification, prior material breach, accord and satisfaction, etc.). Which of these defenses applies to the plaintiff’s claim for breach of contract? Which applies to the claim for fraudulent inducement? For example, does waiver apply to both claims? Depending on the facts, maybe not. *See, e.g., Wells v. Dotson*, 261 S.W.3d 275, 282 (Tex. App.—Tyler 2008, no pet.) (“Acts done in affirmance of a contract can

amount to a waiver of fraudulent inducement only where they are done with full knowledge of the fraud and of all material facts and with the intention, clearly manifested, of abiding by the contract and waiving all right to recover for the deception.”); *Horton v. DaimlerChrysler Fin. Servs. Americas, L.L.C.*, 262 S.W.3d 1, 6-7 (Tex. App.—Texarkana 2008, no pet. h.) (“A party’s silence or inaction for a period of time long enough to show an intention to relinquish the known right...may be sufficient to prove a waiver [of breach of contract].”). Knowing, early on, that the waiver defense may require different evidence to operate against each claim will help you develop the claims or defense throughout discovery and give you the knowledge you need at trial to prove or defend your case.

Prepare the entire charge. All parties’ claims, counterclaims, defenses, damages, etc. Only after you understand how *everything* works together will you truly understand the evidence you need to pursue through discovery and the elements you need to prove at trial. Understanding all of the legal theories and how they work with each other will also give you clarity as to the holes in your opponent’s case—possibly giving you the opportunity for summary judgment or a directed verdict.

Spend time learning the proper measures of damages for the case. Waiting until shortly before trial to figure out your damages can be disastrous, particularly if expert testimony is necessary to prove damages. You do not want to be in a position of trying to “fit” your expert’s analysis into a recoverable measure of damages. Additionally, do not assume that your damages expert will fill all of your evidentiary needs for damages. For example, if you have retained an expert to prove benefit-of-the-bargain damages for your client’s fraud claim but you also have a claim for negligent misrepresentation, you will need different damages evidence for the negligent misrepresentation claim. *See Swinnea v. ERI Consulting Eng’rs, Inc.*, 236 S.W.3d 825, 836 (Tex. App.—Tyler 2007, pet. requested) (measure of damages for fraud includes the benefit of the bargain); *Metropolitan Life Ins. Co. v. Haney*, 987 S.W.2d 236, 246 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (“The benefit-of-the-bargain measure of damages is not available in a claim for negligent misrepresentation.... Plaintiff can recover only the amount necessary to compensate for direct pecuniary loss.”). In short, you need to make sure your expert is proving up a recoverable measure of damages for each cause of action. If you represent the defendant, you need to know the same thing—if you know your opponent’s expert is proving up an unrecoverable measure of damages, you may be entitled to summary judgment or to have expert’s testimony stricken prior to trial as irrelevant.

³ The author acknowledges and gives credit to Lea N. Clinton for her valuable contributions to this section of the material. Lea is an Associate with Munsch Hardt Kopf & Harr, P.C. Dallas, Texas. She earned her B.A. from University of Georgia and J.D., *summa cum laude*, from Texas Wesleyan University School of Law.

C. Where to Look

Start with the Texas Pattern Jury Charges. The PJC is drafted by a highly experienced committee of judges and attorneys who work hard to craft questions in line with Texas law. But beware, the PJC is not the Bible. It is not updated every year, it is updated every two years. In the interim year, the committee develops new chapters for the book and/or closely scrutinizes particular chapters. It also is not—and is not intended to be—a hornbook. As stated in the Introduction to the business volume of the PJC:

Like its predecessors, this Committee has avoided recommending changes in the law and has based this material on what it perceives the present law to be. It has attempted to foresee theories and objections that might be made in a variety of circumstances but not to express favor or disfavor for particular positions. In unsettled areas, the Committee generally has not taken a position on the exact form of a charge. However, it has provided guidelines in some areas in which there is no definitive authority. Of course, trial judges and attorneys should recognize that these recommendations may be affected by future appellate decisions and statutory changes.

See COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES, BUSINESS CONSUMER, INSURANCE AND EMPLOYMENT, *Introduction* ¶ 3 (2006 ed.). Thus, for example, because of the unsettled nature of the law regarding the cause of action for wrongful interference with prospective contractual or business relations, the PJC contains only a comment. See COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES, BUSINESS CONSUMER, INSURANCE AND EMPLOYMENT, PJC 106.2 (2006 ed.). Further, that a pattern charge “may be affected by future appellate decisions” is demonstrated by the Texas Supreme Court’s decision in *Ford Motor Co. v. Ledesma*, where the Court disapproved the model charge definition of “producing cause” in PJC 70.1 of the Malpractice, Premises & Products volume of the PJC. 242 S.W.3d 32, 41-42 (Tex. 2007).⁴

⁴ In *Ledesma*, the jury was instructed per PJC 70.1: “Producing cause means an efficient, exciting, or contributing cause that, in a natural sequence, produces the incident in question. There may be more than one producing cause.” 242 S.W.3d at 45. Ford asked for an instruction stating: “Producing cause means that cause which, in a natural sequence, was a substantial factor in bringing about an event, and without which the event would not have occurred. There may be more than one producing cause.” *Id.* The supreme court disapproved PJC 70.1, holding that PJC 70.1 “provides little concrete guidance to the jury.

Additionally, understand that the unique facts and circumstances of your case will most certainly require modification of the PJC model.

So what if there is no PJC model on a claim or defense? If it is a common-law claim or defense, see if there is case law approving a jury question on it. If there is no case law expressly approving a form of question, see if there is Texas Supreme Court authority spelling out the elements needed to establish the claim or defense. If there is no supreme court authority, draft your question based on elements identified by the courts of appeals.

If the claim or defense is statutory, look first to the statute and then to the case law construing the statute. Again, ideally, you will find authority (preferably supreme court authority) approving a form of the question for the jury. If not, track the statute as closely as possible, unless case law informs otherwise.

Take for example a claim for “control person” liability under the Texas Securities Act (“TSA”). Because there is no PJC model question for “control person” liability under the TSA, you should look first to the language of the statute. Under the TSA:

A person who directly or indirectly controls a seller, buyer, or issuer of a security is liable under Section 33A, 33B, or 33C jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer, unless the controlling person sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

TEX. REV. CIV. STAT. ANN. art. 581-33F(1). Unfortunately, there are no Texas cases approving a particular form for a jury question on “control person” liability under the TSA, and the statute does not provide a definition of “control persons.” However, research reveals that Texas courts use the term “control person” in the TSA “in the same broad sense as in the federal statute.” *Busse v. Pacific Cattle Feeding Fund #1, Ltd.*, 896 S.W.2d 807, 815 (Tex. App.—Texarkana 1995, writ denied). Accordingly, some Texas courts of appeals apply the definition of “control” found in the federal securities law, under which control “means the possession, direct or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting

Juries must ponder the meaning of ‘efficient’ and ‘exciting’ in this context. These adjectives are foreign to modern English language as a means to describe a cause, and offer little practical help to a jury striving to make the often difficult causation determination in a products case.” *Id.* at 46.

securities, by contract, or otherwise.” *Frank v. Bear, Stearns & Co.*, 11 S.W.3d 380, 384 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Barnes v. SWS Fin. Servs., Inc.*, 97 S.W.3d 759, 763 (Tex. App.—Dallas 2003, no pet.); TEX. REV. CIV. STAT. ANN. art. 581-33F cmt. See 17 C.F.R. § 230.405. Texas courts also rely on the comments to art. 581-33F, which note that “a control person might include an employer, an officer or director, a large shareholder, a parent company, and a management company.” TEX. REV. CIV. STAT. ANN. art. 581-33F cmt.; *Tex. Capital Secs. Mgmt., Inc. v. Sandefer*, 80 S.W.3d 260, 267-68 (Tex. App.—Texarkana 2002, pet. stricken).

Research further reveals that the Texas courts of appeals are split on the applicable test for imposing control person liability under the TSA. The Houston Fourteenth and Dallas Courts of Appeals acknowledge a two-prong test fashioned by the Fifth Circuit for control person liability: (1) that the defendant exercised control over the operations of the corporation in general and (2) that the defendant had the power to control the specific transaction or activity upon which the primary violation is predicated. *Frank*, 11 S.W.3d at 384 (citing *Abbott v. Equity Group Inc.*, 2 F.3d 613, 620 (5th Cir. 1993)); *Barnes*, 97 S.W.3d at 764 (citing *Frank*, 11 S.W.3d at 384; *Abbott*, 2 F.3d at 620). See *Hagerty Partners P’ship v. Livingston*, 128 S.W.3d 416, 421 (Tex. App.—Dallas 2004, pet. denied) (applying *Abbott* two-part test). See also *In re Enron Corp.*, 258 F. Supp. 2d 576, 607 (S.D. Tex. 2003) (citing *Frank* and *Abbott* and applying *Abbott* two-part test for TSA control person liability).

