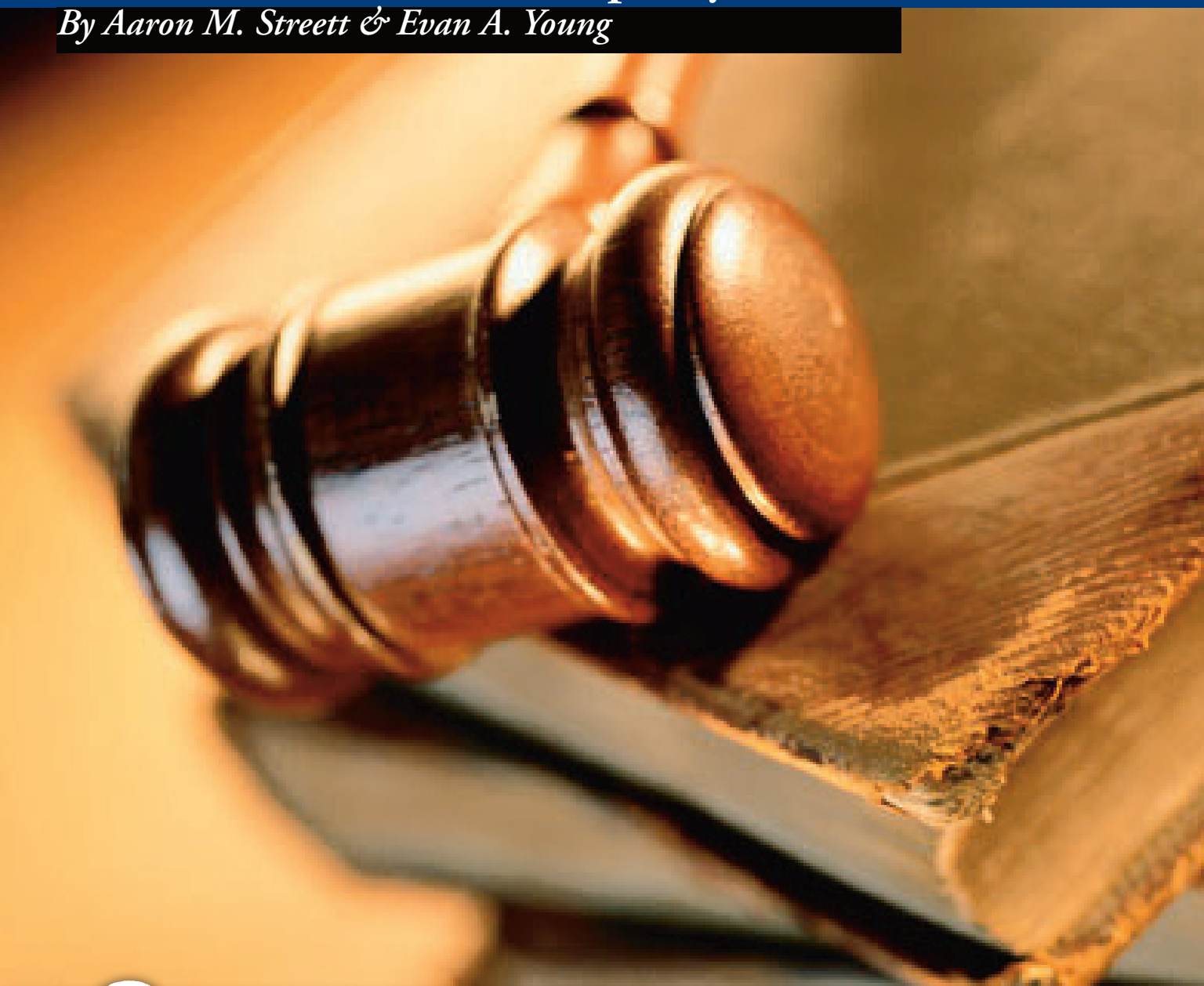
The Twenty-First Century Texas Supreme Court: Pro-Law, Pro-Prosperity

By Aaron M. Streett & Evan A. Young



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I. Introduction

Even when describing the effects of the current recession, commentators often note the comparative strength of the Texas economy. True, its government faces fiscal troubles along with most states—but "Texas has done relatively well during the recession, and its cities continue to lead national lists of the places most poised for a quick recovery."[2] Many point to the lack of state income taxes and the abundance of real property for industry to expand at reasonable costs. And some credit Texas' legal regime, which they believe prizes clear rules, stable principles, predictable outcomes, and efficient use of public and private resources.[3] They assert that such a regime fosters, rather than impedes, prosperity and economic growth.[4] The Texas legislature has actively included such goals in its agenda for well over a decade. But ultimately it is Texas' courts—and particularly the Supreme Court of Texas—that will translate legislation and policy into the life of the law as experienced by citizens, lawyers, and judges in courthouses throughout the state's 254 counties. And the way that the civil justice system is conducted brings immediate but lasting consequences to the sinews of commerce and industry.

This paper reviews a number of business-related decisions of the Supreme Court of Texas over the past two years. In an effort to flesh out the patterns of decision-making that we believe emerge, we describe selected cases in some detail. For the most part, they are not "blockbusters" in the sense of monumental decisions fundamentally shifting the law. Generally speaking, the Texas Supreme Court avoids grand pronouncements. This review of recent decisions concludes that the Supreme Court writes narrowly to forestall the creation of new problems that sometimes emerge from overbroad decisions, and that it seeks to enact rules establishing clear, binding principles that will expeditiously guide lower courts.

Supporters of the Court's current practices argue that the Court's approach to the law is conducive to stability, predictability, practicality, efficiency, certainty, and finality, and that these are the principles that are especially beneficial when economic outlooks are doubtful. Under that view, when the consequences of behavior are foreseeable, potentially expensive litigation-related variables can effectively disappear. As tort reformers and others have argued, one of the reasons Texas may do better in tough economic times than other places is that its supreme court is carefully focused on clarifying—rather than tinkering with, or constantly reimagining—the law.

II. Today's Texas Supreme Court

Justices of the Texas Supreme Court are each elected on a statewide partisan ballot for a six-year term; three classes of three justices are up for election every even-numbered year. Since 1994, only Republicans have won elections (or been appointed to fill unexpired terms); the last justice who ran as a Democrat was defeated in November 1998. When Chief Justice John Hill resigned from the Court in 1987 after barely three years in office, Governor Clements appointed Thomas R. Phillips to fill the vacancy. Chief Justice Phillips was the only Republican on the Texas Supreme Court when he took the center seat on the bench in January 1988. When he retired in September 2004, nearly six years had passed since Justice Rose Spector—the last Democrat to serve on the Court—had departed.

Beyond the speedy transformation of an all-Democrat to all-Republican bench, there have been several cycles of rapid turnover on the Court. New justices took their seats in 1995 (two seats); 1996; 1997; 1999 (two seats); 2001 (two seats); 2002 (three seats); 2003; 2004 (three seats); 2005 (two seats)—remarkable turnover given that Chief Justice Phillips served for nearly sixteen years and Justice Nathan L. Hecht has been on the Court since 1989. But from August 2005, when Justice Don Willett was appointed, no new justices joined the Court until October 2009, when Governor Perry appointed Justice Eva Guzman

to replace Justice Scott Brister. And earlier this year, when Justice Harriet O'Neill retired, Governor Perry appointed Justice Debra Lehrmann to take her position. Whether these two new Justices are at the beginning of a new period of personnel turnover remains to be seen. Whether, and for how long, the Republican Party's hold on the Supreme Court will continue is bound up in that question as well.

The decisions discussed in this paper are, therefore, primarily the work of a group of justices who have served together—by recent Texas Supreme Court standards, at least—for a long period of time. In our view, the past few years' decisions reflect a comfort level the justices have with each other—dissent is relatively infrequent, lineups in non-unanimous cases are hardly predictable, and there is a high proportion of *per curiam* opinions (in which the justices agree that the lower court got it wrong, and so plainly wrong as to justify an unsigned summary reversal). Those decisions also reflect comfort with the longstanding jurisprudence of the Court.

III. A Jurisprudence of Rules: Substantive Legal Developments

The Texas Supreme Court takes on the same sorts of issues that other state supreme courts resolve—except that it lacks criminal jurisdiction. This makes its nine justices specialists in disputes that are resolved through civil litigation. The Court has addressed a wide variety of areas that affect the Texas economy.

A. Arbitration

The Texas Supreme Court has repeatedly ruled that arbitration agreements are enforceable—a result of the fact that both federal and Texas statutes elevate alternative dispute resolution in general, and arbitration in particular, to a favored position of public policy. Plaintiffs and trial courts are frequently hostile to arbitration, often seeking to avoid it and denying motions to compel it respectively. In response, the Supreme Court has reiterated—many times through short, *per curiam* opinions and in the context of mandamus actions—that the black letter of the law and public policy compels arbitration in most circumstances.

Sometimes lower courts find ways to allow litigation to proceed without explicitly or formally authorizing it. In *In re Houston Pipe Line Co.*, the Texas Supreme Court determined that it was an abuse of discretion for the trial court to defer ruling on arbitrability while it "permit[ted] discovery on damage calculations and other potential defendants."[5] Discovery is available in Texas when courts need it to determine the scope of arbitration. Such discovery is designed to make it possible for the court to rule on motions to compel arbitration, but discovery is not to reach the underlying merits (and effectively eviscerate the parties' agreement not to resolve their disputes in court).[6] The Court will not permit trial courts to retain a case that should be in arbitration.

More typically, the Court's arbitration cases squarely involve the core question of whether courts need to honor particular arbitration agreements. The default presumption under federal and Texas law is to compel arbitration; absent proof of "a valid defense against enforcement of [an] agreement to arbitrate" a given dispute, the Supreme Court will grant relief to a party seeking enforcement.[7] There are various incarnations of excuses not to arbitrate, but the Texas Supreme Court typically honors the agreement regardless. In each of these cases, some minor variation from the "typical" case persuaded the court of appeals that the plaintiff could avoid arbitration. In *In re Golden Peanut Company, LLC*, for example, it was not the signatory who tried to avoid arbitration, but his family members after his death.[8] The lower court refused to enforce the arbitration agreement that the decedent had signed because (it held) nonsignatories were not bound.[9] That decision came out shortly before the Texas Supreme Court held, earlier in 2009, "that a decedent's pre-death arbitration agreement binds his or her wrongful death beneficiaries because, under Texas law, the wrongful death cause of action is entirely derivative of the decedent's rights."[10] But the nonsignatories here also argued that arbitration was not enforceable in this particular case because it would amount to "waiving" a cause of action in violation of the Texas Labor Code.[11] Acceptance of such an assertion, of course, would be precedent beneficial to those seeking to evade arbitration, but the Texas Supreme

Court rejected it, observing that "an agreement to arbitrate is a waiver of neither a cause of action nor the rights provided under [the Texas Labor Code], but rather an agreement that those claims should be tried in a specific forum."[12]

Alleged unconscionability is also raised as a defense against motions to compel arbitration. In *In re Odyssey Healthcare, Inc.*, the Court considered whether an employee injured on the job could be forced into arbitration after having signed an agreement that stated (among other things) that the "binding arbitration is the only method for resolving any such claim or dispute."[13] The courts below refused arbitration because they found it unconscionable, apparently focusing on the aspect of the agreement requiring the arbitration to be adjudicated by arbitrators from Dallas (while the employee worked in El Paso).[14] The employee argued that it would be a tremendous burden to arbitrate in Dallas, but the Court found that these were conclusory assertions (the case lacked evidence to support any claim of hardship), and also noted that the agreement did not on its face actually require the arbitration to be conducted in Dallas—but that even if it did, the arbitrator would be in a position to evaluate whether doing so would in fact impose a burden on the employee that required modifying the burden.[15] In rejecting the other arguments—some foreclosed by prior Texas case law, others (such as the Federal Arbitration Act being in violation of the Tenth Amendment) altogether devoid of merit—the Court granted mandamus relief.[16]

Another injured worker attempted to avoid arbitration with her employer based on some confusion about the employer's formal name. The agreement "required arbitration of on-the-job injuries against 'the Company.' On page 1 in bold black lettering, the Plan defined 'the Company' as 'your particular employer,'" stating: "'All Texas employees of Federated Department Stores, Inc [*sic*], Macy's West, Inc., and Federated Systems Group, Inc. will be covered by this program. References to the word 'Company' in this booklet will mean your particular employer.'"[17] The plaintiff argued that her paychecks did not come from any of the three named entities, and for this reason the trial and appellate courts refused to compel arbitration.[18] But the Supreme Court reasoned that common sense is not at odds with arbitration law; whatever the formal name of the company, "the Plan itself stated that 'the Company' would mean 'your particular employer,'" a definition which "serves to avoid the kind of disputes about corporate divisions and affiliates that [plaintiff] tries to raise here."[19] Since she "agreed to arbitrate with her employer and purported to sue her employer, she cannot avoid arbitration by raising factual disputes about her employer's correct legal name."[20]

The Texas Supreme Court adheres to the principle that "courts must resolve any doubts about an arbitration agreement's scope in favor of arbitration."[21] In *In re Polymerica*, two dimensions of that scope were ambiguous—who was covered and during what time period—but the lower courts resolved the ambiguity against arbitration. The employer contracted with a staff-leasing company, which in turn developed a "Dispute Resolution Plan," including an arbitration agreement that reached "any applicant for employment, employee or former employee."[22] The employee and the staff-leasing company—but not the employer—signed it; it covered "[a]ll disputes between you and [the staff-leading company], and/or you and [the employer]."[23] The employer eventually severed its relationship with the staff-leasing company and fired the plaintiff five days later.[24] She brought suit, and the lower courts held (in effect) that the employer could not compel arbitration of claims arising after the termination of the employer's contract with the staff-leasing company.[25] But the Supreme Court disagreed. The agreement unambiguously covered these claims; it included no time limitation and expressly reached disputes not only with the staff-leasing company but with the employer.[26] And the Court reiterated that an employer's signature is not a necessary requirement for a binding arbitration agreement in any event.[27] Thus, while reasonable doubts must be resolved in favor of arbitration, the Texas Supreme Court has repeatedly ordered courts to enforce arbitration agreements even amid findings that no such reasonable doubts existed.

