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Professional Liability

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PROFESSIONAL LIABILITY

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I. INTRODUCTION

DURING this Survey period, the Texas Supreme Court was particularly active in the area of professional liability, issuing opinions on privity issues and damages in the legal malpractice context and on several issues related to health care liability claims under Chapter 74 of the Texas Civil Practice & Remedies Code. The high court also addressed issues related to directors' and officers' liability insurance coverage and the demand requirements for derivative claims. As in years past, this Survey period was dominated by appellate decisions in favor of professional defendants, although plaintiffs did have a few victories, including a clarification regarding who can sue for legal malpractice on behalf of a former client's estate and the circumstances under which a legal malpractice plaintiff can recover a portion of his attorneys' fees incurred in the underlying representation.

II. LEGAL MALPRACTICE

A. TEXAS SUPREME COURT CONTINUES TO GRAPPLE WITH PRIVITY ISSUES

The Texas Supreme Court continued to refine the contours of the privity barrier to legal malpractice claims by non-clients. As we reported in past Surveys, the Texas Supreme Court ruled in 2006 that personal representatives of a deceased client's estate have standing to bring legal malpractice claims on behalf of the estate, reversing two court of appeals opinions that had held to the contrary.[1]

During this Survey period, the supreme court revisited one of those cases in *Smith v. O'Donnell*.[2] Thomas O'Donnell, as executor of the estate of Corwin D. Denney, appealed from a summary judgment in favor of the law firm and attorneys who provided legal advice to Denney during his lifetime in his capacity as executor of his wife's estate.[3] The San

1. Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 782 (Tex. 2006); O'Donnell v. Smith, 197 S.W.3d 394 (Tex. 2006) (vacating judgment of the court of appeals and remanding for reconsideration in light of the supreme court's decision in *Belt*).

2. 288 S.W.3d at 420-21.

3. O'Donnell v. Smith, 234 S.W.3d 135, 138 (Tex. App.—San Antonio 2007), *aff'd*, 288 S.W.3d 417 (Tex. 2009).

Antonio Court of Appeals affirmed summary judgment, but that decision was vacated and remanded for reconsideration in light of *Belt*. On reconsideration, the defendant attorneys argued that the trial court correctly granted summary judgment, even in light of *Belt*, because *Belt* only "narrowly relaxed the privity barrier to allow suits by personal representatives for *estate-planning* malpractice."[4] The attorneys maintained that, because the claims against them arose out of advice to Denney with regard to his wife's estate and not his own, it was not an "estate planning" malpractice case and, therefore, was not governed by *Belt*.[5] The court of appeals disagreed, however, and held that, in concluding that the legal malpractice claims in *Belt* survived the death of the client, the supreme court relied on general legal principles and did not limit its holding to the estate-planning context.[6] In an opinion issued in June 2009, the supreme court agreed with the court of appeals and held that *Belt* was not limited strictly to estate-planning cases but rather applied whenever the executor, standing in the shoes of the deceased, could bring a malpractice claim on behalf of the deceased client.[7]

B. Texas Supreme Court Rules on Two of Three Novel Damages Questions

The Texas Supreme Court avoided a malpractice damages issue of great interest to Texas lawyers, but did bring clarity to two other damages issues—proof of collectability in the underlying case and recovery of attorneys' fees spent in correcting or mitigating an attorney's mistake. In *Akin, Gump, Strauss, Hauer & Feld, LLP v. National Development and Research Corp.*,[8] the plaintiff National Development and Research (NDR) sued its former counsel alleging legal malpractice in connection with a lawsuit between NDR and Panda Energy International (Panda International) and two of its subsidiaries, Panda Global Energy Co. (Panda Global) and Pan-Sino Energy Development Co., LLC (Pan-Sino). The underlying lawsuit was tried to a jury in August 1999, and the trial court entered judgment generally in favor of the Panda entities.[9] After the judgment was affirmed by the court of appeals, NDR sued its trial counsel, Akin, Gump, Strauss, Hauer & Feld (Akin Gump), alleging that Akin Gump negligently failed to request jury instructions asking whether Panda breached a Letter and Shareholders' Agreement between them.

In the malpractice action, the jury found that Akin Gump's negligence in connection with the Panda litigation had resulted in the following damages: (1) the judgment paid by NDR in the underlying lawsuit; (2) the amount of money NDR likely would have recovered from Panda in the underlying litigation; and (3) a portion of the attorneys' fees incurred by

4. *Id.* at 141 (emphasis added).
5. *Id.* at 142 n.9.
6. *Id.* at 142.
7. *Smith*, 288 S.W.3d at 422-23.
8. 299 S.W.3d 106, 111 (Tex. 2009).
9. *Id.* at 110.

NDR in the Panda litigation.[10] Akin Gump did not appeal the finding of negligence or the first element of damages but appealed the other damage awards.

