

A banner featuring a wooden gavel resting on a wooden surface, with a blurred Texas state flag in the background. The text is centered over the image.

## Texas Supreme Court Update

### *Opinions Issued March 19, 2021*

By Stephen Gibson  
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**Mootness:** *A final judgment in the underlying suit subsumes all interlocutory orders and thereby renders moot any pending original proceeding or interlocutory appeal challenging an erstwhile interlocutory order. Such an order is merged into the final judgment which cannot be changed after the trial court's plenary jurisdiction expires.*

In 2011 and 2012, the Electric Reliability Council of Texas, Inc. (ERCOT), forecast within five years a severe shortage in generating capacity. Panda allegedly relied on this forecast to invest \$2.2 billion in building two new generating plants. After Panda started building these plants, ERCOT revised this forecast to predict a glut of generating capacity. Panda sued ERCOT to recover damages for misrepresentation, alleging it relied on ERCOT's forecast when it decided to invest in building the two plants. The trial court denied ERCOT's jurisdictional pleas which asserted the Public Utility Commission had exclusive jurisdiction over the dispute and ERCOT enjoyed sovereign immunity.

By statute, a "governmental unit" is allowed an interlocutory appeal to challenge denials of jurisdictional pleas. ERCOT perfected such an appeal but was concerned about whether it qualified as a "governmental unit" granted the right to an interlocutory appeal under the statute. To preserve its right to appellate intervention if it were not a "governmental unit," ERCOT also filed a petition for writ of mandamus in which it could continue to assert its claim of sovereign immunity from Panda's suit.

While the interlocutory appeal and mandamus proceeding were pending before the supreme court, the trial court rendered a final judgment disposing of all claims by all parties in Panda's misrepresentation suit. Panda timely perfected its appeal from that judgment. That appeal was ongoing on March 19, when the supreme court issued its opinion in this case. The time allowed for the trial court to modify the substance of its judgment – its "plenary jurisdiction" – had also expired. In the usual appeal from a final judgment, the appellate court may review all rulings leading to that judgment in the usual manner unless the error is not properly preserved.

In [\*Electric Reliability Council of Texas, Inc. v. Panda Power Generation Infrastructure Fund, LLC\*](#), and the related original proceeding attacking the trial court's disposition of the jurisdictional pleas, this circumstance presented the question whether the later rendition of a final judgment mooted the interlocutory appeal and mandamus.

A sharply divided supreme court dismissed both proceedings as moot. A five-justice majority in an [opinion written by Justice Boyd](#) explained a case is moot when: (1) a justiciable controversy no longer exists between the parties; (2) the parties no longer have a legally cognizable interest in the outcome, (3) the court can no longer affect the parties' rights or interests, or (4) the decision would provide an advisory opinion. The majority provided several examples in which a trial court's final judgment rendered moot appellate proceedings concerning interlocutory orders. These included situations when, like the ERCOT-Panda dispute, the substance of the controversy continues but must await the outcome of the appeal from the final judgment.

The opinion does not explain it precisely this way, but the justification for this rule is that the lower courts no longer have the power to change the interlocutory order after the trial court renders a final judgment. Any error can only be corrected in the appeal from that final judgment. Mandamus could not be issued because the complaining party has an adequate remedy by appeal. The trial court could not comply with a writ of mandamus because, having lost plenary jurisdiction, it has no authority to change the substance of its judgment. Resolution of the interlocutory appeal would

not be effective for similar reasons. Interlocutory appeals are resolved by a mandate that the trial enter a particular ruling in a pending proceeding. The trial court could not comply with such a mandate because the proceeding is no longer “pending” because it has been ended by the final judgment once the appeal from that judgment is perfected.

Having lost plenary jurisdiction to change its judgment, the trial court could not comply with a writ of mandamus to change its interlocutory order. Resolution of the interlocutory appeal would likewise have no effect because there is no longer a case pending in the trial court or over which it has any authority. As the majority explained, “we cannot direct the court of appeals ... to order the trial court to reinstate its interlocutory order denying ERCOT’s jurisdictional plea because the trial court has already entered a final judgment ..., and [review of] that judgment is pending ... in a separate appellate proceeding.” The ruling on the jurisdictional plea can only be changed in the appeal from the final judgment. The issues presented in the interlocutory appeal and original proceeding are, therefore, “moot” because procedural obstacles prevent the courts from resolving them. Relying on the procedural mootness concept, the majority refused to “spring forward” and resolve the parties’ dispute in the ordinary appeal before the court of appeals resolved that appeal.