In *In re Merrill Lynch & Co., Inc.*, the Court addressed arbitrability in relatively complicated circumstances.[28] Two subsidiaries of a larger corporation had virtually indistinguishable claims against Merrill

Lynch—and shared counsel—except that one was signatory to an arbitration agreement (with a class-action carve-out) and the other was not.[29] The Court reaffirmed that the litigation of the nonsignatory must be stayed pending the arbitration of the signatory—and that the class-action carve-out for the signatory was insufficient to justify lifting the stay while the federal courts considered an appeal of dismissal of a class action (which would have allowed the signatory to avoid arbitration). Reaffirming and extending prior precedent, the Court stated that the carve-out did not justify allowing the nonsignatory to proceed: "[A] stay is appropriate because the alternative—allowing [the nonsignatory] to continue litigating—would create duplicative litigation" and "could moot the contemplated arbitration between [the signatory] and Merrill Lynch, destroying the latter's bargained-for rights."[30]

Sometimes all sides agree that arbitration is required—but the trial court can make decisions that may contradict the agreement. The Texas Supreme Court, in a 6-3 opinion written by Justice Hecht in *East Texas Salt Water Disposal Co. v. Werline*, recently decided that interlocutory appeals are available not only when a court refuses to compel arbitration, but when it vacates an arbitral award and orders a new arbitration.[31] *Werline* involved an employment dispute; the arbitrator found for Werline, and the employer asked the district court to vacate, modify, or correct the arbitration award because (as the Supreme Court later described the request) "the award was so contrary to the evidence that it was arbitrary and capricious and therefore the arbitrator must have been biased."[32] The parties thereupon relitigated the entire matter before the district court, who ruled in favor of the employer and ordered a new arbitration, before a new arbitrator, and even based upon a series of factual and legal findings by the district judge—including resolution of the *very question* the arbitration was supposed to resolve (i.e., whether the employer breached the contract or Werline voluntarily quit).[33] The court of appeals reversed the trial court and ordered confirmation of the arbitrator's award.[34]

The only question in *Werline*, which divided the Supreme Court, was whether the appellate court could even consider the appeal. Under Texas law, an order "confirming or denying confirmation of an [arbitration] award" may be the subject of an appeal,[35] and the majority reasoned that the trial court's order "expressly denied confirmation of Werline's arbitration award and was thus appealable under" that statute.[36] In addition to engaging the textual debate regarding what interlocutory appeals the statute does or does not authorize, Justice Hecht also based the Court's decision on public policy: "Because Texas law favors arbitration, judicial review of an arbitration award is extraordinarily narrow."[37] The interlocutory appeal mechanism, he reasoned, is not designed to allow judicial scrutiny of arbitration so much as to constrain trial courts from attempting to do what they may not do—exceed their role by substituting their judgment for that of arbitrators.[38] Chief Justice Jefferson, joined by Justices Medina and Green, dissented. For them, the statutory language was not clear:

> The Texas General Arbitration Act (TAA) permits a party to appeal an order "confirming or denying confirmation of an award" or "vacating an award without directing a rehearing." In this case, the trial court vacated an arbitration award and also refused to confirm it. Had the trial court stopped there, the order would have been final and appealable. But the court also ordered a rehearing. That order makes the trial court's judgment interlocutory and, in line with almost all decisions in Texas and beyond, ineligible for appeal.[39]

Under this view, the appellate courts would be powerless to stop a district judge from, as Justice Willett put it in his concurring opinion, forcing the parties "into time- and money-wasting arbitral mulligans until the trial court is satisfied."[40] Indeed, the Chief Justice acknowledged that he "share[s] that concern," but he found that alone insufficient to confer what he called extra-statutory jurisdiction on appellate courts.[41]

Perhaps most interesting about this case is that the Texas Supreme Court justices debated it from relatively common perspectives—all the opinions expressed concern about fidelity to the text of the statute and the purposes of arbitration law. The relative infrequency of dissent, and the grounds which gave rise to dissents

on this narrow question, demonstrate why most cases come out unanimously.

Cases like *Werline* also support the inference that the Court is not reflexively "pro-business" in the sense of ruling in favor of corporate defendants—in this case it restored the arbitration award favoring the employee.

B. Forum-selection clauses

Disputes about the enforceability of forum-selection clauses have echoes of the attempts to evade arbitration. In these cases, plaintiffs attempt to litigate somewhere other than the forum they (at least allegedly) contractually agreed upon before the relationship soured. The Texas Supreme Court, consistent with its ordinary approach to contracts, regularly enforces such clauses. But beyond mere contract law (which tells those involved in commerce whether or not Texas courts reliably hold parties to their word), forum-selection clauses arguably implicate the integrity of the judicial system.

As a general rule, Texas courts are supposed to enforce forum-selection clauses. It is the burden of the opponent of the clause to demonstrate any valid reason (such as fraud or fundamental unfairness) that would justify a Texas court in not doing so.[42] In several cases decided over the past two terms, the Court has addressed various gambits to meet (or evade) this obligation in choosing a given Texas forum over the one stated in the contract. In *In re Int'l Profit Associates, Inc.* (a title of several Supreme Court cases), the Court considered—and rejected—the argument that a forum-selection clause was unenforceable if it was not specifically shown to the party now seeking to litigate in Texas court—even though the clause was on page one of the contract and the party signed that contract.[43] Many believe such an argument is fundamentally at odds with the default presumption in favor of enforcement, and would wrongly shift the burden to the proponent of the clause. The Court rejected this excuse and directed the trial court to dismiss the case.[44]

The Court considered, and again rejected, another argument against enforcement in *In re ADM Investor Services, Inc.*[45] A plaintiff sued two parties over a common transaction. One defendant had a hearing seeking transfer to a different Texas county, which was granted. ADM, the other defendant, did not participate at that hearing, but later sought a hearing of its own regarding its motion to dismiss because of a forum-selection clause choosing Illinois courts. The trial court denied that motion because, in the court's view, the plaintiff should not have to proceed against two defendants in two states regarding the same issues.[46] The plaintiff argued waiver, since ADM did not participate in the initial hearing. The Court granted mandamus relief because there is a strong presumption against waiver, which was not met here.[47] Nor did the plaintiff carry her burden to show why a forum selection clause should not be enforced as a matter of fairness; that a plaintiff sued multiple defendants is an insufficient reason to compel a party that had contracted for an out-of-state forum to litigate in Texas.[48]

A month after deciding *ADM*, the Court granted mandamus in another forum-selection clause case, *In re Laibe Corp.*[49] The contract at issue required litigation in Marion County, Indiana; the plaintiff preferred Wise County, Texas. To support jurisdiction in Texas, it argued (1) that no forum-selection clause was listed on an (unsigned) invoice, and that this—rather than the contract signed twice by the plaintiff's agent—should control, and (2) that it would be unjust (because very inconvenient) for it to be forced to litigate in Indiana.[50] The Court disposed of the first argument on basic contract principles, and the second by stating that "we will decline to enforce a forum-selection clause against a party only if the inconvenience it faces is so extreme as to effectively deny the party its day in court."[51] As with prior plaintiffs, the plaintiff failed to meet this burden, and the Court directed the trial court to dismiss because of the forum-selection clause.

The next month, in April 2010, the Court decided *In re Lisa Laser USA, Inc.*, where a plaintiff, bound to litigate in California, attempted instead to use the courts of Travis County, Texas.[52] The arguments here were more complicated than, but of the same species as, those in the earlier cases. In short, there were various documents that formed the agreement; but the plaintiff attempted to segregate the particular exhibit

in which the forum-selection clause was printed, and cast it as standing alone. The Court rejected this effort, concluding that the common-sense understanding of the agreement—as well as its plain text, regardless of how many documents were involved—was that any dispute would be litigated in California.[53] In all of these cases, the Court made plain that contracting parties should expect Texas courts to enforce their agreements about forums just as about anything else.

C. Punitive damages

Bennett v. Reynolds is a case evoking old-time Texas cattle-rustling days.[54] Justice Willett, writing for a unanimous Court, observed that the underlying behavior would "once [have been] redressed beneath a tree rather inside a courtroom."[55] It involved conduct that the Court wholly agreed to be reprehensible—a rancher stole and then sold thirteen head of his neighbor's cattle for $5,327.11, and did so with malice, including making false criminal allegations against his victim to cover up his own offense.[56] He tried to bribe a witness, and then physically threatened that witness, in an effort to induce lies and "foil efforts—not just by Reynolds but by the legal system itself—to unearth the truth."[57] He may have doctored evidence and also filed meritless litigation to undermine this case.[58] The jury found the behavior to have been sufficiently reprehensible to justify an award of $1.25 million in punitive damages—and the Supreme Court held that, while punitive damages were warranted, this amount was excessive in violation of the U.S. Constitution. Referring to the U.S. Supreme Court's general preference for a single-digit ratio between punitive and compensatory damages,[59] the Court concluded that nothing in this case satisfied the exceptions in the U.S. Supreme Court's jurisprudence for higher ratios. "Allowing a freewheeling reprehensibility exception would subvert the constraining power of the ratio guidepost."[60] It thus made clear that no ratio exceeding 4-to-1 would satisfy federal constitutional demands—and indeed noted that "on this record, even 4:1 seems a stretch," because it left little room for more severe awards for more reprehensible conduct (that leading to death, for instance).[61] And it made clear that this result followed from the Texas Supreme Court's understanding of the U.S. Supreme Court's (not its own) requirements: "[W]e are confident the [U.S. Supreme] Court would conclude this award 'was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant.'"[62]

D. Civil litigation

The way that courts actually administer the civil justice system—almost mind-numbingly tedious even to many lawyers—can provide fascinating insight into the nature of legal regimes. In a number of areas, the Texas Supreme Court seems to have sought to lay metes and bounds for the purpose of keeping state courts focused on applying the law crisply, uniformly, and fairly.