One of the issues considered by the supreme court was the proof required to show that a favorable judgment in an underlying case could have been collected. In order to prevail on a malpractice claim arising out of underlying litigation, the client must prove the amount of damages that would have been *recoverable and collectible* if the other case had been properly prosecuted.[11] In the present case, the jury was instructed to consider "the amount of money NDR actually would have recovered and collected from [Panda Global and Panda International]."[12] On appeal, Akin Gump argued that the court of appeals erred in considering evidence of collectability at the time the Panda litigation was filed and that there was legally insufficient evidence that the judgment would have been collected. The supreme court agreed and held that a malpractice plaintiff must produce evidence that a judgment would have been collectible at the time the plaintiff could have initiated collection efforts.[13] Accordingly, evidence of the solvency of the defendant at any time prior to when the underlying judgment could have been collected is relevant only if it is coupled with evidence that the defendant's financial condition did not change during the time before a judgment was signed.[14] Because NDR had not presented legally sufficient evidence to prove the collectability of the damages it would have been awarded from Panda, those damages awards were reversed.

Akin Gump also argued that the damages based on the alleged judgment against Panda should have been reduced by the contingency fee NDR would have owed had it prevailed in the underlying litigation. Akin Gump argued that, had NDR prevailed in the underlying trial, it would have owed Akin Gump a ten-percent contingency fee and, therefore, the verdict should be reduced by that amount in order to place NDR in the same position it would have occupied absent the alleged negligence.[15] There is a split in authority on this issue in other jurisdictions, but because the supreme court held that NDR did not prove that any damage award would have been collectible, it did not have to decide whether any such award should be reduced to take into account the contingency fee.[16]

NDR prevailed on one aspect of its damages claim, however. The court of appeals held that the attorneys' fees NDR paid in the Panda litigation were not recoverable as damages in the malpractice litigation.[17]

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10. *Id.* at 111.
11. *Id.* at 112 (citing Cosgrove v. Grimes, 774 S.W.2d 662, 666 (Tex. 1989)).
12. *Id.* (alteration in original).
13. *Id.* at 114.
14. *Id.*
15. Akin, Gump, Strauss, Hauer & Feld, LLP v. Nat'l Dev. & Research Corp., 232 S.W.3d 883, 897 (Tex. App.—Dallas 2007), *rev'd*, 299 S.W.3d 106 (Tex. 2009).
16. *Akin Gump*, 299 S.W.3d at 118-19.
17. *Id.* at 119.

The supreme court disagreed. It recognized the "American Rule" that attorneys' fees generally are not recoverable absent a statute or contract that allows for their recovery, but went on to conclude that a malpractice plaintiff may recover damages for attorneys' fees paid in the underlying case "to the extent the fees were proximately caused by the defendant attorney's negligence." An example of this is when the client has to incur attorneys' fees to correct the attorney's alleged mistake.[18]

C. Causation Requirement in DTPA Action

In *Hackett v. Littlepage & Booth*,[19] the Austin Court of Appeals attempted to clear up the confusion caused by the 1998 Texas Supreme Court case, *Latham v. Castillo*.[20] In *Latham*, the supreme court held that a plaintiff suing an attorney under the DTPA does not have to prove the "suit-within-a-suit" element usually necessary for a legal malpractice claim.[21] However, the statute does require that the alleged unconscionable act be the "producing cause of actual damages."[22] In *Latham*, for example, the plaintiff presented evidence of mental-anguish damages arising from the attorney's conduct. Plaintiffs have attempted to use this language from *Latham* to maintain a DTPA claim where a legal malpractice claim would fail for lack of causation because the plaintiff could not prove the underlying suit-within-a-suit. The plaintiff in *Hackett*, for example, based his DTPA damages on the allegation that, but for the alleged negligence of the defendant attorneys, he would have had a "viable" medical malpractice case against his treating physicians. Under this type of damages theory, the Austin Court of Appeals confirmed that proof of the suit-within-a-suit was required even under the DTPA because "[w]ithout admissible testimony that raises a fact issue that [plaintiff's] medical malpractice case was 'viable,' there was no evidence that, 'but for' his lawyers' alleged conduct, [plaintiff] would not have sustained injury."[23]

D. Personal and Subject Matter Jurisdiction in Texas State Courts

As in past years, Texas courts dealt with questions of personal jurisdiction over out-of-state lawyers during this Survey period.[24] For example, the Houston Fourteenth Court of Appeals found that Texas did not have personal jurisdiction over the New York law firm of Proskauer Rose,

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18. *Id.* at 120-22.

19. No. 03-08-00056-CV, 2009 WL 416620, at *7-9 (Tex. App.—Austin Feb. 20, 2009, no pet.) (mem. op.).

20. 972 S.W.2d 66 (Tex. 1998).

21. *Id.* at 69.

22. *Id.* (citing Tex. Bus. & Com. Code Ann. §17.50(a) (Vernon 2009)).

23. *Hackett*, 2009 WL 416620, at *10.

