Lehotsky Keller Cohn

Supreme Court of Texas

2022-2023 Term Business Roundup

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ABOUT LEHOTSKY KELLER COHN

Lehotsky Keller Cohn is a national litigation boutique with offices in Austin, Washington DC, Oklahoma City, Denver, and Atlanta.

Lehotsky Keller Cohn's attorneys have broad experience in complex litigation across industries and deep experience litigating in state and federal appellate courts.

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TABLE OF CONTENTS

Torts

Noneconomic / Mental Anguish Damages:
Gregory v. Chohan,
2023 WL 4035886 (Tex. June 16, 2023) 1

Investor Liability:
In re First Reserve Management, L.P.,
2023 WL 4140454 (Tex. June 23, 2023) 2

Regulatory Barriers to Suit:
Wal-Mart Stores, Inc. v. Xerox State & Local Solutions, Inc.,
663 S.W.3d 569 (Tex. 2023) 3

Texas Government

Immunity:
CPS Energy v. Electric Reliability Council of Texas,
2023 WL 4140460 (Tex. June 23, 2023) 4

Jurisdiction

Personal Jurisdiction:
State v. Volkswagen Aktiengesellschaft,
669 S.W.3d 399 (Tex. 2023) 6

Personal Jurisdiction:
LG Chem Am., Inc. v. Morgan,
2023 WL 3556693 (Tex. May 19, 2023) 7

Arbitration

Decisionmaker for Arbitrability:
TotalEnergies E&P USA, Inc. v. MP Gulf of Mexico, LLC,
667 S.W.3d 694 (Tex. 2023) 8

Burden for Opposing Arbitration:
Houston AN USA, LLC v. Shattenkirk,
669 S.W.3d 392 (Tex. 2023) 9

Compelling Non-Signatories to Arbitrate:
Lennar Homes of Texas Land and Construction, Ltd. v. Whiteley,
2023 WL 3398584 (Tex. May 12, 2023) 10

Class Actions

Class Certification:
American Campus Communities, Inc. v. Berry,
667 S.W.3d 277 (2023) 11

Contracts

Insurance Policies:
ExxonMobil Corp. v. National Union Fire Insurance Co. of Pittsburgh, PA,
2023 WL 2939596 (Tex. Apr. 14, 2023) 12

Oil and Gas:
Point Energy Partners Permian, LLC v. MRC Permian Co.,
2023 WL 3028100 (Tex. Apr. 21, 2023) 13

Oil and Gas:
Van Dyke v. Navigator Group,
668 S.W.3d 353 (Tex. 2023), *reh'g denied* (June 16, 2023) 14

Texas Procedure

Permissive Appeals:
Duke Inc., General Contractors v. Denis Garcia Fuentes, et al.,
2023 WL 4278245 (Tex. June 30, 2023) 15

Texas Citizens Participation Act:
McLane Champions, LLC v. Houston Baseball Partners LLC,
2023 WL 4306378 (Tex. June 30, 2023) 16

Torts – Noneconomic / Mental Anguish Damages

***Gregory v. Chohan*, 2023 WL 4035886 (Tex. June 16, 2023)**

- **Vote:** 6-0. Justice Blacklock announced the Court's judgment and wrote an opinion in which Chief Justice Hecht and Justice Busby joined in full and in which Justice Bland joined in part. Justice Devine filed a concurring opinion in which Justice Boyd joined. Justice Bland filed an opinion concurring in part and concurring in the judgment. Justices Lehrmann, Huddle, and Young did not participate.

Key Takeaways: A plurality of the Supreme Court held that, to recover non-economic damages, a wrongful death plaintiff must put forward both evidence of the existence of mental anguish and evidence justifying the *amount* awarded. This burden cannot be satisfied through financial anchors that have no rational connection to the emotional injuries suffered, like the price of paintings or jets, nor through arguments about the defendant's ability to pay.

Background: This case arises out of a fatal accident involving a truck driver. The decedent's family brought a wrongful death action against the driver of the truck who caused the accident, as well as her employer. The jury awarded approximately $16.8 million to the family, over $15 million of which was for noneconomic damages. The plaintiffs did not put forward any evidence connecting their mental anguish to that amount. The only evidence plaintiffs put forward relating to noneconomic damages were references to the price of a Mark Rothko painting, the cost of a Boeing F-18 fighter jet, and the figure of two cents for each mile the defendants' trucks drove the year of the accident. The defendants appealed the award, and the court of appeals affirmed.