1. Anti-speculation

Results from lower court decisions occasionally appear to oppose the principle that "deep pockets" are an insufficient basis for imposing liability under the rule of law. In an apparent effort to ensure that money is not passed around without legal reasons on the record, the Supreme Court has increased its scrutiny of when cases may proceed to trial and when jury awards after trial are lawful. In *Wal-Mart Stores, Inc. v. Merrell*,[63] the Court confronted a case in which it was argued that the evidence connecting Wal-Mart to the death of plaintiff's son was so thin as to require summary judgment—which the trial court had in fact granted, but the court of appeals had reversed.[64]

The facts in *Merrell* were relatively simple. The parents of a man who died of smoke inhalation after a fire in a house sued Wal-Mart for wrongful death, "alleging that a halogen lamp in the apartment, purchased from Wal-Mart, caused the fire. [Decedent's father] testified that he bought the lamp at Wal-Mart for his son, but could not produce a receipt."[65] At the scene, police had found:

> a badly burned recliner, a damaged pole-style floor lamp, and other furniture covered in soot and smoke. There were candles, melted wax, an ashtray, and a "blunt" on the table next to the recliner, as well as smoking paraphernalia throughout the house, including ashtrays, a bong, and marijuana cigarette butts.[66]

But the plaintiff produced an expert, Dr. Craig Beyler, who attributed the fire to the halogen lamp and "ruled out smoking materials as the cause because none were found in the immediate 'area of origin.'"[67]

The Texas Supreme Court lacks jurisdiction to consider factual questions or weigh legally sufficient evidence; however, whether there is any legally sufficient evidence upon which a verdict may be based is a question of law. And the Court held that this expert testimony was literally no evidence on which to predicate even proceeding to trial. Because of his focus on the "area of origin," Dr. Beyler felt no need to exclude smoking materials as a cause—but the Court observed that the "area of origin" he apparently referred to not only lacked smoking materials but also lacked any "evidence of charred or exploded glass (either in the recliner or anywhere else in the house) to support his own theory."[68] Dr. Beyler "provided no explanation for why lit smoking materials could not have been the source. An expert's failure to explain or adequately disprove alternative theories of causation makes his or her own theory speculative and conclusory."[69] The Court therefore reversed the court of appeals and rendered judgment for Wal-Mart.

The Court had earlier considered another case (resulting in a $14 million jury verdict) involving a different fatal fire, which plaintiffs alleged was caused by a design defect in a Whirlpool clothes dryer.[70] As in *Merrell*, the crucial evidence was expert testimony, and the Court presented it as "the only evidence of a design defect."[71] The expert described his hypothesis that a corrugated tube (the alleged design defect) allowed lint to clog inside the dryer and begin a chain reaction that led to the plaintiffs' trailer being set on fire.[72] Writing for a unanimous Court, Justice Johnson again asserted the rigorous scrutiny of expert testimony that Texas courts must undertake,[73] concluded that the trial court and court of appeals did not adequately scrutinize the relevance and reliability of the expert here,[74] and found that the evidence provided in this case was so speculative, unreliable and divorced from the facts as to be legally insufficient to sustain the verdict.[75] The Court therefore not only reversed, but rendered judgment in favor of Whirlpool.[76] In both cases, the Court appeared to be sending a message: Texans—or any potential defendant—should not be unduly concerned if the evidence in a lawsuit against them consists of little more than an expert's say-so when the facts provide no support for that opinion.

2. Procedural regularity and fairness

The rules comprising litigation procedure are the neutral principles which establish the system for resolving disputes, so practitioners often value their regularity. Stability and efficiency—both among private parties and for the judicial system—can also be affected by parties and lawyers. Sometimes claims which seem to be substantively correct will nonetheless not be vindicated in the law—as with the statute of limitations or the doctrine of laches. Parties and lawyers who value stability argue that redressing such claims could be so destabilizing as to significantly endanger the system, thereby justifying denying relief to a party otherwise entitled to it. The Texas Supreme Court has decided a number of cases that appear as though the Court is interested in striking a balance between efficiency and stability, on the one hand, and the final resolution of disputes on the other. Several recent cases show that the Court insists on procedural regularity when rules are clear but does not rigidly enforce boundaries that it determines are objectively arbitrary or unfair.

In *Travelers Insurance Company v. Joachim*, the Supreme Court enforced the kind of rule that extinguishes a claim through a kind of procedural default without respect to the merits. Joachim sued Travelers for allegedly unpaid insurance benefits, but nonsuited Travelers immediately before trial, dismissing claims without prejudice—yet failing to file a final order.[77] Joachim claims not to have received orders from the trial court many months later which finally dismissed the case *with* prejudice for want of prosecution. When he refiled the suit against Travelers, Travelers sought summary judgment based on res judicata, which was granted.[78] The court of appeals reversed, holding that Joachim's nonsuit jurisdictionally deprived the trial court of the ability to dismiss with prejudice, and without such a dismissal, Travelers could not show res judicata.[79]

The Supreme Court reversed. It agreed that the trial court was in fact wrong; plaintiffs have an absolute

right to a nonsuit under specified circumstances, and trial courts cannot deprive them of this right by dismissing with prejudice.[80] But the Court nonetheless held that Joachim's remedy was not to collaterally attack the trial court's order at a time of his choosing through the filing of a new suit, but to directly attack it by asking the trial judge to reconsider or by bringing an appeal. The order of dismissal was voidable, but it was not void.[81] Defendants often rely on finality when cases are dismissed with prejudice, and the Court was unwilling to make unattacked judgments of Texas courts perennially subject to reopening, which the justices believed would diminish confidence in the system's ability to produce stable results.[82]

The Court's approach in such cases has affected plaintiffs and defendants. The Court's jurisprudence makes clear that the justices believe corporate entities also make critical basic mistakes—such as not reading court orders or keeping track of their own litigation—and that the values of finality and systemic efficiency should be enforced regardless of the party that invokes them. In *In re Daredia*,[83] the error was made by American Express, which sued Daredia (an individual) and a corporation to recover about $770,000 due on three credit-card accounts.[84] The corporation did not answer the complaint (but Daredia did); American Express therefore prepared a default judgment for the trial court to sign against the corporation. But American Express mistakenly added the following to the order: "All relief not expressly granted herein is denied. This judgment disposes of all parties and all claims in this cause of action and is therefore FINAL."[85]

More than a year later, when it wanted to proceed against Daredia, American Express moved the trial court for judgment *nunc pro tunc* to correct this error. The trial court granted that relief, and the court of appeals denied Daredia's petition for a writ of mandamus.[86] But the Supreme Court granted the writ, concluding that the *express language* of the order made plain that it was a final judgment—as in *Joachim*, the Court concluded, American Express had to attack the judgment directly (including by seeking a *nunc pro tunc* judgment within the proper timeframe).[87] The trial court had granted American Express everything that it asked for, and it was not absurd for Daredia to conclude that the final judgment disposed of his claim. In any event, once the period for correction by the trial court or the appellate courts had passed, the judgment became final, and American Express could not challenge it later simply by asserting an error.[88]

As *Joachim* and *Daredia* demonstrate, parties must follow the rules of litigation to avoid waiver. But other cases show that the Texas Supreme Court disfavors hyper-technical application of those rules and prefers that disputes be resolved on the merits. It particularly disfavors waiver when it is apparent that the party who waived an argument did so without fault. In *Hidalgo v. Hidalgo*, a divorced woman sued her ex-husband for failure to make life-insurance payments; the trial court ruled in his favor, then granted her a new trial, then—for procedural reasons—switched back to its original order favoring the ex-husband.[89] This third position, she argued, was invalid because Texas law required a trial judge to rescind a new-trial order within seventy-five days of granting it, and in this case it did so ninety-two days afterwards.[90] She won on that basis in the court of appeals—but in the meantime, the Texas Supreme Court decided *In re Baylor Medical Center at Garland*,[91] which eliminated the seventy-five-day rule and therefore meant that the basis for the court of appeals' ruling had disappeared. It therefore changed course. But Mrs. Hidalgo had never had a chance to argue the merits, and the court of appeals determined that she could not do so. The Texas Supreme Court reversed, remanding "in the interest of justice" for her to be able to present substantive arguments attacking the trial court's order.[92]

Similarly, the Court rejected a technical (and, it concluded, an incorrect) application of the doctrine of judicial estoppel to bar a personal injury claim. Ferguson, the plaintiff in *Ferguson v. Building Materials Corp. of America*, was in a building that collapsed when a huge truck crashed into it.[93] Ferguson and his wife sued, and several months later filed for bankruptcy. They listed the lawsuit in the Statement of Financial Affairs, and they disclosed it to the bankruptcy trustee (who in turn included it in the report given to the creditors and the bankruptcy court)—but they omitted it from their Schedule of Personal Property.[94] Shortly after the bankruptcy plan was approved,

the defendant in the state-court personal-injury suit moved for summary judgment on the basis of judicial estoppel, arguing that the Fergusons took inconsistent positions in different judicial proceedings. The lower courts granted the motion, effectively ending the Fergusons' chance to recover for the injury.[95]

The Supreme Court, however, rejected this result, stating that judicial estoppel "is not intended to punish inadvertent omissions or inconsistencies but rather to prevent parties from playing fast and loose with the judicial system for their own benefit."[96] The Fergusons argued that they were not guilty of that, since they did not conceal the suit or benefit from it being absent from that form, and neither the creditors nor the defendant in the personal-injury case were prejudiced by the initial omission. The Court reversed the grant of summary judgment and remanded for further proceedings.[97] Texas plaintiffs have heavy burdens in some circumstances, but dodging what the Court believes are the technicalities dredged up by adversaries does not appear to be among them. Such methods of terminating litigation are, as this case makes clear, disfavored by the Texas Supreme Court.

3. New trials

A trial court traditionally could order a new trial for any reason merely by formulaically stating that it was in the interest of justice.[98] This means, in effect, that a party could be forced to relitigate a case until a jury reaches a result that satisfied the trial judge. In *In re Columbia Medical Center of Las Colinas,* Justice Johnson—writing for the majority of a fiercely divided Texas Supreme Court—dramatically changed the law in this area by inserting a new requirement: Trial judges must now give *some reason* for ordering a new trial, rather than simply reciting the formula.[99] The Court predicated this holding on the Texas Constitution's declaration that jury-trial rights shall be inviolate; undoing the work of a jury, without explanation, imperils that right.[100]

Justice O'Neill, joined by Chief Justice Jefferson, Justice Medina, and Justice Green, dissented. As is often the case, the underlying principles did not divide the Court; she wrote that she "agree[d] that trial courts should not set aside jury verdicts without valid reasons," and that a change to the procedural rules to that effect might be desirable—but "declaring such a rule by judicial fiat on interlocutory review, and issuing mandamus relief against the trial court for not following it, turns our mandamus jurisprudence on its head."[101] To the majority, the respect for a jury verdict and the incentives to avoid unnecessary and wasteful retrials justified a minor burden on trial courts before they could set aside the work of a trial; to the dissent, that was too much of a policy goal, and while worthy, it would have consequences exceeding the new-trial context.

4. Forum non conveniens

The Texas Supreme Court has decided several recent cases to give teeth to the forum non conveniens rules governing when Texas courts must dismiss suits that should be prosecuted elsewhere. The law developing from these cases suggests that the Court believes using Texas courts as a forum for litigating matters that bear little connection to Texas or Texans is an inefficient use of judicial resources and one that smacks of motives other than expeditiously and fairly resolving a dispute.