24. *See* Kelli M. Hinson, Jennifer Evans Morris & Sarah Hodges, *Professional Liability*, 61 SMU L. Rev. 1047 (2008); Kelli M. Hinson, Jennifer Evans Morris & Elizabeth A. Snyder, *Professional Liability*, 60 SMU L. Rev. 1233 (2007).

LLP. The plaintiffs in *Proskauer Rose, LLP v. Pelican Trading, Inc.*[25] brought claims against the defendant law firm arising out of advice Proskauer Rose provided regarding certain tax shelters created with the assistance of Ernst & Young, LLP.[26] The law firm filed a special appearance denying any personal jurisdiction in Texas. In reversing the trial court's denial of the special appearance, the court of appeals held that performing legal services in New York, such as drafting opinion letters and a "Certificate of Facts," would not constitute purposeful availment, even if the work product were transmitted to a Texas client.[27] The court of appeals reiterated its prior holding in *Markette v. X-Ray X-Press Corp.*[28] that "neither the mere existence of an attorney-client relationship between a resident client and an out-of-state attorney nor the routine correspondence and interactions attendant to that relationship are enough to confer personal jurisdiction."[29]

The Fort Worth Court of Appeals also declined to exercise jurisdiction over a Florida law firm in *Gordon & Doner, P.A. v. Joros.*[30] The court of appeals held that entering into a joint-representation agreement with a Texas firm to represent a Florida client in litigation in New York did not constitute "purposeful availment" so as to subject the Florida law firm to jurisdiction in Texas.[31] Although entering into a contract with a Texas resident does satisfy the Texas long-arm statute, a Texas court still cannot exercise jurisdiction over a non-resident defendant unless the defendant meets the minimum-contacts requirement of federal due process.[32] Because the Florida defendant's contacts with Texas were limited to entering into the joint-representation agreement whereby the Texas law firm would provide legal services in Texas, the court of appeals found that it had no general or specific jurisdiction over the Florida defendant.[33]

Texas state courts' reluctance to impose personal jurisdiction over out-of-state attorneys should be compared with the Fifth Circuit's recent ruling in *Walk Haydel & Associates, Inc. v. Coastal Power Production Co.*,[34] in which it reversed the lower court's ruling that it did not have personal jurisdiction over the out-of-state law firm defendant. The Fifth Circuit held that the plaintiff, Delasa, had met its burden to establish a prima facie case for specific jurisdiction in Louisiana. Plaintiff produced evidence at the hearing that the defendant law firm had agreed to represent a Louisiana client, Delasa, that it had assisted in setting up a meeting in New Orleans involving Delasa, and that in the course of repeated tele-

25. No. 14-08-00283, 2009 WL 242993 (Tex. App.—Houston [14th Dist.] Feb. 3, 2009, no pet.) (mem. op.).
26. *Id.* at *1 (Ernst & Young was sued as well but was not a party to the appeal.).
27. *Id.* at *4.
28. 240 S.W.3d 464 (Tex. App.—Houston [14th Dist.] 2007, no pet.).
29. *Proskauer Rose*, 2009 WL 242993, at *4.
30. 287 S.W.3d 325, 328 (Tex. App.—Fort Worth 2009, no pet.).
31. *Id.* at 333.
32. *Id.* at 332 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 2008)).
33. *Id.* at 335-36.
34. 517 F.3d 235 (5th Cir. 2008).

phone calls and correspondence with Delasa in Louisiana, the law firm had failed to disclose that it had an alleged conflict of interest.[35] Accordingly, the Fifth Circuit found that the evidence was sufficient to make a prima facie case of "the purposeful direction of material omissions to [Louisiana]."[36] The Fifth Circuit also noted that it could consider, as "part of the analysis," that the harmful effects of the law firm's allegedly wrongful actions were felt in Louisiana.[37]

The Fort Worth Court of Appeals considered the issue of subject matter jurisdiction in *Minton v. Gunn*.[38] *Minton* was a legal malpractice case based on alleged negligence during the litigation of a patent infringement case in federal court. The plaintiff alleged that, in the underlying patent infringement case, the defendant lawyers failed to timely plead and pursue the "experimental use doctrine" and that, as a result, the plaintiff's patent infringement case was dismissed on summary judgment, depriving the plaintiff of a potential judgment against the patent defendants or, in the alternative, a $100,000,000 settlement.[39] In the subsequent malpractice action, the plaintiff bore the burden of establishing that, but for the attorneys' alleged negligence, the plaintiff would have prevailed in the underlying litigation. The defendants filed a motion for summary judgment alleging that, as a matter of law, the experimental use doctrine was not applicable, and therefore, their failure to plead and pursue it did not result in any harm to plaintiff.