Decision: The plurality held that a plaintiff seeking non-economic damages must put forward evidence of the existence of mental anguish as well as evidence justifying the *amount* awarded. The plurality rejected the use of anchors that have no rational connection to the emotional injuries suffered, like the price of paintings or jets. Instead, a plaintiff must show "a rational connection, grounded in evidence, between the injuries suffered and the amount awarded." Justice Devine, joined by Justice Boyd, concurred in the judgment only. He would hold that the value of life is unquantifiable, so the only way to cabin these damages is through legislation. Justice Bland, in her concurrence, emphasized common ground between the plurality and the concurrences: that mental anguish damages must be based on the evidence, and that improper yardsticks, like paintings and jets, cannot be used to measure mental anguish damages.

Torts –
Investor Liability

***In re First Reserve Management, L.P.*, 2023 WL 4140454 (Tex. June 23, 2023)**

- **Vote:** 8-0 Chief Justice Hecht wrote for the Court. Justice Boyd concurred in the disposition. Justice Bland did not participate.

Key Takeaway: Investors in a company are entitled to appoint loyal employees to the company's board and engage in other activities under their "investor status"—including monitoring performance, supervising finance and capital budget decisions, and articulating general policies—without exposure to direct liability for the company's actions.

Background: More than 2,000 cases involving more than 7,000 plaintiffs were filed and consolidated in an MDL court pertaining to an explosion at the TPC petrochemical processing plant. Plaintiffs later amended their petition to add as defendants investor groups who owned TPC on the theory that they were TPC's alter ego, liable for TPC's torts through veil-piercing, and liable for their own negligent undertaking. The investors moved under Rule 91a to dismiss the plaintiffs' claims for having "no basis in law or fact." The MDL court denied the motion to dismiss, and the court of appeals denied mandamus review. The investors then sought mandamus review in the Texas Supreme Court.

Decision: The Court denied the petition for the writ of mandamus, but only because the Court was concerned that mandamus would disrupt proceedings that had been stayed by bankruptcy. The Court did not address the plaintiffs' alter ego and veil-piercing claims because the bankruptcy court enjoined the plaintiffs from proceeding on those claims. Nonetheless, the Court explained that the plaintiffs did not sufficiently plead their claim that investors were directly liable through negligent undertaking. Because companies are distinct legal entities, they are not liable for each other's conduct unless some exception applies. Accordingly, for the plaintiffs' allegations of negligent undertaking to survive a Rule 91a motion to dismiss, they needed to allege that the investors acted in a way that imposed a duty where one would otherwise not exist. Specifically, they were required to plead facts showing that investors undertook to run TPC's day-to-day operations and that the investors specifically delayed the turnaround that could have prevented the explosions. Plaintiffs failed to do so, however, instead alleging only that the investors had an interest in TPC, had appointed board members, and otherwise were active investors.

**Lehotsky Keller Cohn submitted an amicus brief in this case on behalf of the United States Chamber of Commerce and the Texas Association of Business in support of Petitioners.*

Torts –
Regulatory Barriers to Suit

***Wal-Mart Stores, Inc. v. Xerox State & Local Solutions, Inc.*, 663 S.W.3d 569 (Tex. 2023)**

- **Vote:** 8-0. Justice Devine wrote for the Court. Justice Lehermann did not participate.

Key Takeaway: A federal regulation permitting retailers at their "own choice and liability" to process Supplemental Nutrition Assistance Program ("SNAP") transactions in a certain manner when a state-contractor's Electronic Benefit Transfer ("EBT") system is unavailable does not insulate the state contractor from liability against a retailer's common-law claims.

Background: State agencies administer the federally funded SNAP program by distributing monthly benefits through an EBT processing system. Xerox contracts with Texas to operate that system. In 2013, the system was unavailable during peak retail-transaction times, so Wal-Mart and other retailers employed a method known as "store and forward" to submit transactions to Xerox at a later time for reimbursement. Xerox, however, declined to reimburse many of these transactions, and in response Wal-Mart and other retailers filed suit, asserting various tort and breach of contract claims. Xerox moved for summary judgment at trial arguing that section 274.8(e)(1) of the federal SNAP regulations, authorizing retailers to employ the "store and forward" method at their "own choice and liability," precluded liability. The trial court granted summary judgment, and the court of appeals affirmed.

Decision: The Court held that section 274.8(e)(1) does not immunize Xerox from liability for state-law claims. The Court walked through the regulation's "text, structure, history, and purpose," concluding that they all pointed "in the same direction" of permitting suit against state contractors. The Court further reasoned that Xerox's position would "allow an EBT contractor to escape independently negotiated contractual obligations with a retailer and avoid liability not only for its negligent conduct but also for intentional torts." Finally, the Court stated that, under Xerox's reading, the regulation operates as a preemption provision, so even if the regulation were ambiguous, the Court "would construe [it] consistent with the presumption against preemption."

**Lehotsky Keller Cohn submitted an amicus brief in this case on behalf of FMI – The Food Industry Association and the Merchant Advisory Group supporting Petitioner.*

Texas Government – Immunity

***CPS Energy v. Electric Reliability Council of Texas*, 2023 WL 4140460 (Tex. June 23, 2023)**

- **Vote:** 5-4. Chief Justice Hecht wrote for the Court. Justice Boyd filed a dissenting opinion in which Justices Devine, Lehrmann, and Busby joined.

Key Takeaway: CPS Energy sued the Electric Reliability Council of Texas ("ERCOT") alleging over $18 million in underpayments related to Winter Storm Uri. Panda Power separately sued ERCOT alleging that ERCOT's failure to publish an adequate report on future electric demand and capacity caused it over $2 billion in damages. The Supreme Court held in an opinion addressing both cases that ERCOT is entitled to sovereign immunity and that the Public Utilities Commission ("PUC") has exclusive jurisdiction over the claims.

Background: This decision involved two separate cases that raised overlapping jurisdictional questions and so were consolidated at the Supreme Court.

(1) CPS Energy sued ERCOT for assorted claims related to Winter Storm Uri. The trial court denied ERCOT's plea to the jurisdiction asserting governmental immunity and the PUC's exclusive jurisdiction. ERCOT appealed and alternatively sought review via a petition for mandamus. The court of appeals, through different panels, denied ERCOT's mandamus petition but held ERCOT is entitled to an interlocutory appeal and that the PUC has exclusive jurisdiction. CPS petitioned the Supreme Court for appellate review and alternatively for mandamus.

(2) Panda Power sued ERCOT for alleged failures with ERCOT's reports on future capacity, demand, and reserves. The trial court denied ERCOT's pleas to the jurisdiction claiming exclusive jurisdiction and sovereign immunity. Following an interlocutory appeal, remand, and dismissal for lack of jurisdiction, Panda appealed the dismissal and the court of appeals reversed, holding that ERCOT is not entitled to sovereign immunity and that the PUC lacks exclusive jurisdiction. ERCOT petitioned for Supreme Court review.

Decision: The Supreme Court issued three holdings—the first two were unanimous, but the third split the Court 5-4, with Justice Boyd filing the dissent.

First, the Court held that it had jurisdiction over ERCOT's interlocutory appeal in the CPS case. A "governmental unit" is entitled to file an interlocutory appeal from a denial of a plea to the jurisdiction under the Texas Tort Claims Act. The Court explained that a

private, non-governmental entity qualifies as a "governmental unit" under that Act if (a) it "is an institution, agency, or organ of government" and (b) "derives its status and authority as such from the Texas Constitution or statutes." Because ERCOT functions as an "organ of government" by performing the "uniquely governmental function of utilities regulation" and derives that status from the Public Utility Regulatory Act, the Court held that it qualifies as a "governmental unit" entitled to file an interlocutory appeal.

Second, the Court held that the PUC has exclusive jurisdiction over Panda and CPS's claims. The Court explained that, although courts are presumed to have jurisdiction to resolve legal disputes, that presumption may be overcome where a statute grants an agency "exclusive jurisdiction either expressly or by establishing a 'pervasive regulatory scheme.'" Accordingly, to establish exclusive jurisdiction over a particular issue, an agency must show both "an express or implied grant of exclusive jurisdiction" and "that the issue falls within that jurisdictional scope." Applying this test, the Court held that the Public Utilities Code "constitutes a pervasive regulatory scheme that imparts exclusive jurisdiction" to the PUC. Moreover, complaints about activities that the PUC regulates (the focus of CPS's claims) and complaints about the PUC's control over ERCOT's performance (the focus of Panda's claims) fall within this jurisdictional scope.

Third, the Court held, over a vigorous dissent, that ERCOT is entitled to sovereign immunity. The Court explained that, although rare, a private entity is entitled to sovereign immunity if (a) "the governing statutory authority demonstrates legislative intent to grant an entity the nature, purposes, and powers of an arm of the State government," and (b) "extending immunity would 'satisfy the political, pecuniary, and pragmatic policies underlying'" that immunity. The Court reasoned that ERCOT satisfied the first prong of the test because it "operates under the direct control and oversight of the PUC"—including the PUC's "complete authority" over ERCOT's operations, finances, and budget—"performs the governmental function of utilities regulation," and "possesses the power to adopt and enforce rules pursuant to that role." As for the second prong, the Court explained that "governmental immunity benefits the public by preventing disruptions of key governmental services," and that allowing suit against ERCOT would harm the public by raising electricity costs for consumers and impairing state assets because the State is the ultimate judgment creditor for ERCOT. The Court rejected the argument that this left ERCOT unaccountable, reasoning that ERCOT is politically "accountable to the people through the political process."

Jurisdiction –
Personal Jurisdiction

***State v. Volkswagen Aktiengesellschaft*, 669 S.W.3d 399 (Tex. 2023)**

- **Vote:** 5-4. Justice Devine wrote for the Court. Justice Huddle filed a dissenting opinion, in which Chief Justice Hecht and Justice Bland joined. Justices Blacklock and Young did not participate. Chief Justice Sudderth of the Court of Appeals for the Second District of Texas sat for Justice Blacklock and Justice Tijerina of the Court of Appeals for the Thirteenth District of Texas sat for Justice Young.

Key Takeaway: When assessing personal jurisdiction, a foreign corporation is responsible for forum-state contacts effectuated through legally distinct intermediaries to the extent that those intermediaries act at the foreign corporation's direction and under its contractual control. Additionally, the fact that a foreign corporation directs the same activity at multiple states without differentiation does not negate its personal availment of a state's market—there is no requirement that a company have engaged in unique contacts with the forum state in order for those contacts to establish personal jurisdiction.

Background: The State of Texas sued German auto manufacturers Volkswagen Germany and Audi under state environmental laws over their intentional evasion of federal emissions standards through emissions-beating technology, including after-market software updates installed through Texas dealerships. The German manufacturers contested personal jurisdiction and entered a special appearance in the district court. After jurisdictional discovery, the district court found personal jurisdiction. The German manufacturers perfected interlocutory appeals, and the court of appeals reversed.

Decision: The Court held that the German manufacturers established contacts with Texas sufficient to establish personal jurisdiction through their direct contractual control over an American subsidiary and their direct and indirect contractual control over Texas-based dealerships. The Court reasoned that the manufacturers could expect to be haled into court in Texas given that they structured their business relationships so that neither their American subsidiary nor the dealerships had control over how the vehicles at issue were modified by emissions-evading software updates that occurred within Texas. The Court then rejected the argument that personal jurisdiction is improper where a foreign corporation's contacts are part of a nationwide effort and not uniquely directed at Texas. The Court explained that the required forum-by-forum analysis does not demand that a defendant's conduct be unique to Texas, so long as that conduct was directed at Texas.

Jurisdiction –
Personal Jurisdiction

***LG Chem Am., Inc. v. Morgan,* 2023 WL 3556693 (Tex. May 19, 2023)**

- **Vote:** 8-0. Justice Huddle wrote for the Court. Justice Young did not participate.

Key Takeaway: Where "a defendant purposefully avails itself of the privilege of doing business in Texas by selling and distributing into Texas the very product that injures a plaintiff, personal jurisdiction is not lacking merely because the plaintiff is outside a segment of the market the defendant targeted."

Background: Plaintiff, Tommy Morgan, was injured when a lithium-ion battery in his e-cigarette exploded in his pocket. He had purchased the e-cigarette from a store in Texas, where he also purchased the battery. Morgan sued the South Korean manufacturer of the battery, LG Chem, its American distributor, LG Chem America, and others. LG Chem and LG Chem America did not dispute that they sold and distributed their batteries to Texas manufacturers. But the foreign defendants entered special appearances, arguing that personal jurisdiction was lacking because they did not sell the batteries for resale to individual consumers to be used with e-cigarettes. Rather, they sold batteries to industrial manufacturers, who would then incorporate the batteries into consumer products like cordless power tools and laptop computers. The trial court denied the special appearances. On interlocutory appeal, the court of appeals affirmed.

Decision: The Supreme Court affirmed, holding that the foreign defendants are subject to specific personal jurisdiction. The foreign defendants argued that the claims did not arise from their contacts with Texas because they manufacture, sell, and distribute industrial components to manufacturers—not for use by individual consumers. By contrast, the plaintiff's claim is about a consumer product—a standalone battery sold to individuals. The Court, however, rejected this distinction on the facts presented, saying that it "has never endorsed" the foreign defendants' "proposed granulation of the forum—the State of Texas—into distinct market segments when evaluating personal jurisdiction." Rather, "the whole forum—the entire state of Texas" is the relevant market in the minimum-contacts analysis. The foreign defendants' purposeful availment of the Texas market to sell batteries was therefore sufficient to establish personal jurisdiction.

Arbitration – Decisionmaker for Arbitrability

***TotalEnergies E&P USA, Inc. v. MP Gulf of Mexico, LLC*, 667 S.W.3d 694 (Tex. 2023)**

- **Vote:** 6-1. Justice Boyd wrote for the Court. Justice Bland filed a concurring opinion. Justice Busby filed a dissenting opinion. Justices Huddle and Young did not participate in the decision.

Key Takeaway: An agreement to arbitrate in accordance with American Arbitration Association (AAA) rules or similar rules is a clear and unmistakable agreement to delegate arbitrability issues to the arbitrator.

Background: MP Gulf and Total E&P each own interests in a group of oil-and-gas leases. The parties built a Common System to jointly process, store, and transport production from those leases and entered into two agreements to establish the Common System. One is the System Operating Agreement, in which the parties agreed to arbitrate "in accordance with the rules of the AAA" and using "procedure[s] … in accordance with the Commercial Rules of the AAA." The other is the Cost Sharing Agreement, which lacks an arbitration clause. A dispute arose about cost allocation related to the leases. Total E&P filed suit, seeking a declaration that the Cost Sharing Agreement controls the parties' dispute. MP Gulf then initiated arbitration proceedings before the AAA. Total E&P moved the district court to stay the arbitration proceedings. In opposition, MP Gulf moved the district court to compel arbitration, arguing that the System Operating Agreement's arbitration provision required the AAA arbitrator to decide arbitrability. The trial court stayed the arbitration. The court of appeals reversed.

Decision: The Supreme Court affirmed, holding that, "as a general rule, an agreement to arbitrate in accordance with the AAA or similar rules constitutes a clear and unmistakable agreement that the arbitrator must decide whether the parties' disputes must be resolved through arbitration," because those rules state that arbitrators decide their own jurisdiction. In so holding, the Court rejected Total E&P's contention—and the view of other courts—that an agreement delegates arbitrability "only if it *both* incorporates the AAA or similar rules *and* broadly requires arbitration of any and all disputes between the parties, without carving out any particular disputes." The System Operating Agreement's language requiring arbitration only of disputes that "arise out of" the Agreement did not affect the clear delegation of arbitrability.

Arbitration –
Burden for Opposing Arbitration

***Houston AN USA, LLC v. Shattenkirk*, 669 S.W.3d 392 (Tex. 2023)**

- **Vote:** 9-0. Justice Lehrmann wrote for the Court.

Key Takeaway: A party opposing arbitration on grounds that the prohibitive cost of arbitration renders the agreement to arbitrate unconscionable must prove not merely that costs could be prohibitive, but that it will actually be charged those costs.

Background: AutoNation hired plaintiff, Shattenkirk as the car dealership's general manager, and Shattenkirk signed an arbitration agreement in his onboarding process. The agreement did not stipulate what arbitration rules would apply or discuss how arbitration costs would be allocated. Shattenkirk was later terminated, after which he sued AutoNation for race discrimination and retaliation. AutoNation moved to compel arbitration and to stay or dismiss the lawsuit. Shattenkirk opposed that motion on the grounds that, among other things, the arbitration agreement was unconscionable because excessive costs would likely preclude him from vindicating his rights. The trial court denied AutoNation's motion to compel, and the court of appeals affirmed.

Decision: The Supreme Court reversed. The Court explained that in limited circumstances, the cost of arbitration can render an agreement to arbitrate unconscionable because it does not provide an adequate and accessible alternative to litigation. But a party resisting arbitration on grounds of unconscionability must prove not only that he *may* be required to pay excessive costs, but that he *will* be required to pay those costs. The Court accordingly held that the evidence was legally insufficient to establish unconscionability. The plaintiff presented invoices from other, unrelated proceedings and an affidavit from his attorney that this matter would be more complicated and thus more expensive than those proceedings. But there was no evidence that the costs would be excessive as compared to litigation. Moreover, because the arbitration agreement was silent on the assignment of costs, there was no evidence the plaintiff would actually incur excessive costs. The Court, however, emphasized that while the evidence was legally insufficient, it was "premature" to resolve unconscionability given the lack of clarity as to the assignment of costs.

Arbitration – Compelling Non-Signatories to Arbitrate

***Lennar Homes of Texas Land and Construction, Ltd. v. Whiteley*, 2023 WL 3398584 (Tex. May 12, 2023)**

- **Vote:** 9-0. Justice Busby wrote for the Court.

Key Takeaway: A non-signatory to a home purchase agreement containing an arbitration clause can be required to arbitrate claims "based on" that agreement under the doctrine of direct-benefit estoppel, including claims that the builder breached the implied warranties of good workmanship and habitability.

Background: A purchaser signed a Purchase and Sale Agreement (PSA) with Lennar to buy a home. The deed to the property provided that it was subject to an attached arbitration provision, which stated that it "shall run with the land and be binding upon the successors and assigns of" the buyer. Plaintiff, Whitely, later purchased the property from the original buyer and shortly after noticed a serious mold problem. Whitely sued Lennar for negligent construction and breach of the implied warranties of habitability and good workmanship. Lennar filed an application to stay proceedings pending arbitration, which the trial court granted. The arbitrator denied Whitely relief and awarded Lennar attorney's fees and costs. Lennar filed a motion in the trial court to confirm the award, and Whitely opposed on the grounds that no valid agreement to arbitrate existed between her and Lennar. The trial court agreed with Whitely, and the court of appeals affirmed.

Decision: The Court reversed and rendered judgment confirming the award against Whitley. The Court first explained that under the doctrine of direct-benefit estoppel, "a non-signatory plaintiff may be compelled to arbitrate if its claims are 'based on a contract' containing an agreement to arbitrate." Although "the boundaries of direct-benefits estoppel are not always clear, nonparties generally must arbitrate claims if liability arises from a contract with an arbitration clause, but not if liability arises from general obligations imposed by law." The Court then turned to the plaintiff's claims for breach of the implied warranties of good workmanship and habitability and determined they were based on the PSA. The Court reasoned that although the warranties are implied from common law, their existence is predicated on the underlying contract, and their scope is determined by reference to its provisions.

Class Actions – Class Certification

***American Campus Communities, Inc. v. Berry*, 667 S.W.3d 277 (2023)**

- **Vote:** 9-0. Justice Blacklock wrote for the Court.

Key Takeaway: Class-wide certification under Rule 42 should not be granted where the plaintiffs' claims have no valid basis in law. Accordingly, when courts address class certification—including courts of appeals reviewing a class certification decision on interlocutory appeal—they must assess the substantive law governing the plaintiffs' claims and deny certification where those claims are "facially defective as a matter of law."

Background: American Campus Communities, Inc., owns and manages residential rental properties. Four former tenants sued American Campus, alleging violations of Chapter 92 of the Texas Property Code—in particular that the leases tenants signed omitted statutorily required language that informs the tenant of remedies available under Chapter 92 of the Code. The plaintiffs asked the district court to certify a class of more than 65,000 former tenants, and they claimed that the lease omission made American Campus strictly liable under the Code to each class member for one month's rent plus $500. The district court granted the plaintiffs motion for class certification, and the court of appeals affirmed a modified version of the certification order.

Decision: Courts applying Rule 42 must perform a "rigorous analysis" before ruling on class certification. In deciding whether to certify a class, courts must understand the applicable substantive law in order to make a meaningful determination of certification issues. Courts of appeals likewise must analyze whether the claim is suitable for certification in light of the substantive law governing the claim. And if a claim is facially defective as a matter of law, the class claim should not be certified. Here, Chapter 92 of the Property Code does not contemplate any remedy for a landlord's failure to include the required lease language, so the plaintiffs' claims were facially deficient as a matter of law, and the class was erroneously certified.

Contracts –
Insurance Policies

***ExxonMobil Corp. v. National Union Fire Insurance Co. of Pittsburgh, PA*, 2023 WL 2939596 (Tex. Apr. 14, 2023)**

- **Vote:** 8-0. Justice Young wrote for the Court. Justice Lehrmann did not participate in the decision.

Key Takeaway: There are "three basic principles for interpreting the meaning of an insurance policy": (1) "begin with the text of the policy"; (2) "refer to extrinsic documents only if that policy clearly requires doing so"; and (3) "refer to such extrinsic documents only to the extent of the incorporation and no further."

Background: Exxon hired Savage Refinery Services to work as an independent contractor. Pursuant to their service agreement, Savage agreed to obtain liability insurance. National Union accordingly underwrote two insurance policies for Savage—a primary general commercial liability policy and an umbrella policy. Following a workplace incident, Exxon settled with injured employees for $24 million. National Union's primary policy covered $5 million, and Exxon paid the remaining out of pocket because National Union denied coverage under the umbrella policy. Exxon sued National Union, arguing that National Union wrongfully denied coverage. The trial court agreed with Exxon, but the court of appeals reversed.

Decision: The Court held that the umbrella policy provided coverage and that in holding to the contrary, the court of appeals had improperly considered extrinsic documents. The Court explained that when interpreting an insurance policy, courts refer to extrinsic documents only if the policy clearly requires doing so, and then only to the extent of the incorporation and no further. The umbrella policy's text plainly incorporated the primary policy for purposes of determining who qualified as an "additional insured." The primary policy, in turn, covered any organization to which Savage was obligated by agreement to provide insurance. Therefore, because the service agreement obligated Savage to provide insurance to Exxon, Exxon qualified as an additional insured. At the same time, the Court rejected National Union's argument, adopted by the court of appeals, that the umbrella policy also incorporated the primary policy's policy limit and the service agreement's payout limit. The Court stressed that extrinsic documents are incorporated only to the extent the text of the at-issue policy instructs, and no language in the umbrella policy referenced payout or policy limits in other documents. Exxon was thus covered by the umbrella policy to the full limits of the umbrella policy.

Contracts –
Oil and Gas

***Point Energy Partners Permian, LLC v. MRC Permian Co.*, 2023 WL 3028100 (Tex. Apr. 21, 2023)**

- **Vote:** 9-0. Justice Devine wrote for the Court.

Key Takeaway: A provision prohibiting a lease from expiring "[w]hen Lessee's operations are delayed by an event of force majeure" imposes a causal-nexus requirement between the force majeure event and a delay that, if not excused, would result in the lease's expiration.

Background: MRC Permian executed an oil and gas lease with lessors. Although the lease's primary term expired, the lease provided that the primary term would not terminate so long as MRC spud a new well every 180 days. MRC sought to keep the primary term from expiring by spudding new wells, but erroneously calculated the relevant date. MRC was required to spud a new well by May 21, but scheduled spudding the well for June 2. After MRC realized its mistake—and after the May 21 deadline—MRC invoked the lease's force majeure clause, which would extend the deadline by 90 days. As the force majeure event, MRC cited a 30-hour delay in the availability of its drilling equipment. Before receiving notice, however, the lessors signed new leases. MRC sued the original lessee and putative successor in interest for, among other claims, tortious interference of the lease on the theory that the lease was still in effect. The trial court agreed that the force majeure clause did not extend the term of the lease. The court of appeals reversed, holding that fact issues existed as to whether the clause applied.

Decision: The Court held that an ordinary person using the phrase "[w]hen Lessee's operations are delayed by an event of force majeure," given its textual context, would not understand those words to encompass a 30-hour slowdown of an essential operation that was already destined to be untimely due to a scheduling error. Force majeure clauses are not one-size-fits all, and parties may contract for different risk allocations with these clauses. Here, by requiring "Lessee's operations" to be delayed "by" a force majeure event, the lease's force majeure clause imposes a causal-nexus requirement that is a necessary predicate to properly invoke the clause. The Court rejected MRC's argument that this causal nexus is satisfied by any delay in drilling, even if that delay did not cause the missed deadline. Rather, the Court held that the clause required the delaying event to have caused the missed deadline such that, but for the event, the well would have been timely drilled.

Contracts – Oil and Gas

***Van Dyke v. Navigator Group*, 668 S.W.3d 353 (Tex. 2023), *reh'g denied* (June 16, 2023)**

- **Vote:** 9-0. Justice Young wrote for the Court.

Key Takeaway: When interpreting an antiquated oil and gas instrument that includes a double fraction involving 1/8—*e.g.* 1/4 of 1/8—courts must "*begin* with a presumption" that the "use of such a double fraction was purposeful and that 1/8 reflects the *entire* mineral estate, not just 1/8 of it." The presumption, however, is "readily and genuinely rebuttable." "If the text itself has provisions—whether express or structural—illustrating that a double fraction was in fact used as nothing more than a double fraction, the presumption will be rebutted."

Background: In 1924, landowners conveyed their ranch and underlying minerals to grantees with the reservation of "one-half of one-eighth of all minerals and mineral rights." For nearly 90 years after the deed's execution, both parties, their assignees, and third parties engaged in numerous transactions and filings that reflected that each side of the original conveyance maintained equal 1/2 interests in the minerals. But in 2013, the "White parties"—whose interests derived from the grantees—objected to the payment of royalties in equal shares and brought a trespass-to-try title action. They asserted that the double fraction is simply an arithmetic formula that clearly indicates that only a 1/16 interest was reserved to the grantors. The trial court entered summary judgment in favor of the White parties, and the court of appeals affirmed.

Decision: The Supreme Court reversed, holding that the "one-half of one-eighth" language reserved 1/2 royalties for the grantors. The Court explained that legal texts, including deeds, must be given the meaning they had when adopted. At the time the deed was executed, "1/8" was widely used as a term of art to refer to the total mineral estate. When courts encounter a double fraction including 1/8 in an antiquated instrument, they should therefore begin with a presumption that the use of such a double fraction was purposeful and that 1/8 reflects the entire mineral estate. This presumption, however, is rebuttable. A rebuttal could be established by express language, distinct provisions that cannot be harmonized if 1/8 is given the term-of-art usage, or by the repeated use of fractions other than 1/8 in ways that reflect that the instrument is referring to arithmetic. The Court then offered an alterative holding, stating that even if 1/8 were not a term of art, on these facts the "presumed-grant doctrine"—a form of adverse possession—would entitle the White Parties to only half of the mineral estate.

Texas Procedure – Permissive Appeals

***Duke Inc., General Contractors v. Denis Garcia Fuentes, et al.*, 2023 WL 4278245 (Tex. June 30, 2023)**

- **Vote:** The Court denied the Petition for Review. Justice Busby, joined by Justice Young, wrote a concurrence.

Key Takeaway: The Texas Legislature passed a law requiring courts of appeals as of September 1, 2023, to provide "the specific reason for finding that a[] [permissive] appeal is not warranted" if they "do 'not accept [the] appeal.'" S.B. 1603, *amending* Tex. Civ. Prac. & Rem. Code § 51.014. The law will also permit the Supreme Court to direct courts of appeals "to accept the [permissive] appeal" if it determines on de novo review that the requirements for a permissive appeal are satisfied. Justices Busby and Young emphasized that this law will allow the Supreme Court to better police the court of appeals and ensure that permissive appeals are no longer denied without appropriate explanation.

Background: The respondent, Fuentes, sued petitioner, Duke, for injuries sustained from work on a construction site. The district court denied Duke's motion for summary judgment. But in the same order, the district court certified Duke's question of duty as appropriate for permissive interlocutory appeal under § 51.014(d). Duke sought leave from the court of appeals to file an interlocutory appeal, which the court of appeals denied in a single paragraph opinion. That opinion said nothing about why leave was denied except that the petition failed to establish each requirement under Rule 28.3(3)(e)(4).

Decision: The Supreme Court denied Duke's petition. Justice Busby's concurrence in the denial criticized the court of appeals for failing to explain the denial, but noted that the Texas Legislature has provided a solution by expressly requiring courts of appeals in the future to explain denials and permitting the Supreme Court to require courts of appeals to reach the merits in permissive appeals. The Justices concluded:

> The upshot is this: Going forward, the courts of appeals should grant permission far more often, as our cases repeatedly have urged. If they choose not to, or believe themselves not authorized to do so, they should express their reasons in detail and not with the currently prevailing rubber stamp. And this Court should grant few petitions after the courts of appeals have refused to adjudicate an interlocutory appeal, but should instead direct the courts of appeals to reach the merits when the statute makes review warranted.

Texas Procedure – Texas Citizens Participation Act

***McLane Champions, LLC v. Houston Baseball Partners LLC*, 2023 WL 4306378 (Tex. June 30, 2023)**

- **Vote:** 7-2. Justice Lehrmann wrote for the Court. Chief Justice Hecht filed a dissent, in which Justice Blacklock joined. Justice Blacklock also filed a dissent.

Key Takeaway: To invoke the special motion to dismiss procedure authorized by the Texas Citizens Participation Act ("TCPA") for suits involving the right of free speech, the suit must be based on communications that had "some relevance to a public audience" when they were made. Private business negotiations merely allocating benefits and burdens among the transacting parties do not qualify, even if the subject of the transaction is generally of public interest and those negotiations later become relevant to the public.

Background: In 2011, Houston Baseball Partners LLC entered into an agreement to purchase the Houston Astros from McLane Champions, LLC. The agreement included the team and the Astro's interest in a soon-to-be launched regional sports network in which a Comcast affiliate had invested. When the network failed, Partners sued Comcast, Champions, and Champions' owner for various common law torts and breach of contract, alleging that Comcast and the Astros had known that the network's business plan was unreasonable. Champions and Partners moved to dismiss under the TCPA's dismissal procedure, but the trial court denied the motion. The court of appeals affirmed.

Decision: The Supreme Court affirmed, holding that the TCPA did not apply to Partners' suit. Under the TCPA, a party may file a motion to dismiss if a legal action is based on, related to, or in response to that party's exercise of the right of free speech, right to petition, or right of association. The TCPA further defines "exercise of the right of free speech" as "a communication *made* in connection with a matter of public concern." The Court held that private communications can implicate the right of free speech, but that those communications must have "some relevance to a public audience when they were made." "Absent this limiting principle," "the TCPA would apply to communications made as part of any private business deal involving any industry that impacts economic or community well-being." The Court accordingly held that Partners' suit based "solely on private business negotiations," was not based on the exercise of free speech. Moreover, the fact that the purchase was about a professional sports team that is generally of public interest "does not render the specific communications at issue relevant to a public audience when they were made."