In contrast, the Texarkana Court of Appeals has relied on Fifth Circuit authority for a different two-part test for control person liability: (1) that the defendant had actual power or influence over the controlled person and (2) that the defendant induced or participated in the alleged violation. *Sandefer*, 80 S.W.3d at 268. The *Sandefer* court, however, relied on *Dennis v. Gen. Imaging, Inc.*, 918 F.2d 496, 509 (5th Cir. 1990), a case the Fifth Circuit later, in its 1993 decision in *Abbott*, 2 F.3d at 620 n.18, denounced as improperly including a culpable participation requirement for control person liability. Given the *Sandefer* court’s improper reliance on *Dennis*, the two-part test set forth in *Frank* and *Barnes* appears to be the better test. See *Barnes*, 97 S.W.3d at 763-64 (discussing the *Sandefer* court’s improper reliance on *Dennis*).

Given the state of the law in Texas regarding “control person” liability, the relevant questions might be drafted as follows:

QUESTION _____

Was *Deborah Dennis* a control person?

A “control person” is a person who—

a. exercised control over the operations of [the seller/buyer/issuer] in general; and

b. had the power to control the specific transaction or activity you found to be fraud in Question ____.

“Control” means the possession, direct or indirect, of the power to direct or cause the direction of the management or policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

Answer “Yes” or “No”: _____

QUESTION _____

Is *Deborah Dennis* excused from liability as a control person?

Deborah Dennis is excused if *she* did not know, and in the exercise of reasonable care could not have known, of the existence of the facts that you found to be fraud in Question ____.

Answer “Yes” or “No”: _____

As is apparent from this example, thorough research is required to draft a question or defense for which there is no PJC model or definitive authority. And, even if there is a PJC model, research must be done to make sure the model is up to date and correct for your case.

D. Broad Form

1. What does “broad form” mean?

The goal of the charge is to submit to the jury the issues for decision logically, simply, clearly, fairly, correctly, and completely. *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664 (Tex. 1999). Over time, Texas’ view on the best method for accomplishing this goal has evolved.

In 1922 the Texas Supreme Court directed the submission of “each issue distinctly and separately.” *Fox v. Dallas Hotel Co.*, 240 S.W. 517, 522 (Tex. 1922). Based on this directive, Texas developed a very complicated system for jury questions. Then, in 1973, Texas Rule of Civil Procedure 277 was amended to provide that the form of submission (special issue versus broad form) was within the discretion of the court. This led to further confusion as to when special issue versus broad form was appropriate. See, e.g., *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 255 (Tex. 1974) (criticizing the trial court’s submission of both a general negligence issue based on res ipsa proof and a second negligence question based on proof of specific negligent acts, stating, “[w]e disapprove the practice of submitting the same issue in two different ways”).

The Melting Pot of Appellate Law

In 1988, Rule 277 was amended to remove the discretion of the trial court and mandate that all jury charges be submitted in broad form:

In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions. ...

TEX. R. CIV. P. 277. The Rule 277 mandate applies only “whenever feasible,” which means “any or every instance in which it is capable of being accomplished.” *Texas Dep’t of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). Thus, absent extraordinary circumstances, a court must submit jury question in broad form. *Id.* at 649.

One benefit of broad form submission is a reduction in conflicting jury answers, thus reducing appeals and avoiding retrials. Also, theoretically, Rule

277 expedites trials by simplifying the charge conference and making questions easier for the jury to comprehend and answer. *Id.* At a minimum, a jury is faced with far fewer questions than under the old regime.

So, what is a broad form question? Generally, it is a single question to the jury that encompasses several elements of a single ground of liability (e.g., duty, breach, causation), several bases for liability under a single ground of liability (Texas Deceptive Trade Practices Act (“DTPA”) laundry list violations, insurance code violations, etc.), or multiple damages elements (pain, mental anguish, loss of earning capacity, medical care, etc.). For example, broad form and special issue DTPA liability questions might read:

Broad Form DTPA Question	Special Issue DTPA Question
<p>Did Defendant engage in one or more of the following acts or practices and, if so, was that was a producing cause of damages to Plaintiff?</p> <p>A. Representing that the insurance policies had characteristics, uses, benefits and qualities which they did not have, or</p> <p>B. Representing that the insurance policies were of a particular standard, quality or grade if they were of another, or</p> <p>C. Advertising insurance policies with intent not to sell them as advertised, or</p> <p>D. Representing that agreements conferred or involved rights, remedies or obligations which they did not have or involve, or</p> <p>E. Failing to disclose information concerning an insurance policy which was known at the time of the transaction with the intention to induce another into a transaction? YES _____ NO_____</p>	<p>A1. Did Defendant represent that the insurance policies had characteristics, uses, benefits and qualities which they did not have? YES _____ NO_____</p> <p>A2. If Yes, was Defendant’s representation a producing cause of damages to Plaintiff? YES _____ NO_____</p> <p>B1. Did Defendant represent that the insurance policies were of a particular standard, quality or grade if they were of another? YES _____ NO_____</p> <p>B2. If Yes, was Defendant’s representation a producing cause of damages to Plaintiff? YES _____ NO_____</p> <p>Etc., ...</p>

Defect cases are a good example of how broad form offers simplicity, and avoids redundancy and potential conflicts in a jury charge. In *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664 (Tex. 1999), Rodriguez was injured in an automobile accident and brought a “crashworthiness” suit against the vehicle manufacturer and seller under theories of negligence, strict liability, and breach of warranty based on an alleged design defect. Rodriguez requested individual questions on each theory, which the trial court refused. The Texas Supreme Court agreed with the trial court:

Because the controlling issues regarding the existence of a defect for strict liability and breach of implied warranty were functionally identical in this case, we hold that the district court was not required to submit Rodriguez’s requested question and instruction. Rather, to avoid confusing the jury and the possibility of inconsistent findings, the district court properly refused the requested question and instruction. This is true even though the language of the refused question and instruction was different than that of the

question and instruction submitted. While trial courts should obtain fact findings on all theories pleaded and supported by evidence, a trial court is not required to, and should not, confuse the jury by submitting differently worded questions that call for the same factual finding.

Id. at 665-66.

The Restatement (Third) of Torts: Products Liability similarly recommends a single submission to the jury in such cases:

[T]wo or more factually identical defective design claims ... should not be submitted to the trier of fact in the same case under different doctrinal labels. Regardless of the doctrinal label attached to a particular claim, design ... claims rest on a risk-utility assessment. To allow two or more factually identical risk-utility claims to go to a jury under different labels, whether “strict liability,” “negligence,” or “implied warranty of merchantability,” would generate confusion and may well result in inconsistent verdicts.

Id. at 666-67 citing (Restatement (Third) of Torts: Products Liability § 2 cmt. n, at 41-42 (Proposed Final Draft, 1997)).

2. Exceptions to broad form – *Casteel*

Rule 277 recognizes the potential for exceptions to the rule of broad form. Specifically, the charge is to be in broad form “whenever feasible.” TEX. R. CIV. P. 277. Under the law as it has developed since the Texas Supreme Court’s decision in *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), broad form is not “feasible” when it precludes meaningful appellate review of the jury’s findings. *Id.* at 387 (citing TEX. R. APP. P. 44.1(a): “No judgment may be reversed on appeal on the ground the trial made an error of law unless the court of appeals concludes that the error complained of: (1) probably caused the rendition of an improper judgment; or (2) *probably prevented the appellant from properly presenting the case to the court of appeals.*” (Emphasis added.)).

In *Casteel*, policyholders brought an action against a life insurer, Crown Life, and its agent, Casteel, to recover for allegedly misrepresenting that the policyholders’ obligations to pay premiums would vanish. Casteel responded with a cross-claim against Crown Life for violations of the Texas Insurance Code and the DTPA. Casteel asserted 13 different bases for liability under his Insurance Code claim, 5 of which were based on the DTPA.⁵

The trial court submitted a single liability question on Casteel’s cross-claim against Crown Life, which encompassed all 13 bases for liability:

Did Crown Life engage in one or more of the following acts or practices and if so was that a producing cause of damages to Casteel?

