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September 2: Petitions Granted, Arguments Scheduled
In this edition, the *Update* will preview the 17 cases that have been scheduled for argument so far this term. The petitions in 15 of these cases were granted on September 2, the first day of the current term. These represent approximately one-sixth of the total number of cases the court is likely to hear this term. There's a little something for everyone, but oil and gas, the Texas Citizen's Participation Act, governmental immunity and *ad valorem* taxation are continuing topics of interest to the court.

Here's the preview of coming attractions.

Defamation: What Does "Gist" Mean Under the Texas Citizen's Participation Act?
On October 4, the court heard oral argument in *D Magazine Partners, L. P. v. Rosenthal*, a defamation case arising from an March 2013 article entitled "The Park Cities Welfare Queen." The article was written by an "Anonymous Park City Parent" who reported that Rosenthal received and food stamp benefits while living in a $1.15 million University Park home.

The dispute is not about the contents of the article, but rather what was its "gist." In a 2-1 decision, the majority of the Dallas court of appeals determined that the article was defamatory because its "gist" included an implied accusation of welfare fraud that the magazine failed to show was true. Consequently, the plaintiff survived the magazine's motion to dismiss under the Texas Citizen's Participation Act. The dissent disagreed treating the "gist" of the article "satirical critique of a benefits system that allows a woman with a criminal history of theft, living in a million-dollar home, and taking advantage of the highly rated school system of a wealthy enclave, to collect food stamps. The central issue is whether the majority went too far in using sources outside the record but available to readers to create a defamatory innuendo even though the article did not explicitly accuse Rosenthal of fraud.

Property Insurance: Unfair Claims Settlement Practices & Necessity of Breach of Policy or Independent Injury from Failure to Adequately Investigate
The court granted the petition in *USAA Texas Lloyds Co. v. Menchaca* and will hear oral argument on Tuesday, October 11. *Menchaca* is a suit arising from homeowner's insurance coverage for damages caused by Hurricane Ike. The Montgomery County jury found no breach of contract, but concluded that the insurer did not reasonably investigate the claim. The trial court disregarded the jury's determination of the contract issue. It deemed the jury question inadequate to obtain a meaningful determination of whether the insurer breached the policy by failing to pay. It rendered judgment awarding contractual and extra-contractual damages based on the failure-to-reasonably-investigate finding.

[1] The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

The Corpus Christi court of appeals upheld the judgment except for the interest penalty for delay. Texas Insurance Code 542.003(b)(3)proscribes "failing to adopt and implement reasonable standards for the prompt investigation of claims arising under the insurer's policies." The court of appeals held that, standing alone, the finding that the insurer violated this provision supported the award of both the amounts due under the policy – i.e., contractual damages – and extra-contractual damages. The insurer contends that allowing recovery is barred by the holding in *Provident Am. Ins. Co. v. Castañeda*, 988 S.W.2d 189, 198 (Tex. 1998), that recovery on an extra-contractual theory requires proof of either a policy breach or an injury independent of the loss of contractual benefits. The insured argues that she is entitled to recover under the holding in *Vail v. Texas Farm Bureau Mutual Insurance Co.*, 754 S.W.2d 129, 136 (Tex. 1988), that "an insurer's unfair refusal to pay the insured's claim causes damages as a matter of law in at least the amount of the policy benefits wrongfully withheld."

Real Property: A Rule Against Perpetuities Case … No Kidding

If, like yours truly, you laughed during law school at the notion that the Rule Against Perpetuities would ever surface in your professional life, it's time to stop laughing. The court will be hearing such a case. Soon. The petitioner in *BP America Prod. Co. v. Laddex, Inc.*, argues that Rule Against Perpetuities – at least the version ensconced in article I, §26 of the Texas Constitution – invalidates a lease which was necessary to vest respondent with an interest necessary to its standing. Under the Rule, "no interest is valid unless it must vest, if at all, within twenty-one years after the death of some life or lives in being at the time of the conveyance." The parties dispute the validity of a "top lease" because when it is possible for an interest to vest outside the period permitted by the Rule. This case will also be heard on Tuesday, October 11.