As an initial matter, the court of appeals considered whether it had jurisdiction to consider this malpractice action. Minton alleged that his case "'arises under' the exclusive patent law jurisdiction of the federal courts."[40] In making his argument, Minton relied on two Federal Circuit cases, *Air Measurement Technologies, Inc. v. Akin Gump Strauss Hauer & Feld, LLP* and *Immunocept, LLC v. Fulbright & Jaworski, LLP*,[41] both of which hold that

> when a state legal malpractice claim requires the hypothetical adjudication of the merits of an underlying federal patent infringement lawsuit—that is, trial of the patent infringement suit within the legal malpractice suit—the legal malpractice case presents a disputed, substantial question of federal patent law conferring Section 1338 juris-

35. *Id.* at 244-45.

36. *Id.* at 245 (alteration in original).

37. *Id.*

38. 301 S.W.3d 702, 706-10 (Tex. App.—Fort Worth 2009, pet. filed).

39. The defendants in the underlying patent infringement suit relied on the "on sale bar rule" as a defense to the plaintiff's infringement claims and won summary judgment based on that doctrine. After the summary judgment ruling, the plaintiff sought to raise the "experimental use doctrine" as a way to avoid application of the "on sale bar rule," but the court did not allow the plaintiff to raise experimental use at that point in the litigation. *Id.* at 706.

40. *Id.* at 708.

41. Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P., 504 F.3d 1262 (Fed. Cir. 2007); Immunocept, LLC v. Fulbright & Jaworski, LLP, 504 F.3d 1281 (Fed. Cir. 2007).

diction on the federal courts.[42]

Surprisingly, however, the court of appeals declined to follow these two cases and held that it did have jurisdiction over this malpractice case.[43] The court of appeals went on to hold that the experimental use doctrine was not applicable to the underlying patent infringement case and, therefore, summary judgment in favor of the defendant attorneys was appropriate.[44]

E. Compulsory Arbitration Between Lawyer and Client

In *Chambers v. O'Quinn*,[45] the Houston First Court of Appeals joined a growing number of Texas courts in upholding mandatory arbitration agreements in legal malpractice cases. Arbitration agreements are generally favored under both federal and state law, but section 171.002(a)(3) of the Texas Civil Practice & Remedies Code requires that arbitration agreements in "personal injury" cases be signed by each party and each party's independent attorney.[46] Siding with the majority of Texas courts, the *Chambers* court held that a legal malpractice case is not a claim for "personal injury" even if the underlying case involved personal injury claims.[47]

The *Chambers* court also refused to adopt the plaintiffs' argument that mandatory arbitration provisions between attorneys and clients violate the Texas Disciplinary Rules of Professional Conduct. Rule 1.08(g) provides that an attorney may not "[enter] into an agreement with a client that prospectively limits the attorney's liability to the client" except under certain circumstances.[48] The court of appeals agreed with prior Texas appellate courts in holding that a mandatory arbitration provision does not limit the attorney's liability, but "merely prescribes the procedure for resolving any disputes between attorney and client"; therefore, such an agreement does not violate the disciplinary rules.[49]

The Houston Fourteenth Court of Appeals ruled similarly in *Labidi v. Sydow*,[50] holding that legal malpractice claims are not personal injury claims under the meaning of section 171.002 of the Texas Civil Practice & Remedies Code and that arbitration agreements between lawyers and cli-

42. *Minton*, 301 S.W.3d at 718 (Walker, J., dissenting) (citing *Air Measurement Techs.*, 504 F.3d at 1272-73, and *Immunocept*, 504 F.3d at 1283).

43. *Id.* at 709.

44. *Id.* at 714-15.

45. 305 S.W.3d 141, 145 (Tex. App.—Houston [1st Dist.] 2009, pet. filed).

46. Tex. Civ. Prac. & Rem. Code Ann. § 171.002(a)(3) (Vernon 2005).

47. *Id.* at *3-4 (comparing Taylor v. Wilson, 180 S.W.3d 627, 630 (Tex. App.—Houston [14th Dist.] 2005, pet. denied); Miller v. Brewer, 118 S.W.3d 896, 899 (Tex. App.—Amarillo 2003, no pet.); *In re* Hartigan, 107 S.W.3d 684, 690 (Tex. App.—San Antonio 2003, pet. denied), with *In re* Godt, 28 S.W.3d 732, 739 (Tex. App.—Corpus Christi 2000, no pet.)).

48. *Chambers*, 305 S.W.3d at 150-51 (discussing Tex. R. Disciplinary P. 1.08(g),*reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G (Vernon 2005)); *see also* Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co., 20 S.W.3d 692, 699 (Tex. 2000).

49. *Chambers*, 305 S.W.3d at 151 (citing *In re Hartigan*, 107 S.W.3d at 689).