Question 16(a) “Representing that the insurance policies had characteristics, uses, benefits and quantities which they did not have,” or

Question 16(b) “Representing that the insurance policies were of a particular standard, quality or grade if they were of another,” or

Question 16(c) “Advertising insurance policies with intent not to sell them as advertised,” or

Question 16(d) “Representing that agreements conferred or involved rights, remedies or obligations which they did not have or involve,” or

Question 16(e) “Failing to disclose information concerning an insurance policy which was known at the time of the transaction with the intention to induce another into a transaction,” or

Questions 16 (f)-(m) (other Article 21.21 non-DTPA claims)

YES X NO ___

At the charge conference Crown Life argued that Casteel was not a “consumer” under the DTPA and therefore, those theories that required consumer status (Questions 16(a)-(e)) were improper and should not be presented to the jury. Casteel agreed that he was not a consumer, however, he argued that consumer status was not required to bring the DTPA claims when raised through their incorporation into the Insurance Code. *Casteel*, 22 S.W.3d at 386-87. The trial court agreed and included the DTPA-based theories in the charge to the jury. The Texas Supreme Court disagreed, concluding that Casteel lacked standing to bring four of the DTPA-based theories because he was not a consumer. *Id.* at 387. (One DTPA-based theory survived because it did not explicitly require consumer status.)

Having found error in the trial court’s inclusion of the four improper bases in the broad-form question, the

⁵ Article 21.21 of the Texas Insurance Code incorporates certain provisions of the DTPA by providing a cause of

action for “unlawful deceptive trade practices” defined under DTPA section 17.46. See TEX. INS. CODE art. 21.21, §16(a); TEX. BUS. & COM. CODE §17.46(b).

issue for the supreme court was whether the error was harmful. *Id.* at 388. The Court found that it was, because there was no way to determine on appeal whether the jury had based its finding of liability on one of the four improper bases:

It is fundamental to our system of justice that parties have the right to be judged by a jury properly instructed in the law. Yet, when a jury bases a finding of liability on a single broad form question that commingles invalid theories of liability with valid theories, the appellate court is often unable to determine the effect of this error. The best the court can do is determine that some evidence *could* have supported the jury’s conclusion on a legally valid theory. To hold this error harmless would allow a defendant to be held liable without a judicial determination that a fact finder actually found the defendant *should* be held liable on proper, legal grounds.

* * *

Accordingly, we hold that when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on improperly submitted invalid theory.

Id. (citing TEX. R. APP. P. 44.1(a) (“No judgment may be reversed on appeal ... unless the court of appeals concludes that the error complained of ... probably prevented the appellant from properly presenting the case to the court of appeals.”); TEX. R. APP. P. 61.1 (“No judgment may be reversed on appeal ... unless the Supreme Court concludes that the error complained of ... probably prevented the petitioner from properly presenting the case to the appellate courts.”)).

The Court thus instructed:

[W]hen the trial court is unsure whether it should submit a particular theory of liability, separating liability theories best serves the policy of judicial economy underlying Rule 277 by avoiding the need for a new trial when the basis of liability cannot be determined.

Id. at 390.

This rule applies to damages questions as well. In *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2003) the Texas Supreme Court found harmful error in the submission of a single damages question that commingled valid and invalid elements of damages:

Question 3: When determining Lynn Smith’s damages, if any, the jury may consider:

- a. Physical pain and mental anguish.
- b. Loss of earning capacity.
- c. Physical impairment.
- d. Medical care.

Harris County objected, arguing there was no evidence to support damages for loss of earning capacity. The trial court overruled the objection and the jury awarded \$90,000.00 in total damages to Mr. Smith. The court of appeals agreed that there was error in submitting loss of earning capacity but found the error harmless. The supreme court disagreed, extending the holding of *Casteel* to damages questions and finding the error harmful because it precluded meaningful appellate review. *Id.* at 335-36.

The error complained of in *Casteel* and *Harris County* could have been avoided by simply seeking separate answers to the challenged theories or elements. Unfortunately, the “fix” for this problem is not always so simple. For example, in *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005), Romero brought an action against a hospital, a surgeon, and others for negligence. He also pled a malicious credentialing theory against the hospital. The hospital opposed the inclusion of the malicious credentialing theory in the jury charge, arguing there was no evidence of malice, a prerequisite to that theory of liability. The trial court overruled the hospital’s objection, and submitted the negligence claim against all defendants (including the hospital) in Question 1 and the malicious credentialing claim against only the hospital in Question 2.

In Question 1, the jury found that Romero’s injury was caused by the negligence of all defendants (including the hospital). In Question 2, the jury found that Romero’s injury was also caused by the hospital’s malicious credentialing of the surgeon. *Id.* at 225.

The jury was then asked:

What percentage of the conduct that caused the occurrence or injury do you find to be attributable to each of those found by you, in your answer to Questions 1 and/or 2 to have caused the occurrence of injury?

Id. at 225. The jury apportioned 40% of the responsibility to the hospital.

The hospital appealed, and the supreme court agreed there was legally insufficient evidence to support the jury’s finding of malicious credentialing. Significantly, the error in the submission of the malicious credentialing question did not impact only the judgment awarding damages based on that finding, it also impacted the jury’s finding on proportionate

responsibility because the jury could not conceivably have ignored the malicious credentialing finding when apportioning responsibility among the defendants. *Id.* at 227. Because it was impossible to determine the basis for the jury's apportionment of liability, the hospital was effectively prevented from demonstrating the consequences of the error on appeal, requiring reversal of the judgment based on the jury's proportionate responsibility finding as well. *Id.* at 227.

Accordingly, when the law is unsettled or the evidence is weak, structure the jury charge to isolate the jury's findings on the impacted issues—broad form simply isn't feasible in these circumstances. See *Harris County*, 96 S.W.3d at 235 (citing *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 n.6 (Tex. 1992) (“Although we adhere to the principles of broad-form submission, [Rule] 277 is not absolute; it mandates broad-form submission ‘whenever feasible.’ Submitting alternative liability standards when the governing law is unsettled might very well be a situation where broad-form submission is not feasible.”)).

E. Instruction and Definitions

Instructions and definitions are included with questions in the jury charge to explain words or phrases given a technical or distinctive meaning by law apart from their ordinary usage. *Green Tree Acceptance, Inc. v. Combs*, 745 S.W.2d 87, 90 (Tex. App.—San Antonio 1988, writ denied). The trial court is required to “submit such instructions and definitions as shall be proper to enable the jury to render a verdict.” TEX. R. CIV. P. 277; *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 842-43 (Tex. 2005); *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992).

An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence. *Union Pac. R.R. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002). A trial court is only required to submit explanatory instructions and definitions for legal and technical terms. See *Reliable Consultants v. Jaquez*, 25 S.W.3d 336, 344 (Tex. App.—Austin 2000, pet. denied) (no specific definition of “unreasonable risk of harm” needed in broad form question on premises liability claim); *Green Tree Acceptance, Inc. v. Combs*, 745 S.W.2d 87, 90 (Tex. App.—San Antonio 1988, writ denied) (definition of term “gross and willful misconduct” not necessary where term was set out in the contract at issue and were words of ordinary legal meaning and readily understood by the average person).

Where a court's charge fairly and fully presents all controlling questions, it is not error to refuse to submit additional instructions that are merely shades or variations of the questions submitted. *Zinda v. McCann Street, Ltd.*, 178 S.W.3d 883, 889 (Tex.

App.—Texarkana 2005, pet. denied); *Carr v. Weiss*, 984 S.W.2d 753, 766 (Tex. App.—Amarillo 1999, pet. denied). In fact, it is error “to burden the jury with excess instructions which emphasize extraneous factors to be considered in reaching a verdict.” *First Int'l Bank in San Antonio v. Roper Corp.*, 686 S.W.2d 602, 605 (Tex. 1985).

Sterling Trust Co. v. Adderley, 168 S.W.3d 835, 842-43 (Tex. 2005), is an example of when a definition is necessary for the jury to properly consider a submitted question due to the special meaning the law places on certain terms. *Sterling Trust Co.* involved investors who were defrauded by their broker in an alleged Ponzi scheme. The investors sued the broker, brokerage firm and a third party trustee—Sterling, for violations of the Texas Securities Act (“TSA”).

Among other things, the jury charge asked whether Sterling aided the broker in committing securities fraud “directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aiding a seller of a security.” *Sterling Trust Co.*, 168 S.W.3d at 838.

