

ALAN B. DAUGHTRY - REPRESENTATIVE MATTERS

The following reflects a summary of various types of matters of past engagement. It should be noted, however, that prior results in other matters do not guarantee a similar outcome.

MARITIME REPRESENTATION—

Rigdon Marine v. Roberts, 270 S.W.3d 220 (Tex. App.—Texarkana 2008, pet. denied).

Issues—

- Jones Act Liability/General Maritime Unseaworthiness
- Proper Maritime Jury Charges and Instructions
- Direct Employer Liability/ Unruly Crews
- Standards for Recovery of Lost Earnings, Earnings Capacity

Summary—

A ship owner has the affirmative obligation to provide a ship with a safe, competent crew. Rigdon Maritime had well-documented problems with the crew of the *Iberville*—drug use, drinking. And frequent fighting between a mixed crew of Angolans and Americans. Rigdon Marine brought in Bobby Robert as a replacement captain, and to do so, they promised Roberts that various troublesome members of the crew had been removed.

That promise was broken, and fights and riots greeted Roberts the first day he was aboard. An American member who was to have been removed left the ship, came back intoxicated, and then came back spitting on Angolan crewmembers. The Angolan crew then rioted. After the fighting had supposedly been quelled, a number of Angolans threatened Roberts with a knife, saying “now you die.” Roberts then held up in the bridge with Angolans threatening to break down the door. Apparently safe, the replaced captain (who was supposed to have been removed) let the Angolans in, where Captain Roberts was severely beaten.

Rigdon sought to avoid liability based on the savage disposition doctrine, a well-recognized theory that requires the ship owner to have known of a particular crew members’ savage disposition and then fail to do something about it. Moreover, cases recognize that fights are common at sea, and not necessarily indicative of a savage disposition. Because Roberts was attacked by a mob (and could not identify anyone), Rigdon argued that savage disposition of any particular crew member could not be established, much less that the employer’s failure to identify that savage disposition had caused the harm.

In a case of first impression, the court of appeals recognized the doctrine of direct liability. For a typical crew fight, the ship owner is only liability if it had advance

knowledge of a savage disposition that could foreseeably lead to harm, and then failed to remedy the situation. For this situation, however, the court recognized that the owner was already aware of the bad situation, and failed to eliminate unruly crew members; thus, direct liability was established, and the savage disposition doctrine was deemed not applicable in this unusual circumstance. The court also upheld the jury charge submitted to the jury, refusing certain embellishments, and limiting the situations in which foreseeability and proximate causation were required. In addition, the court established guidelines for upholding sizable lost earnings damages where the income had not diminished for some time after the accident, based on lost opportunities for advancement and physical infirmities.

***SeaRiver Maritime, Inc. v. Pike*, No. 13-05-0033-CV, 2006 WL 1553264 (Tex. App.—Corpus Christi June 8, 2006, pet. denied).**

Issues—

- Jones Act Liability/Causation of Damages
- Limited Standard of Review/Featherweight Causation
- Standards for the Recovery of Medical Expenses

Summary—

Under federal maritime law, a ship owner has high standard of care in providing a safe working environment for its crew, as well as liability for injuries sustained at sea. The captain of the *S/R American Progress* removed safety mats from the ship's galley, which had been supplied to prevent slipping on the slick tile surface of the galley deck. With the ship rolling heavily in North Atlantic Sea, Pike spilled some grease during cooking. She then slipped, slicing open her leg and hurting her back. A jury found the ship unseaworthy and SeaRiver negligent under the Jones Act.

On appeal, SeaRiver challenged causation claiming that Pike caused her own injury. But the court of appeals upheld SeaRiver's liability, noting that the rolling condition of the ship, coupled with the slick tile, required the use of safety mats to prevent slipping. The court also rejected SeaRiver's claim that the amount of future medical damages was required to be supported independently by medical expert testimony. The court, however, reduced the amount of damages awarded to conform to the amount of evidence of medical expenses submitted to the jury.

***In re Shippers Stevedoring Co.*, 274 S.W.3d 840 (Tex. App.—Houston [14 Dist.] 2008, orig. proceeding).**

Issues—

- Tort Recoveries for Longshore Workers

- Exceptions to LHWCA Preemption
- Mandamus Review/Subject Matter Jurisdiction

Summary—

Lewis was killed when a forklift backed up over her while checking containers for inventory on the docks at a port terminal. The driver had not been trained to operate the forklift, and he lacked the necessary certification from the applicable governmental agency. The heirs and estate of checker who was killed while working at a dock on a ship channel brought action against checker's employer for wrongful death and survival. The employer claimed preemption under the Longshore and Harbor Workers' Compensation Act.

The probate court initially dismissed the claim, but after being brought in to file a motion for rehearing, the court actually reversed its decision and reinstated the claims, arguing that the location of the worker fell within the “twilight zone” of concurrent jurisdiction and thus permitted a claim for gross negligence. The employer sought mandamus review from the court of appeals, which refused to permit review by the extraordinary writ of mandamus. The probate court has since let the claim of gross negligence proceed against the employer, preserving claims for the estate and heirs.

CONSTITUTIONAL ISSUES—

Humana Insurance Company v. Jerry Luke LeBlanc, et al., consolidated with United HealthCare v. Honorable Kathleen Blanco, The Governor of the State of Louisiana, Cause Nos. 07-594, 07-532 (M.D. La. Oct. 31, 2007).

Issues—

- Contracts Clause/Impairment of Contracts
- Government Contracts/Procurement and Bidding
- Commerce Clause/State Restraints on Commerce and Contracts
- Substantive Due Process
- 11th Amendment Immunity/Exceptions
- Federal Injunctive/Declaratory Relief Against State Acts/Legislation

Summary—

The United States Constitution sets restrictions on States’ ability to discriminate against non-residents. Called the dormant Commerce Clause provision of the Constitution, courts have held that States generally cannot erect barriers to competition that favor local or State residents over non-residents. United HealthCare, along with another national insurer, won a competitively bid contract with the Office of Group Benefits in Louisiana to administer health care benefits to state and local employees and retirees. Prompted by a local Louisiana-based

insurer that had lost out on the bidding, the Louisiana Legislature passed a bill requiring the Office of Group Benefits to give a contract to any local insurer, greatly undercutting the benefits of the prior contract. The district court held that this legislation favoring local interests to the detriment of non-resident companies violated the dormant Commerce Clause, and an injunction was issued precluding enforcement of the legislation.