50. 287 S.W.3d 922, 929 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

ents do not violate Texas public policy. The court of appeals also discussed the recent opinion issued by the Texas Ethics Commission, which states that an attorney must make the client aware of the significant advantages and disadvantages of arbitration and provide sufficient information to permit the client to make an informed decision about whether to agree to the arbitration provision.[51] The court of appeals noted that opinions of the Texas Ethics Commission are advisory rather than binding and that, in any event, such opinions govern the conduct of lawyers but do not affect the enforceability of arbitration provisions.[52]

Accordingly, the majority of Texas courts seem to be enforcing mandatory arbitration agreements in legal malpractice cases. However, to avoid a potential ethical violation, attorneys desiring to take advantage of mandatory arbitration should be careful to ensure that the provisions are not unduly burdensome on the client and that the client receives full disclosure before signing the agreement.

III. MEDICAL MALPRACTICE

A. APPLICABILITY OF CHAPTER 74

As anyone who deals with medical malpractice claims in Texas should know, "health care liability claims" are subject to the provisions and requirements of Texas Civil Practice and Remedies Code Chapter 74. "A health care liability claim" is defined as:

> a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.[53]

During the Survey period, several courts dealt with the issue of whether a claim was a "health care liability claim" and, thus, subject to Chapter 74.

The most notable case on this topic was a Texas Supreme Court decision, *Marks v. St. Luke's Episcopal Hospital*.[54] The plaintiff in *Marks* was recovering from back surgery at the defendant hospital. He attempted to stand up by pushing off the hospital bed's footboard, but the footboard came loose, causing Marks to fall. Marks alleged that the hospital was negligent for various reasons,

> including (1) failing to train and supervise the nursing staff properly, (2) failing to provide him with the assistance he required for daily living activities, (3) failing to provide him with a safe environment in

51. *Id.* (citing OP. TEX. ETHICS COMM'N NO. 586 (2008)).
52. *Id.*
53. TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(a)(13) (Vernon Supp. 2009).
54. No. 07-0783, 2009 WL 2667801 (Tex. Aug. 28, 2009). This case was decided under Chapter 74's predecessor statute, TEX. REV. CIV. STAT. art. 4590i, but, as the supreme court noted, the pertinent language from that statute is similar to that in the current Chapter 74. *See id.* at *24 n.2.

> which to recover, and (4) providing a hospital bed that had been negligently assembled and maintained by the hospital's employees.[55]

Marks did not serve an expert medical report within 120 days after filing his petition, as required by Chapter 74, and the hospital filed a motion to dismiss on that basis. The trial court dismissed all of the claims, holding that they were all health care liability claims for which an expert report was required. The court of appeals affirmed the dismissal of all of the claims based on the same reasoning.[56]

In a 5–4 decision, the supreme court agreed that the first three claims were health care liability claims, but it held that the fourth was not. The supreme court applied three factors to determine whether the claim was a health care liability claim: "(1) whether the specialized knowledge of a medical expert may be necessary to prove the claim, (2) whether a specialized standard in the health care community applies to the alleged circumstances, and (3) whether the negligent act involves medical judgment related to the patient's care or treatment."[57] First, Marks presented evidence that the footboard was the responsibility of the maintenance staff, and the evaluation of maintenance staff duties would not require expert testimony. Second, the breaking of a footboard did not invoke a special standard of care unique to the medical community. Third, while there are circumstances in which medical judgment might be involved in hospital bed assembly or use, this was not one of those cases. The supreme court also relied on the statute's policy: to remedy a "medical malpractice insurance crisis" in Texas.[58] The claim in this case would not be covered by medical malpractice insurance. Rather, it would be covered by the hospital's general commercial liability insurance since, "[a]t its core, Marks's hospital bed claim involves the failure of a piece of equipment."[59] The supreme court also noted, "it is not the identities of the parties or the place of injury that defines the claim."[60]

Various courts of appeals also struggled with the issue of what constitutes a "health care liability claim." The Beaumont Court of Appeals held that the failure of a nursing home to provide food and water was a health care liability claim in *Medical Hospital of Buna Texas, Inc. v. Wheatley*.[61] In that case, the plaintiff sued a nursing home for failure to adequately take care of a resident but did not serve expert reports. The nursing home moved to dismiss, but the trial court denied the motion, holding that the claims were not health care liability claims. On appeal, the plaintiff argued that her original and first amended petitions alleged

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55. *Id.* at *1.

56. The case was appealed once to the Texas Supreme Court, but after the decision in *Diversicare*, the case was remanded to the court of appeals for further determinations. *See* St. Luke's Episcopal Hosp. v. Marks, 193 S.W.3d 575 (Tex. 2006) (per curiam). The appeal of those determinations is what is addressed here.

57. *Marks*, 2009 WL 2667801, at *4.

58. *Id.* at *3.

59. *Id.* at *5.

60. *Id.* at *8.