The parties disputed whether the charge should include a definition that explained that an alleged aider under the TSA cannot be held secondarily liable unless it has a “general awareness” of its role in the primary violation. *Id.* at 840. Sterling argued that the phrase reckless disregard in the question would confuse the jury into finding liability based on mere negligence when a higher standard was required by the TSA. The trial court refused the definition, and the jury returned a yes answer, finding Sterling liable as an aider and abettor. *Id.*

On appeal, the Texas Supreme Court clarified that the TSA does require “general awareness” for aider and abettor liability. *Id.* at 841-42. Additionally, the Court held that the failure to include the definition was reversible error when considering the pleadings, evidence presented at trial and the charge in its entirety. *Id.* at 843 (investors argued during trial that Sterling “either knew fully what Cornelius was doing” or “exercised reckless disregard” by ignoring internal procedures that would have brought Cornelius's activities to light). As this case demonstrates, the omission of a single instruction can require reversal and remand of the entire case. See also *Southwestern Bell Telephone Co. v. John Carlo Texas, Inc.*, 843 S.W.2d 470 (Tex. 1992) (failure to define “justification” in tortious interference case constituted reversible error where company's requested instruction was substantially correct, and factual dispute between parties was primarily whether company's conduct was justified.); *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812 (Tex. 1997) (failure to instruct jury on proper measure of direct damages on purchasing corporation's claim under DTPA regarding

accounting firm's audit of acquired corporation was reversible error, where jury was not asked to find direct damages at time of sale as well as consequential damages attributable to accounting firm's misrepresentations, but was simply asked to consider purchase price as part of overall damages, and purchasing corporation did not establish how much of its loss was attributable to accounting firm.); *Texas Dept. of Human Serv. v. Hinds*, 904 S.W.2d 629 (Tex. 1995) (failure to instruct jury in whistleblower action brought by former employee of state agency that employer does not discriminate against employee for reporting violation of law, in good faith, to appropriate law enforcement authority, unless employer's action would not have occurred when it did had report not been made, was reversible error; absence of proper causation instruction was reasonably calculated to prevent jury from making finding necessary to establish liability under statute, resulting in improper judgment.); *Mason Const., Inc. v. Robertson*, No. 09-03-360-CV, 2004 WL 2248074, at *4 (Tex. App.—Beaumont, Oct. 7, 2004, no pet.) (failure to instruct on waiver was reversible error where waiver was pled and supported by some evidence, and was a controlling fact issue).

F. Solicit “Yes” Answers

When drafting your jury charge, keep in mind that a jury's failure to find a particular fact means only that the proponent failed to meet its burden of proving the fact by a preponderance of the evidence. It does *not* mean the reverse of the failed fact finding. For example, a jury's failure to find the defendant negligent is not an affirmative finding that the defendant was *not* negligent. *Battaglia v. Alexander*, 177 S.W.3d 893, 902 (Tex. 2005). The jury's “no” answer to the negligence question is a “non-finding.” *Id.* Similarly, a jury's “no” answer to one party's claim for breach of contract does not establish that the other party substantially performed. *Grenwelge v. Shamrock Constructors, Inc.*, 705 S.W.2d 693, 694 (Tex. 1986) (per curiam). See also *Texas Star Motors, Inc. v. Regal Fin. Co., Ltd.*, 246 S.W.3d 745, 754-55 (Tex. App.—Houston [14th Dist.] 2008, pet. requested); *Nat'l Dev. & Research Corp. v. Panda Global Energy Co.*, No. 05-00-00820-CV, 2002 WL 1060483, at *6 (Tex. App.—Dallas May 29, 2002, pet. denied).

This principle applies as well in the declaratory judgment context. For example, in *Indigo Oil, Inc. v. The Wiser Oil Co.*, each party sought declaratory relief as to the propriety of Indigo's removal of Wiser as operator under the parties' joint operating agreement (“JOA”). No. 05-96-00984-CV, 1998 WL 839591, at *16 (Tex. App.—Dallas Dec. 7, 1998, pet. denied). Wiser could be removed as operator only if it failed or refused to carry out its duties under the JOA. The jury

was asked: “Did Wiser fail or refuse to carry out its duties under the [JOA].” *Id.* The jury answered “no.” Wiser argued that this finding meant Indigo's removal of Wiser as operator was without cause, entitling Wiser to declaratory relief. However, this “no” answer found only that Indigo did not prove by a preponderance of the evidence that Wiser failed or refused to carry out its duties under the JOA. It was not a finding that Wiser proved the opposite. *Id.* What Wiser needed for declaratory relief was an affirmative finding that Wiser complied with its duties as operator—a finding the jury was not asked to make. *Id.* at *16-17 (“By not requesting a jury question designed to elicit an affirmative finding that it complied with the Field JOA, Wiser obtained no finding that it satisfied its burden of proving it was entitled to declaratory relief.”).

Note that there are exceptions to the general rule that only a “yes” answer supports recovery or relief. For instance, in the breach of fiduciary duty context there is a presumption of unfairness when a fiduciary profits or benefits in any way from a transaction with the beneficiary. This presumption of unfairness shifts the burden of persuasion to the fiduciary or the party claiming the validity or benefits of the transaction to show that the transaction was fair and equitable to the beneficiary. See *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 20 S.W.3d 692, 699 (Tex. 2000); *Tex. Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 509 (Tex. 1980); *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964). See COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES, BUSINESS CONSUMER, INSURANCE AND EMPLOYMENT, PJC 104.2 cmt. (2006 ed.). The presumption may be rebutted by the fiduciary with a finding that he complied with his fiduciary duty to the claimant. Because the burden of proof and persuasion is shifted to the fiduciary, a “yes” answer effectively exonerates him, barring the claimant from recovery on this claim. Accordingly, for the claimant to recover in this context, the jury's answer must be “no,” reflecting that the fiduciary failed to carry his burden of proving he complied with his fiduciary duty to the claimant (leaving the presumption that he did so intact). If the answer is “no,” the case proceeds to the recovery stage, e.g., fee forfeiture, damages, etc., and any jury questions at the recovery stage are predicated on a “no” answer to the question on breach of fiduciary duty. See COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES, BUSINESS CONSUMER, INSURANCE AND EMPLOYMENT, PJC 104.2 (2006 ed.).⁶

⁶ The 2008 edition of the Texas Pattern Jury Charges includes a comment to PJC 110.1 (the predicate instruction conditioning damages questions on liability) to explain that, in certain instances, damages questions must be conditioned on a “no” instead of “yes” answer to liability.

G. Instruction on Measure of Damages

Your damage question *must* include an instruction on the appropriate measure of damages. See *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973) (“Damages must be measured by a legal standard, and that standard must be used to guide the fact finder in determining what sum would compensate the injured party.”). The measure included in the jury charge cannot be simply “monetary reward.” *Id.* “Monetary reward” does not describe, for example, “net profits.” *Id.* Your damage question must specify each recoverable measure of damage for which there is evidentiary support.

H. Preserving Error in the Charge

1. Generally

“Preservation of error generally depends on ‘whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling.’” *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 43 (Tex. 2007). Regardless of this seemingly straightforward requirement, you should adhere to the technical rules governing jury charge preservation.

For questions, Rule 278 of the Texas Rules of Civil Procedure provides:

Failure to submit a question shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party.

TEX. R. CIV. P. 278.

For instructions and definitions, Rule 278 provides:

Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment.

TEX. R. CIV. P. 278.

A mechanical reading of these rules leads to the following requirements:

For **omitted questions**: if the trial court is refusing to submit a question upon which your client has the burden of proof, you must tender the question in substantially correct wording to preserve error.

For **defective questions**: if the trial court is submitting a question that is defective, tender the question in substantially correct wording to preserve error if your client has the burden of proof, and object to the defective wording or missing elements if your opponent has the burden of proof.

For **omitted instructions or definitions**: burden of proof is irrelevant; if your client wants a particular instruction or definition included in the charge, tender the instruction or definition in substantially correct wording to preserve error.

For **defective instructions or definitions**: burden of proof is irrelevant; object to the defective wording to preserve error.