Statutory Interpretation: Family Therapist's Capacity to Diagnose Mental Disorders

The court agreed to hear *Texas State Board of Examiners of Marriage & Family Therapists v. Texas Medical Ass'n* to review a decision by a divided Austin court of appeals to interpret the statutory definition of "marriage and family therapy" to exclude diagnosis of mental disorders overturning a practice accepted for two decades. This case will round out the October 11 oral argument calendar.

Measure of Damages & Limitations for Land Pollution

The court granted the petition in *ExxonMobile Corp. v. Lazy R. Ranch, L.P.* to revisit the proper measure of damages and the accrual of a case of action for contamination of real property. The court of appeals in this case allowed the landowner to recover the costs of a remediation plan that far exceeded the diminution in the value of the property. Hitherto, it has been fairly settled that recovery is limited to the lesser of costs of repair or diminution so that the law did not encourage economically infeasible repairs. The limitations issue turns on whether a cause of action can accrue if the landowner does not know the full extent of damage or the defendant fraudulently concealed the full extent of the damage or could not specify a precise accrual date. The court will entertain arguments on November 7.

Labor Code Statutory Pre-Emption: Sexual Assault v. Sexual Harassment

On November 7, the court will hear argument in *B.C. v. Steak 'n Shake Operations, Inc.*, a workplace sexual assault case. The issue is whether the common-law intentional tort of sexual *assault* has been preempted by the statutory cause of action for sexual harassment under the Texas Commission on Human Rights Act in chapter 21 of the Texas Labor Code.

Directors' & Officers' Insurance: Insured v. Insured Exclusion

On the November 9 argument calendar is *Great American Ins. Co. v. Primo*. At issue is the applicability of the insured v. insured exclusion to a suit against an insured by the *assignee* of another insured under the same policy. Here, a dispute arose over checks the company treasurer wrote to himself. The company's fidelity bond company paid the company for its losses and sued the treasurer as the company's assignee. The bond company's suit was non-suited but the treasurer sought his defense costs under the D&O policy. The decision that the loss was not excluded turned on whether "successor to the interests" of the insured organization applies if the person bringing suit is not the successor *in* interest to the organization; i.e., succeeds to all of the rights of the insured. Also at issue are the scope of the rule barring extrinsic evidence in deciding duty to defend and ability to re-litigate matters determined in the underlying litigation.

Malicious Prosecution

Bennett v. Grant is a malicious prosecution case questioning whether legally sufficient evidence supported the jury's finding that the petitioners procured the respondent's indictment by deception and whether more than $1 million in exemplary damages on $10,700 actual damages violated constitutional limits. Also at issue is whether the trial court abused its discretion by allowing the plaintiff, to join a third-party defendant in the trial proceedings. The case will also be argued November 9.

***Ad Valorem* Taxation**

Valero Refining –Texas L.P. v. Galveston Central Appraisal District is an equal-and-uniform-taxation challenge. The questions the court will entertain are whether the trial court has jurisdiction if the property owner only challenges some but not all component parts of the property, each with a separately assigned tax account and, if so, whether the owner must prove the component parts can be separately valued apart from those parts that have not been challenged. Also at issue are whether the owner must present evidence (and explaining the exclusion of unchallenged component parts and the standard by which that evidence is deemed sufficient. The dispute also includes whether the valuation of other refineries is legally sufficient evidence that an appraisal is not equal and uniform.

Bankruptcy: Exchange Agreement Indemnity

Noble Energy Inc. v. ConocoPhillips Corp. is an indemnity dispute in which Conoco seeks to hold Noble liable under an indemnity agreement entered by a bankrupt from whom Noble purchased certain assets in bankruptcy. The asset purchase agreement limited the assumption of liabilities only to those specifically identified. The bankruptcy order provided all assets were "free and clear" of all "claims." Ten years later, Conoco sued for indemnity under a pre-bankruptcy agreement between it and the bankrupt. The indemnity agreement was not listed in either the purchase agreement or listed in the bankruptcy schedule. The issues are (1) whether a pre-bankruptcy exchange agreement was executory under the Bankruptcy Code and (2) whether the appeals court misconstrued the asset-purchase agreement and bankruptcy plan under Texas contract law.