In *In re ENSCO Offshore International Co.*, Paul Merema—an Australian employed by an Australian company with an employment contract governed by Australian state law—was working on a Liberian-flagged drilling rig in Singaporean waters and was killed in an accident that the government of Singapore investigated.[102] His widow sued both in Western Australia and in Dallas County, Texas, where some defendants had corporate offices. The defendant ENSCO filed a motion to dismiss in favor of Singaporean or Australian courts. The trial court denied the motion, and the court of appeals denied relief. But the Supreme Court granted mandamus to compel dismissal pursuant to the forum non conveniens statute.[103]

That statute lists six factors—focusing on the adequacy and availability of a forum outside Texas with stronger ties to the case and which would not cause duplicative litigation or increase burdens on the parties.[104] Under Texas law, when the "factors weigh in favor of the claim or action being more properly

heard in a forum outside Texas," the court should stay or dismiss the case.[105] To meet the requirement that a foreign forum is adequate, detailed analysis of the forum's procedural system is not required (and indeed should be avoided)—what matters is only if deferring to a foreign court "would effectively result in no available remedy at all."[106] And when pursuing a claim in Texas would deprive defendants of the ability to call many key witnesses in foreign countries, the injustice of maintaining the litigation here points toward dismissal.[107] "[C]learly the great majority of witnesses and most of the evidence remain in Australia and Singapore."[108] The connection—if any—between the accident and any acts or omissions taking place in Texas was speculative at best, weighing against Texas jurisdiction.[109] The Court reiterated that it "'is fundamentally unfair to burden the people of Texas with the cost of providing courts to hear cases that have no significant connection with the State.'"[110] And it rejected old common-law rules requiring dismissal only if the balance *strongly* favors doing so—under the statute, when the factors favor another forum, Texas courts *must* dismiss, and since all six factors support it here, the Supreme Court directed the trial court to dismiss.[111]

Two months after *ENSCO*, the Supreme Court further limited the ability of plaintiffs to litigate in Texas without good reason. In *Quixtar Inc. v. Signature Management Team, LLC*,[112] the Court unanimously adopted the statement of a prior plurality opinion: the "'forum-non-conveniens doctrine generally affords substantially less deference to a nonresident's forum choice.'"[113] *Quixtar* involved a common-law (rather than statutory) motion to dismiss on the basis of forum non conveniens. The suit involved two Michigan companies (one registered in Nevada) and concerned activities mostly taking place in Michigan (although with nationwide consequences).[114] Again addressing whether forum non conveniens analysis must "strongly favor" dismissing, the Court held that to be—even in the common-law context—the wrong standard, particularly when the plaintiff is a nonresident.[115] Further, with respect to the common-law factors governing dismissal for forum non conveniens, the Supreme Court held that the court of appeals "improperly require[d] Quixtar to prove that *each* [such] factor strongly favored dismissal, an extremely weighty burden given the circumstances of this case."[116] Applying the factors, which are centrally concerned with convenience, the Court concluded that the trial court did not abuse its discretion when it dismissed; Michigan would be a far superior forum.[117]

5. Personal jurisdiction

While forum non conveniens analysis considers whether a plaintiff should be able to continue to pursue a lawsuit in Texas courts, personal jurisdiction analysis asks whether Texas courts may even assert their authority over particular defendants in the first place. The Texas Supreme Court has issued three recent opinions indicating that it will carefully enforce the limitations on personal jurisdiction, and that while mere reference to extraneous connections or attenuated relationships to Texas are insufficient, jurisdiction is proper when defendants take actions that necessarily invoke Texas law.

In *Kelly v. General Interior Construction, Inc.*,[118] Justice Guzman held for a unanimous Court that nonresidents, sued in their individual capacities, were not amenable to suit in Texas simply because they were officers of a non-Texas corporation which had been hired to do work in Texas. Because they showed that they did not live in Texas, own any property there, or conduct business in their personal capacity in Texas, and because none of the acts leading to liability was alleged to have occurred in Texas, a suit against them in their personal capacity was improper—even though the corporation of which they were officers was subject to suit in Texas court.[119]

Shortly after deciding *Kelly*, the Court considered another defendant's claim that it should not be subject to suit in Texas. Chief Justice Jefferson wrote the opinion in *Spir Star AG v. Kimich*,[120] where the Court affirmed the judgments below and held that a foreign manufacturer who availed itself of a Texas distributor for its products took sufficient steps to bring itself within the reach of Texas courts for claims relating to those products. Because the manufacturer "intentionally target[ed] Texas as the marketplace for

its products," its use of "a distributor-intermediary for that purpose provides no haven from the jurisdiction of a Texas court."[121] Chief Justice Jefferson was careful to limit the holding—the mere awareness of the stream of commerce is insufficient on its own to confer jurisdiction anywhere the stream might flow,[122] but here it was not so passive—it was the manufacturer's "own conduct directed toward marketing its products in Texas" that created personal jurisdiction there.[123] The Court also limited this holding to the context of specific jurisdiction (as to suits relating to the products or transactions the manufacturer directed to Texas), rather than finding it sufficient to create general jurisdiction (for any kind of suit).[124] That is, the Court appears to be insisting on clear rules to protect nonresidents from improperly being haled into Texas courts, and rules that cannot be easily evaded when nonresidents should be amenable to suit.

A month after it decided *Spir Star*, the Court released a short *per curiam* opinion in *Zinc Nacional, S.A. v. Bouché Trucking, Inc.*[125] Unlike the manufacturer in *Spir Star*, which targeted Texas as a market, the defendant in *Zinc* simply "us[ed] a third-party trucking service to transport its goods through Texas to an out-of-state customer."[126] The Court held that this was insufficient to establish even specific jurisdiction with respect to the sale or transportation of grayback paper it manufactures. Although Zinc, a Mexican company, has some Texas customers for *other* products, it has no offices or employees in Texas and has no customers or sales (or efforts at creating customers or sales) for its grayback paper there; it hired a Mexican trucking company to transport the grayback paper to its non-Texas customers.[127] That company in turn subcontracted some transportation jobs to another company, which was based in Texas. During one such shipment, a driver was injured and sued (and recovered from) that company, which in turn sued Zinc in Texas court for indemnification.[128] The lower courts thought that Zinc, knowing its product would have to go through Texas, had purposefully availed itself of benefits from Texas, making it amenable to jurisdiction.[129] But the Supreme Court reversed, observing that "the mere fact that goods have traveled into a state, without more, does not establish the minimum contacts necessary to subject a manufacturer to personal jurisdiction within that state."[130] Rather, "[t]he exercise of jurisdiction over a merchant requires that the merchant actually direct sales *to* the forum state, not *through* it."[131] Zinc's lack of contacts with Texas meant that mere transportation was insufficient for it to be subject to suit in that state. By adhering to that rule, the Court avoided expanding the jurisdiction of state courts, which, some posit, may have impeded the free flow of goods in international markets.

6. Discovery

The current Court sees litigation itself as debilitating; aside from the costs of the specific dispute itself, the Court has been concerned about oppressive and unfair collateral burdens associated with litigation. In a few recent cases, the Court has attempted to enforce limits on discovery, which some believe makes litigation less a battle of attrition and more focused on resolving the case at hand. In *In re Deere & Co.*, for example, it granted mandamus in a products-liability case when the trial court authorized discovery into customer complaints about various John Deere products that was unbounded in time, potentially going back decades.[132] While discovery is ordinarily within the discretion of the trial judge, discovery orders must be reasonable in scope as to subject matter and timeframe.[133] The Court has also made clear that discovery must not become a tool in which valuable trade secrets are unnecessarily disclosed. In *In re Union Pacific Railroad Co.*, it held that formulas through which Union Pacific set shipping rates were not proper parts of discovery in a personal injury case, when any relevant argument could have been made using non-trade secret materials.[134] And in *In re Weekley Homes, L.P.*, the Court, in an opinion by Justice O'Neill, placed limits on electronic discovery. Parties may not simply demand access to the other side's hard drives (which would be taken out of service during the proposed wide-ranging analysis) for intrusive searching, absent a rigorous showing of need and reliable methodology to properly achieve a legitimate discovery purpose.[135]

7. Attorney's fees

The Texas Supreme Court has long attempted to regulate the award of attorney's fees in actions which

do not follow the "American rule" that parties pay their own fees.[136] The Court recently considered a contract case, which under Texas law entitles a prevailing claimant to attorney's fees. The plaintiff—a commercial landlord—sued a non-paying tenant, seeking about $215,000 in damages. The only evidence of reasonable fees was provided by the attorney, who testified that a reasonable award would be about $62,000 in total to cover the trial and both levels of appeal.[137] The jury awarded only about a third of what the plaintiff sought in damages, and awarded $0 in fees. The trial court offered the plaintiffs about a third of the fees they sought, but the court of appeals determined as a matter of law that all of the fees sought by the plaintiff should be awarded, because the only evidence offered was for that amount, and it was unrebutted.[138]

Chief Justice Jefferson, writing for the Court, held that the plaintiff was in fact entitled to fees under the statute and that no evidence supported the jury's award of $0 in fees—that is, nothing the jury heard could rationally have led it to conclude that the plaintiff's representation was costless.[139] But it reversed the court of appeals' full award of fees. Even without any competing evidence at trial, courts must assess fees as a matter of law through the lens of the multi-factored tests—including evaluating the results of the litigation—articulated in prior decisions. The limited results (a third of the amount sought and zero fees awarded by the jury) required a remand for reconsideration rather than simply giving the plaintiff whatever his attorney sought.[140]

8. Class actions

Although most attention gets paid to classes presented for certification to federal courts, class actions are not merely a federal phenomenon. Texas Rule of Civil Procedure 42—analogous to Federal Rule of Civil Procedure 23—is the basis for a number of putative class actions, the certification of which is frequently reversed by the Texas Supreme Court. Throughout the decade, the Supreme Court has considered a number of interesting class actions and developed rules for certification that closely track those in federal court. Then-Justice Jefferson wrote *Compaq Computer Corp. v. LaPray*,[141] a major class-action choice-of-law case, which involved a UCC claim. The Court reversed the certification because, "[w]hile this case involves a Uniform Commercial Code breach of express warranty claim, it seems that 'the Uniform Commercial Code is not uniform.'"[142] The reflexive application of Texas law, even in the UCC context, made a nationwide class improper.

In 2007, the Court decertified another class action, which appeared to steer clear of the deficiencies in *Compaq*.[143] *Citizens Insurance v. Daccach*, a securities case, involved a proposed *worldwide* class action, but only to challenge the selling or offering of securities from Texas without having registered with the Texas Securities Board. The class representative acknowledged that none of the purchasers of the securities allegedly sold by Citizens was a Texan—but because of the narrow framing of the suit, citizens of other states and countries would be limited to whatever relief Texas law (rather than their states' law) provided.[144] Justice Wainwright, for the majority, held that the class representative succeeded where *Compaq* had failed—that is, the class claim, as drafted, legitimately could apply only Texas law.[145] How could some other state penalize failure to register *with the Texas Securities Board?* Given this self-imposed limitation, there could be no problematic choice-of-law analysis.[146] But the analysis did not end there. The narrowing of the claim, by preventing non-Texas law from governing, (even though, with a class made up of non-Texans, non-Texas law could presumably govern the conduct in almost every case), called into doubt the adequacy of the class representation.[147] A strategic decision to abandon all claims other than the Texas Securities Act claim meant that claim preclusion would then attach and all members of the class would be barred from litigating their claims under the (potentially more favorable) law of their own jurisdictions. Pursuing the litigation in class form might well be inferior to non-class suits. At the very least, the affected class would have to be given solid notice of the likely effect (as assessed by the district judge) of the abandonment of claims; and taken as a whole, the problems generated by stripping them away might be sufficient to deny certification at all.[148]

The Court has continued to subject class actions to heightened scrutiny. In *Exxon Mobil Corp. v. Gill*, the Court reemphasized to lower courts that class actions are different: Judges must "perform a rigorous analysis before ruling on class certification" to ensure compliance with the rules, they "may look beyond the pleadings," and, as in *Compaq*, "the substantive law . . . must be taken into consideration" when evaluating whether Rule 42 requirements can be met.[149] The claim in *Gill* was another UCC violation (but, after *Compaq*, the class representative carved out all class members outside of Texas)—here that Exxon violated UCC § 2.305, which governs open-price sales (specifically, gasoline from Exxon to its franchisees).[150] The claim was that Exxon's offer of a "rebate" was a breach of contract because the costs of the rebate were added back into the price of the fuel. The Court turned to the substantive law in deciding whether a class could be certified. The UCC provision at issue includes a safe harbor (the "established" or market price) precisely because every open-price transaction otherwise would become a jury question. Therefore, "the required good faith must be measured objectively, with reference to commercial realities, rather than subjectively, based on the person's motives or alleged dishonesty."[151] The dealers' "claim lacks merit,"[152] which in the class-action certification context can be fatal. "When a class has been certified based on a significant misunderstanding of the law," remand is appropriate to see if certification can be salvaged in light of a correct statement of the law.[153]

Gill stands for more, obviously, than the underlying UCC merits question; it stands for the proposition that anyone proposing (and any judge certifying) a class action in Texas should expect rigorous scrutiny. Even more recently, the Court demonstrated that point in *Southwestern Bell Telephone Co. v. Marketing On Hold Inc.*, where Justice Wainwright, writing for a divided Court, decertified a class where an assignee of claims was the class representative.[154] Marketing On Hold, which effectively "bought" claims relating to improper billing from some of Southwestern Bell's customers, by that method became a member of the class and satisfied several of the Rule 42 requirements.[155] But the Court held that an assignee could not always be an adequate class representative. "We believe courts should scrutinize carefully the motivating interests and incentives of parties that agree at an apparent financial loss to obtain the right to serve as the class representative."[156] The goal is to ensure alignment of interests, but the class representative here—never actually suffering the injury of the absent class members—would easily find itself drawn to litigation theories that do not make itself or others whole (because it has nothing to recover beyond the contingent share of the particular claims assigned to it).[157] Its "motives, different interests, and potentially conflicting interest created by" the assignments "distinguish it from the thousands of other class members."[158] And "[w]hile the sacrificial servant role exists in many segments of our society, it is not often found in class action litigation."[159] This does not mean that no assignee can ever be class representative: "The assignee is not disqualified . . . so long as it is not a stranger seeking entrepreneurship in class actions, and it does not distort the litigation process."[160] But—to the majority, at least—that is what the putative class representative in this case would do, and it therefore decertified the class.[161] At the very least, it is a recent reaffirmation of the decade-long effort to ensure that Texas class actions must be above suspicion.