Chief Justice Hecht, joined by three justices, dissented in a vigorous rejection of the majority’s self-restraint. The [dissent](#) begins by noting that whether ERCOT enjoys sovereign immunity is, since the winter storm and power outages experienced this February, a question to which the public as well as the parties want an answer. In addition to citing the public’s interest in knowing whether ERCOT enjoys governmental immunity, the dissent also bemoans how long the case has been pending to support its rejection the notion of procedural mootness. As the dissent put it, “The parties want to know. The public wants to know... [F]ive years after this litigation began ... [a]ll agree ... the trial court’s dismissal of the case did not moot the parties’ controversy. The parties have the same *real disagreement*.” (Emphasis added).

Justice Blacklock, who also joined the majority opinion, [concurred](#) separately to respond directly to the dissent’s appeal to perceived popular opinion. ““What the public wants’ in response to Texas’s recent winter-weather difficulties is a question [for] the executive and legislative branches of government,” not the judiciary whose responsibility is to “apply the law to the facts of the cases properly brought before it *without regard to public opinion*.” (Emphasis in original).

The dissent, however, bluntly declares the majority “simply wrong” when rejecting the determination that “there is no mandamus relief that can cause the case to be reopened in the trial court if the court of appeals erred” in concluding ERCOT enjoys immunity. The dissent warns the procedural mootness concept “could thwart review of appellate decisions [on a trial court’s interlocutory rulings] simply by ordering trial courts to comply with [those rulings] quickly.” It further posits if the supreme court determined otherwise, it “would direct the court of appeals to withdraw that ruling, and the Court would also require the court of appeals to reverse the dismissal it erroneously ordered.” The dissent does not explain, however, how prompt compliance with the appellate court’s interlocutory order could “thwart review.”

If the trial court simply proceeds in accordance with the appellate court’s judgment in the interlocutory appeal without rendering a final judgment, relief in the supreme court is still available by petition for review or for writ of mandamus. In a mandamus proceeding, the court has discretion to grant a temporary stay or other relief to preserve its jurisdiction. Tex. R. App. P. 52.10.

While the interlocutory appeal is pending, the appellate court may issue either a supersedeas or temporary orders to preserve the rights of the parties. Tex. R. App. P. 29.3. Moreover, Texas Rule of Appellate Procedure 29.5 explicitly prevents the trial court from entering any order inconsistent with a temporary order from an appellate court, interfering with the appellate court’s jurisdiction, or limiting the effectiveness of relief potentially available in the interlocutory appeal. In addition, [Civil Practice & Remedies Code § 51.014](#)(b) automatically stays many trials while an interlocutory appeal is pending. When available, the automatic stay should also prevent disposition by summary judgment.

The dissent appears to overlook mechanisms preventing the trial court from rendering a final judgment. The judgment of the court of appeals concerning the interlocutory appeal does not take effect until the appellate court issues its mandate. Tex. R. App. P. 18.6. The mandate cannot issue until ten days after no further time can be permitted to file a petition for review or additional time cannot be granted to move for rehearing. Thus, the aggrieved party can prevent the court of appeals from issuing a mandate and thereby limit the trial court’s ability to render a final judgment that

might, under the majority's reasoning, moot further pursuit of the interlocutory appeal simply by filing or moving for additional time to file a petition for review.

To reinforce the dissenters' conclusion a decision on ERCOT's governmental immunity should not await an appeal from a final judgment, Justices Guzman, Lehrmann and Devine, [separately dissented](#) to urge the majority "abdicates [the court's] Constitutional duty ... by declining to resolve the merits of a dispute the entire Court and both parties agree is live, legally cognizable, and of escalating importance." This dissent analyzes the question as a matter of justiciability under concepts imported from federal jurisprudence: whether there is a genuine and present dispute between the parties. They ignore that even if such a dispute exists, the court's authority to decide cases is not limited solely by justiciability.