Simi Investment Co. v. Harris County, Texas, 236 F.3d 240 (5th Cir. 2000), rehearing denied, 256 F.3d 323 (5th Cir. 2001).

Issues—

- Right of Access/Abutting Property Rights
- Substantive Due Process/§1983 Liability for Constitutional Violations
- Arbitrary and Capricious Governmental Acts
- Governmental Takings/Interference to Benefit Private/Special Interests
- Exhaustion/Ripeness Requirements for Constitutional Claims

Summary—

A governmental entity abuses its power when it deprives property owners of rights for the benefit of special interests. Here, Harris County capriciously deprived Simi Investments of its right of access to Fannin Street as an abutting property owner. The County claimed existence of an intervening five-foot fictional park, which had been created to benefit the special interests of former County Judge Roy Hofheinz, who had owned the property north of the Simi Investments tract.

Harris County established the Fannin Street right of way in the 1960s in conjunction with the building of the Astrodome. Harris County Judge Roy Hofheinz, who would have been involved in the County's acquisition of rights of way, was also President of the Houston Sports Association, which also leased the Astrodome from the County.

Hofheinz had his business partner acquire significant blocks of land along the Fannin Street right of way. After Hofheinz' efforts to acquire the Simi tract were rebuked, Harris County modified the Fannin Street right of way plat to depict a five-foot park running from the southern boundary of the Hofheinz property, along the boundary of the Simi property to the 610 loop. The result of this altered plat (notated as "location questionable") depicting a five-foot wide "park" was that all of the Hofheinz property abutted Fannin Street (and thus had a right of access), whereas the Simi tract was denied access due to the intervening five-foot "park." The owners of the Simi property repeatedly sought access to Fannin Street from Harris County. In denying approval for a curb cut, the County Engineer consulted with former County Judge Hofheinz, who objected.

Moreover, the County did not treat the strip as park land, allowing gas lines, bus stops and sidewalks to be located along the majority of the five-foot wide strip.

The Fifth Circuit held that the County's conduct deprived Simi of its substantive due process rights, as the fictional five-foot wide park had been arbitrarily and capriciously used to deny Simi's its right of access to Fannin Street as an abutting property owner, particularly as the County's actions in interfering with Simi's rights of access had been to benefit the private interests of the Hofheinz family holdings. The court also held that Simi was not required to exhaust its taking claims in Texas state court before pursuing any constitutional claims in federal court. As the interference for a fictional park was improper in and of itself, Simi's claims were ripe from the outset, and did not require an initial hurdle of seeking just compensation from a state procedure.

In denying rehearing *en banc*, the Fifth Circuit stressed the illegality of the County's conduct, and it noted that this case represented the rare situation in which a substantive due process claim would lie.

***Williams v. Houston Firefighters Relief and Retirement Fund, et al.*, No. 98-21080 (5th Cir. July 19, 2000).**

Issues—

- §1983 Liability/Procedural and Substantive Due Process
- Vested Rights/Retroactive Determinations
- Immunity/ Legislative and Judicial Functions
- Pension Rights/Administrative Rulemaking and Interpretation

Summary—

A statutory pension board with the power to promulgate and interpret guidelines for determining pension benefits performs a legislative, more than a judicial, function. Williams brought constitutional due process and equal protection claims challenging the Houston Firefighters Relief and Retirement Fund's determination of guidelines for quantifying pension benefits for prior service credit for firefighters transferring from other cities with different type of pension plans. The Fifth Circuit held that Williams was afforded due process—the right to notice and to be heard. As to his claims over the guideline promulgation and interpretation, the court of appeals held that this legislative function was not subject to suit under Section 1983 for constitutional deprivations.

***Sanchez v. General Growth Mgmt. Co.*, No. 96-21070, (5th Cir. Jan. 23, 1998).**

Issues—

- Title VII Liability/Discrimination

- Hostile Work Environment/Standards of Proof
- Outrageous Conduct/Intentional Infliction Emotion Distress

Summary—

In response to Sanchez' claims of constructive discharge based on race, hostile work environment and intentional infliction of emotional distress, the Fifth Circuit reviewed Sanchez' claims from the context of the complaint he filed with the EEOC. The complaint lodged with the EEOC was radically different from the claims he asserted in his subsequent lawsuit. For example, his administrative complaint alleged that he was discriminated against because the company accepted his resignation, but did not accept the resignation of a white security director. In a case of the underlying complaints not matching the claims in the lawsuit, the Fifth Circuit held that Sanchez' claims were precluded because he did not exhaust his administrative remedies by pursuing those charges with the EEOC before filing suit.

GOVERNMENTAL POWERS/CONDEMNATION—

Seureau v. Exxonmobil Corp. & Port of Houston Authority, 274 S.W.3d 206 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

Issues—

- Sovereign Immunity/Navigation District
- Immunity from Derivative, Successor Liability

Summary—

A governmental entity is generally immune from lawsuits, and in this matter, the Seureau family sought to have the Port of Houston liable for \$600 million in damages for lost development opportunities regarding the Seureau's property. The Seureau land abutted property held for development by the Port, and the Seureaus contracted with Exxon to be included in development plans tied to the potential Port development project. Years later, however, Exxon backed out, and the Port condemned the Seureaus' property after acquiring additional property from Exxon. Claiming that they had been denied the opportunity to develop the property in violation of an agreement with Exxon, the Seureaus sued for damages for the lost development opportunity.

The court of appeals confirmed that the Port, as a governmental entity, has immunity from suit unless consent for suit has been provided by the legislature. This decision reversed prior decisions finding that a statute allowing the Port to "sue or be sued" waived immunity. Instead, this statute reflected the corporate powers of a navigation district, allowing it to appear and prosecute or defend against lawsuits. The court also negated any derivative liability or any exceptions to this immunity. The Seureaus claimed that Exxon had agreed to allow for

development, and that when the Port acquired the property from Exxon, it too was then subsequently bound by the agreement to permit development. The court confirmed that the Port was not a party to any agreement to permit development; however, the court found that the Port could not agree to forego its constitutional power of eminent domain—an entity cannot agree to constrain its powers. Free to condemn the land, the Port was immune from any claims for damages, except for the requirement that the condemning authority pay “just compensation” the market value of any property acquired by eminent domain. Lost profits for development would not fall into this category.