Despite this apparent clarity, some courts have added to these requirements. For example, there is case law to the effect that, to preserve error, a party must not only tender a substantially correct written request but also object to the omission of a desired question, instruction, or definition. See William G. “Bud” Arnot, III and David Fowler Johnson, *Current Trends in Texas Charge Practice: Preservation of Error and Broad-Form Use*, 38 ST. MARY’S L.J. 371, 381 n.4 (2007) (citing *Sears, Roebuck & Co. v. Abell*, 157 S.W.3d 886, 891 (Tex. App.—El Paso 2005, pet. denied); *Texas Power & Light Co. v. Barnhill*, 639 S.W.2d 331, 334-35 (Tex. App.—Texarkana 1992, writ ref’d n.r.e.); *Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901, 903 (Tex. App.—Austin 1991, no writ); *Wright Way Constr. Co. v. Harlingen Mall Co.*, 799 S.W.2d 415, 418-19 (Tex. App.—Corpus Christi 1990, writ denied); *Johnson v. State Farm Mut. Auto. Ins.*, 762 S.W.2d 267, 270 (Tex. App.—San Antonio 1988, writ denied)).

Thus, the safest route is to always also object to the trial court’s refusal to submit a question, instruction or definition, even if you have tendered a substantially correct written request, to-wit:

Omitted Question	Your client has BOP	Tender written request in substantially correct wording Object to refusal to include
	Your opponent has BOP	Object
Defective Question	Your client has BOP	Object
	Your opponent has BOP	Object
Omitted Instruction or Definition	Your client wants the omitted instruction or definition included in the charge; BOP is irrelevant	Tender written request in substantially correct wording Object to refusal to include
Defective Instruction or Definition	BOP does not matter	Object

2. *Casteel* preservation

For a *Casteel*-type objection, the best practice is a two-fold objection: (1) object to the substantive invalidity of the issue itself (invalid theory, no support in evidence, etc.); then (2) object to the broad form nature of the question.

Casteel preservation is still a developing area of law. In the *Casteel* case itself, the error was preserved by Crown Life's timely objection to the DTPA questions on the ground that there was no standing for *Casteel* to pursue DTPA claims because he was not a consumer. 22 S.W.3d at 387-88. In *Harris County* the error was preserved by an objection to the inclusion of the particular element of damages with no support in the evidence. 96 S.W.3d at 232.

Preservation may be more difficult in the *Romero* type case, where the improper apportionment question was created by the submission of a properly isolated, but invalid theory of liability. In *Romero*, the objection was preserved by an objection to the submission of the malicious credentialing theory "on the grounds there is no evidence to warrant its submission, no evidence of malice, and no evidence under the clear and convincing standard of malice." 166 S.W.3d at 228. The court overruled the objection and counsel then objected to the submission of a single apportionment question—but did not request two apportionment questions, and indicated it would also object to the submission of two apportionment questions. *Id.* This was sufficient to apprise the trial court of the error and preserve the issue for appellate review.

The courts of appeals continue to grapple with the steps necessary to preserve error in the *Casteel* context. For example, in *Schrock v. Sisco*, 229 S.W.3d 392, 395 (Tex. App.—Eastland 2007, no pet.), the court of appeals held that a simple objection to the inclusion of the alleged invalid theory of recovery is sufficient to preserve error. See also *Missouri Pacific Railroad Co. v. Limmer*, 180 S.W.3d 803, 822-23 (Tex. App.—Houston [14th Dist.] 2005, pet. granted) (analyzing whether objection to apportionment question is required in *Romero*-type charge and ultimately holding that it is not if party properly objected to erroneously submitted liability theory).

I. The Charge Conference

1. Informal

This is where the battle is won or lost! So be very prepared and organized. Create a file for every claim and defense and then a subfile for each related instruction and definition. Have at least three copies (one each for the trial court, opposing counsel, and yourself) of each case and statute you rely on, and have statutory or case law support for every claim, defense, instruction, definition, etc. that you want included in the charge.

Typically, the court will require the parties to file their drafts of the charge before trial. File both a hard copy and electronic version of your charge, so your version will be "user-friendly" for the trial court. Unless the trial court requires the parties to each file a complete charge, you may want to file only the claims and defenses upon which your client has the burden of proof, and the instructions and definitions that you want included in the charge. You want to avoid drafting the charge for your opponent. On the other hand, when the trial court takes control of drafting the charge, you want the court to use your version. That is more likely to happen if your version contains the entire charge.

Carefully analyze your opponent's draft of the charge. At the informal charge conference, you not only need to persuade the trial court to adopt your version of the charge, you need to explain, with authority and understanding, why your opponent's version is incorrect. Accordingly, be thoroughly prepared to object to your opponent's version of the charge. You can file written objections, but it may be wiser to just prepare your objections and argue them at the conference so as to not tip your hand ahead of time.

2. Formal charge conference

Remember: while the real fight for the jury charge takes place at the informal charge conference, nothing said at that conference preserves error because it is typically not on the record. Normally, your sole opportunity for preserving error in the jury charge is at the formal charge conference. Again, preparation is the key. Methodically go through the entire charge and note your objections, very specifically. Do not make any "running" objections – they don't count! Make sure the record is clear when you make a tender to the court – state on the record what you are doing and what your tender contains. As you make your objections and tenders, get verbal rulings on your objections and written rulings on your tenders from the court! Often the formal charge conference takes place immediately prior to closing argument and the trial court is acutely aware of the waiting jury. While you need to be expeditious in making your record, do not be pressured into skipping objections or written rulings on your tenders from the court. The court will be anxious to move the process along and not keep the jury waiting. Your job is to make your objections and get your rulings no matter how long it takes.

VI. PRACTICAL TIPS AND ADVICE, PART TWO: ARBITRATION AGREEMENTS

In interpreting and applying arbitration agreements, courts provide guidance not only to lawyers litigating disputes, but also to lawyers drafting arbitration agreements. For every pronouncement about what an arbitration agreement allows or prohibits, the courts provide valuable tips about the

manner in which future arbitration agreements might be drafted to promote or avoid certain risks and results.

A good place to start is the State Bar of Texas ADR Section's excellent White Paper on Arbitration. (Dec. 19, 2008). The Paper provides information about the state and federal arbitration acts, as well as information about trends and statistical information about arbitration as a method of ADR. The Paper is available online at http://www.texasadr.org/pdf/white_paper_arbitration_adr_sectin.pdf, or by clicking on "Download The Whitepaper on Arbitration published by the ADR Section" on the Section's homepage (<http://www.texasadr.org/>).

And now, on to some useful recent cases . . .

A. Aspects of the Arbitration Clause

1. Fee splitting

The Texas Supreme Court has adopted the position that fee-splitting provisions are not *per se* unconscionable. *In re Poly-America, L.P.*, 262 S.W.3d 337, 356 (Tex. 2008). However, the Court stated that a fee-splitting provision is unconscionable and unenforceable if it operates to prohibit an employee from fully and effectively vindicating statutory rights. *Id.* An employee must provide some evidence that he or she will likely incur arbitration costs in such an amount as to deter enforcement of statutory rights in the arbitral forum. *Id.* A "risk" that the employee will incur prohibitive costs is not sufficient to invalidate the arbitration agreement. *Id.*

In *Poly-America*, the fee-splitting provision was subject to a cap. 262 S.W.3d at 356-57. The employee's share of the arbitration costs were capped at "the gross compensation earned by Employee in Employee's highest earning month in the twelve months prior to the time the arbitrator issues his award." *Id.* at 357. The employee in *Poly-America* did not demonstrate that the ability to pursue his claim in the arbitral forum hinged upon his payment of the estimated costs. *Id.* at 356. He provided gross compensation information outside the relevant twelve-month period and, therefore, did not provide any evidence of his *likely* share of the arbitration costs. *Id.* at 356-57. In addition, *Poly-America* presented some evidence that the capped cost-splitting arrangement might even benefit the employee. *Id.* at 357.

The Court also noted that nothing should prevent arbitrators from fairly adjusting employee cost provisions when necessary to allow full vindication of statutory rights in the arbitral forum. 262 S.W.3d at 357. The *Poly-America* arbitration clause specifically provided that the arbitrator may modify unconscionable terms. *Id.* Thus, the Court reasoned that, if the cost provisions precluded the employee's enforcement of his non-waivable statutory rights, they would surely be unconscionable under the Court's

enunciated standard, at which point the arbitrator would be free to modify them. *Id.* The Court noted that the arbitrator is better situated to assess whether the cost provision in the particular case will hinder effective vindication of the employee's statutory rights and, if so, to modify the contract's terms accordingly. *Id.* Therefore, the Court found no abuse of discretion in the district court's refusal to declare the cost-splitting provision unconscionable. *Id.*

2. Limiting discovery

a. Pre-arbitration discovery

Pre-arbitration discovery is expressly authorized under the Texas Arbitration Act (which governs the pre-arbitration phase regardless of whether the Texas or federal arbitration act is involved) when a trial court cannot fairly and properly make its decision on the motion to compel because it lacks sufficient information regarding the scope of an arbitration provision or other issues of arbitrability. *In re Houston Pipe Line Co.*, --- S.W.3d ---, 52 Tex. Sup. Ct. J. 1098, 2009 WL 1901640, at *2 (July 3, 2009, reh'g filed). This provision, however, is not an authorization to order discovery as to the merits of the underlying controversy. *Id.* To justify the discovery, the requesting party must link the discovery sought to an issue of arbitrability, such as scope, or a defense to arbitration. *Id.* A helpful question to ask might be, "Can the party avoid its agreement to arbitrate merely by showing {topic of discovery sought}?" *See id.* If not, the discovery may not go to arbitrability or arbitration defenses, but instead to the merits.