E. Negligence, liability, and duty

The Court places high value on the argument that litigation is at its most expensive, and exposure to liability at its most uncertain, when the rules governing conduct are unclear. It sometimes uses cases before it to ensure that, whenever possible, clear legal principles make outcomes predictable before litigation ensues. In *Scott & White Memorial Hospital v. Fair*, for example, the Court decided that "naturally occurring ice that accumulates without the assistance or involvement of unnatural contact is not an unreasonably dangerous condition sufficient to support a premises liability claim" brought by invitees (i.e., patients visiting a hospital for a doctor's appointment who slipped on the ice), and therefore could not be a predicate for premises liability.[162] Chief Justice Jefferson wrote that ice in its natural state does not amount to an unreasonable risk. He rejected plaintiffs' argument based upon the fact that "icy conditions occur rarely in Texas."[163] "[I]ce, like mud, results from precipitation beyond a premises owner's control" and invitees are as aware of naturally

accumulated ice (and may be *better* able to take precautions to avoid it than the premises owner).[164] (The Court also rejected claims that deicing converted naturally occurring ice into something unnatural.[165]) By delineating legal rules that govern liability, as here, the Court removes some disputes from the jury-trial process altogether.

The Court's recent cases also seek to articulate clear rules identifying to whom specific duties are owed, avoiding standards that, for lack of clarity, could generate additional litigation. In *Grant Thornton LLP v. Prospect High Income Fund,* Chief Justice Jefferson, again writing for a unanimous Court, addressed the scope of auditors' liability to third parties who invest in a business. He held that the auditors' duty with respect to negligent misrepresentation does not extend to anyone who happens to read issued reports and might invest based on them, but rather to the corporation itself and *known* investors whose reliance the auditor intends.[166] Thus, Grant Thornton's incorrect statements about the financial health of Epic Resorts, LLC, the company for which Grant Thornton was the auditor, were not necessarily innocent—but third-party investors without any connection to Grant Thornton cannot recover from it for their losses.

In this way, many believe the Court balanced the need to hold auditors accountable to those for whom they worked or whom they had specific reason to know would act in reliance on their reports, but would not expose them to effectively unlimited—and therefore prohibitive—liability by making them answerable to anyone who later claimed to have acted in reliance when some of their investments were addressed in the auditor's reports. Without this latter limitation, there would be no way to predict who might be a potential plaintiff.[167] Similarly, the Court tightened up the reliance standards for fraud claims by third parties against auditors; among other things, plaintiffs must show not only justifiable but actual reliance on the specific representations the auditors made, and in this case, there was no evidence of either.[168] The Court also refused to open Texas courts to "holder claims"—claims that one did not sell investments because of the auditors' representations—absent, at the least, "a direct communication between the plaintiff and the defendant," which the plaintiffs here did not have.[169]

The Court does not seem interested in reducing liability for its own sake. In fact, the Court takes the integrity of relationships of trust—those "fiduciary" relationships that relate to the management of resources without which society could not function effectively—particularly seriously. It recently, and unanimously, extended the penalties available for breaches of trust. Although a fiduciary's breach has always justified forfeiture of ill-gotten gains, profits, or compensation, even when actual damages are hard to prove, the Court in *ERI Consulting Engineers, Inc. v. Swinnea* reversed a pro-defendant appellate judgment and extended those consequences to the forfeiture of consideration a fiduciary receives for the sale of his own business.[170]

ERI involved a business partner who had sold his interest in the partnership—an asbestos-abatement consultancy—to the other partner, all the while (and on the sly), developing a scheme to eventually wipe out that partner and buy back the whole company at half-price.[171] This amounted to fraudulent inducement (by a fiduciary) to enter the contractual relationship in the first place.[172] The trial court ordered forfeiture of virtually all the amounts that the defendant had received for the sale of his half of the partnership (and other consideration that was part of the deal); the court of appeals reversed. The Supreme Court agreed with the trial judge in principle. Justice Green wrote that "where willful actions constituting breach of fiduciary duty also amount to fraudulent inducement, the contractual consideration received by the fiduciary is recoverable in equity regardless of whether actual damages are proven, subject to certain limiting principles" that the Court discussed.[173] Those limits reflect the Court's belief that such forfeiture could be extraordinarily debilitating and might exceed the bounds of justice. Consequently, a trial court must exercise its discretion to determine whether and to what extent forfeiture of consideration is appropriate, including "the gravity and timing of the breach of duty, the level of intent or fault, whether the principal received any benefit from the fiduciary despite the breach, the centrality of the breach to the scope of the fiduciary relationship, and

any threatened or actual harm to the principal," along with "the adequacy of other remedies—including any punitive damages award."[174] Because the trial court had not evaluated these specific factors, the Court remanded for a determination of a proper amount of forfeiture pursuant to that analytical framework.[175]

Texas law has changed over recent decades to require more rigorous showings before plaintiffs can collect awards. As one example, an earlier version of the Deceptive Trade Practices Act required a plaintiff to show that the conduct complained of adversely affected him; in 1979, the Legislature tightened that up and, under current law, requires a plaintiff to show that the conduct was a "producing cause" of the actual injury.[176] Thirty years later, some circumstances remained unclear, requiring the Supreme Court to state that what would have been an easy plaintiff victory under the old law now requires a take-nothing verdict. The plaintiff in *Metro Allied Insurance v. Lin* thought he had procured a commercial general liability insurance policy; he paid the premiums and was repeatedly assured that the policy was in effect when he was sued.[177] His agent—who at trial fully acknowledged negligence—never actually obtained the policy. Under the old "adversely affected" standard, this alone would be sufficient to sustain the hefty jury award favoring the plaintiff. But the "producing cause" standard required the plaintiff to show that the agent's conduct "was a substantial factor in bringing about the injury, without which the injury would not have occurred."[178] Because the plaintiff could not show that any insurance policy could have been obtained that would have covered the claim that he wished to make, he could not show causation. In other words, while his agent's behavior was undeniably negligent and it certainly adversely affected the plaintiff, if the plaintiff could not have obtained a policy that would have eliminated the injury he actually suffered, then the negligence of the agent was not a cause of the injury here.[179] By reversing the court of appeals, which held otherwise, the Supreme Court added to its jurisprudence of rules. Opinion is divided on the value of those rules, with plaintiff advocates arguing that those rules are unfortunate in the face of an insurance client who thought he was covered, and others arguing that they more precisely demarcate the liability citizens owe to each other.

In that vein, what duty does an employer owe a party harmed by an employee on his way home from work? In *Nabors Drilling U.S.A., Inc. v. Escoto*, an employee of Nabors—an oil-field drilling company—finished a twelve-hour shift at 6:00 in the morning, chose not to sleep in a trailer provided by Nabors, and began driving home.[180] Unfortunately, he drifted into oncoming traffic, causing a collision in which he and three others died. The plaintiffs, relatives of those killed in the collision, sued Nabors for negligence in allowing the employee to drive home.[181] The Court determined that Nabors had no duty either to prevent him for driving home or to train employees about the hazards of driving while fatigued. There are times when an employer does owe the public a duty to prevent harm—such as when it requires an employee to consume alcohol at work.[182] To impose a duty on an employer as a matter of law, the employer must have some "knowledge of employee impairment" and "exercise the requisite control" over the employee to make the employee's subsequent acts somehow attributable to the employer.[183] The legal test for imposing duty requires that the employer have not just general knowledge that working a long night shift leads to fatigue, but actual knowledge of impairment—which was lacking here—and the exercise of some affirmative control (such as sending the employee home and away from the site).[184] The Court also held that it would not impose "an independent duty to train [Nabors'] employees, especially inexperienced employees, regarding the dangers of fatigue."[185] Warning about fatigue is not like teaching an employee how to operate specialized heavy machinery; rather, as the Court quoted a police officer, "'it is just common sense, you know when you are too tired to drive.'"[186]

F. Medical malpractice

Medical malpractice cases involve Texas courts' efforts to apply the substantial policy reforms enacted by the Texas legislature over the past decade.[187] The Supreme Court's decisions in this area are essentially a crystallization of the policies established through legislative means. Last year, in *Aviles v. Aguirre*, for

example, the Court refocused the lower courts on the legislature's primary goal of reducing medical malpractice insurance costs.[188] In Texas, the law requires dismissal of health-care claims (along with attorney's fees to the defendant) if statutorily mandated expert reports are not timely served (as one requirement among many others).[189] In *Aviles*, the plaintiffs failed to do so, and it took the district court seven years to finally dismiss the claim. But it refused to award fees, and the court of appeals agreed, for the reason that the fees were not (as the statute required) "incurred" by the doctor, because it was his insurance company that paid them.[190] The Supreme Court made speedy work of reversing. The doctor was the one who was sued and who was responsible for any liability and any defense costs—"[t]hat he had previously contracted with an insurer to pay some or all of both does not mean he incurred neither."[191] The Court thought that was common sense, as the reform statute included the need to reduce the cost of malpractice insurance in its very title and in nearly all of the legislative findings explaining the reason for the statute's enactment.[192] "By refusing to award costs unless no insurance was involved, the court of appeals completely misunderstood the nature and frustrated the purpose of the statute."[193] The Supreme Court therefore summarily reversed the lower court's decision, stating that it "reflect[ed] a basic misunderstanding of the statute and liability insurance."[194]

In August 2010, the Supreme Court considered another medical malpractice claim where no expert report was filed—and where the lower courts again declined to award attorney's fees. This was a much more complicated case, and it divided the Court. The statute, all justices agreed, makes fees mandatory when a defendant asks for dismissal and fees on the basis of an untimely (or nonexistent) expert report.[195] In this case, there was no doubt that the fees were incurred, but the only evidence related to fees that the defendant put forth was the attorney's testimony about what would be reasonable for similar cases—nothing about the actual fees that were incurred in this case.[196] The majority agreed that the testimony was not conclusive as to the amount that should be awarded because it was untethered from the facts. But because the record makes clear that some fees were incurred (because the attorney actually did work for the doctor), and because when fees are incurred the trial court must award a reasonable amount of fees (but not more than actually incurred), the Court remanded the fee-award issue to the trial court.[197]

Chief Justice Jefferson and Justice Johnson dissented. True, fees are mandatory—"[b]ut even a mandatory fee award must have evidentiary support."[198] The evidence put forth by the doctor said nothing about the amount actually incurred; in any other area of the law, when a party with the burden to produce evidence produces no evidence, that is dispositive of the result, and there is ordinarily no second chance.[199] Both the majority and the dissenters pointed to competing interests to be served, leading to different results. The majority focused on the legislative policy of ensuring fees when some fees obviously were incurred; the dissent focused on the burden someone seeking fees must bear to get them and was motivated by the potential negative consequences in other contexts should this case stand for the proposition that burdens (especially in the hotly contested area of attorney's fees) can be met with far less effort by the proponent of awards than previously thought.

Another divisive case arose when an expert report was timely filed but was, according to the defendants, fatally deficient—another statutory basis for dismissal and attorney's fees.[200] The trial court granted the motion to dismiss on this basis as to one defendant but not the individual doctor. Even though Texas law permitted the doctor to take an interlocutory appeal at the time the trial court denied the motion to dismiss for a deficient expert's report, the doctor did not do so. Six months passed, and the plaintiff asked the trial court to dismiss the case with prejudice, which it did.[201] At that point—with the case dismissed—the doctor sought to appeal on the basis of the report's deficiency (which would allow him to recover attorney's fees).