Article V, section 3 of the Texas Constitution provides "the *appellate* jurisdiction [of the supreme court] ... shall extend to all [civil] cases *except ... as otherwise provided* in this Constitution or *by law*." (Emphasis added). Its *original* jurisdiction is likewise constrained by "such regulations as may be prescribed by law" and legislatively prescribed limitations on certain writs. One such law or regulation is the supreme court's own Texas Rule of Civil Procedure 329b.

Under rule 329b, when the trial court renders a judgment intended to dispose of all claims of all parties, its power – i.e. "plenary jurisdiction" – to change the substance of that judgment is time limited. *See Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993). The dissenters acknowledge this limitation on the court's *appellate* jurisdiction but insist the supreme court still has the power to correct the trial court's ruling in the original mandamus proceeding by ordering the court of appeals to correct the trial court's ruling on ERCOT's governmental immunity claim. It is unclear, however, how an order from the court of appeals could have any effect after time runs out on the trial court's loses power to change its judgment. The ruling on governmental immunity is merged into that judgment. If the judgment cannot be changed, changing the governmental immunity ruling would be of no consequence.

The sharp divide within the supreme court suggests that a different outcome might be available in a later case with a change in the court's membership. A one-vote switch would change the result in *ERCOT* and a substantial body of Texas law along with it.

The takeaway for practitioners is to take care to employ the measures available to prevent the trial court from rendering a final judgment while an interlocutory appeal or original proceeding is pending. There are many mechanisms for achieving this objective. These include seeking supersedeas, and diligent enforcement of the limitations on the trial court's power under Texas Rule of Appellate Procedure 29 and Civil Practice and Remedies Code §51.014. If these do not suffice, the court of appeals has the power to issue stays pending resolution of the interlocutory appeal.

**Res judicata** does not bar claims that were not ripe for adjudication in the previous litigation.

**Limitations:** A cause of action does not accrue until there is some damage and it is the summary judgment movant's burden to establish date of accrual.

**Waiver:** When considered under then-existing circumstances and in light of the entire course of the plaintiff's litigation conduct, the declaration plaintiff would not accept an assignment of interests was not an unequivocal waiver of the right to recover damages for allegedly wrongfully withheld proceeds.

[Eagle Oil & Gas Co. v. TRO-X, L.P.](#) was the second round in a fight over rights under a mineral lease. The lease included a provision allowing a party, Eagle, the right acquire interests in a prescribed area. Under the lease, the other party, TRO-X, had ten days to acquire an equal share of the acquired interest. Under the lease, those interests could be held in Eagle's name for the benefit of both Eagle and TRO-X.

In round one, TRO-X recovered judgement for "lost profits" on the theory that Eagle breached its contractual obligation by preventing TRO-X from *acquiring* its interests under the lease. The court of appeals ruled, however, that it was legally impossible for Eagle to have prevented from acquiring its interest because the lease itself vested TRO-X with equitable title and rendered a take-nothing judgment on the breach-of-contract theory under which the jury awarded lost profits.

Undeterred, TRO-X commenced round two to recover the production proceeds based on the theory of equitable ownership. In a haymaker otherwise known as a take-nothing summary judgment, the trial court put TRO-X down for the count on grounds its second attempt to recover production proceeds as damages were legally precluded by res judicata, limitations, or waiver. A unanimous supreme court ruled in an [opinion by Justice Lehrmann](#) that TRO-X should be allowed another "round."

*When the proceeds of the lease have not yet been generated during a suit to establish the ownership interest on which the claim to the proceeds is based, that suit is not res judicata of the right to those proceeds because such a claim was not ripe.*

*Res judicata* bars a second suit if the claim could, through the exercise of due diligence, have been asserted in previous litigation over the same subject, transaction or set of related transactions. Eagle and TRO-X agreed that there was a final judgment by a court with jurisdiction that bound the rights of the same parties or those in privity. Their dispute was over whether the claims in “round two” were “ripe” so that they could have been asserted during “round one.” To be “ripe,” circumstances must be such that an injury has occurred or is likely.