For example, the discovery ordered by the district court in *Houston Pipe Line* concerned the identity of all potential defendants and the extent of damages attributable to each defendant. 2009 WL 1901640, at *1-2. The district court stated that the information was needed in order that "the scope of the Arbitration clause . . . may be properly applied to the actual party responsible" *Id.* at *1. The Texas Supreme Court agreed that identifying other culpable parties could, under some circumstances, be related to arbitrability. *Id.* at *2. However, the Court rejected the idea that a party could avoid its agreement to arbitrate merely by alleging that there may be other potential defendants. *Id.* The party seeking discovery had not linked the identity of potential defendants to any arbitrability issue or an arbitration defense. *See id.* After concluding that the discovery ordered was "overbroad and beyond the issues raised in the motion to compel," the Court conditionally issued a writ of mandamus requiring the district court to vacate its discovery order and rule on the motion to compel arbitration. 2009 WL 1901640, at *2.

b. Arbitration discovery

Another issue addressed by the Texas Supreme Court in *Poly-America, supra*, was the enforceability of limits on discovery during arbitration. The arbitration agreement at issue provided that:

- each party may serve on the other a single set of twenty-five interrogatories (including sub-parts);
- each party may serve on the other one set of twenty-five requests for production or inspection of documents or tangible things;
- each party is limited to a single, six-hour deposition;
- the parties are prohibited from serving requests for admission;
- the employee is forbidden from inquiring into Poly-America's finances; and
- the parties and their attorneys are required to keep confidential all aspects of the arbitration.

262 S.W.3d at 357. The employee argued that these limitations would virtually prohibit him from proving his claim of retaliatory discharge, rendering the arbitration agreement unconscionable. *Id.*

The Court held that, where the underlying substantive right is not waivable, *ex ante* limitations on discovery that unreasonably impede effective prosecution of such rights are unenforceable. 262 S.W.3d at 358. However, the Court also stated that the arbitrator is in the best position to determine this issue. *Id.* The necessary inquiry will depend upon the facts presented in a given case and the particular discovery limitations' effect upon the relevant statutory regime. *Id.* If the discovery limitations operate during the arbitration to prevent effective presentation of the employee's claim, the Court opined that they would be unenforceable. *Id.*

Determining whether limitations on discovery would unreasonably impede effective prosecution of a party's rights would involve consideration of the particular claims and defenses, as well as the evidence needed to prove them. *See* 262 S.W.3d at 358. For example, in *Poly-America*, the employee's expert witness testified that, in most employment-discharge cases, the employer needs to take only the plaintiff's deposition, but the plaintiff generally needs testimony from a number of witnesses to disprove the employer's likely defense that termination was based on poor performance. 262 S.W.3d at 358. Additionally, the expert noted that an employee will likely wish to depose additional witnesses to show a pattern or practice of discrimination, whereas the employer typically has a ready pool of available employees and managers to assist in preparing for the arbitration. *Id.* These were reasons indicating that the limitations

might prove to be unconscionable in this case. *See id.* Nevertheless, the Court neither spoke to the ultimate decision that should be made, nor outlawed discovery limitations in general. *Id.*

3. Attorneys' fees

Many arbitration agreements incorporate arbitration rules – *e.g.*, American Arbitration Association, Judicial Arbitration and Mediation Services, National Arbitration Forum – by reference. This seemingly innocuous practice may have an unexpected impact if the arbitration rules contain provisions permitting awards of attorneys' fees beyond those allowed under Texas law. *See* Shawn M. Bates, 46 HOUSTON LAWYER 8 (July/August 2008).

For example, the Commercial Arbitration Rules of the AAA empower an arbitrator to “grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties.” AAA Comm. Arb. Rule 43(a) (June 1, 2009). The rule specifically allows the award of attorney fees not only when authorized by law or the governing agreement, but also “if all parties have requested such an award” *Id.* at 43(d)(ii). Thus, if both sides request attorneys' fees in their papers, the arbitrators have the power to grant the prevailing party fees, even if: (1) the contract does not set forth a “prevailing party” standard; and (2) the prevailing party is the respondent and would not be entitled to attorneys' fees under Texas law. *Cf. Thomas v. Prudential Secs., Inc.*, 921 S.W.2d 847, 849, 851 (Tex. App.—Austin 1996, no writ) (applying NYSE rule).

If certain rules are incorporated into an arbitration agreement, it would be wise to identify any rules that could encompass attorneys' fees (*e.g.*, provisions regarding attorneys' fees, fees generally, or even costs). Examine the breadth of the rule's scope and what types of events trigger its application. Depending on the particular rule(s), it might be advisable to carve out attorneys' fees from the “rules incorporation,” expressly stating that availability of fees is to be determined by the governing substantive law, not the arbitral rules. *See* Bates, 46 HOUSTON LAWYER at 11.

B. Powers of the Arbitrator(s)

1. Power to decide issues of arbitrability

In general, arbitrability under the Federal Arbitration Act is a matter committed to the district court. *Agere Sys., Inc. v. Samsung Elec. Co., Ltd.*, 560 F.3d 337, 339 (5th Cir. 2009). However, an exception applies in cases in which the parties unmistakably provide for the arbitrator to decide the issue. *Id.* In *Agere*, the agreement provided, among other things, that the arbitrator “shall determine issues of arbitrability” *Id.* at 340 (emphasis omitted). Thus, the question of whether the agreement applied to

the parties' dispute was a question for the arbitrator to decide.⁷ *Id.*

2. Assessment of arbitrator's fees

Even where an arbitrator is authorized attorneys' fees, his power may be limited. In *Lee v. Daniels & Daniels*, 264 S.W.3d 273 (Tex. App.—San Antonio 2008, pet. denied), the court examined an arbitration agreement governed by the Texas General Arbitration Act. The arbitration agreement provided that “[t]he cost of the arbitrator will be paid fifty percent (50%) by the client and fifty percent (50%) by Daniels & Daniels.” *Id.* at 282. The arbitrator assessed 100% of his fees against the losing party. *Id.* Because the parties had “otherwise provided in the agreement to arbitrate,” the arbitrator’s award exceeded his powers. *Id.* The portion of the arbitrator’s award in excess of the 50% amount should not have been confirmed by the trial court. *Id.* at 283.

3. Waiver by substantial invocation of the litigation process

Arbitrators do not have authority to decide whether a party has waived arbitration by substantially invoking the litigation process. *Perry Homes v. Cull*, 258 S.W.3d 580, 589 (Tex. 2008), *cert. denied*, 129 S.Ct. 952 (2009). Rather, substantial invocation of the litigation process is a question for the court to decide. *Id.*

C. Waiver of right to arbitrate

Although the Texas Supreme Court has stated theoretically that a party waives an arbitration clause by substantially invoking the judicial process to the other party’s detriment or prejudice, the Court had never found such a waiver until *Perry Homes*. Indeed, in previous cases, the Court had found that parties did **not** waive arbitration by:

- filing suit;
- moving to dismiss a claim for lack of standing;
- moving to set aside a default judgment and requesting a new trial;
- opposing a trial setting and seeking to move the litigation to federal court;
- moving to strike an intervention and opposing discovery;
- sending 18 interrogatories and 19 requests for production;
- requesting an initial round of discovery, noticing (but not taking) a single deposition,

and agreeing to a trial resetting; or

- seeking initial discovery, taking four depositions, and moving for dismissal based on standing.