The question that divided the Supreme Court was whether the appeal was available at this point. The majority, through Justice Johnson, reversed the court of appeals' judgment that the appeal was jurisdictionally barred, and held that the right to an interlocutory appeal was permissive (the statute used the word

"may"), so choosing to pursue the appeal later did not mean that the right to relief had been waived.[202] Indeed, such a reading would mean that unless the interlocutory appeal was immediately taken, then the substantive remedy of obtaining attorney's fees if the expert's report were deficient, would be taken away from a defendant who in fact prevailed.[203]

Chief Justice Jefferson, joined by Justices O'Neill and Medina, dissented. They argued that the interlocutory appeal, while permissive, was the only remedy for a challenge to a deficient report. The legislature's goal was "to quickly dispose of frivolous cases that increase the cost of insurance and drive doctors away from Texas."[204] The purpose of the expert report is to allow courts (and defendants) to quickly ascertain whether the claim has merit. In the dissenters' view, reserving appellate challenges if the trial court finds it to be sufficient undermines that goal of speed.[205] And more than undermining speed in the particular case at hand, it distorts the right systemic incentives. "When a claim lacking merit is immediately dismissed, and the claimant obliged to pay attorney's fees, future meritless claims are deterred. It is shortsighted, then, to think that the Legislature was concerned only about particular cases."[206] And it was equally wrong, they argued, to regard the statute as designed "to protect only the health care industry" when the need to "repel weak claims stands alongside [the legislature's] insistence that malpractice be penalized."[207] The dissent, therefore, would have imposed "[a] bright line rule that requires an immediate appeal" rather than prolonging litigation and making it inherently uncertain as to when such an appeal will come.[208] As in *Garcia v. Gomez*, the division in *Hernandez* shows that both positions attempted to vindicate important and legitimate legislative policies; the majority showed no signs of disagreement with Chief Justice Jefferson's arguments regarding the procedural benefits of immediate appeals, but because it was convinced that the legislature in fact had made the timing of interlocutory appeals a matter of the defendant's choice in this context, it was unable to share his conclusion.

Expert reports are among the most contested procedural aspects of modern Texas malpractice litigation, but there are other statutory requirements for plaintiffs wishing to bring such a claim. Among them is the obligation to provide the defendant with authorization to obtain otherwise protected health information that is relevant to the claim.[209] In *In re Collins*, Justice O'Neill held for a unanimous court that plaintiffs could not undercut that requirement by obtaining a broad "protective order" that precludes ex parte communications with the physicians who treated the plaintiff and have the health information that must be provided. The statute has a mechanism for the plaintiff herself to identify treatments that are irrelevant to the claim (and therefore privileged) in the first instance, and in this case the plaintiff did not use that mechanism.[210] There is no separate bar to ex parte contact under these circumstances, either under the malpractice statute or under federal law,[211] and ordinary requirements for protective orders apply just as much here as in any other discovery setting.[212] The Court therefore sought to support the legislative policy to expeditiously and informally resolve malpractice claims.[213]

The Court has also considered the question of what proof is required in the context of "loss of chance" claims. In *Columbia Rio Grande Healthcare, L.P. v. Hawley*, the Court considered several issues with respect to the conduct of a negligence action against a hospital.[214] Alice Hawley's cancer diagnosis was made in a hospital's pathology lab (by a doctor not employed by the hospital) in November 2000, but her doctors did not read the pathology report, and therefore she was not treated until the summer of 2001. By then it was too late; her cancer was terminal.[215] In the ensuing litigation, Hawley and her husband claimed that the hospital acted negligently in not ensuring that the reports were reviewed by the doctors, and the Court agreed that this was a theory the jury could accept.[216] But the most important legal question in the malpractice context was what the plaintiff had to show to win. In Texas, recovery "requires proof to a reasonable medical probability that the injuries complained of were proximately caused by the negligence of a defendant."[217] In other words, Hawley had to show that if she had begun receiving treatment at the time of the alleged negligence, her

cancer would most likely not have been terminal. If it most likely would have been terminal either way, the Court held, Texas law would deny her recovery, even if the negligence had converted a small chance of survival into an almost impossible one.[218] The trial court's refusal of a jury instruction explaining this principle meant that the jury could have found the hospital liable even if it thought that Mrs. Hawley's chances of survival dropped from, say, forty percent to twenty percent—a scenario under which, as a matter of law, she could not recover. The refusal of the jury instruction likely resulted in an improper judgment, and for that reason (as well as other errors), the Court reversed the judgment and remanded for a new trial.[219]

Not all medical malpractice decisions are favorable to the health-care industry. The Court made it easier for some plaintiffs to pursue their claims by explaining the circumstances that can toll the two-year statute of limitations for malpractice actions. In two "sponge cases" decided on the same day, both authored by Justice Willett for a unanimous Court, the Court reaffirmed precedent and held that the Texas Constitution's "Open Courts" provision requires such tolling when "foreign objects" like sponges are left inside a patient who justifiably does not discover this negligence—which is wholly within the control of the surgeon—within the statutory period.[220] But it limited that holding by concluding in the companion case that the ten-year statute of repose (as compared with the statute of limitations) was not subject to such extensions.[221] Two years is the limit in ordinary cases, but is too short for a small, almost unique category of cases (such as when sponges are left inside the body); ten years is the outer limit for any case, allowing potential defendants finality and certainty.[222] "Without a statute of repose, professionals, contractors, and other actors would face never-ending uncertainty as to liability for their work. Insurance coverage and retirement planning would always remain problematic, as would the unending anxiety facing potential defendants."[223]

Thus, the results differed for otherwise similarly situated plaintiffs. Because one discovered the sponge 9.5 years after the negligent act, she could bring her claim; the other, who discovered it after 11 years, could not. That may seem arbitrary, and it may seem unfair if one assumes that the likelihood of discovery is not much greater at 9.5 than 11 years. But in the Court's view, some line has to be drawn, and "[f]ocusing solely on [a plaintiff's] lost right to sue ignores the broader societal concerns that spurred the Legislature" to enact a statute of repose.[224] The Court's acceptance of the legislative limitation as consistent with the Texas Constitution sought to balance the rights of individuals to fairly petition the courts with the need for protection from stale claims.

G. Absestos liability and retroactive laws

In late October 2010, the Texas Supreme Court decided *Robinson v. Crown Cork & Seal Co., Inc.*, a long-awaited case—it was argued in February 2008—about whether the Texas Legislature could limit the asbestos-related liability of a successor corporation.[225] The Court concluded that a 2003 statute (or rather, a small part of a large statute), which would have absolved Crown Cork of such liability, violated the Texas Constitution's prohibition of retroactive laws.[226] It therefore reversed the judgment of the lower courts, which had held that the plaintiff's claims were barred by the statute.

The Court divided 6-2 (Justice Guzman did not participate), with Justice Hecht writing for the majority. The facts, as he described them, are familiar in asbestos cases. In this case, John Robinson alleged that he contracted mesothelioma from exposure to asbestos at the workplace over multiple decades. He and his wife, Barbara, sued twenty-one defendants. Crown Cork was one of them. But Crown had never been involved with any asbestos product; rather, its involvement in the lawsuit came from its acquisition in the 1960s of Mundet Cork Corp., which had manufactured asbestos insulation to which Robinson allegedly was exposed.[227] Through the operation of successor liability, Crown became liable for all the claims that eventually were stated against Mundet—an amount that dramatically exceeded the value of Mundet in the first place.[228]

The Texas Legislature stepped in and in 2003 adopted Chapter 149 of the Texas Civil Practice and Remedies Code as part of a larger tort reform effort.

Chapter 149 limits the cumulative asbestos liability of a successor corporation (so long as it acquired the corporation before May 13, 1968) to "the fair market value of the total gross assets of the merger or consolidation," including insurance coverage, so long as the new company does not continue in the asbestos business.[229]

The only company that apparently would benefit from this statute was Crown Cork.[230] And shortly after Chapter 149 was enacted, the trial court granted summary judgment to Crown Cork; John died shortly thereafter, and Barbara maintained the suit (and added additional statutory claims).[231] Robinson alleged that the legislature had unconstitutionally passed a retroactive law which divested her of her "vested rights" to recover. The court of appeals concluded that the legislature, properly acting under its police power, could legislate as it did, even though it would have a retroactive effect on Robinson.

In reversing, the Supreme Court did not conclude that any statute that had retroactive effects violated the state constitutional prohibition; otherwise, virtually any statute that touched on any past transactions would be invalid.[232] Nor was the old test susceptible to principled application; that old test involved asking whether a "vested right" had been impaired—but that test was impractical because there was no way to identify "vested rights" beforehand. As Justice Hecht described it, "the 'impairs vested rights' test thus comes down to this: a law is unconstitutionally retroactive if it takes away what should not be taken away."[233]

The Court concluded that a better test than that was necessary if the legislature and the citizenry were to know in advance what the limits of legislative power were (or, perhaps, to know in advance how to legislate properly to obtain a given result). The test that the Court distilled turns on whether the statute upsets settled expectations and, if it does so, whether it is undeniably for the public (rather than private) good.[234] Although the Texas Supreme Court prefers bright-line tests when they are available, that is not always possible. In this case, Justice Hecht wrote:

> No bright-line test for unconstitutional retroactivity is possible. Rather, in determining whether a statute violates the prohibition against retroactive laws . . . , courts must consider three factors in light of the prohibition's dual objectives: the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; the nature of the prior right impaired by the statute; and the extent of the impairment.[235]

Given that test, the Court concluded that Chapter 149 could not stand. First, although many people might conclude that the bankruptcy of any enterprise which ever had any asbestos-related business at all is harmful to the public interest, that is not what the legislature found. Rather, "[n]o legislative findings or statement of purpose accompanied Chapter 149."[236] The only legislative history was inserted *after passage* by the sponsor of the legislation. And in debate, it was commonly recognized that only Crown Cork would benefit by this enactment.[237] It is for the legislature to decide what steps to take in defending the public interest, and the courts take the record as the legislature creates it; but here, the record was insufficient for the Court to be sure that the legislation vindicated an important public interest.

Second, Robinson's rights that were impaired included long-established common-law claims that had been subject to litigation through discovery; they were not claims that were unfiled before the enactment of Chapter 149, for instance; such claims would presumably be subject to lesser "settled expectations" than claims which were valid until a sudden act by the legislature.[238] And finally, unlike statutes that merely alter the amount of recovery or otherwise adjust a remedial regime, Chapter 149 extinguished the claims altogether.[239] The Court's test plainly leaves substantial scope to the legislature, but it also sends a message: Before the legislature can change rights retroactively, it needs to think hard about what it is doing, and create a solid record showing that its actions are not targeting (whether favorably or unfavorably) select individuals or entities, but is designed to maximize the public good. It makes clear that the courts will subject such statutes to heightened scrutiny.

Justice Wainwright, joined by Justice Johnson, wrote a lengthy dissent. They concluded that the legislative action here was a balanced, rational legislative response to a major crisis—what they saw as the unfair

destruction of businesses which had no role in asbestos but for acquiring other (often small) businesses years before any such exposure was known. "This Court's holding that the legislation is unconstitutional prevents the Legislature from addressing an injustice arising from a crisis that caused dozens of bankruptcies and the loss of thousands of jobs in this state and throughout the country due to asbestos-related litigation."[240] Time will tell whether the newly established test does in fact limit the legislature, or whether it provides a more rigorous framework through which the legislature must proceed when it wishes to respond to crises based on long-past actions or inactions.

H. Contracts

As in other areas, the Supreme Court does not appear unwilling to rule in favor of plaintiffs, and against a business interest, in the interpretation of contracts. Such a decision, written by Justice Green for a unanimous Court, came in *Vanegas v. American Energy Services*. An employer allegedly had promised eight original employees that, if they stayed with the company until a merger or acquisition, they would receive five percent of the value of that transaction.[241] The company was in fact acquired, and seven of the original employees were still on the job—and the employer refused to pay, claiming that the promise was "illusory" because the employees were at-will and could have been fired at any time. The trial court granted summary judgment to the employer on that basis, and the appellate court—relying on prior Supreme Court decisions—affirmed.[242] But the Supreme Court rejected the application of its prior decisions, which occurred in the context of bilateral contracts. The contract here was unilateral—a promise for a benefit upon performance.[243] The promise here may have been "illusory" to start with (since the employer could have terminated the employment), but that is irrelevant—it was motivating employees to stay, and "what matters is whether the promise became enforceable by the time of the breach."[244] The employees, by remaining on the job when the company was acquired, "performed" and thereby accepted the offer; "[a]t that point, [the employer's] promise became binding" and it breached the agreement by not paying.[245] The decision was predicated in part on concerns about systemic stability—if this sort of promise was merely "illusory" and could not be enforced upon performance, then why isn't any other sort of promise (about pay rates or vacation leave, for instance) similarly illusory, given that the employee is at-will?[246]

I. Corporations

Shareholder derivative suits are rare in Texas courts; Texas is not Delaware.[247] But how easy should it be for a shareholder to invoke the legal system, purportedly on behalf of the corporation itself? Texas law has always required the familiar "demand letters"—in which the shareholder who will file the suit first alerts the corporation to the claim in hopes that it will take corrective action—except in cases of futility.[248] In 1997, the legislature changed the law to require such a demand letter in all circumstances, regardless of alleged futility, and that the demand state "with particularity the act, omission, or other matter that is the subject of the claim or challenge" that the shareholder seeks to remedy.[249] In *In re Schmitz*, the Court addressed for the first time two threshold questions: May the demand letter be anonymous, and how much detail must it provide?