The opinion distinguished TRO-X’s claim in the first suit as one to establish its ownership interests whereas the second suit was to recover the *proceeds* from those interests – proceeds which had not been generated when the first suit had been proceeding. Thus, TRO-X’s claim for lost proceeds were not “ripe” when the first suit was decided and, therefore, could not have been asserted in that action. Accordingly, *res judicata* did not bar the suit to recover proceeds from TRO-X’s equitable interests.

*Summary judgment based on limitations could not be upheld because the movant did not adduce evidence when the cause of action for production proceeds accrued.*

The opinion also rejected Eagle’s assertion that TRO-X’s claim for production proceeds was barred by limitations. Eagle urged the cause of action for lost proceeds accrued immediately on Eagle’s failure to immediately assign TRO-X its share of the interest even though TRO-X was not damaged from this breach until the proceeds were generated. The opinion rejected this argument because the failure to document TRO-X’s interest did not deprive TRO-X of its equitable ownership. Therefore, TRO-X sustained no legal injury and no cause of action accrued with respect to the proceeds until there was production under the lease. Eagle, however, failed to discharge its burden of proving when production activity began and the date the cause of action for the recovery of those proceeds accrued. Accordingly, Eagle could not prevail on its limitations defense.<sup>1</sup>

*Summary judgment based on waiver could not be upheld because the statement that TRO-X would pursue damages and would not accept an assignment of interests was not an unequivocal rejection of the right to recover damages which it consistently pursued.*

In its last ground for summary judgment, Eagle claimed that TRO-X waived its right to recover production proceeds. During the “round one” ownership rights litigation, TRO-X had declared its intent to seek monetary damages and would not accept the “assignments of any interests” because it “didn’t want them anymore.” Without detailed discussion, the opinion concludes these statements have to be considered in the context in which they were made and did not establish that TRO-X unequivocally intended to relinquish all rights stemming from its equitable title. According to the opinion, its actions in both the first and second suit were “consistent with its ‘ultimate goal’ of being made whole.”

Finding no basis on which to affirm the summary judgment, the supreme court remanded the case to the trial court for final disposition. In doing so, it also vacated the trial court’s award of attorney’s fees under the declaratory judgment act for reconsideration of what award, if any, would be equitable and just under the final disposition of the case.

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<sup>1</sup> As a reminder that summary judgments cannot be affirmed on grounds raised for the first time on appeal, the opinion rejected Eagle’s arguments that it breached no contractual or fiduciary duty by failing to remit these proceeds because Eagle omitted these contentions in its summary judgment motion.

**Insurance Law – Prompt Payment Statute:** *The Prompt Payment of Claims Act’s penalties apply when an insurer does not timely pay the amounts appraisers ultimately determine should be paid on the claim even when that amount is not determined until after the statutory deadline expires.*

The [Prompt Payment of Claims Act](#) (“prompt payment statute”) generally requires an insurer to pay accepted first-party insurance claims within five business days after receiving all the necessary information requested. The prompt pay statute authorizes recovery of 18% interest and attorney’s fees if an insurer does not pay a claim within the statutory deadlines.

In *Barbara Technologies Corp. v. State Farm Lloyds*, the supreme court ruled that paying an appraisal award on a claim it initially *rejected* did not prevent recovery under the prompt payment statute if the appraisal award was not paid within the statutory deadlines. In *Alvarez v. State Farm Lloyds*, the insurer *accepted* the claim and paid part of the amount claimed. After the statutory deadlines expired, the insurer paid the additional sum the appraisers determined was owed under the policy. The supreme court held the quick payment of the difference between the amount initially paid and the appraisal award did not prevent liability under the prompt payment statute if that payment occurred after the statutory deadline.

In *Hinojos v. State Farm Lloyds*, the insurer accepted the claim and timely paid *part* of the amount the insured demanded before the statutory deadline expired. After the deadline expired, State Farm invoked the appraisal process and ultimately paid the difference between the sum it initially paid and the appraisal award. The trial court granted State Farm’s motion for summary judgment the insured take nothing under the prompt payment statute for the delayed payment of the entire amount owed under the policy. State Farm urged on appeal that it did not have all the “necessary information” to pay the claim until the appraisers made their award and the deadlines under the prompt payment statute did not begin to run until then. The court of appeals ruled State Farm’s prompt partial payment was “reasonable” and therefore enough to avoid liability for the interest and attorney’s fees allowed under the prompt payment statute.