258 S.W.3d at 590.

In *Perry Homes*, the homeowner-plaintiffs initially opposed the defendant warranty companies’ motion to compel arbitration. 258 S.W.3d at 585. No hearing was held, and the homeowners sought and obtained extensive discovery from all the defendants. *Id.* After a trial date was set, the homeowners shifted gears and moved to compel arbitration. *Id.* The district court concluded that the defendants had not shown any prejudice by virtue of the discovery, since those same activities “may or may not have been required by the arbitrator.” *Id.* Therefore, the district court granted the homeowners’ motion to compel arbitration. *Id.*

The Texas Supreme Court stated that waiver must be decided on a case-by-case basis, and that courts should look to the totality of the circumstances. 258 S.W.3d at 591. The Court noted that federal courts consider factors such as:

- whether the movant was plaintiff (who chose to file in court) or defendant (who merely responded);
- how long the movant delayed before seeking arbitration;
- whether the movant knew of the arbitration clause all along;
- how much pretrial activity related to the merits rather than arbitrability or jurisdiction;
- how much time and expense has been incurred in litigation;
- whether the movant sought or opposed arbitration earlier in the case;
- whether the movant filed affirmative claims or dispositive motions;
- what discovery would be unavailable in arbitration;
- whether activity in court would be duplicated in arbitration; and
- when the case was to be tried.

Id. at 591. The Court further noted that it had, in the past, examined factors such as: (1) when the movant knew of the arbitration clause; (2) how much discovery has been conducted; (3) who initiated it; (4) whether it related to the merits rather than arbitrability or standing; (4) how much of it would be useful in arbitration; and (5) whether the movant sought judgment on the merits. *Id.* at 591-92.

Any one factor may be enough in a given case; in other cases, there may be a need to find more than one.

⁷ Although the Court referenced the Federal Circuit’s two-part test for analyzing whether the parties’ language clearly demonstrates an intent to shift the arbitrability decision to the arbitrator, the Court expressly stated at the opinion’s conclusion that it was “adopt[ing] no new standards of Fifth Circuit analysis of arbitration provisions today.” *Agere*, 560 F.3d at 340.

See id. at 591. The factors apply to both plaintiffs and defendants, even though some factors may be better suited to evaluate as to one type of party or the other. *Id.* at 592; *but see Nicholas v. KBR, Inc.*, 565 F.3d 904, 908 (5th Cir. 2009) (discussed below). Although the movant's status is a factor to consider, it does not alone justify a finding of waiver or change the basic nature of the totality-of-the-circumstances test. 258 S.W.3d at 592.

In addition to a showing of substantial invocation of the litigation process, the party asserting waiver must establish prejudice. 258 S.W.3d at 593, 595.

In *Perry Homes*, both the district court and the Supreme Court agreed that, “unquestionably, the [homeowners] substantially invoked the litigation process.” 258 S.W.3d at 595. Not only had the homeowners taken extensive discovery, they had opposed the warranty companies’ motion to compel arbitration and moved themselves for arbitration “very late in the trial process *Id.* at 595-96.

With regard to prejudice, the Court noted that the respondents “had to show substantial invocation that prejudiced them, not precisely how much it all was.” 258 S.W.3d at 599. In the context of waiver by substantial invocation, prejudice “relates to inherent unfairness – that is, a party's attempt to have it both ways by switching between litigation and arbitration to its own advantage.” *Id.* at 597. Prejudice “refers to the inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue.” *Id.*

The Court found that the warranty companies had established prejudice:

[T]he record before the trial court showed that the [homeowners] objected to arbitration initially, and then insisted on it after the Defendants acquiesced in litigation. They got extensive discovery under one set of rules and then sought to arbitrate the case under another. They delayed disposition by switching to arbitration when trial was imminent and arbitration was not. They got the court to order discovery for them and then limited their opponents' rights to appellate review. Such manipulation of litigation for one party's advantage and another's detriment is precisely the kind of inherent unfairness that constitutes prejudice under federal and state law.

258 S.W.3d at 597. Accordingly, the homeowners had waived their right to arbitration. *Id.*

It is unlikely that *Perry Homes* has opened the floodgates to findings of waiver by substantial invocation. In two other cases, the Texas Supreme

Court already has applied the *Perry Homes* standard and concluded there was no waiver of contractual arbitration rights. *In re Citigroup Global Markets, Inc.*, 258 S.W.3d 623 (Tex. 2008); *In re Fleetwood Homes of Tex., L.P.*, 257 S.W.3d 692 (Tex. 2008). In *Citigroup Global*, the Court noted that the defendant’s actions and statements in requesting transfer to an MDL court were factors to be considered, but not dispositive on the waiver issue. 258 S.W.3d at 626. In *Fleetwood Homes*, the Court determined that e-mails about a possible trial setting, an aborted deposition notice, and service of a set of discovery were not enough under the circumstances to overcome the presumption against waiver. 257 S.W.3d at 694-95. In both cases, the Court declined to state whether express waiver in this context is governed by different rules than those governing implied waiver, finding in each case that no express waiver had occurred. *See Citigroup Global*, 258 S.W.3d at 626; *Fleetwood Homes*, 257 S.W.3d at 694.

Also, it should be noted that the Fifth Circuit takes a different approach to the application of waiver factors to a plaintiff, as opposed to a defendant. *Compare Perry Homes*, 258 S.W.3d at 592 with *Nicholas*, 565 F.3d at 908. In past cases, the Fifth Circuit had not expressly drawn a distinction between the waiver analysis when applied to a plaintiff and that applied to a defendant, yet had recognized that the decision to file suit typically indicates a “disinclination” to arbitrate. *Nicholas*, 565 F.3d at 908. “Indeed, short of directly saying so in open court, it is difficult to see how a party could more clearly ‘evinced [] a desire to resolve [a] ... dispute through litigation rather than arbitration’” *Id.*

Thus, in the Fifth Circuit, the act of a plaintiff filing suit without asserting an arbitration clause constitutes substantial invocation of the judicial process, unless an exception applies. 565 F.3d at 908. Exceptions would include lawsuits that would not be inconsistent with seeking arbitration. *Id.* For example, a plaintiff might file suit solely to obtain a threshold declaration as to whether a valid arbitration agreement existed. *Id.* A plaintiff might also have to file suit to obtain injunctive relief pending arbitration. *Id.* These examples are not exclusive. *Id.* at 909. And, the defendant still must establish the element of prejudice. *Id.* at 908.

D. Judicial Review

1. Vacatur under the FAA limited to statutory grounds

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008), the Court addressed the following question: can parties contractually enlarge review of arbitration awards beyond the limits imposed by courts? 128 S.Ct. at 1403-05. The petition, *Hall Street*, argued that private parties have the right to

contract for review beyond the scope of the Federal Arbitration Act (9 U.S.C. §§ 10, 11) just as courts have the right to enlarge the scope judicially. *Id.* at 1403. Pointing to the judicially created “manifest disregard” ground for vacatur sanctioned by the Supreme Court in *Wilko v. Swan*,⁸ Hall Street argued “if judges can add grounds to vacate (or modify), so can contracting parties.” *Hall Street*, 128 S.Ct. at 1403.

The Supreme Court rejected this extrapolation and drew a line in the sand between judicial opinions and private contracts. *Id.* at 1404. The Court found that Hall Street’s proposed extension “is too much for *Wilko* to bear.” *Id.* As between the statutory grounds and those created by private contract, the Court decided that the statutory categories are exclusive. *Id.*

Rather than resolving the issue, this conclusion teed up a new question: is the manifest disregard vacatur ground still valid?⁹ Is manifest disregard a “non-statutory” ground, or is it simply a different way of expressing grounds provided by the Federal Arbitration Act? If the Supreme Court wished to abrogate it, the Court easily could have stated that the manifest disregard standard no longer exists. Instead, the Court mused about the meaning of *Wilko*’s manifest disregard language. *Hall Street*, 128 S.Ct. at 1404. Was it meant to name a new ground for review; or was it a re-expression of the statutory grounds? *Id.* If a re-expression, was it a collective reference to multiple § 10 grounds; or instead, was it “shorthand” for subsections authorizing vacatur when the arbitrators committed misconduct or exceeded their powers? *Id.*

Whatever the meaning, the Court refused to overturn the manifest disregard ground. Instead, the Court rose above the fray, noting that “we, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment” *Id.* (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)). The Court rejected Hall Street’s interpretation of manifest disregard as a blessing on enlarged review by contract. *Id.* But the Court held back from rejecting manifest disregard, if it falls within the scope of a statutory ground. *See id.*

In *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 357 (5th Cir. 2009), the Fifth Circuit confirmed that, “to the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur,”

it is no longer valid. Nevertheless, citing to the Second Circuit’s decision in *Stolt-Nielsen*,¹⁰ the Court embraced the concept that a “very narrow” strip of “manifest disregard” may be “simply folded . . . into § 10(a)(4).” 562 F.3d at 357. Section 10(a)(4) provides for vacatur if the arbitrators “exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” *See* 9 U.S.C. § 10(a)(4).