***Board of Regents of the University of Houston v. FKM Partnership, Ltd.*, 178 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2005), *aff’d in part, rev’d in part*, 255S.W.3d 619 (Tex. 2008).**

Issues—

- Condemnation/Just Compensation
- Dismissal/Fees Attributable to Taking

Summary—

A condemning authority is required to pay just compensation for the property it takes. Recognizing that a decision to condemn property ties up that property, rendering it unmarketable, a Texas statute provides that a property owner must be made whole, paying for loss of use and attorneys’ fees, when it decides no longer to condemn the property. Here, the University of Houston tried to avoid that consequence, dismissing all but a sliver of property it had sought to condemn in order to avoid paying fees for the dismissal.

The University of Houston sought to condemn an entire 1.0792 acre tract. When evidence undercutting the University’s motives and need for the property surfaced in litigation, the University sought to dismiss its condemnation proceedings. However, to avoid paying fees to the property owner (which are designed to make it whole), the University tried to retain a five-foot sliver along the property. This property would be used for landscaping only, and the landowner would be permitted to have any source of ingress and egress over the five foot way it desired.

The court of appeals held that, in a case of first impression, that a partial dismissal that so radically changes the nature of the proof to establish fair market of the property taken is tantamount to a dismissal entitling the landowner to payment of attorneys’ fees and loss of use of the property the condemning authority no longer wanted to take. The Texas Supreme Court upheld this decision, however deciding that the dismissal statute could not recover appellate attorneys’ fees.

***Williams v. Houston Fireman’s Relief and Retirement Fund*, No. 01-98-00681, 1999 WL**

82441 (Tex. App.—Houston [1st Dist.] Feb. 11, 1999, pet. denied).

Issues—

- Statutory Pensions/Vesting of Statutory Rights
- Limits on Judicial Review of Administrative Determinations
- Administrative Rule-Making and Interpretive Authority
- Judicial Jurisdiction over State Administrative Schemes and Determinations
- Exclusive Jurisdiction and Statutory Review Procedures

Summary—

The Houston Firemen's Relief and Retirement Fund is a type of statutory pension plan directed at Houston firefighters. Its board calculates and administers pension benefits based on length of service, the benefits being funded and determined in part from payroll contributions from the firefighters and the employer, the City of Houston. Williams transferred from another fire department that did not offer these types of pension benefits (instead, operating on a voluntary 401k-type contribution system). The pension board construed the statute and the pension rules not to permit credit for prior service time to factor into and thereby substantially increase the firefighter's pension benefits. Williams sought judicial review of the decision, claiming that the board had violated the statute, engaged in improper rulemaking, and had deprived him of vested pension benefits in violation of constitutional due process and equal protection rights.

The court of appeals upheld the dismissal of his claims. Where statutory rights are conveyed through an administrative agency, there is no judicial review typically unless permitted by statute, and then only in strict accordance with the statutory procedures for obtaining review. Here, the statute at issue only provided a right to judicial review once the firefighter was eligible for retirement—only then would his pension rights vest and be subject to judicial challenge. His constitutional claims were likewise improper because they had not vested, and were thus subject to change, prior to vesting. The court also rejected any challenge to the board's promulgation of guidelines interpreting statutory benefits calculation, noting that the statute itself provided the board with the authority and discretion to engage in such interpretative rule-making.

Christopher Village v. Nicholas Retsinas, Albert Case, Director Multifamily Housing Management, Andrew Cuomo, Secretary of Housing and Urban Development, and Henry Cisneros, 190 F.3d 320 (5th Cir. 1999).

Issues—

- Administrative Procedure Act
- Arbitrary and Capricious Government Acts
- Declaratory Judgment/ Basis for Governmental Liability

- Mootness

Summary—

Christopher Village owned and operated a federally subsidized Section 8 apartment complex in Bryan, Texas. HUD provides financing for such projects through a non-recourse note, and HUD is supposed to subsidize rent payments in an amount sufficient to cover capital costs and operating expenses, as well as provide a reasonable rate of return. Christopher Village requested a rent increase to help refurbish the property. HUD instead tabled the rent request, refusing even to consider the request unless the owners first contributed \$2 million in equity. When Christopher Village refused, HUD foreclosed on the property, sold it, and the apartment complex was later torn down. Christopher Village sued complaining that HUD had caused Village to default. The trial court threw out the case on summary judgment; the Fifth Circuit reversed and rendered judgment for Christopher Village, finding that HUD had acted arbitrary and capriciously.

Congress had granted HUD full discretion in determining rent increase requests. Thus, HUD argued that Christopher Village's claims fell into a pervasive line of cases finding rent request cases unreviewable. The Fifth Circuit disagreed, noting that the claim actually presented was HUD's refusal even to entertain a rent request increase unless the property owner contributed additional millions in property renovation. The court likened this conduct—threatening foreclosure and demanding multi-million dollar equity contribution—to extortion. The court found that, unlike most rent request cases, the conduct of HUD violated its plain statutory duty to entertain requests and amounted to constitutional error that was reviewable. The question became how to review that error. Because HUD had foreclosed on the property and sold it to the City of Bryan, Texas for \$10, HUD argued that the case was now moot. While the Fifth Circuit agreed that the claims for mandamus and injunctive relief were now moot—the court could not now “unscramble the eggs”—it recognized that the declaratory judgment presented a live dispute that could be used by Christopher Village as a predicate for obtaining damages against HUD in the Court of Federal Claims

United Healthcare of Georgia, Inc. v. Georgia Dept. of Community Health, 666 S.E.2d 472 (Ga. App. 2008).

Issues—

- Government Procurement Contracts
- Trade Secret Protection
- Private Confidential Information Underlying Public Bids
- Restrictions on Contractual Waiver of Statutory Rights

Summary—

When a business contracts with a state, it is entitled to certain protections, such as

protection from disclosure of its trade secrets. When United Healthcare won a contract to administer the state health plan, doctor's association sought disclosure of United's provider contracts, which would reveal the reimbursement rates United had negotiated with doctors around the state, which would result in a material competitive disadvantage in dealing with doctors as well as benefiting United's competitors. The district court ordered disclosure, and the court of appeals affirmed. Brought in to file a motion for rehearing, an argument was made that the court had seized on a required boilerplate contractual provision that, if applied in the manner by the court of appeals, would void trade secret protection for any business contracting with the state. The court of appeals adopted this argument, granted rehearing, and decided that indeed United was entitled to trade secret protection, reversing the trial court.