The issue before the supreme court was whether State Farm complied with the prompt payment statute by timely paying the part of the claim it admitted owing when the contested balance of the amount due on the claim was not determined by the appraisers or paid by the insurer until after the prompt payment statute’s deadlines expired. In a 7:2 opinion by Justice Bland, the majority of the supreme court ruled “State Farm’s payment of the appraisal award outside the statutory deadline does not relieve it of ... liability” under the prompt payment statute. Relying on the court’s earlier decision in *Republic Underwriters Insurance Co. v. Mex-Tex, Inc.*, the majority rejected the notion that a “reasonable” payment within statutory deadlines excused State Farm from liability under the statute because it requires payment of the full amount ultimately determined to be due under the claim. Otherwise, insurers could avoid the prompt pay statute’s objective by partial payment.

On this point, Justice Blacklock joined by Justice Guzman [dissented](#) because they disagreed about what the court meant in *Barbara Technologies* by “delay payment.” According to the dissenters, an insurer who makes an initial payment on a claim within the statutory deadlines does not “delay payment” of the claim and should not be subject to the penalties imposed by the prompt payment statute. “[T]he simple approach that best comports with the statutory text is that an insurer who timely pays its insured’s claim at an amount lower than the insured would like has not “delay[ed] payment of the claim.” (Emphasis added). As this quote suggests, the dissent’s view of “the claim” does not include a specific *amount* but only a specified loss so that any timely payment toward that loss avoids the penalties. Justice Guzman [dissented separately](#) to emphasize that in her view the timely payment of that part of the claim it then believed that it owed was enough to avoid the prompt payment statute.

**Insurance Law – Separate Trials for Contractual Liability for Uninsured Motorists Liability:** *Trials of the uninsured motorist’s liability for purposes of determining whether the insurer would be liable under the uninsured motorists coverage under its policy must be bifurcated from the trial of the insured’s claims against the insurer for extra-contractual Insurance Code violations even if the insured only asserts the extra-contractual claims.*

“[A]n insurer’s extra-contractual liability is ‘distinct’ from its liability for benefits under the insurance policy.” *USAA Texas Lloyds v. Menchaca*, 545 S.W.3d 501-02 (Tex. 2018). Thus, an insured who seeks to impose extra-contractual statutory liability for the denial of uninsured motorist benefits must first establish a contractual right to those benefits. Doing so requires a two-stage trial that first fixes the insured’s *contractual* liability by establishing the uninsured

motorist's liability and the amount of damages payable under the uninsured motorists provision of the insurance policy. The second phase determines whether the insurer has extra-contractual statutory liability and, if so, the amount of damages for the extra-contractual liability.

As a general rule, proof of a *statutory violation* standing alone does not authorize recovery of policy benefits. In *USAA Texas Lloyds v. Menchaca*, 545 S.W.3d 479 (Tex. 2018), the supreme court recognized two exceptions to this general rule. First, "an insured who establishes a right to receive [policy] benefits ... can recover those benefits as 'actual damages' *under the statute* if the insurer's statutory violation causes the loss of the benefits. Second, "even if the insured has no right to those benefits under the policy," "an insured can recover [them] as actual damages [under the statute] ... if the insurer's [statutory violation] caused the insured to lose that contractual right."

*In re State Farm Mutual Automobile Insurance Co.*, was an original proceeding to determine whether insureds in two separate cases could recover amounts allegedly owed under their respective policies by only suing under the statute without also alleging the insurer breached the policy. In one of the actions, State Farm refused to pay any UIM benefits. In the other, State Farm paid less than the amount the insured thought due. Both suits alleged State Farm failed to "to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim [for] which the insurer's liability has become reasonably clear" and "promptly provide ... a reasonable explanation of the basis in the policy, in relation to the facts or applicable law, for the insurer's denial of a claim" in violation of Texas Insurance Code § 541.060(a)(2)(A), (a)(3).