Approvingly, the Fifth Circuit noted that its sister court “in *Stolt-Nielsen* did not shy from *Hall Street*’s holding.” *Bacon*, 562 F.3d at 356. Instead, as the Fifth Circuit did in *Bacon*, the Second Circuit recognized that *Hall Street* limited vacatur to statutory grounds, and that the court’s previous opinions characterizing manifest disregard as a nonstatutory ground conflicted with this mandate. *Id.* However, the Second Circuit also defined a narrow area of overlap between manifest disregard and section 10(a)(4), stating:

We must therefore continue to bear the responsibility to vacate arbitration awards in the rare instances in which “the arbitrator knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it.” At that point the arbitrators have “failed to interpret the contract at all,” for parties do not agree in advance to submit to arbitration that is carried out in manifest disregard of the law. Put another way, the arbitrators have thereby “exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”

Id. at 357 (quoting *Stolt-Nielsen*, 548 F.3d at 95).

In discussing this overlap, the Fifth Circuit did emphasize its narrow scope. As the Court instructed, “We should be careful to observe, however, that this description of manifest disregard is very narrow. Because the arbitrator is fully aware of the controlling principle of law and yet does not apply it, he flouts the law in such a manner as to exceed the powers bestowed upon him. This scenario does not include an erroneous application of that principle.” 562 F.3d at 357.

Other circuits have taken other approaches to “manifest disregard” after *Hall Street*. *See, e.g., Bacon*, 562 F.3d at 355-57 (discussing *Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n. 3 (1st Cir. 2008); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed.Appx. 415, 418-19 (6th Cir. 2008); *Stolt-*

⁸ 346 U.S. 427, 436-37 (1953).

⁹ Hall Street never attempted to use the “public policy” ground – another “extra” ground used in the Fifth Circuit – to support expanded review by contract. *See Hall Street*, 128 S.Ct. at 1404-06. The Supreme Court never discussed the meaning of the public policy ground or its place in arbitration appeals. *Id.*

¹⁰ *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 93-95 (2d Cir.2008), cert. granted, 129 S.Ct. 2793 (2009).

Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 93-95 (2d Cir.2008), *cert. granted*, 129 S.Ct. (2009); and *Comedy Club Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009)).

Also, particularly given the Fifth Circuit's favorable discussion of *Stolt-Nielsen*, it should be noted that, on June 15, 2009, the United States Supreme Court granted review in that case. *Stolt-Nielsen S.A. v. AnimalFeeds Intern. Corp.*, 129 S.Ct. 2793 (2009). The question presented for review, however, does not address the "manifest disregard" issue. Instead, the question is whether, despite *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act. *Stolt-Nielsen S.A. v. AnimalFeeds Intern. Corp.*, No. 08-1198, Petition for a Writ of Certiorari at i.¹¹

As of the writing of this paper, Petitioner's Brief is due on August 28, 2009, and Respondent's Brief is due on October 20, 2009. To follow the case, check out the docket online at <http://origin.www.supremecourtus.gov/docket/08-1198.htm>.

2. Mandamus review of an order compelling arbitration under the FAA

In 2006, the Texas Supreme Court in a *per curiam* opinion stated that "both the Federal and Texas acts leave little uncertainty that . . . the respective legislatures intended" review of orders *denying* arbitration, but not orders *compelling* arbitration. *In re Palacios*, 221 S.W.3d 564, 566 (Tex. 2006). However, the Court recently clarified that an order compelling arbitration under the Federal Arbitration Act is subject to review when "the stringent requirements for mandamus are met." *Poly-America*, 262 S.W.3d at 345-46. These requirements are: (1) the trial court's clear abuse of discretion; and (2) a determination that

the benefits of mandamus outweigh the detriments such that an appeal is an inadequate remedy. *Id.* at 346. The Court noted that "courts should be hesitant to intervene" by mandamus because arbitration is intended to provide a lower-cost, expedited means to resolve disputes, and mandamus of a compel-and-stay order will often, if not always, deprive the parties of the arbitration agreement's intended benefits. *Id.* Nevertheless, the Court determined that mandamus should be conditionally granted in this case. *Id.* at 361. In a dissent, Justice Brister disagreed with the majority that mandamus review was available. *Id.* at 361, 365 (Brister, J., dissenting).

E. Final Considerations

In closing, it is worthwhile to mention that the ADR Section of the State Bar of Texas has adopted "Best Practices" for consumer arbitrations. *See, e.g.*, John Fleming, *Using Best Practices to Draft Arbitration Agreements*, 69 TEX. BAR J. 866, 866-67 (2006). The Section intends its Best Practices as a guide not only in drafting arbitration agreements, but also in determining whether an arbitration agreement is unconscionable. *Id.* at 866. Thus, these principles are useful to keep in mind when evaluating a current agreement or drafting a new one.

1. Arbitration is a selection of a dispute resolution forum. An agreement to arbitrate is not the waiver of substantive legal rights, but merely a change in the forum. Therefore, an arbitration agreement must provide a fair process with appropriate safeguards for due process.
2. The agreement to arbitrate should be mutual and reciprocal. If a consumer is required to arbitrate the consumer's claims, then the business must equally be bound to arbitrate its claims against the consumer. The business should not be given an "opt-out" right unless the same is granted to the consumer.
3. The arbitration clause must be conspicuous and sufficiently clear to notify the consumer of the terms and conditions relating to the arbitration. Ideally, the notice should specifically state that both parties are waiving any right to a jury trial.
4. Arbitrators must be neutral and independent. Arbitrators should be required to adhere to the Arbitrator Ethics Guidelines adopted by the American Bar Association and the Alternative Dispute Resolution Section of the State Bar of Texas. This includes the requirement that arbitrators should be required to disclose all former and current associations and relationships with the parties and attorneys in a case that are likely to affect partiality or that

¹¹ The full question reads:

In *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), this Court granted certiorari to decide a question that had divided the lower courts: whether the Federal Arbitration Act permits the imposition of class arbitration when the parties' agreement is silent regarding class arbitration. The Court was unable to reach that question, however, because a plurality concluded that the arbitrator first needed to address whether the agreement there was in fact "silent." That threshold obstacle is not present in this case, and the question presented here—which continues to divide the lower courts—is the same one presented in *Bazzle*:

Whether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*

- would cause a reasonable person to conclude the arbitrator was partial to one party to the arbitration.
5. Arbitration service providers must be independent. When an arbitration agreement names an arbitration service provider in which the business is a member, the agreement should also provide the option for the consumer to choose another non-affiliated and independent service provider to administer the arbitration. Full disclosure of the relationship should be made when a party is affiliated with, or a member of, the arbitration service provider.
 6. All parties to an arbitration agreement should be provided an equal opportunity to participate in the selection of the arbitrator.
 7. Consumers' forum access fees which include arbitration filing fees, administrative fees, and arbitrator expenses must be reasonable. The filing fees and court fees which a party would be expected to pay to initiate litigation of the claim is one of the factors to consider in the determination of what a reasonable charge is.
 8. The arbitration agreement should not require a consumer who does not prevail in an arbitration to pay the attorney fees or arbitration expenses of the business unless such payment is expressly provided in an applicable state or federal statute.
 9. Consumers and businesses should be provided adequate disclosures and, if necessary, discovery in order to allow each party reasonable opportunity to fully present its claims or defenses. The amount and scope of discovery should be subject to the direction of the arbitrator and should be consistent with the equal goals of providing each party an adequate opportunity to develop its claim or defense and to avoid the excessive costs incurred in civil litigation.
 10. A consumer is entitled to an in-person hearing and is entitled to be represented.
 11. The arbitration venue should be in reasonable proximity of a consumer's residence.
 12. The arbitrator must be given the power to award any damages or other relief that the consumer would be entitled to recover under applicable federal or state law.
 13. The award of the arbitrator should include a brief written statement of the basis of the award.
 14. The arbitration agreement should provide that when the size of the claim is small, either party may elect to bring the claim in small claims court.
 15. A predispute agreement to arbitrate should not require the arbitration to be confidential. Subsequent to the occurrence of a dispute, the parties may mutually enter into an agreement providing that the arbitration hearing, arbitration award, or both, will be confidential.