Oil & Gas: Commercial Viability Under a Producer's Lease & Significance of the Form of the Jury Charge

BP America Production Co. v. Red Deer Resources LLC is a contest over the viability of a producer's lease. The first issue is whether the top-lease holder secured a necessary finding that a well was *incapable* of producing in paying quantities when the producer stopped production and invoked a shut-in royalty clause. The finding it obtained from the jury, however, was that the well was not incapable of production in paying quantities until *the day after* the well was shut in. BP challenges the sufficiency of this finding to support the judgment and whether the jury's findings irreconcilably conflict. Also under attack is whether evidence of unprofitability is any evidence that the lease was *incapable* of production in paying quantities and how the jury should have been instructed with respect to wells that flow intermittently. The last issue is whether the trial court's refusal to submit a requested definition of "speculative" was harmful when, according to BP, what is "speculative" in the oil and gas business excludes matters that would be deemed speculative in other ventures because the oil and gas business involves inherently higher risks. This case will be argued November 10.

Attorney-Client Privilege: Can a Party Seeking Its Own Attorney's Fees Discover the Opponent's Attorney's Fees for Purposes of Comparison?

Also on the November 10 calendar is *In re National Lloyds Insurance Co*. In dispute is whether an insurance company's attorney fees and the basis for them are discoverable when the insurer is not seeking its fees, but rather is contesting the insured's fees for pursuing the insurer for underpayment of the insured's damage claims. The trial court ordered and the Corpus Christi court of appeals approved the disclosure of the insurer's attorney's fees and the insurer urges that disclosure violates its attorney-client privilege.

Insurance Premium Finance Statute: Policy Cancellation

BankDirect Capital Finance LLC v. Plasma Fab LLC and Russell McCann arises out of the termination of an insurance-financing agreement for chronic late payment. The notice of termination was only 9 days instead of the required 10, but the court of appeals held it was effective as of the earliest date permitted under the Texas Premium Finance Act. The parties contest whether a substantial compliance standard is permissible under the TPFA and whether the power-of-attorney agreement BankDirect used to cancel the policy should be strictly construed.

Chapter 33 Comparative Responsibility: Is Responsibility Permitted Where Liability Would Not Be?
Pagayon, et al. v. ExxonMobil Corp. questions the liability standard that must be met to submit the responsibility of an emergency room physician as a responsible third party under Texas Civil Practice & Remedies Code chapter 33, the comparative responsibility statute. The plaintiff sued Exxon for negligent supervision of its convenience store employee who assaulted the decedent. Exxon claimed the emergency room physician's negligence was at least partly responsible for the decedent's demise. Under the medical liability statutes in chapter 74 of the Texas Civil Practice & Remedies Code, an emergency room physician cannot be liable for ordinary negligence. Instead, the physician must commit "willful and wanton negligence." The court of appeals ruled, however, that to reduce a defendant's share of "responsibility" for purposes of the comparative responsibility statute only required culpable behavior, not *liability* for that behavior. On the other hand, the purpose of chapter 33 was to put the parties in the same position that they would have enjoyed had all responsible third parties been joined in the action, which would require proof of liability before there would have been a right of contribution. The court will hear this and the following case December 6.

***Ad Valorem* Taxation: Prohibited for Temporarily-Stored Gas by the Dormant Commerce Clause?**
ETC Marketing Ltd. v. Harris County Appraisal District asks the court to decide whether, consistent with the dormant Commerce Clause, natural gas temporarily stored in Texas is then in "interstate commerce" and, if so, whether it can be assessed for purposes of *ad valorem* taxation.

Vicarious Liability Based on Breach of Fiduciary Duty: Are Causation and Damages Necessary?
In *First United Pentecostal Church of Beaumont v. Parker*, the church seeks to recovery from its attorney who lied about a trust-fund embezzlement by a colleague. The church seeks to impose liability on the prevaricating lawyer on the theory that the lawyer breached a fiduciary duty. The question is whether liability under that theory requires some evidence of causation and damages and, if so, whether the evidence adduced by the church sufficed.

Governmental Immunity for Private University's Police Department?
University of the Incarnate Word v. Redus is a this wrongful-death case arising from a university police shooting. The private university claims that when the Legislature granted it the authority to create a Texas law enforcement agency that commissions peace officers, it is entitled to governmental immunity with respect to the law enforcement agency. If it was immune, the university was entitled to an interlocutory appeal from the trial court's refusal to dismiss the suit against it on immunity grounds.