ENVIRONMENTAL—

City of Shoreacres, et al. v. Leonard D. Waterworth, Colonel, District Engineer, Galveston District—US Army Corp of Engineers, et al., (5th Cir. 2005).

Issues—

- Dredge and Fill Permits
- NEPA Environmental Analysis
- Clean Water Act/Scope of Jurisdictional Waters
- Analysis of Least Damaging Practicable Alternatives
- Consideration of Project Purpose in Alternatives Analysis

Summary—

In 1998, the Port of Houston Authority filed an application with the U.S. Army Corps of Engineers seeking a permit to build a cruise and container terminal along the Bayport Shipping Channel in Galveston Bay. This application was significant, as similar proposed major harbor projects around the United States had been denied over the last decade due to stringent environmental standards for new development. After considerable disclosure and a lengthy period for public input and consideration of the environmental and economic impacts, the Corps of Engineers approved the Bayport permit. A federal district court denied numerous environmental challenges to the federal permit.

On appeal, the Fifth Circuit upheld the issuance of the permit, providing significant analysis on the jurisdictional reach of the Clean Water Act's regulation of "navigable waters." A significant issue underlying the quantification of the project's environmental impacts was the Corps' determination of the jurisdictional "wetlands" affected by the project. The court deferred to the Corps' determination of whether a sufficient hydrological nexus existed to bring various wetlands under the Corps' regulatory control. This determination materially affected the Corps' analysis of the least environmentally damaging practicable

alternative. Whereas the permit challengers argued that any wetland areas within the flood plain of Galveston Bay were jurisdictional, the Corps found only 19.7 acres to be sufficiently related to the navigable waters of the United States to trigger the Corps' jurisdiction. The standard of review for this decision was also significant, as the Fifth Circuit confirmed that the determination of the extent of the Corps' jurisdiction was a fact question subject to deferential review, whereas the question whether the Corps had jurisdiction at all had been deemed a legal issue without deference. This distinction—the extent, not the existence of agency jurisdiction—has now been embraced in other deferential agency challenges.

The Fifth Circuit also articulated an intelligible standard for addressing the determination of the least environmentally damaging practicable alternative. In making this assessment, the Fifth Circuit confirmed that the Corps could (and should) consider the project objectives and needs. Environmental opponents had raised a number of challenging distant alternative locations that were not economically or practically feasible for the Port—known as a “NIMBY” or “Not in my backyard”-type of objection. The court considered these project objectives in rejecting various alternative. The Shoal Point location was not available to the Port because it was already subject to a Texas City harbor project, and the location did not have sufficient size to accommodate the number of ship berths required by the Port. Also, Pelican Island and Shoal Point were outside of Harris County, and thus the Port could not use its bond revenue to fund land acquisition for those locales. Moreover, siting the project at these more distant locations would frustrate the economic purposes of the project, which was to simplify the logistics of maritime commerce in conjunction with the Port's already existing Barbour's Cut facilities.

The court also upheld the Corps' refusal to consider the future deepening of the ship channel as a necessary cumulative impact of the project. Any determination to permit further deepening of the ship channel would require Congressional approval, and thus was a potential separate project that need not be considered by the Corps.

Elementis Chromium, L.P. v. El Paso Merchant Energy-Petroleum Co. v. Amerada Hess Corporation v. Magellan Terminals Holdings L.P., (5th Cir. 2006).

Issues—

- CERCLA Liability
- Several Liability under § 113(f).
- Judicial Estoppel/Waiver
- Preservation of Error in Judgment/Joint Liability

Summary—

The Comprehensive Environmental Response Compensation and Liability Act,

CERCLA, provides a statutory method for allocating liability for environmental contamination. El Paso (successor to Coastal) was found to be primarily responsible for significant hydrocarbon contamination, which had migrated onto Elementis Chromium's property. El Paso then instituted a contribution action under §113(f) of CERCLA seeking to allocate its liability for response costs, suing Amerada Hess as the prior owner of adjacent property and Magellan as the current owner of the property. The district court found El Paso 89.5% responsible, and held Amerada Hess and Magellan jointly liable for the remaining 10.05% responsibility. When the joint liability was challenged, the district court justified its decision on waiver and estoppels.

In a case of first impression, the Fifth Circuit held that liability for contribution under CERCLA § 113(f) could only be several, not joint. Thus, the district court erred when it held Amerada Hess and Magellan jointly liable for 10.05% allocated liability. With respect to waiver, the Fifth Circuit held that the time to object to joint liability occurs when that liability is imposed at judgment. The case was remanded for the district court to allocate responsibility for the 10.05% liability between Amerada Hess and Magellan.

City of Olmsted Falls, Ohio v. Federal Aviation Administration, 292 F.3d 261 (D.C. Cir. 2002).

Issues—

- Clean Air Act
- Review of Agency Decision/Administrative Procedure Act
- Determination of Baseline Standards/Scope of Project
- Cumulative Impacts Analysis
- Coordination with State Government/State Certification
- NEPA Disclosure of Environmental Impacts

Summary—

Construction projects requiring federal permits also require analysis of the environmental impacts attributable to the construction. Cleveland Hopkins International Airport decided to extend a primary run to permit landings for long international flights. Over the objections of the City of Olmsted Falls, a neighboring community of luxury homes, the FAA approved the decision, and the city took an appeal to the federal circuit court of appeals for the District of Columbia. Hired to file an amicus brief for Continental Airline, which used the airport as a hub, the court of appeals largely based its opinion on legal analysis provided in Continental's amicus brief. Whereas the City and the FAA focused solely on discussing administrative regulations, the amicus brief provided case law supporting in how those regulations were to be applied. Thus, the D.C. Circuit held that the FAA's determination of the baseline amount of emissions prior to the project was not arbitrary or capricious, and therefore the *de minimis*

exception to clean air impacts was appropriate. The court also held that a federal environmental challenge could not collaterally attack a *state* agency's decision to certify the project for compliance with state standards, which could only be attacked through state court procedures.

INSURANCE COVERAGE/BAD FAITH—

***Aetna Casualty and Surety Company v. Vino Naran*, No. 05-96-01486-CV, 1999 WL 59782 (Tex. App.—Dallas Feb. 10, 1999, pet. denied).**

Issues—

- Insurance Coverage/Property Damage
- Causation/Trigger of Coverage/Manifestation Theory
- Estoppel to Deny Coverage/*Wilkinson* Exception
- Insurer's Reservation of Rights
- Automatic Renewal and Notice Requirements/Nonpayment of Premiums

Summary—

Coverage under an insurance policy often turns on *when* the damage “occurs.” A catalytic converter slowly wore down, gradually exposing a car's interior lining to excessive heat and scorching the interior until, after a prolonged drive, the car caught fire, destroying other luxury cars and Vino Naran's home. The fire occurred in July 1986, and the company that installed the catalytic converter had liability coverage through June 1986. Because the process by which the catalytic converter damaged the car was gradual until the fire caught, the trial court held that coverage existed under an “exposure theory” for the \$1.8 million in damages suffered by Naran. The court of appeals reversing the judgment against Aetna and rendered judgment that Aetna owed nothing on the claim. The court rejected the exposure theory and applied a manifestation trigger of coverage theory, holding that property damage “occurred” when it first was manifest on the property. Thus, the occurrence was the resulting fire, not the gradual degradation of the property that led to the fire. The court also held that Aetna was not estopped to deny coverage, and that coverage for the company had not automatically renewed because premiums had not been paid.

***Headley, et al. v. Nan Travis Memorial Hospital, et al.*, No. 12-96-0029-CV (Tex. App.—Tyler Jan. 6, 1998, pet. denied).**

Issues—

- Scope of Coverage
- Named Insured/Additional Insured

- Construction of Insurance Policies/Lack of Ambiguity
- Umbrella Coverage Coordination with Primary Coverage

Summary—

Many insurance coverage claims turn on a basic question: Who is an insured under the policy? The Headleys sued Nan Travis Memorial Hospital after their daughter was born with severe brain damage, and the case was settled on the representation that the hospital had \$1 million in coverage per occurrence. When the Headleys later learned that the Methodist Hospital had an additional \$15,000,000 in coverage for the Methodist’s management of hospitals, such as Nan Travis, they sued to set aside the settlement and to seek the proceeds of the \$15,000,000 policy. The court of appeals held that the policy listed the “named insured” as “The Methodist Hospital Health Care System,” and the policy only provided coverage for Methodist entities for Methodist’s liability for hospitals it managed. The policy thus did not cover the liability of the hospitals themselves. [Opinion]

Curlee Mfg. Co., Inc. v. The Charter Oak Fire Ins. Co., Inc., No. 01-97-00917-CV (Tex. App.—Houston [1st Dist.] Jan. 14, 1999, no pet.).

Issues—

- Insurance Coverage/Deductibles
- Voluntary Payment/Conditions to Coverage

Summary—

Many policies, such as the group health policy issued to Curlee Manufacturing for its employees, instruct the insured not to make voluntary payments without permission. Graham, a Curlee employee, was injured, and Curlee paid \$25,000 in medical bills toward the company deductible. Graham later filed for workers’ compensation, and Curlee sought reimbursement from the insurance company for funds expended toward the deductible. The court of appeals held that amounts voluntarily paid, without authorization, were not subject to reimbursement under the insurance policy.

ATTORNEY DISQUALIFICATION/CONFLICTS OF INTEREST—

In re George Parnham, P.C., 263 S.W.3d 97 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding).

Issues—

- Attorney-Client Privilege/Inadvertent Disclosure
- Consequences for Review of Confidential Communication
- Standards for Disqualification of Opposing Counsel
- Snap-Back Rule/Return of Confidential Information

Summary—

In a case of first impression involving the snap-back rule, the court of appeals held that attorneys cannot be disqualified for reviewing privileged documents *inadvertently* disclosed during discovery. In a lawsuit challenging the representation of convicted murderer Clara Harris, an associate inadvertently produced attorney-client communications along with other discovery that had been sought in the case. When this mistake became known, Harris' counsel sought and obtained the disqualification of Parnham's attorneys, the law firm of Jackson Walker. On petition for writ of mandamus, the court of appeals granted mandamus relief against the trial court judge, indicating that she had no discretion to disqualify counsel for reviewing documents inadvertently produced in discovery. Where the disclosure occurred during the course of discovery, the court held that the typical harm-based standards for disqualification are not applicable, and the only remedy is a return of documents and a requirement not to use any disclosed information.

In re Liberty Insurance Corporation, No. 04-08-00464-CV (Tex. App.—San Antonio Aug. 27, 2008, orig. proceeding).

Issues—

- Attorney Disqualification
- Conflicts of Interest/Imputed Firm Conflicts
- Substantially Similar Representation
- Confidential Information/Limited Firm Imputation of Knowledge
- Mandamus Review/Conflicting Evidence

Summary—

The Texas Rules of Disciplinary Procedure preclude one lawyer from representing a client in one matter, and then turning around and taking representation adverse to that client in the same or a substantially similar matter. In addition, a lawyer cannot obtain confidential information from a client and then take representation in a matter substantially related, in which there is a risk that such confidential information will be dissemination. While the conflicts of a law firm are imputed to every attorney within a firm, when an attorney leaves a firm, only his specific representation is at issue.

While these rules broadly apply to protect client confidences, the general nature of these standards is subject to abuse by former clients seeking to disqualify lawyers who leave large firms, and then input that disqualification that any subsequent lawfirm the attorney joins. The potential for such abuse was reflected by *In re Liberty Insurance*, where an

insurance company tried to disqualify an associate (and the firm he joined) from ever working on insurance bad faith matters again, despite whether the facts in the prior cases were related or not, and even though the lawyer's prior work was for an affiliate company.

An associate worked at V&E, handling certain claims against Liberty *Mutual* Insurance Company for its extra-contractual docket. When the associate left and joined another firm, which later sued Liberty *Insurance* Corporation, the insurer sought to disqualify both the associate and his new firm, claiming that the prior representation was substantially related. The trial court refused to require disqualification on evidence that, while the general type of bad faith claims in each case was similar, the facts in the prior representation had nothing to do with the claims in the subsequent litigation. An associate's understanding of general claims handling procedures or settlement practices was insufficient to raise a disqualifying interest. The San Antonio Court of Appeals upheld the ruling on mandamus review, noting that it was certainly within the trial court's discretion to find that the claims were not substantially related due to the differing factual background.

PROCEDURAL/STATUTORY/OTHER ISSUES—

Southland Corp. v. Lewis, 940 S.W.2d 83 (Tex. 1997).

Issues—

- Dramshop Liability
- Statutory Construction
- Causation
- Standards for Summary Judgment Grounds

Summary—

In this case of first impression, the Texas Supreme Court reviewed the causation requirements of the dramshop liability provision of the Texas Alcoholic Beverage Code, which imposes liability on sellers/providers of alcoholic beverages for injuries resulting from intoxication. Lewis was injured in an automobile accident. The twenty-one-year-old driver, who previously had been drinking at a private party and a local bar, stopped at a 7-11 convenience store. The passenger, however, went in to buy beer. Lewis sued under various theories, including the dramshop act, claiming that 7-11 should be liable because it had sold alcohol to an individual who was obviously intoxicated. The Texas Supreme Court construed the causation requirements of the statute, noting that a plain reading of the statute required that the "obviously intoxicated" individual to whom alcohol was served must have been the one to have caused the harm. Thus, the statute would not impose liability for the sale of alcohol to a passenger in a car, regardless whether

the driver consumed that alcohol, because the intoxication of the passenger would not have caused the accident. In addition, the court struck the remaining negligence and negligence per se claims, finding that the dramshop statute provided the exclusive cause of action for claims involving the sale or provision of alcohol to persons 18 years or age or older.

***Mossler v. Nouri*, 2010 WL 2133940 (Tex. App.—Austin May 27, 2010, n.p.h.).**

Issues—

- Corporate Charter/Forfeiture
- Standing/Corporate Claims
- Attorneys' Fees/Damages to Support

Summary—

Jeff Nouri and Mahmoud Nouri leased property from Liza Mossler to operate a restaurant. After the Nouris got behind on rent, Mossler evicted them, but the Nouris and their restaurant business (J.A.M. Brothers, Inc.) claimed that the eviction had been wrongful. They sued Mossler seeking damages allegedly resulting from their eviction from property they leased to operate a restaurant. After a bench trial, the district court rendered judgment awarding the Nouris, but not the corporation, damages for lost profits and conversion of personal property as well as attorney's fees.

The Nouris, not the company, sought to recover damages because J.A.M. Brothers, Inc. had forfeit its corporate charter due to the non-payment of taxes. Title to these company claims, however, had not devolved to the owners of the company because the company had not been dissolved, even though not permitted to operate under state law. The court of appeals thus found that the Nouris did not have standing to claim the damages for lost profits, as these belonged to the company, and the Nouris did not otherwise establish any damages. Moreover, because the Nouris did not have the right to recover attorneys' fees, because they had not recovered any damages themselves on which to base such an award. As a result, the court of appeals rendered judgment that the Nouris could not recover anything from Mossler, the landlord.

***Sibai v. Wal-Mart Stores, Inc.*, 986 S.W.2d 702 (Tex. App.—Dallas 1999, no pet.).**

Issues—

- Premises liability

- **Active negligence vs. passive conditions of property**
- **Directed Verdict and Evidentiary Sufficiency**

Summary—

Sibai was severely injured when she was struck in the head by a cashier at a Sam's Wholesale Club store. Sam's Club obtained a directed verdict on Sibai's claims, arguing that Sibai did not have sufficient evidence of a risk of harm from the location of the checkout stations to justify submission of a premises liability/defect question to the jury. The court of appeals reversed, explaining that the injury was caused by a negligent activity, not a latent defect in the store premises or layout.

Apple v. Continental Personnel Service, No. 05-96-01462-CV (Tex. App.—Dallas July 21, 1997, writ denied).

Issues—

- Deceptive Trade Practices Act/Unconscionable Conduct and Misrepresentations
- Modification/Novation of Contract/Excuse for Performance
- Jury Charge Waiver/Failure to Submit Proper Contract to Jury
- Briefing Waiver/Standards for Briefing Error on Appeal
- Preservation/Waiver of Error on Factual Sufficiency

Summary—

In a bait and switch, a job placement agency advertised that a job was without a placement fee, then the agency sent the applicant to a job interview for a position that required payment of a placement fee. After the applicant landed the job, the agency required a promissory note for the placement fee. The employer later reached a global agreement with the agency over its employees, and under this agreement the applicant and the agency reached a new agreement limiting the amount of placement fee that was owed. The agency nevertheless sued the applicant for breach.

On appeal, the court of appeals held that sufficient evidence existed to support the defense of novation—that the agreement to pay had been replaced by a new agreement—and that the defense of novation excused performance under the prior promissory note. Because the agency had not submitted claims for breach under the new agreement to the jury, the court held that the agency had waived any claim for breach of the novated agreement. In addition, the court held that the agency had failed to preserve factually sufficiency challenges to the applicant's DTPA recovery by filing a motion for new trial, and the some evidence supported the agency's fraud in posting a "no fee" advertisement. Thus, the court upheld the applicant's recovery of damages and attorneys' fees against the agency.

***Miller v. Greenpark Surgery Center Associates, Ltd.*, 974 S.W.2d 805 (Tex. App.—Houston [1st Dist.] 1998, no pet.).**

Issues—

- Appellate Timetable/Jurisdiction
- Notice of Appeal/Perfection
- Implied Motion to Extend Time
- Standard for Extension/Good Faith and Conscious Disregard

Summary—

For some of the trickier appellate deadlines, the Texas Rules of Appellate Procedure used to be referred to as the acronym “T.R.A.P.” In 1997, the Texas Supreme Court began to relax some requirements, and recognized that when a notice of appeal is filed late, but within 15 days of the deadline for perfecting an appeal, it is accompanied by an *implied* motion to extend time to file the notice of appeal. The *Miller* opinion was one of the first appeals to address the evidentiary standards for implying a motion to extend time and sustaining the motion, and whether an excuse for the late filing was substantiated or brought in bad faith. The evidence only reflected that the document perfecting the appeal was two days late, and despite repeated briefing from the appellee, the appellant never provided evidence explaining why the document was filed late or providing an excuse for missing the deadline. In addition, statements of counsel at oral argument reflected inconsistencies in his belief as to the date the document was filed. In the absence of any evidence to support a motion to extend time, the court dismissed the appeal for want of jurisdiction.

***Diferrante v. Keraga*, 976 S.W.2d 683 (Tex. App.—Houston [1st Dist.] 1997, no writ).**

Issues—

- Appellate Jurisdiction
- Appeals by Writ of Error/Restrictive Appeals
- Participation in the Trial Court/Lack of Notice of Judgment

Summary—

Ordinarily an appeal must be brought within thirty to ninety days of judgment, depending whether certain types of post-trial motions have been filed extending the appellate timetable. However, different rules can apply to a judgment rendered where a party was absent from trial. Called an appeal by writ of error (and now known as a restricted appeal), a court of appeals may review a judgment by a party who did not participate in the trial in an appeal is filed within six

months of judgment. This case determined what acts constitute participation at trial. In this medical malpractice case, Differante had filed various court documents and motions leading up to the rendition of judgment, including a motion to retain the case and for a continuance. The court held that, by participating in the events that led to the dismissal of his case, Diferrante had participated at trial. Thus, the court of appeals dismissed the writ of error appeal for want of jurisdiction. This “events leading up to judgment” standard has now been used by other courts in demonstrating the minimal degree of trial court participation that could preclude a writ of error appeal where the trial court had not given plaintiff notice that his case had been dismissed.

***Baugus and the City of Sachse v. Bizmart Inc.*, No. 05-96-01493-CV (Tex. App.—Dallas July 27, 1998, no pet.).**

Issues—

- Inadequate Damages/Jury’s Failure to Award Categories of Damage
- Review of Sufficiency of Evidence
- Waiver/Consequences of Moving for Entry of Judgment
- Improper Jury Argument

Summary—

Baugus sued the City of Baugus and Bizmart for injuries she sustained from a broken chair. The jury awarded minimal damages at trial, refusing to award any damages for some of Baugus’ complaints, such as disfigurement. In a case where plaintiff had waived complaints to inadequacy of damages by moving for entry of judgment, the court of appeals affirmed the jury verdict, denying a new trial, finding that the record was sufficient for the jury to have chosen to award the damages it did. In addition, the court concluded that any objections to improper jury argument had not been preserved.

***Shubert v. J.C. Penney Co.*, 956 S.W.2d 634 (Tex. App.—Texarkana 1997, writ denied).**

Issues—

- Interlocutory Appeal
- Venue/Multiple Plaintiffs/Mass Torts
- Statutory Enablement/Retroactive and Prospective Application of Law
- Joinder of Plaintiffs/New Actions
- Letter from Court/Potential Effect as Rendition of Judgment or Order

Summary—

A group of employees brought sick building claims alleging that fumes and dust had made them ill at the J.C. Penney corporate headquarters. A group of plaintiffs had sued prior to the enactment of various tort reforms, and after the effective

date of the statute, a whole new group of plaintiffs joined the lawsuit seeking to avoid the newly added requirements for establishing the venue of certain lawsuits in certain counties. The court of appeals dismissed the appeal, construing the new statute and its applicability, holding that review could not be obtained for an order transferring venue of lawsuits, as opposed to a determination whether cases could be joined.

***Reames v. Hawthorne-Seving Inc.*, 949 S.W.2d 758 (Tex. App.—Dallas 1997, writ denied).**

Issues—

- Statute of Repose/Limitations on Actions
- Construction Law: Fixtures vs. Improvements
- Constitutional “Open Courts”/Viable Restrictions on Suits

Summary—

The statute of repose limits the time period for bringing lawsuits based on improvements to real property. Reames was injured by a conveyor belt at the Marazzi tile plant, which had been installed at the plant more than ten years prior to Reames’ injuries and lawsuit. The court of appeals held that the conveyor belt system, which was designed specifically for the plant and integrated into the manufacturing system, was an improvement to the real property, not just a fixture. Accordingly, any claims against the manufacturer of the conveyor belt system were barred by the ten-year statute of repose. The court further held that this restriction on suits relating to improvements to real property did not violate the “open courts” provision of the Texas Constitution.

***Peters v. Blockbuster, Inc.*, 65 S.W.3d 295 (Tex. App.—Beaumont 2001, pet. denied).**

Issues—

- Class Actions
- Settlement Classes

Summary—

Class actions are well-known procedural devices to impose liability on one defendant for a widespread class of plaintiffs claiming damages for similar conduct. But the rules do not limit class actions to a class of plaintiffs seeking to impose liability. Although rare, the rules do envision that the class action device could be applied by a defendant to a class of plaintiffs to limit liability.

Known as a settlement class, a defendant enters into a settlement agreement with a number of plaintiffs, and then class certification is sought to approve a class settlement that would bind every potential plaintiff in the class that does not opt

out of the settlement.

Blockbuster faced numerous lawsuits comprising a significant number of plaintiffs complaining of Blockbuster's newly imposed late fee policy. Blockbuster reached an agreement with one group of plaintiffs, and then sought a certified class to impose the settlement class-wide. The court upheld the use of this procedural class action device, and it was used to end a multitude of lawsuits around the state.

***World Savings Bank, F.S.B. v. Gantt*, 246 S.W.3d 299 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).**

Issues—

- Lis Pendens/Cancellation
- Constructive/Actual Notice
- Real Property Records/Chain of Title

Summary—

Notices are frequently filed in county real property records to alert purchasers as to existing liens or claims on property, and a lis pendens is a type of lien notice that property is subject to claims in a lawsuit. A lis pendens was filed on residential property to give notice that the property was subject to claims in the divorce action. A court later rejected those claims and cancelled the lis pendens notice, and an appeal was taken. World Savings Bank took a mortgage on the property based on the cancelled lis pendens notice, but just weeks before the deal went through, the court of appeals reversed and reinstated the claims that had been dismissed. The trial court then found World Savings Bank liable for the proceeds of the sale of the home based on the notice in the real property records that had been provided by the cancelled lis pendens notice--the trial court believed that the bank had a duty to go beyond the notice and track the status of the case, including any appeal. On appeal, in a case of first impression, the court held that a cancelled lis pendens provides no constructive notice of any claim, and, absent any *actual* notice that a subsequent appeal had reinstated the dismissed claims, the bank was entitled to rely on the cancelled lis pendens and was not subject to any lien.

***Laredo Medical Group v. Jaimes*, 227 S.W.3d 170 (Tex. App—San Antonio 2007, pet. denied).**

Issues—

- Vicarious liability
- Causation/New and Independent Cause
- Jury Charge Waiver/Failure to Submit Issue on Liability

- Stipulations/Construction and Enforceability
- Charitable Organization Limits of Liability

Summary—

In order to recover on a theory of liability, a question on that theory must be submitted to the jury in the jury charge. Luis Jaimes suffered a brachial plexus injury during childbirth, and his mother sued the delivering doctor (Dr. Diaz) and Laredo Medical Group, with whom Dr. Diaz had been employed until shortly before delivery. The claim of negligence had been that Dr. Diaz had been negligent in attempting a vaginal delivery, as the indications were that Luis was possibly too large to go through the birth canal. The jury awarded \$2.8 million for Luis' injuries, and the trial court entered judgment for this amount against Dr. Diaz (who later settled) and Laredo Medical Group. On appeal, Laredo Medical Group claimed that the Jaimes had waived any recovery against the Group because they had failed to submit an issue on vicarious liability to the jury. Indeed, the record reflected that Laredo Medical Group could not have been vicariously liable for Dr. Diaz' treatment because Diaz had left the Group weeks before the delivery. The San Antonio Court of Appeals agreed, holding that the issue had been waived because no jury issue had been submitted. In addition, the court noted that the causative act—the decision to attempt a vaginal delivery instead of a c-section—occurred at a time when Dr. Diaz was not employed by the Laredo Medical Group. Thus, the court of appeals reversed the \$2.8 million judgment against Laredo Medical Group and held that the Jaimes take nothing against Laredo Medical Group.

MEMC Electronic Materials, Inc. v. Albemarle Corporation, Lexington Insurance Co., and Travelers Property Casualty Group, (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

Issues—

- Indemnity
- Contract Construction/Interpretation

Summary—

MEMC purchased a polysilicon manufacturing plant in Pasadena from Albemarle, but with Albemarle continuing to operate the plant for MEMC. The purchase and sale agreement had complicated indemnity obligations, with Albemarle being responsible only for contractual obligations it specifically assumed. For lawsuits, the parties had a customary “before-and-after“ agreement, with Albemarle liable for claims occurring before the sale of the plant, and MEMC liable for claims occurring after the sale. Three Albermarle employees were severely injured in a plant fire, and Albemarle's parent company was sued for the construction and design of the plant. Albemarle indemnified its parent company and then sought

several million dollars from MEMC, claiming that MEMC was liable for indemnity for the fire, which occurred after the sale of the plant. The trial court agreed, holding that MEMC was liable for the indemnity as well as additional attorneys' fees in enforcing the indemnity.

In an opinion that holds practical importance for the application of indemnity agreements in general, the court of appeals held that the indemnity was not determined by the fire, but instead by Albemarle prior contract to indemnify its parent Ethyl, an undisclosed Albemarle contractual obligation that MEMC had not agreed to assume, and an obligation that also pre-dated the purchase and sale agreement. Thus, MEMC went from owing several million dollars in indemnity and attorneys' fees to Albemarle to owing Albemarle nothing and with Albemarle potentially subject to MEMC for attorneys' fees.

***Shell Cortex Pipeline v. Shores*, (Tex. App.—Fort Worth 2004, pet. denied).**

Issues—

- Class Action/Preponderance
- Probate Court Jurisdiction/Ancillary Jurisdiction

Summary—

The probate court of Denton County certified a nationwide class of current and former overriding royalty owners for claims of breach of contract and bad faith for alleged underpayment of carbon dioxide royalties (the carbon dioxide was used for mass injection into depleted West Texas oil fields to stimulate production). An estate's trust claims for royalty proceeds were used to piggy-back the nationwide class action in the probate court as an ancillary proceeding to the estate administration. On interlocutory appeal, the Fort Worth Court of Appeals confirmed that appellate jurisdiction exists to consider the trial court's subject matter jurisdiction to render the order subject to interlocutory appeal, reasoning that, "if the court has no authority to act, it can hardly be said that the court's action is valid."

Statutory probate courts exercising original probate jurisdiction have the power to hear "all matters incident to an estate." The basis for the probate jurisdiction

***Columbia Hosp. Corp. of Houston v. Moore*, 43 S.W.3d 553 (Tex. App.—Houston [1st Dist.] 2001), *aff'd in part, rev'd in part*, 92 S.W.3d 470 (Tex. 2002).**

Issues—

- Medical Malpractice/Damage Cap

Summary—

In a case of first impression, the First District Court of Appeals held that the medical malpractice damages cap applicable to a single defendant who is jointly and severally liable cannot be multiplied by the number of defendants liable. Thus, the court reduced the judgment owed from \$3.675 million to \$1.3 million. On petition to the Texas Supreme Court, it was held that prejudgment interest likewise applied to the cap.

Limited Family Law Representation—

Mr. Daughtry has been involved in a number of family law cases wherein commercial issues—such as claims to a family business, accounting or breaches of fiduciary duty—were critical to the resolution of the pending divorce. Representation related to custody or non-commercial distribution of assets is not desired.

Limited Criminal Representation—

Mr. Daughtry has been involved in a discrete number of criminal matters. This representation is not actively sought, but rather the resulting from a request from a federal district court to accept a limited appointment under the Criminal Justice Act.

United States v. Mathew Morgan, (5th Cir. 2002).

Issues—

- Sentencing Guidelines/Challenges
- Statutory Mandatory Minimums

Summary—

This criminal appointment stemmed from participation in a trial involving shopping center perchlorethylene contamination where, in exchange for permission to conduct jury charge objections as appellate counsel, federal district court judge David Hittner required counsel to undertake a sentencing guideline appeal. In a case of first impression, the Fifth Circuit held that the weight of a solvent in which LSD is dissolved cannot be considered for purposes of the sentencing guidelines.

Matthew Morgan pled guilty of possession with intent to distribute LSD. The DEA had seized several sheets of LSD on blotter paper. The sentencing guidelines had a predetermined method for calculating the weight of the drug on blotter paper, assigning .4 milligram to each dosage unit. The liquid LSD was more troublesome. Several bottles had been seized containing LSD dissolved in a liquid solvent, such as alcohol. The solvent would be placed on the blotter paper, and when it evaporated, the LSD would be left behind on the blotter paper, which

would then be separated into dosage units. For sentencing purposes, the court counted the entire weight of the LSD in the dissolved in the solvent, with the solvent weighing 4000 times more than the weight of the actual LSD. In terms of degree of wrongdoing, this amount of weight would have been the equivalent of trafficking a truckload full of marijuana.

The Fifth Circuit construed the sentencing guidelines and the application notes and held that only the weight of the LSD, and not that of the solvent, should be considered for sentencing purposes. The Fifth Circuit thus reversed the sentence imposed and remanded Morgan for resentencing.