61. 287 S.W.3d 286, 289-90 (Tex. App.—Beaumont 2009, pet. filed).

health care liability claims only in the alternative, and that the second amended petition omitted the health care liability claims altogether. The original petition stated that the nursing home "failed to properly attend to the needs of the residents of the nursing home," while the second amended petition claimed that the nursing home failed to provide "basic human necessities."[62] The court of appeals found no difference between the two assertions and held that "supervision and providing for the fundamental care needs of [the plaintiff] are inseparable from health care services provided to [the plaintiff] as a resident of the nursing home."[63] Further, it added that a claim alleging that a nursing home failed to adequately provide food and water to the plaintiff was a claim of substandard care of a heath care provider. Therefore, the claims were subject to Chapter 74 and should have been dismissed for failure to serve a timely expert report.

The Corpus Christi Court of Appeals determined that claims concerning problems with a laser hair removal were not health care liability claims in *Tesoro v. Alvarez*.[64] The court of appeals rejected the plaintiff's theory that because the sessions involved "treatment" they inherently involved health care, reasoning that this treatment was not related to health care, as the statute requires. In *Turtle Healthcare Group, LLC v. Linan*, the Corpus Christi Court of Appeals decided that allegations that a healthcare group provided an uncharged battery for a ventilator machine was not a health care liability claim subject to Chapter 74.[65] In that case, the plaintiff requested an oxygen tank and two batteries for a ventilator machine from the health care group. The employee delivered them, but the battery put into the machine "turned out to be uncharged."[66] Noting that the claim would not require expert testimony to prove, the court of appeals held that the claim was not a health care liability claim within the meaning of the statute.[67]

B. Mandamus Review and Interlocutory Appeals in Challenges to Expert Reports

The question of how and when to appeal the denial of a motion to dismiss has been the subject of many recent Texas cases. Adding to the confusion in this area is the statute's differing treatment of "deficient" reports as opposed to late-filed or absent reports. Under Chapter 74, a plaintiff who files a health care liability claim is required to serve an expert report within 120 days of filing the original petition.[68] The expert report must provide a fair summary of the expert's opinions regarding the

62. *Id.* at 289-91.
63. *Id.* at 294.
64. 281 S.W.3d 654, 655-56 (Tex. App.—Corpus Christi 2009, no pet.).
65. No. 13-08-00533-CV, 2009 WL 1905379, at *7 (Tex. App.—Corpus Christi June 11, 2009, pet. filed).
66. *Id.* at *1.
67. *Id.* at *7.
68. Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a) (Vernon Supp. 2009).

standard of care, how the defendant allegedly breached that standard, and a causal relationship between the breach and the plaintiff's injury.[69] If the plaintiff fails to timely serve the expert report, the trial court *shall* dismiss the claims with prejudice.[70] On the other hand, if the plaintiff serves a report that is deficient in some way, the trial court may grant one thirty-day extension to cure the defects.[71] An interlocutory appeal may be taken from a denial of a motion to dismiss based on failure to serve a report, but an interlocutory appeal is statutorily prohibited from an order granting a thirty-day extension.[72] Since these statutory changes were enacted in 2003 and 2005, courts have wrestled with the minutiae, and many issues have reached the Texas Supreme Court. For instance, in *Badiga v. Lopez*,[73] a case within this Survey period but discussed in the last Survey,[74] the supreme court held that a defendant *may* seek an interlocutory appeal of a trial court order that simultaneously granted a thirty-day extension and denied a motion to dismiss if the report were not timely filed.

A few days after deciding *Badiga*, the Texas Supreme Court issued *In re Watkins*[75] on a similar issue. The plaintiff in that case filed a "report" that the defendant claimed was merely a "narrative of treatment."[76] The report was missing opinions as to the applicable standard of care, breach, and causation. The trial court granted a thirty-day extension for the plaintiff to cure the defects. Dr. Watkins, a defendant, filed a joint interlocutory appeal and petition for writ of mandamus to the court of appeals. The appellate court dismissed the appeal for want of jurisdiction since this was an appeal of an extension to cure a deficient expert report.[77] The court of appeals also denied mandamus relief.[78] Dr. Watkins did not appeal the dismissal of the interlocutory appeal, but instead pursued only the mandamus claim in the supreme court.

Dr. Watkins argued to the supreme court that since the report was missing a standard of care, breach, and causation, it was not an "expert report" as contemplated by the legislature. But the supreme court did not reach that issue. Instead, in a short majority opinion, the supreme court determined that mandamus relief was not the appropriate remedy. The supreme court reasoned that if no report had been served at all, there was an adequate remedy through interlocutory appeal, so mandamus relief was not available.[79] Moreover, if a deficient report had been served, mandamus relief was also not appropriate. The supreme court

69. *Id.* § 74.351(r)(6).
70. *Id.* § 74.351(b)(2).
71. *Id.* § 74.351(c).
72. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (Vernon 2008).
73. 274 S.W.3d 681, 682-85 (Tex. 2009).
74. *See* Kelli M. Hinson, Jennifer Evans Morris & Jennifer C. Wang, *Professional Liability*, 62 SMU L. REV. 1392 (2009).
75. 279 S.W.3d 633 (Tex. 2009).
76. *Id.* at 633.
77. *Id.* at 634.
78. *Id.*
79. *Id.; see* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(9) (Vernon 2008).

reasoned that the legislature meant to limit review of deficient reports by expressly disallowing interlocutory appeals. Therefore, allowing mandamus review would subvert legislative intent. The supreme court accordingly denied the petition for mandamus.