Justice Brister, for a unanimous Court, held that the statute does not countenance anonymous demands. "Given the interrelation between the demand and the subsequent suit, it is hard to see how or why the demand could be made by anyone other than the shareholder who will file the suit."[250] The statute contemplates communication between the shareholder and the corporation, which implies knowledge of the shareholder's identity. Similarly, the identity of the shareholder may influence the corporation: "[A] demand from Warren Buffett may have different implications than one from Jimmy Buffett."[251] And without knowing who the shareholder is, the corporation could not even verify that the demand was stated by someone entitled to make it; time and expense would be wasted responding to demands from outsiders with no skin in the game.[252] Justice Brister expressly recognized the possibility of abuse by law firms (the one sending the letter here was from outside of Texas and with a reputation for directing

litigation without reference to clients), and held that requiring identification of the shareholder would help limit abusive demands on Texas corporations.[253]

Secondly, Justice Brister held that Texas law affords corporations reasonable protections against abusive demands by requiring, as a minimum standard for later bringing suit, that the demand letter not just state the problem but explain it. In this case, for instance, the two-sentence letter noted that the corporation was considering an acquisition offer at $22 a share from another corporation, and demanded that it be halted because of a purported offer at $23 elsewhere. But merely saying that is insufficient to help a board of directors determine the merits of the complaint—"[i]n a merger like this involving several hundred million dollars, one cannot say whether the $23 offer was superior to the $22 offer without knowing a lot more."[254] The strings attached or the potential obstacles to merger may explain why a slightly lower dollar-amount offer would actually be better for shareholders; in any event, the demand letter here gave the corporation nothing to work with.

This does not mean that the Supreme Court is hostile to derivative suits per se. To the contrary, "a derivative suit can serve as one important means of preventing a corporate board from enriching themselves at the shareholders' expense."[255] But demand letters must avoid generic and vague descriptions of problems and assert precisely what is happening and why it should be fixed; otherwise, the Court likely considered, corporations would have little ability to separate valid claims from frivolous ones, and Texas courts would have little ability to ensure that judicial resources are being used where needed most. Presumably the Supreme Court concluded that the burdens of sending a descriptive, non-anonymous demand letter are relatively small compared with the benefits received.

J. Takings and eminent domain

Like many courts across the country, the Texas Supreme Court is developing a takings jurisprudence that addresses the conflict between the rights of the State to take property under the constitutional and statutory parameters which authorize it, and the rights of property owners to receive just compensation when a taking occurs (and to avoid a taking at all when it is illegitimate). Several cases testing these boundaries have been or will be argued at the Court, and some recent decisions also indicate the direction that the Court is already taking.

In August 2010, the Court decided *State v. Brownlow*.[256] The Brownlows and the State reached an agreement to give the State a permanent easement that would allow it to construct a "flood-plain mitigation pond," which it concluded to be necessary as a result of a highway widening.[257] In making the pond, the State excavated over 87,500 cubic meters of dirt—which it then took and used elsewhere on the highway expansion project. The Brownlows sued for inverse condemnation for the value of the dirt; the State claimed that the easement gave them the right to it.[258] The trial court dismissed on the basis of sovereign immunity; the Supreme Court, in a unanimous opinion by Justice Johnson, agreed with the court of appeals that the Brownlows could maintain their takings suit—sovereign immunity is no protection from such suits under the Texas Constitution—and that the Brownlows owned the dirt, having granted the State only an easement rather than the fee simple.[259] The Court took an aggressive position, citing Texas law, requiring the State to adequately compensate for any deprivation that exceeded by any amount the rights it received pursuant to the agreement, rejecting the State's argument that the Brownlows had been "adequately" compensated by that very agreement.[260] Perhaps it seems obvious to the State that creating a pond would require excavation which in turn would allow it to do what it wished with the dirt; but that was not the agreement, and the Court determined it is the language of the agreement that defines the property rights of the parties.[261]

Also in connection with inverse condemnation, but in the context of alleged regulatory takings, the Court has reaffirmed in *City of Houston v. Trail Enterprises, Inc.*, that Texas law does not require exhaustion of administrative or local remedies—like seeking variances—when doing so would be futile.[262] But at the same time it insists on regular procedure. A trial court had held a trial on whether a taking had

occurred, and concluded that Houston's ordinance preventing use of the real property in question amounted to a deprivation worth $17 million.[263] But (before the Texas Supreme Court had issued a prior decision to the contrary) the trial court granted summary judgment for the City because the property owners had not sought a variance and the suit was therefore not ripe. The court of appeals reversed and rendered judgment on the jury verdict, but the Supreme Court in turn reversed—not on ripeness grounds, about which it agreed with the court of appeals, but because the trial court had never entered a final judgment. "Our rules provide procedures through which parties may challenge a verdict's or judgment's propriety."[264] The court of appeals short-circuited the important post-verdict work, which in turn prevented the City from developing a proper appeal. Perhaps a taking did occur, but appellate review required operation pursuant to regular procedure.

There are cases, of course, in which a takings claim—even one that might appear sympathetic—is not redressable. In *Southwestern Bell Telephone, L.P. v. Harris County Toll Road Authority*, Chief Justice Jefferson—writing for a unanimous Court—held that a government entity did not "take" property when its development of a highway forced a utility to move telecommunication facilities under the public right-of-way.[265] Southwestern Bell's takings claim arose under the Texas Constitution.[266] But it did not have a vested property right in the public right-of-way, even though a state statute authorized it to locate its telecomunnications facilities there (so long as it did not inconvenience the public).[267] Sovereign immunity is not a defense to a takings claim, but it can play a role with respect to government payments that are only required by statute. In this case, Southwestern Bell's fallback argument was that a separate statute *did* require the government to pay relocation expenses; but the Court (after casting doubt on this reading of the statute) held that the legislature had not waived sovereign immunity.[268] And in *State v. Bristol Hotel Asset Co.*, the Court unanimously held that when there is a taking, courts must scrutinize the aspects of it that are compensable. In that case, for instance, the loss of business associated with the taking of some real property on which a hotel stood (which in turn generated a need for construction that had temporary business consequences) was not compensable, whereas the difference in the property's value before and after the taking was.[269] Similarly, "Texas courts have refused to consider business income in making condemnation awards even when there is evidence that the business's location is crucial to its success."[270] The Court's recent takings jurisprudence defends property owners—but only with respect to vested property interests and (when no constitutional taking has occurred) only when authorized by statute.

IV. Conclusion

Justice Scalia famously stated that the rule of law depends upon a law of rules. The Texas Supreme Court's recent decisions illustrate that it often sets out to delineate what it believes are clear and predictable legal rules that faithfully interpret the acts of the legislature, and to apply those rules to both plaintiffs and defendants. In doing so, the Court has placed a high priority on stability and has apparently endorsed the view that entrepreneurs and individuals can more readily order their affairs with confidence in such a legal environment. The Court's pursuit of an even-handed rule of law has in this way promoted the predicates for innovation and prosperity.

Endnotes

1 Aaron Streett is an appellate lawyer in the Houston office of Baker Botts, L.L.P. Evan Young is an appellate lawyer in the Austin office of the same firm. Streett clerked for Chief Justice William H. Rehnquist in October Term 2003, while Young clerked for Justice Antonin Scalia in October Term 2005. The opinions expressed in this paper reflect the views of Streett and Young and are not necessarily the views of Baker Botts or its attorneys.

2 *A Hole in the Heart of Texas*, The Economist, July 10, 2010, at 29; *Four Reasons Why Texas Beats California in a Recession*, Fortune, July 13, 2010, *available at* http://money.cnn.com/2010/07/13/news/economy/california_texas_economy.fortune/index.htm.

3 Editorial, *Texas Tort Victories*, Wall St. J., June 14, 2009, at A12 (attributing Texas' economic success in part to its "fairer legal environment"); Sherry Sylvester, *The Benefits of Tort Reform in Texas* (Aug. 15, 2010), *available at*, http://tortreform.com/node/583 (arguing that Texas' legal regime has "helped strengthen the Texas economy even in these tough times" and noting that Texas "has created more jobs in the last two years than the other

49 states combined").

4 *See supra* note 3; *cf.* U.S. Chamber Institute for Legal Reform, *Ranking the States Lawsuit Climate 2010*, at 2 (noting that "two-thirds" of in-house counsel "report that the litigation environment in a state is likely to impact important business decisions at their companies, for instance, where to locate or do business").

5 311 S.W.3d 449, 450 (Tex. 2009) (per curiam).

6 *Id.* at 451 (citing Tex. Civ. Prac. & Rem. Code §§ 171.023(b), 171.086(a)(4), (6)).

7 *In re* Odyssey Healthcare, Inc., 310 S.W.3d 419, 421 (Tex. 2010) (per curiam).

8 298 S.W.3d 629,630 (Tex. 2009).

9 *Id.* at 630-31.

10 *Id.* at 631 (quoting *In re* Labatt Food Serv., L.P., 279 S.W.3d 640, 646 (Tex. 2009)).

11 *Id.* at 631.

12 *Id.*

13 310 S.W.3d 419, 421 (Tex. 2010) (per curiam).

14 *Id.* at 421-422.

15 *Id.* at 422-23 (citing *In re* Poly-America, L.P., 262 S.W.3d 337, 357 (Tex. 2008)).

16 *Id.* at 423-24. To be more precise, it "*conditionally*" granted a writ of mandamus. *Id.* at 424. This is ordinary Texas practice—more genteel and less jarring than formally directing a writ of mandamus to a lower court, Texas appellate courts instead give them a hint as to what they should do. "We are confident the trial court will comply [with the Texas Supreme Court's order to compel arbitration], and the writ will issue only if it fails to do so." *Id.*

17 *In re* Macy's Texas, Inc., 291 S.W.3d 418, 419 (Tex. 2009).

18 *Id.*

19 *Id.*

20 *Id.* at 420.

21 *In re* Polymerica, LLC, 296 S.W.3d 74, 77 (Tex. 2009) (per curiam).

22 *Id.* at 75.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.* at 76.

27 *Id.* (citing many cases noting that signatures and other formalities beyond writing are not required).

28 315 S.W.3d 888 (Tex. 2010) (per curiam).

29 *Id.* at 889-90.

30 *Id.* at 892.

31 307 S.W.3d 267, 268 (Tex. 2010).

32 *Id.* at 269.

33 *Id.*

34 *Id.* at 269-70.

35 Tex. Civ. Prac. & Rem. Code § 171.098(a)(3).

36 307 S.W.3d at 270.

37 *Id.* at 271 (footnotes omitted).

38 *Id.* Nonetheless, Justice Hecht noted that there is utter disarray across the nation regarding whether appeals can be taken from trial court orders vacating arbitration awards and remanding for new arbitrations. *Id.* at 272-74.

39 *Id.* at 277 (Jefferson, C.J., dissenting) (quoting Tex. Civ. Prac. & Rem. Code § 171.098(a)(3), (5)).

40 *Id.* at 277 n.11 (Willet, J., concurring).

41 *Id.* at 282 (Jefferson, C.J., dissenting).

42 *In re* Int'l Profit Assocs., Inc., 274 S.W.3d 672, 675 (Tex. 2009).

43 286 S.W.3d 921, 922-23 (Tex. 2009) (per curiam).

44 *Id.* at 924.

45 304 S.W.3d 371 (Tex. 2010).

46 *Id.* at 373.

47 *Id.* at 374.

48 *Id.* at 374-76.

49 307 S.W.3d 314 (Tex. 2010) (per curiam).

50 *Id.* at 315-17.

51 *Id.* at 317.

52 310 S.W.3d 880 (Tex. 2010) (per curiam).

53 *Id.* at 884-87.

54 315 S.W.3d 867 (Tex. 2010).

55 *Id.* at 885.

56 *Id.* at 870-71.

57 *Id.* at 875-76.

58 *Id.* at 876-77.

59 *Id.* at 877 (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003)).

60 *Id.* at 879.

61 *Id.* at 882-83.

62 *Id.* at 883 (quoting *State Farm*, 538 U.S. at 429).

63 313 S.W.3d 837 (Tex. 2010) (per curiam).

64 *Id.* at 839.

65 *Id.* at 838.

66 *Id.* The Court noted that a "blunt" was the stub of a marijuana joint and a "bong" is a water pipe often used to smoke narcotics. *Id.* at 838 nn.1-2.

67 *Id.* at 838.

68 *Id.* at 839.

69 *Id.* at 840.

70 Whirlpool Corp. v. Camacho, 298 S.W.3d 631 (Tex. 2009).

71 *Id.* at 635.

72 *Id.* at 635-36.

73 *Id.* at 637.

74 *Id.* at 639 ("If courts merely accept 'experience' as a substitute for proof that an expert's opinions are reliable and then only examine the testimony for analytical gaps in the expert's logic and opinions, an expert can effectively insulate his or her conclusions for meaningful review by filling gaps in the testimony with almost any type of data or subjective opinions.").

75 *Id.* at 640-43.

76 *Id.* at 643.

77 315 S.W.3d 860, 861-62 (Tex. 2010).

78 *Id.* at 862.

79 *Id.*

80 *Id.*

81 *Id.* at 863-64.

82 *See id.* at 865 (discussing policy favoring settlement, which requires nonsuit with prejudice, which would be jeopardized by reopening a case through a collateral attack).

83 No. 09-1014, __ S.W.3d __, 2010 WL 2636025 (Tex. 2010) (per curiam).

84 *Id.* at *1.

85 *Id.*

86 *Id.*

87 *Id.* at *1-*2.

88 *Id.* at *3.

89 310 S.W.3d 887, 888 (Tex. 2010) (per curiam).

90 *Id.* at 889.

91 280 S.W.3d 227 (Tex. 2008).

92 310 S.W.3d at 889.

93 295 S.W.3d 642, 643 (Tex. 2009) (per curiam).

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.* at 643-44.

98 *In re* Columbia Med. Ctr. of Las Colinas, Subsidiary, L.P., 290 S.W.3d 204, 208, 210 (Tex. 2009).

99 *Id.* at 207.

100 *Id.* at 206, 209, 211.

101 *Id.* at 215 (O'Neill, J., dissenting).

102 311 S.W.3d 9212, 923 (Tex. 2010) (per curiam).

103 *Id.*

104 Tex. Civ. Prac. & Rem. Code § 71.051(b).

105 *In re* Ensco Offshore Int'l Co., 311 S.W.3d 921, 924 (Tex. 2010) (per curiam) (quoting *In re* Gen. Elec. Co., 271 S.W.3d 681, 686 (Tex. 2008)).

106 *Id.* at 925.

107 *Id.*

108 *Id.* at 926.

109 *Id.* at 927.

110 *Id.* (quoting *In re* Pirelli Tire, L.L.C., 247 S.W.3d 670, 676 (Tex. 2007)).

111 *Id.* at 929.

112 315 S.W.3d 28 (Tex. 2010) (per curiam).

113 *Id.* at 31 (quoting *In re* Pirelli Tire, 247 S.W.3d at 675); *see also id.* at 32 (explicitly endorsing *Pirelli* in this context despite *Pirelli*'s status as plurality opinion).

114 *Id.* at 30.

115 *Id.* at 33 & n.2.

116 *Id.* at 33 (emphasis added).

117 *Id.* at 34-35.

118 301 S.W.3d 653 (Tex. 2010).

119 *Id.* at 660.

120 310 S.W.3d 868 (Tex. 2010).

121 *Id.* at 871.

122 *Id.* at 873.

123 *Id.* at 874.

124 *Id.* at 874-75.

125 308 S.W.3d 395 (Tex. 2010) (per curiam).

126 *Id.* at 396.

127 *Id.*

128 *Id.* at 396-97.

129 *Id.* at 397.

130 *Id.* (citing cases from the U.S. and Texas Supreme Courts).

131 *Id.* at 397-98 (original emphasis).

132 299 S.W.3d 819, 821 (Tex. 2009) (per curiam).

133 *Id.* at 820-21.

134 294 S.W.3d 589, 593 (Tex. 2009) (per curiam).

135 295 S.W.3d 309 (Tex. 2009).

136 *See, e.g.*, Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818-19 (Tex. 1997) (holding that fees cannot be awarded simply at a contingency-fee rate but must be assessed pursuant to eight enumerated factors).

137 Smith v. Patrick W.Y. Tam Trust, 296 S.W.3d 545, 546 (Tex. 2009).

138 *Id.* at 546-57.

139 *Id.* at 548.

140 *Id.*

141 135 S.W.3d 657 (Tex. 2004).

142 *Id.* at 673 (quoting Walsh v. Ford Motor Co., 807 F.2d 1000, 1016 (D.C. Cir. 1986)).

143 Citizens Ins. Co. of Am. v. Daccach, 217 S.W.3d 430 (Tex. 2007).

144 *Id.* at 447.

145 *Id.* at 440-42.

146 *Id.* at 441.

147 *Id.* at 447.

148 *Id.* at 457-58.

149 299 S.W.3d 124, 126 (Tex. 2009) (internal quotation marks and citations omitted).

150 *Id.*

151 *Id.* at 128.

152 *Id.*

153 *Id.* at 129.

154 308 S.W.3d 909 (Tex. 2010).

155 *Id.* at 914-16 (obtained contractually valid assignments), 920 (typicality requirement satisfied), 925 (predominance requirement met as to liability and damages).

156 *Id.* at 925.

157 *Id.* at 925-26.

158 *Id.* at 926.

159 *Id.*

160 *Id.* at 927.

161 *Id.*

162 310 S.W.3d 411, 414 (Tex. 2010).

163 *Id.* at 412-13.

164 *Id.* at 414 (citing M.O. Dental Lab v. Rape, 139 S.W.3d 671, 676 (Tex. 2004) (per curiam).

165 *Id.* at 416-19.

166 314 S.W.3d 913, 915 (Tex. 2010). Baker Botts LLP was counsel for petitioner Grant Thornton.

167 *Id.* at 921.

168 *Id.* at 922-26.

169 *Id.* at 930.

170 No. 07-1042, __ S.W.3d __, 2010 WL 1818395, * 1-*2 (Tex. May 7, 2010).

171 *Id.* at *1-*2.

172 *Id.* at *4.

173 *Id.* (emphasis added).

174 *Id.* at *5.

175 *Id.* at *6.

176 Metro Allied Ins. Agency, Inc. v. Lin, 304 S.W.3d 830, 834 (Tex. 2009) (per curiam).

177 *Id.* at 833.

178 *Id.* at 834.

179 *Id.* at 835-38.

180 288 S.W.3d 401, 404 (Tex. 2009).

181 *Id.*

182 *Id.* at 405 (describing other similar examples).

183 *Id.* at 406.

184 *Id.* at 406-07.

185 *Id.* at 412.

186 *Id.* at 413.

187 For some background on the basis for the legislature's action, see *Hernandez v. Ebrom*, 289 S.W.3d 316, 324 (Tex. 2009) (Jefferson, C.J., dissenting) (describing the "apocalyptic terms" in which the legislature addressed the need for reform).

188 292 S.W.3d 648, 649 (Tex. 2009) (per curiam).

189 *Id.* at 648 & n.1 (citing the various statutory provisions).

190 *Id.* at 648-49.

191 *Id.* at 649.

192 *Id.*

193 *Id.*

194 *Id.* at 648.

195 Garcia v. Gomez, No. 09-0159, __ S.W.3d __, 2010 WL 3365341, *3 (Tex. Aug. 27, 2010); *id.* at *4 (Jefferson, C.J., dissenting).

196 *Id.* at *2 (majority opinion).

197 *Id.* at *3-*4.

198 *Id.* at *5 (Jefferson, C.J., dissenting).

199 *Id.* at *5-*7.

200 Hernandez v. Ebrom, 289 S.W.3d 316, 317 (Tex. 2009).

201 *Id.*

202 *Id.* at 319.

203 *Id.* at 319-20.

204 *Id.* at 325 (Jefferson, C.J., dissenting).

205 *Id.* at 328.

206 *Id.* at 329.

207 *Id.*

208 *Id.* at 331.

209 *In re* Collins, 286 S.W.3d 911, 913 (Tex. 2009).

210 *Id.* at 918.

211 *Id.* at 918, 920.

212 *Id.* at 919.

213 *Id.* at 915 (describing statutory purposes).

214 284 S.W.3d 851 (Tex. 2009).

215 *Id.* at 855.

216 *Id.* at 859.

217 *Id.* at 860.

218 *Id.* at 861.

219 *Id.* at 861-62, 866.

220 Walters v. Cleveland Reg'l Med. Ctr., 307 S.W.3d 292 (Tex. 2010). The holding did not actually "toll" this particular claim, but held that the plaintiff had created a fact issue about whether she had discovered it within a "reasonable" time, a question directed to the trial court on remand. *Id.* at 295, 299. And the holding is quite limited. *See id*. at 298 ("Sponge cases are *sui generis*. They rarely occur, they never occur absent negligence, and when they do occur, laypeople are hard-pressed to discover the wrong.").

221 Methodist Healthcare Sys. of San Antonio, Ltd. v. Rankin, 307 S.W.3d 283 (Tex. 2010).

222 *See Walters*, 307 S.W.3d at 297-98.

223 *Rankin*, 307 S.W.3d at 286.

224 *Id.* at 287.

225 No. 06-0714, __ S.W.3d __, 2010 WL 4144587 (Tex. Oct. 22, 2010). Baker Botts represented Crown Cork, the defendant in the lawsuit and the petitioner at the Supreme Court.

226 *See* Tex. Const. art. I, § 16.

227 *Robinson*, 2010 WL 4144587, at *1.

228 *Id*. ("While Crown acquired Mundet for only about $7 million, by May 2003 Crown had paid over $413 million in settlements" deriving from Mundet's asbestos liability.).

229 Tex. Civ. Prac. & Rem. Code §§ 149.004(c), 149.002(b)(5).

230 *Robinson*, 2010 WL 4144587, at *2.

231 *Id.* at *3.

232 *Id.* at *6-*8.

233 *Id.* at *10.

234 *Id.* at *12.

235 *Id.*

236 *Id.* at *2, *15-16.

237 *Id.* at *2, *16.

238 *Id.* at *15.

239 *Id.*

240 *Id.* at *30 (Wainright, J., dissenting).

241 302 S.W.3d 299, 300 (Tex. 2009).

242 *Id.* at 300-01.

243 *Id.* at 302.

244 *Id.* at 303.

245 *Id.* All of these statements turn on facts as alleged, rather than as proven, because the Court was reviewing the grant of summary judgment. *See id*.

246 *Id.* at 303-04 (citing 1 John E. Murry, Jr. & Timothy Murray, Corbin on Contracts § 1.17 (Supp. Fall 2009)).

247 *In re* Schmitz, 285 S.W.3d 451, 454 (Tex. 2009).

248 *Id.* at 455.

249 *Id.* (quoting Tex. Bus. Corp. Act art. 5.14, § C).

250 *Id.*

251 *Id.* at 456.

252 *Id.*

253 *Id.* at 456-57.

254 *Id.* at 457.

255 *Id.* at 458.

256 No. 08-0551, __ S.W.3d __, 2010 WL 3365948 (Tex. Aug. 27, 2010).

257 *Id.* at *1.

258 *Id.* at *1, *3.

259 *Id.* at *2-*5.

260 *Id.* at *7.

261 *See id.* at *6-*7.

262 300 S.W.3d 736, 737 (Tex. 2009) (per curiam).

263 *Id.*

264 *Id.*

265 282 S.W.3d 59 (Tex. 2009).

266 *See* Tex. Const. art. I, § 17.

267 *Id.* at 61-62 (noting also that the same result occurs under the federal Constitution).

268 *Id.* at 68-70.

269 293 S.W.3d 170, 172-73 (Tex. 2009) (per curiam).

270 State v. Central Expressway Sign Assocs., 302 S.W.3d 866, 871 (Tex. 2009) (context of valuing condemned land on which a revenue-generating billboard stood).

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