Even though the insureds only sought to impose liability for statutory violations, not breach of contract, the suits only sought policy benefits as damages. State Farm nevertheless moved to bifurcate the trials to require the insureds to first establish liability and underinsured status of the other motorists. The insureds claimed no bifurcation was necessary because they had not based their claims on breach of contract. They urged that no matter whether they could prove their right to policy benefits, they were entitled to recover for State Farm's refusal to settle after its liability was reasonably clear and failure to reasonably explain its resistance to part of all of the insured's respective claims. The original proceeding ensued after the trial courts denied State Farm's motions.

A unanimous court under an opinion by Justice Blacklock ruled the trial court abused its discretion in ruling on State Farm's motion for a bifurcated trial because the insureds' recovery under the statute nonetheless required them to establish their contractual right to recover under their respective policies. Quoting *Menchaca*, the court reiterated "[a]n insured cannot recover any damages based on an insurer's statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent of a right to benefits."

*1. Nature of the damages sought determines whether the injury is "independent."*

The court rejected that this rule was limited to claims under homeowner's policies. It then rejected the insureds' claim they were asserting an "independent injury" because their *damages* were all rooted in rights conferred under the policies and were based on the alleged failure to make payments that were "adequate" under the policies. The legal basis of the claims for those damages did not determine whether there was an injury independent of the right to policy proceeds.

*2. Separate trial is necessary to avoid prejudice likely to result from presentation of evidence of extra-contractual liability in proceedings to determine contractual liability.*

Because the injury was not "independent" of rights under the policy, the opinion then considered whether the claim was one for policy benefits. It seems inevitable to this writer that damages that are not independent of the right to policy benefits will be one that, if valid at all, *is* for policy benefits. Nevertheless the opinion reiterates that recovery for uninsured motorists insurance both by statute and by common law requires the insured to establish the *damages* for which the uninsured motorist was liable. The court ruled that the proceeding to do so should be separate for two reasons: (1) to avoid wasting resources – both judicial and those of the litigants – in deciding issues germane to statutory recovery that would be moot if there were no right to recover damages under the policy; and (2) because of the need to consider offers of settlement in the trial of the statutory claim which would "prejudice" the insurer in the trial of the contract issues by suggesting the insurer has implicitly acknowledged liability. As a general rule, appellate courts say that they *must* presume the jury follows instructions to disregard evidence or to consider it only for limited purposes. *See Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 862 (Tex. 2009)(jury charge);

*Toyota Motor Sales, U.S.A., Inc. v. Reavis*, No. 05-19-00075-CV, 2021 Tex. App. LEXIS 4378, \*54 (Tex. App. – Dallas June 3, 2021, no. pet. h.) (instruction to disregard evidence). The opinion does not explain why this presumption would not be mandatory simply because it involves an insurer’s settlement offer.

3. *Appeal is not an adequate remedy “for the ‘time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.’”*

Further, the opinion posits the necessity for bifurcation is so clear the trial court abused its discretion in denying the motion. “When all of the facts and circumstances of the case unquestionably require a separate trial to prevent manifest injustice, and there is no fact or circumstance supporting or tending to support a contrary conclusion, and the legal rights of the parties will not be prejudiced thereby, there is no room for the exercise of discretion.” “When a bifurcated trial is denied in these circumstances, the insurer lacks an adequate appellate remedy for the “time and money utterly wasted enduring eventual reversal of improperly conducted proceedings.” Again, the opinion does not explain why it departs from the general rule announced in *Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992), in which the supreme court “disapprove[d] of ... any other authorities ... that ... imply ... a remedy by appeal is inadequate merely because it might involve more delay or cost than mandamus.”

**Appellate Procedure – Counter Supersedeas:** *Temporary relief orders to preserve the rights of the parties and the appellate court’s jurisdiction during an interlocutory appeal do not violate the general rule that judgments against state agencies are automatically suspended and cannot be “counter superseded.”*

Under Government Code §22.004(i), appeals by state agencies and department heads automatically suspend judgment enforcement without the usual supersedeas requirements – i.e., posting a bond or other security. If state agencies and department heads are not involved, the trial court may refuse to supersede enforcement if the appellee “counter supersedes” – i.e., posts sufficient security to protect appellant from the adverse effects of the judgment while the appeal is pending. So-called “counter supersedeas” is not available under any rule of appellate procedure when the judgment is against a state agencies or a department head unless the matter was “the basis of a contested case in an administrative enforcement action.” Tex. Gov’t Code §22.004(i); *see also* Tex. R. App. P. 24.2(a)(3).