If Dr. Watkins had pursued the interlocutory appeal rather than the mandamus, the supreme court may have reached Dr. Watkins's argument that the report was so deficient that it constituted no report at all. That issue was highlighted by Justice Willett in *Ogletree v. Matthews*,[80] a Texas Supreme Court opinion discussed in a previous survey. At that time, it was assumed that the issue was a "rare bird."[81] But in the past three years, three separate supreme court decisions and several appellate court decisions have touched on—but not answered—the issue.[82]

Justices Johnson and Willett wrote separately in *Watkins* to explain that they each believed the expert report, merely a "status report," to be wholly deficient such that it was "not a statutory expert report *at all*."[83] Justice Willett lamented that Dr. Watkins did not pursue the interlocutory appeal so that the supreme court could address this question once and for all. Willett stated he would not allow an extension in a case where the expert report "bears zero resemblance to the statute" and is "no more an expert report than my son's tricycle is a Harley."[84]

Although the issue of what constitutes an adequate expert report remains unanswered by the Texas Supreme Court, the Fort Worth Court of Appeals did address it during the Survey period. In *Scoresby v. Santillan*,[85] the court determined the plaintiff's expert report was deficient but not so deficient that it was no report at all. In that case, the plaintiff served an expert report before the 120-day deadline but failed to timely serve a curriculum vitae as required by statute.[86] The trial court denied the defendant's motion to dismiss based on failure to serve a complying medical report, and the court granted a thirty-day extension to "cure any deficiencies" in the expert report.[87] The doctor defendant appealed, arguing that the plaintiff's expert report was so lacking as to constitute no report at all. The court of appeals interpreted *Ogletree* to mean that there are only two classes of reports: (1) those that are deficient and (2)

80. 262 S.W.3d 316, 317 (Tex. 2007) (Willett, J., concurring).

81. *Id.* at 324 (Willett, J., concurring).

82. *See id.* at 316-17; *In re* Watkins, 279 S.W.3d 33, 633-34 (Tex. 2009); Lewis v. Funderburk, 253 S.W.3d 204 (Tex. 2008); Bogar v. Esparza, 257 S.W.3d 354, 357-58 (Tex. App.—Austin 2008, no pet.) (purported report was no report at all); Rivenes v. Holden, 257 S.W.3d 332, 338-39 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (same); Apodaca v. Russo, 228 S.W.3d 252, 255-58 (Tex. App.—Austin 2007, no pet.) (same); Tenet Hosp., Ltd. v. Gomez, 276 S.W.3d 9, 12-13 (Tex. App.—El Paso 2008, no pet.) (report was not so deficient as to constitute no report at all); Cook v. Spears, 275 S.W.3d 577, 580-82 (Tex. App.—Dallas 2008, no pet.) (same).

83. *Watkins*, 279 S.W.3d at 635 (Johnson, J., concurring); *see also id.* at 636 (Willett, J., concurring).

84. *Id.* at 636-39 (Willett, J., concurring).

85. 287 S.W.3d 319, 323-25 (Tex. App.—Fort Worth 2009, pet. filed).

86. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon Supp. 2009).

87. *Scoresby*, 287 S.W.3d at 321.

those that are not served at all.[88] The court of appeals determined that the plaintiff did serve a report in this case. Therefore, it necessarily fell into the first category and was merely deficient—lacking the curriculum vitae. The court of appeals added, "[No] supreme court opinion holds that a timely served expert report containing a narrative that fails to include any expert opinion on the standard of care, breach, or causation is tantamount to no report at all and thus ineligible for any [thirty-day] extension."[89] The court of appeals reasoned that the legislature's provided remedy for a faulty report was time to fix it and not dismissal of the claim entirely. Furthermore, the court of appeals added, an appeal from such an extension, even if it was coupled with a denial of a motion to dismiss, was not proper.[90] Thus, the court of appeals dismissed the appeal for lack of jurisdiction.

C. Dallas Court of Appeals Defines Beginning of 120-Day Period

In *Lone Star HMA v. Wheeler*,[91] the Dallas Court of Appeals held that Chapter 74 means what it says and that the 120-day period for filing an expert report begins on "the date the *original* petition was filed" even if an amended petition later adds additional or different defendants.[92] The plaintiffs in that case filed their original petition on January 17, 2008, but the petition incorrectly identified the hospital defendant. At the same time, the plaintiffs also filed an expert report that did not reference the claims against the hospital. In their first amended petition, plaintiffs attempted to correct the name of the hospital, but it was not until the second amended petition, filed March 31, 2008, that the hospital entity was named correctly and served. On July 11, 2008, 176 days after the original petition was filed, but only 101 days after the second amended petition, the plaintiffs served an expert report addressing the claims against the hospital. The trial court denied the hospital's motion to dismiss for failure to serve an expert report within 120 days of the petition. The court of appeals reversed, holding that the plain language of the statute required service of a complying medical report "not later than the 120th day after the date the *original* petition was filed."[93] Contrary to the plaintiffs' arguments, there was no statutory exception that allowed counting from the date of an amended petition adding a new defendant, nor was there an exception that provided a grace period in cases of alleged misidentification.[94]

88. *Id.* at 324 (citing Ogletree v. Matthews, 262 S.W.3d 316, 320 (Tex. 2007)).
89. *Id.* at 324-25.
90. *Id.* (citing *Ogletree*, 262 S.W.3d at 321).
91. 292 S.W.3d 812 (Tex. App.—Dallas 2009, no pet.).
92. *Id.* at 815-16.
93. *Id.* at 815 (quoting Tex. Civ. Prac. & Rem. Code Ann. § 74.351(a) (Vernon Supp. 2009)) (emphasis in opinion).
94. *Id.* at 816-17. The hospital had argued that it was sued, although incorrectly named, in the original petition. Plaintiffs countered that the hospital was not sued until the name was corrected in the second amended petition. The court of appeals did not decide

D. Expert Reports Addressing Vicariously Liable Defendants

Often medical negligence plaintiffs sue both physicians and another entity such as a hospital or a physician's group, but serve one expert report that addresses the alleged negligence of only the physician. In these situations, the entity defendant may argue the claims against it should be dismissed since the expert report did not address any claims against it. During the Survey period, the Texas Supreme Court discussed this issue in *Gardner v. U.S. Imaging, Inc.*[95] In that case, a plaintiff underwent a lumbar epidural procedure that allegedly caused spinal meningitis, resulting in the plaintiff's hearing loss. The plaintiff sued both the operating doctor and the corporation that owned and operated the facility where the procedure was performed. The plaintiff timely served an expert report, but the report did not mention or address any negligence by the corporation. The corporation moved to dismiss. The plaintiff argued that all the claims against the corporation were vicarious and, therefore, the expert report did not need to specifically implicate the corporation. The supreme court agreed and held, "[w]hen a party's alleged health care liability is purely vicarious, a report that adequately implicates the actions of that party's agents or employees is sufficient."[96]

The Houston Fourteenth Court of Appeals extended the holding of *Gardner* to professional associations in *Obstetrical and Gynecological Associates, P.A. v. McCoy*.[97] There, the plaintiff's expert report implicated the actions of only the doctor and not the doctor's professional association. The court of appeals determined that the claims alleged against the professional association were vicarious in nature and, applying the same reasoning as *Gardner*, held it was not necessary for the plaintiffs to provide a separate expert report for the professional association.[98]

On the other hand, when there are direct claims against the entity based on the entity's own alleged negligence, the expert report must specifically address those claims, even if the plaintiff alleges both vicarious liability and direct liability claims against the entity. The Corpus Christi Court of Appeals faced this issue in *In re Knapp Medical Center Hospital*.[99] The plaintiffs in that case raised both direct and vicarious claims against the entity, and the court of appeals determined that the plaintiffs should produce reports addressing both the doctor and the entity in such a situation.[100] The Fort Worth Court of Appeals reached the same con-

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this issue, holding instead that the time period began to run on the day the original petition was filed, regardless of whether the hospital was named correctly or added later. *Id.* at 817.

95. 274 S.W.3d 669 (Tex. 2008) (per curiam).

96. *Id.* at 671-72.

97. 283 S.W.3d 96, 103 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

98. *Id.* at 106-08.

99. No. 13-09-00381-CV, 2009 WL 2398003 (Tex. App.—Corpus Christi 2009, orig. proceeding).

100. *Id.* at *3-4.

clusion in *Vestal v. Wright*.[101]

E. Ex Parte Communications with Non-Party Medical Providers

Chapter 74 also requires that, at least sixty days before filing a health care liability claim, the plaintiff must serve a notice of the claim to each physician or health care provider against whom the claim will be made.[102] Furthermore, the notice must be served with a statutory medical authorization form, allowing the soon-to-be defendants to obtain the claimant's medical records.[103] Some defense attorneys, upon notice of the claim, attempt to gather information from non-party physicians through ex parte communications with them. They can then obtain information that is not contained in either the plaintiff's claims or medical records. The Texas Supreme Court recently held in *In re Collins*[104] that this was permissible because such communications were included in the statutory release.

In *Collins*, the supreme court held that the trial court abused its discretion when it issued a protective order preventing defendants and their attorneys from ex parte contacts with plaintiff's non-party medical providers. That case involved claims by the patient, Kelly Regian, against her physician, