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> **Employment Law – Circumstantial Evidence of Termination Causation:** Without proof of knowledge and evidence of motive, the fact that termination followed protected conduct is not probative circumstantial evidence of causation, especially if there were other legitimate grounds for termination.
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> **Employment Law – The Whistleblower Act:** *The Whistleblower Act does not insulate an employee who makes a protected report from later disciplinary action unless there is a but-for causal connection between the report and the disciplinary action.*

In *Office of the Attorney General v. Laura G. Rodriguez*, the Texas Supreme Court reversed the imposition of liability against the office of the attorney general under the Texas Whistleblower Act because the evidence of a causal connection between the termination and the employees' report of an alleged legal violation was legally insufficient.

Rodriguez was a regional manager in one of the AG's regional child-support services offices. For three years, she received "outstanding" performance evaluations before reports she threatened her management team, was overly controlling, and created "a very hostile working environment." Her supervisors encouraged Rodriguez to take corrective action, but did not discipline her.

Rodriguez had become a close friend of her executive assistant. The assistant gave Rodriguez access to the assistant's email account. Rodriguez discovered an email in which the assistant allegedly falsely claimed to be related to member of her household so the resident could be added to the assistant's state health insurance. Rodriguez's supervisor told Rodriguez to report to the department's ethics advisor. Rodriguez complied, but emphasized her desire to remain anonymous.

The matter was referred for investigation that determined the resident was eligible if she lived in the assistant's household even if not related. Rodriguez later disclosed to investigators the "resident" actually had been living in a rent house owned by Rodriguez's sister. The investigation resulted in a recommendation the assistant be suspended for five days. Rodriguez asked to be "recused" from preparing a report suspending her assistant but ultimately complied.

Meanwhile, there were additional written complaints about Rodriguez's management. The agency's inquiry concluded Rodriguez and her staff had lost confidence in each other.

A month later, Rodriguez's supervisor proposed to fire Rodriguez citing, among other management failings, the mistrust between Rodriguez and her staff, Rodriguez's conflict of interest in renting houses to her subordinate's children, and resisting the request to discipline her assistant. When Rodriguez was told that she was about to be terminated, she volunteered for and received a demotion and transfer to a different office instead of termination.

Rodriguez received a satisfactory rating at her next performance evaluation, but it noted continuing difficulties with team members and cited the incident involving her executive assistant. Rodriguez was also failing to clear the case backlog at the new office, the primary objective of her position.

Rodriguez then anonymously filed a written complaint that she had been "discriminated against" for reporting her former assistant. Meanwhile, Rodriguez's supervisor asked the agency to fire Rodriguez for failure to take the actions necessary to make progress on clearing the cases backlog in Rodriguez's office. This supervisor was *not aware of Rodriguez's report* about her assistant's efforts to get health insurance. However, a different manager who was aware of the incident joined the recommendation that Rodriguez be terminated.

Rodriguez argued that despite the lapse of fifteen months between her report about her assistant and her termination, circumstantial evidence supported the inference of a causal relationship between the two events. Under *City of Fort Worth v. Zimlich*, 29 S.W.3d 62 (Tex. 2000), circumstances may evince a retaliatory motive when if there had been: (1) knowledge of the report, (2) expression of a negative attitude toward the report, (3) failure to adhere to established policies regarding employment decisions, (4) discriminatory treatment compared to similarly situated employees, and (5) evidence that the stated reason for the adverse employment decision was false. Item 2, standing alone, is not enough to show a causal connection between the report and the adverse employment action. Thus, a supervisor's warning, without context or additional details, that there would be "consequences" for a complaint does not support the inference of causation.

Although the opinion does not explain it in these terms, this conclusion is nothing more than the application of the multiple inferences rule. That rule provides that if multiple inconsistent conclusions are equally plausible inferences from the circumstances, an inference is not probative evidence. In this case, one of the supervisors was not aware of the protected report. Moreover, the supervisor who was aware of it was not the only decision maker involved. As a result, the inference that the protected report about the assistant played any role in Rodriguez's termination was nothing more than non-probative speculation.

There must be evidence of a but-for connection between the protected activity and the adverse employment action. In this case, no evidence demonstrated that the employee's report of a violation of state law more than one year earlier caused the agency to terminate the Rodriguez's employment. Such a relationship could not be inferred from the report alone because evidence showed there were other justifications for the employment decision. The Whistleblower Act is not insurance from adverse employment decisions.

> **Farm Animal Activity Act:** The historical context in which the Farm Animal Activity Act was originally adopted and as amended in 2011 demonstrates that the Act was not intended to exempt injuries that occur in the course of ordinary farm and ranching activities.
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> **Statutory Interpretation:** Over the objections of textualist dissenters, a seven-member majority began its statutory interpretation not with the plain meaning of the statutory language, but rather with consideration of that language in the context of its legislative history without first identifying an ambiguity ordinarily necessary for consideration of legislative history.
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> **Statutory Interpretation:** Courts should avoid statutory interpretations that would cause a statute to conflict with a more general statute that is an expression of a broader public policy; therefore, the exemption from liability created by the Farm Animal Activity Act was not deemed to apply to work-related injuries covered under the workers' compensation act.

Raul Zuniga was a ranch hand who died on the job when a bull trampled him. The ranch owners were not worker's compensation subscribers and did not enjoy worker's compensation immunity from common law tort liability.

Mr. Zuniga's parents and surviving children sued the ranch owners for damages to themselves and Mr. Zuniga's estate because of his injury and death. At issue in *Waak et al. v. Rodriguez et al.* was whether the Farm Animal Activity Act ("FAAA") barred these claims. Section 87.003 of that Act provides that, but for specific exceptions, "any person … is not liable for … damages arising from the personal injury or death of a participant in a farm animal activity" which

the Act defines broadly to include "handling … a farm animal belonging to another." The ranch owners argued the Act barred their liability for the injuries caused Mr. Zuniga's death. The Texas Supreme Court disagreed and held the FAAA did not apply.

The court's statutory interpretation begins with legislative history instead of plain language.

The court routinely espouses fealty to the plain meaning of the statutory text and ordinarily begins (and ends) its statutory interpretation with the literal meaning of the words used considering statutory context. When that meaning is *un*ambiguous, the court eschews resort to legislative history. *See, e.g., Continental Cas. Ins. Co. v. Functional Restoration Assoc*., 19 S.W.3d 393, 399 (Tex. 2000); *Tune v. Texas Dept. of Pub. Safety*, 23 S.W.3d 358, 363 (Tex. 2000).

Waak, however, stands that analysis on its head. Without first identifying any ambiguity, Chief Justice Hecht's opinion for a 7:2 majority, begins, "To interpret the Farm Animal Act, we must *first examine its history*." (Emphasis added). That examination disclosed that the FAAA's predecessor, the "Equine Act" was adopted after comparative negligence eliminated the absolute assumption-of-the-risk defense. The Equine Act was adopted to continue protection of the horse industry from risks inherent in handling horses on the basis of voluntary assumption of certain risks. The opinion's discussion of the Equine Act focused on its adoption in all but two states and its historical focus on recreational, entertainment and educational activities instead of routine farm and ranch operations. That analysis concluded by pointing out that the person protected from liability was the "equine activity sponsor" which was defined in a way that excluded ranchers. Thus, the baseline for the court's interpretation of the FAAA was set by the characteristics of the multi-state Equine Act on which the current FAAA was based.

The opinion's FAAA interpretation begins by observing that the FAAA broadened in the Equine Act in three ways but otherwise "did not depart" from it. The opinion highlighted the examples of persons and activities protected under the FAAA all related to persons involved in recreational, entertainment and educational livestock activities. The opinion deemed these statutory examples as meaningful, even if not exclusive, about whom the FAAA insulated from liability. The 2011 "expansion" of the FAAA added loading and unloading to those examples of protected farm animal activities.

Turning to the FAAA's definitions, the opinion bolstered its conclusion by noting the definition of protected "farm animal activity organizers" did not include ranchers generally and that ranch hands did not qualify as "participants" under the FAAA because they do not work as amateurs or professionals, do not pay for their work, and do not work for free. Accordingly, the opinion concluded that nothing in this addition suggested that the Legislature intended to expand the FAAA's liability protections to routine farm and operations.

The dissent bemoans the departure from plain meaning textualism and would leave it to the Legislature, not legislative history, to reign in statutory text.

Justices Blacklock and Boyd – the latter being the court's most arduous proponent of textualism and plain meaning – dissented to point out that the majority had effectively defined "any person" as used in the statute to include only certain people engaged in certain activities when the plain text of the statute warranted no such limitations. They complain the judiciary

> should not attempt to remedy a perceived disconnect between a broadly worded statute and the narrow concerns presumed to have motivated its enactment. That is a legislative function. We should apply the words of the law exactly as written.
>
> *But the majority opinion's ace-in-the-hole was the need to protect the worker's compensation statutory scheme*.

The majority responded by pointing out that its decision to limit the scope of the FAAA's immunity from liability was necessary to preserve the worker's compensation statutory scheme. The majority explained the Legislature could have tried to "single out ranch hands and deny them, alone of all employees in the state, any right of recovery whatsoever

for certain accidental injuries" if it intended the FAAA to override the worker's compensation statute. However, the majority denied that it was the judiciary's "place to make policy decisions that are for the Legislature to make. But it is exclusively [the court's] place to determine what policy decisions they have made." The majority required a more explicit indication from the legislative branch before it would hold the FAAA carved out a farm and ranch hand exception to Texas's workers compensation statute.

> **Derivative Sovereign Immunity** *protects government contractors from suit for alleged liability that is derivative of and dependent upon governmental liability. Otherwise, a government contractor only enjoys derivative immunity if the government controlled the alleged act or omission on which the contractor's liability is based.*

In *Dawn Nettles v. GTECH Corp*., a private contractor to the Texas Lottery Commission claimed it was derivatively entitled to the Commission's sovereign immunity when sued for fraud over allegedly misleading scratch-off game instructions. The contractor, however, was not entitled to shelter under the Commission's immunity umbrella because the Commission "did not control [the contractor]'s choices in writing the game instructions." However, the contractor was entitled to derivative sovereign immunity for claims the contractor "aided and abetted" and conspired with the Commission to defraud the plaintiffs because that liability was entirely dependent on the Commission being held liable.

The contractor proposed the Commission adopt a scratch-off game the contractor was producing for other states. The Commission agreed but requested some modifications to the game. The contractor complied but failed to modify the instructions to accommodate the modifications. Disappointed players sued when they learned that their tickets were not winners as they had believed based on the erroneous instructions. These suits proceeded as two separate actions yielding conflicting decisions by the Dallas and Austin appellate courts in interlocutory appeals from motions to dismiss for want of jurisdiction based on sovereign immunity.

These cases were consolidated before the Supreme Court of Texas where a fractured majority in a plurality opinion by Justice Busby resolved the conflict in the lower court opinions.

> *The plurality addresses the standards for application of defense the court has not yet recognized.*

The plurality begins oddly. It observes the court has not yet decided whether contractors could *ever* enjoy derivative sovereign immunity ("DSI"), only that no contractor in previous cases presenting the issue could have satisfied the DSI's requirements if it had been recognized. Nevertheless, the plurality opinion, like the opinions in the previous cases, discusses in considerable detail this so-far hypothetical standard as the groundwork for ultimately recognizing DSI later in the opinion.

> *DSI would only apply if the governmental to exercised control over the that part of the contractor's work out of which the liability allegedly arose.*

The possible scope of a private contractor's DSI would be limited to "cases where … the conduct complained of was "effectively attributed to the government" because it was effectively the act of the government *through* the contractor as opposed to "the independent action of the contractor." (Emphasis in original). That analysis is remarkably similar to the control test that distinguishes independent contractors from employees when deciding vicarious liability. If the government told the contractor *how* to perform a particular task, the contractor, at most, could only enjoy DSI to the extent it was allegedly liable for following those instructions. If the contractor either employed its own manner and means of performing the injury-causing event or failed to comply with contract specifications altogether, there could be no DSI.

> *According to the plurality, the contractor, not the Commission, chose the wording in the game's instructions so that the Commission could not be deemed to have controlled that aspect of the project.*

The plurality's opinion then proceeded under this paradigm by first identifying the precise game instructions alleged to have been actually and constructively fraudulent concerning. The plurality determined that the challenged wording of those instructions was the allegedly chosen by the contractor, not the Commission, as required under the contract. According to the testimony of the contractor's representative, she treated the Commission's suggested changes as requests the contractor was allowed to modify. The Commission's representative testified he relied on the contractor to raise any concerns about the game or its instructions. The plurality concluded this meant the contractor "had some discretion" about the game's structure and instructions. The government's close supervision the contractor's work was not the same thing as "specifying the manner in which a task is to be performed." Thus, the contractor would not have been entitled to DSI from the claims based on the allegedly misleading instructions even if DSI were a recognized defense.

> *The plurality rejected the Commission's ultimate* right of control *as sufficient justification for extending DSI to contractors.*

The contractor claimed, however, the Commission was the ultimate decision-maker about accepting or rejecting the contractor's recommendations, so it remained ultimately responsible for any misrepresentation. The plurality declined to consider this argument because of the procedural posture of the case. "A challenge to an element of a plaintiff's claim … does not implicate … jurisdiction" and "should be raised in a motion for summary judgment rather than a plea to the jurisdiction."

The ultimate control issue is where Chief Justice Hecht, with Justices Green and Blacklock, parted company with the plurality. They dissented from that part of the plurality opinion denying DSI to the contractor because they did not agree DSI should be limited to situations where the governmental entity tells the contractor what to do and how to do it. According this partial dissent, the Commission may not have exercised detailed control over the content of the instructions, but it had the ultimate decision about rejecting or accepting the contractor's recommendations. Therefore, they reasoned, DSI should have shielded the contractor from plaintiff's claims based on the wording of the instructions.

> *Chief Justice Hecht's partial dissent urges that the Commission's* right of control *is sufficient to warrant the extension of DSI to the contractor.*

The partial dissent also attacked the plurality's decision that extending DSI to the contractor would not serve the fundamental purposes of sovereign immunity: protecting taxpayers from the expense of "faulty government" and keep courts out of legislative and executive affairs. According to Hecht's partial dissent, "today's decision disserves those purposes" by "authoriz[ing] courts to tell … a state agency[] how to run its business."

> From now on the agency must choose between telling its advisor every move to make and thereby depriving itself of needed expertise, or allowing its expert discretion to provide counsel and thereby paying for litigation costs in the form of higher consulting contract prices that it would not otherwise incur…. [I]f the government acts only through its own employees, it is immune …, but if it consults experts … it is still immune … but the experts are not, except that the experts are immune … for helping the government defraud but not for giving the government advice that it uses to defraud.

The Hecht partial dissenters would have extended DSI to the contractor.

> *DSI extended to government contractors when the contractor's alleged liability is entirely derivative of the governmental entity's alleged liability*.

The plurality and Chief Justice Hecht's partial dissenters coalesced their views, however, over DSI for the contractor with respect to claims that it "conspired" with and "aided and abetted" an alleged fraud by the Commission itself. They reasoned any liability of the contractor under this theory of recovery was entirely derivative of the Commission's alleged liability. If valid at all, "these alternative theories [necessarily] assume that the Commission is responsible for … and committed fraud through [the game] instructions." That alleged derivative responsibility was enough to convince eight of nine justices that DSI for these allegations furthered the purposes for the doctrine of sovereign

immunity and that they should recognize for the first time that DSI could shield a government contractor from suit on such theories of recovery.

Justice Boyd dissented in part and concurred in part separately to reject DSI entirely. He believed "sovereign immunity only protects the sovereign" and "a contract with the government does not make private entities sovereign" so that could benefit from the government's immunity from suit. In his view, the contractor's proper defense would be one that could only be asserted on the merits, not as a jurisdictional hurdle, and would be based on the concept of qualified immunity.

Chief Justice Hecht's partial dissent challenged that approach because it obliged contractors to incur the expense of litigation which would ultimately adversely affect taxpayers through increased contracting costs.

> **Workers' Compensation:** An employee injury is not "intentional" from the standpoint of the employer and, therefore, exempt from the exclusive remedy provision of the workers' compensation statute, unless the employer knew there was a *definite* risk of a particular injury to a *particular* employee. Knowledge that a practice generally increased the risk that an employee would eventually be injured does not prevent it from being deemed "accidental" so it remains subject to the exclusive remedy provision.

For accidental, non-intentional, job-related injuries to employees, the Texas workers' compensation statute supplanted an employer's liability under customary tort remedies with a statutorily prescribed exclusive remedy unfettered by common law defenses. The Open Courts guarantee in Article XVI, § 26 of the Texas Constitution provides, however, "[e]very person...that may commit a homicide, through wil[l]ful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving [spouse and] heirs …." Soon after the worker's compensation statute was passed, the Supreme Court of Texas held in *Middleton v. Texas Power & Light* the Open Courts guarantee preserved, notwithstanding the workers' compensation statute's exclusive remedy provision, right to sue for the usual tort liability for damages resulting from "intentional," as opposed to "accidental," on-the-job injuries. "Intentional" injuries include those in which the actor either desires the consequences, or believed those consequences were substantially certain to follow.

At issue in *Mo-Vac Service Co. v. Escobedo* was the circumstances under which an employer could be deemed "substantially certain" its acts or omissions would result in an injury so that the exclusive remedy provision of the worker's compensation act would not foreclose the employer's tort liability. *Escobedo* was a survival action by the estate and relatives of a truck driver killed when his truck veered off the road in the middle of the night. The decedent had been "forced" to work an average 17 hours a day for eight days preceding the crash and 19 hours the day before it. Evidence opposing the employer's summary judgment motion further showed the employer routinely forced drivers to work long hours with little opportunity for restful sleep, instructed them about how to falsify logs to evade DOT restrictions, and ignored warnings that its demands would "get one of its drivers killed."

Under an opinion by Chief Justice Hecht, a virtually unanimous court held that this affidavit testimony not probative evidence the driver's injury and resulting death was "substantially certain" from the employer's standpoint. The first principle underlying the opinion's reasoning was the perceived necessity of maximizing the exclusive remedy provision deemed "critical" to the "continued effectiveness" of the workers' compensation scheme.

The opinion details holdings that, because of this need, an employer's common law liability "cannot be stretched" under the guise of "substantial certainty" to include everything that made an injury to *any* employee more likely. Knowledge that a dangerous condition will eventually result in an injury to some employee is not enough. For an injury to be deemed "intentional" so that the exclusive remedy provision does not apply, the risk from which the injury resulted must be a *definite* risk to a *particular* employee. Applying this standard to the summary judgment evidence in *Escobedo*, the majority held that Mo-Vac's knowledge that its practices may have made an employee injury more likely was no evidence that the employer intended to injure or kill Escobedo as the result of imposing grueling working conditions. Accordingly, Mr. Escobedo's injury and resulting death were not "intentional" so that the suit outside the exclusive remedy provision of the workers' compensation statute.

The majority recognized "[t]he temptation is for courts to search for ways to avoid harsh results and recompense injury from an employer's egregious behavior." However, it justified its decision by urging that "destabilizing the workers' compensation system is also a harsh result affecting all Texas employers and employees who benefit from it." The opinion offers no explanation why that policy concern is one for the judiciary rather than legislature.

As mentioned previously, this case was about whether injury was "intentional" so that the suit was not subject to the exclusive remedy provision of the worker's compensation act. However, it should be noted that the Open Courts guarantee allows "heirs" to sue for punitive damages even if the injury was not intentional. An action for punitive damages was not available to the plaintiffs in *Escobedo* because, while "family" members, they were neither the decedent's surviving spouse nor his statutory heirs.

Justice Guzman joined the majority because she felt precedent obliged her to do so. However, she concurred separately to urge the Legislature to expand the exception to the worker's compensation statute to add parents to those permitted to seek punitive damages because she deemed the employer's conduct in this case to be "at a minimum some evidence of extreme gross negligence."

> **Forum Selection Clauses** only apply to parties to the agreement or for the benefit of third parties who are permitted to enforce them under the agreement.
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> **Agreement Consummated by Multiple Instruments:** For multiple instruments to be deemed documentation of an overarching complex agreement, there must be more than mere common surrounding circumstances and contemporaneousness. There must be some indication the documents relate to the same or same series of agreements as part of a greater transaction.
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> **The Transaction Participant Theory** does not allow enforcement of forum selection clauses by signatories against non-signatories.

Reider v. Woods involved an interlocutory appeal from the denial of a special appearance. At issue was whether a forum selection clause that none of the individual plaintiffs or defendants signed could apply to them. The precise question was whether the forum selection clause in one agreement applied to the individuals as parties to a different agreement on the theory that the both agreements were components of a larger single transaction. A unanimous court ruled the agreements were not intended as a single transaction so the the forum selection clause did not apply to another agreement.

Three individuals formed a separate Nevada LLC in hopes of forming a business relationship with a Texas LLC and sell the Texas LLC's genetic testing services. The Nevada LLC's organizing agreement contained a generic clause permitting it "all [lawful] powers" allowed by Nevada's LLC law and choosing Nevada law for its interpretation. This organizing agreement did not mention the Texas LLC or the alleged objective of selling its genetic testing.

The individuals signed the Nevada LLC's organizing agreement. They did not, however, sign the instrument containing the forum selection clause that was executed on the same day as the Nevada LLC's organizing agreement. That instrument was a "series agreement" by the Nevada LLC with the Texas LLC. A series agreement is one that creates a "series LLC" with separate business purposes, rights, powers or duties of a subset of an LLC's members or assets under Business Organizations Code §101.601. The series agreement – the one that none of the individuals signed – is the instrument that contained the Texas choice-of-law and forum selection clauses. This series agreement also specified the "sale and distribution of DNA testing" as its business purpose.

These business aspirations were never realized. A dispute ensued among the Nevada LLC's organizing individuals after one of them accepted employment with the Texas LLC. The other two asserted this violated a restrictive covenant in the Nevada LLC's organizing agreement. The side-swapper filed a declaratory judgment action in Fort Worth, premising personal jurisdiction against the other two individuals under the forum selection clause in the "series agreement" which none of the individual defendants signed.

The plaintiffs in the declaratory judgment action urged the individual defendants were bound by the series agreement's forum selection clause because the series agreement and the Nevada LLC's organizing agreement were separate instruments implementing a single overarching agreement. The Texas Supreme Court unanimously rejected this argument.

> *The Nevada LLC's organizing agreement was not part of the same transaction as the series agreement and, therefore, the series agreement's forum selection clause was not binding on parties to the organizing agreement on the theory the organizing agreement was part of the same transaction as the series agreement.*

The court acknowledged "instruments pertaining to the same transaction may be read together to ascertain the parties' intent, even if … executed … at different times and [without] expressly refer[ring] to each other" if the documents were necessary to the same transaction. The manifest intent of the parties is essential, however, to treating multiple instruments as parts of a transaction. The plaintiff seeking to have the series agreement's forum selection clause applied to confer personal jurisdiction over the non-signatory individuals insisted that the transactional chronology established the Nevada LLC's organizing agreement and the series agreement facilitated a single transaction that would allow the Nevada LLC to market the Texas LLC's genetic services.

> *The circumstances were not enough to establish a single transaction and the court looks to whether the transaction was the "sole purpose" for the agreements.*

The court's opinion postponed addressing that argument because it first determined the "plain language" of the Nevada LLC's organizing agreement "cannot reasonably be construed as supporting the conclusion that it was executed for the *sole* purpose of entering the Series Agreement." (Emphasis added). "The mere fact that the [organizing] agreement and the series agreement bore some relationship to one another and were executed on the same day is not controlling" the opinion says. Obviously, the opinion places the burden on the party asserting the "same transaction" doctrine because the opinion cites nothing that forecloses the possibility that the organizing and series agreements *were in fact intended to be part of a single agreement.*

After saying the circumstances were not some evidence, standing alone, the agreements were intended to be part of the same transaction, the opinion points to the the broad "permissible activities" provision in the Nevada LLC's organizing agreement's "intent to form a broad-functioning limited liability company." According to the opinion, this provision supported the conclusion that the Nevada LLC's organizing agreements could not meet the "single transaction" test which the opinion also characterized as the "sole purpose" instead of the "same transaction" as the single transaction talisman. Without that change, nothing in the broad "permissible activities" clause would have been inconsistent with or *excluded* the possibility that the formation of the Nevada LLC was part of the same transaction as the series agreement.

The majority may have not recognized, and certainly offered no explanation why, it injected the more restrictive "sole purpose" for "necessary purpose" as the test for making two instruments parts of a single transaction. Under a "sole purpose" analysis, any organizing agreement that employs the customary purpose provision that broadly allows an LLC to pursue any and all lawful activities could never meet the "sole purpose" test. As if less than comfortable with this reasoning standing on its own, the court further supported its conclusion by pointing to the absence of anything in the organizing agreement that could "reasonably … support[] the conclusion that it was executed for the *sole* purpose of entering the [s]eries [a]greement."

Note the repetition of the "sole purpose" requirement. While "sole purpose" may have simply been a misguided short-hand reference for the same transaction test, the repetition of this keystone to the opinion's analysis suggests that it is equally possible the opinion intended to erect a new hurdle to the single transaction analysis. Drafters of multi-instrument transactions who wish to have the instruments construed together take note. Include a reference to a particular objective or transaction in addition to a broad statement of permissible activities if the parties intend for the organizing agreement to be part and parcel of a larger transaction or agreement.

The separate merger clauses in each agreement were treated as further indicating the parties intended the agreements not to relate to the same transaction.

The court also relied on the presence of merger clauses in the organization and series agreements as indicating that the parties to those agreements intended them as separate transactions. The opinion distinguished a contrary result in *In re Laibe Corp*., 307 S.W.3d 314, 317 (Tex. 2010) (orig. proceeding). *Laibe* involved a purchase contract and an invoice for a drilling rig, both of which involved the same parties. The purchase contract contained forum selection and merger clauses which the court held applied to both written instruments. The *Reider* opinion distinguished *Laibe* because both instruments were between the same parties and manifestly involved the same transaction and the merger clause in the purchase contract showed they intended for it, not the later invoice, to be their "final and binding agreement." In *Reider* the court reasoned the merger clauses "confirm[] the [organizing and series] agreements are separate and distinct from one another and the parties did not intend otherwise."

Of course, the opinion is bootstrapping here because this conclusion necessarily rests on the premise these agreements were not part of the same transaction in the first place. Those orchestrating deals requiring multiple instruments should, therefore, exercise caution about including a boiler plate merger clause without indicating each instrument is to effect one part of a larger, single transaction. Doing so, according to the *Reider* opinion, was a further indicium, in addition to the fact that each agreement was governed by the law of a different state, the parties intended these agreements embodied separate transactions.

The court also opined that the purpose of organizing agreement was to limit the Nevada LLC's liability before it entered the series agreement and that this showed the parties did not intend the two agreements to be parts of the same transaction. According to the opinion,

> These liability-limiting measures would have been unnecessary if the parties had intended the two business-formation documents to be construed as a single transaction. Absent a textual basis to do so, we cannot read the contracts in a manner that ignores the well-established legal principle that limited liability companies and their obligations are legally distinct from their members and managers.

Consequently, the court ruled the forum selection clause in the series agreement could not be enlarged to include the parties to the organizing agreement.

The board exculpation clause in the organizing agreement did not mandate enforcement of its own forum selection clause.

The organizing agreement also contained a "board exculpation" clause that said

> No Board Member … will be liable … to the Company or to any Member for any acts performed or omitted by him or her related to the Company, except … breach of the … duty of loyalty …; … acts or omissions not in good faith or which involve intentional misconduct … ; … breaches of this Agreement; or … for any transaction from which the Board Member derived an improper personal benefit.

The transaction participant theory did not permit enforcement of the series agreement's forum selection clause.

In *Pinto Technology Ventures, L.P. v. Sheldon*, the court observed three years ago that "'transaction participants' may enforce a valid forum-selection clause even if they are not actual signatories to the contract." This result was based on the notion of foreseeability that the forum selection clause would apply. Plaintiffs urged that this doctrine allowed the series agreement's forum selection clause to be applied to the non-signatory defendants.

The opinion rejected this additional attempt to invoke the forum selection clause because the transaction participant theory had only been applied to allow enforcement by non-signatories against signatories. Plaintiffs were trying to apply it to non-signatories. The opinion then points out that *Sheldon* did not adopt the transaction participant theory or decide "whether, or under what circumstances, a non-signatory transaction participant could enforce the forum-selection clause because it unequivocally limited those who could benefit from it and thereby made its enforcement against non-signatories impermissible. The opinion distinguished this situation from one in which the parties had agreed to extend arbitration rights to non-signatories. Because the series agreement's forum selection clause provided for no similar extension to non-signatories, it could not bind them because its application to them was unforeseeable.

In sum, to treat separately documented agreements as part of a single complex transaction requires an overt expression of that intent and, possibly, the transaction must be the "sole purpose" for the component agreement. Forum selection clauses may be invoked against signatories by non-signatories under the transaction participant theory, but not by signatories against non-signatories. In conclusion, it is worth noticing that the opinion's signatory/non-signatory dichotomy appears to assume the only persons bound by an agreement are those who actually sign it. The issue was not explicitly addressed so too much should not be read into signatory/non-signatory as the dividing line between parties bound and those not bound by an agreement.