[\*In re Texas Education Agency\*](#) was an original proceeding involving an agency’s interlocutory appeal of an adverse temporary injunction. The injunction was issued in Houston ISD’s fight against the Texas Education Commissioner’s plan to appoint a board to replace it. The trial court allowed HISD to counter supersede the judgment thereby allowing the injunction to remain in force during the appeal. The court of appeals vacated this order as a violation of §22.004(i).

However, if the effect of the temporary injunction were automatically suspended under §22.004(i), the commissioner could take final and unappealable administrative action that would render the interlocutory appeal moot. Acknowledging §22.004(i) prohibited counter superseding the judgment in an appeal by a state agency, the court of appeals dissolved the trial court’s ruling allowing HISD to counter-supersede and thereby allow continued enforcement of the temporary injunction. However, pursuant to Texas Rule of Appellate Procedure 29.3, which authorizes it to make any temporary orders necessary to preserve the rights of the parties and the appellate court’s jurisdiction over the interlocutory appeal while an interlocutory appeal is pending, the court ordered that the temporary injunction remained in effect until it could rule on the appeal.

In an 8-1 decision by Justice Guzman, the majority ruled the appellate court’s order to preserve the *status quo* and the rights of the parties under rule 29.3 did not violate the prohibition against counter supersedeas in §22.004(i). The majority explained that the temporary order was not “counter-supersedeas” proscribed by §22.004(i) because supersedeas and counter-supersedeas are devices that originate in the trial courts, whereas temporary orders originate in the appellate court. More importantly, the opinion traces the historical origins of the §22.004(i) prohibition and concludes that it does not create an absolute right of government agencies to suspend enforcement of all judgments against it. Appellate courts have an inherent right to preserve its authority to decide pending cases on the merits.

Under the circumstances in this case, recognizing an absolute right to supersedeas would have the effect of depriving the court of appeals of the power to decide a case properly before it. The majority concludes the language in §22.004(i) manifests the Legislature’s intent only to regulate the process of supersedeas in the trial courts, not the inherent ability of the appellate court to preserve its authority to decide cases within its jurisdiction. The majority noted that Texas Rule of Appellate Procedure 29 itself differentiates between the supersedeas process, Tex. R. App. P. 29.1, and the

materially different objectives of temporary orders. Tex. R. App. P. 29.3. The majority also notes that rule 29.3 requires the actions of a “multi-judge panel” so that the actions of a single trial judge cannot “the state from exercising its lawful powers and from representing the public as it sees fit” while the appeal is pending. The majority also noted that if the Commissioner thought delay in the effectiveness of the injunction were harmful it could have but did not seek an expedited resolution through an accelerated briefing and submission schedule.

Chief Justice Hecht *dissented*. In his view, the majority violated the plain mandate of §22.004(i) and “flaunts the Legislature’s will” by distinguishing temporary orders from supersedeas while leaving “the wellbeing of school children in limbo” because “several District schools have underperformed academically—which means ... students were denied the education promised

by state law, dimming their futures and injuring society.” Chief Justice Hecht reasons the practical effect of the temporary order and the prohibited “counter-supersedeas is identical and labels the majority’s reasoning as “backdoor purposivism” untethered from the statutory text. He asserts the majority is being inconsistent because it refused to accept substantially identical arguments by Texas Democrats in a case seeking a determination whether Covid-19 was a sufficient reason to request a mail-in ballot.

Justice Guzman, writing for the majority, responded sharply to “address the dissent’s *misrepresentation* that the Court ‘reached a conclusion exactly the opposite of the one it reaches today’.” Clearly, passions run high over this otherwise limited and relatively technical issue.

**Upcoming Attractions:** The supreme court agreed to accept a certified question from the Fifth Circuit whether it will recognize an exception that will permit consideration of facts other than those alleged in the underlying lawsuit when deciding an insurer’s duty to defend its insured. The case is [\*Bitco General Ins. Corp. v. Monroe Guarantee Ins. Co.\*, No. 21-0232](#).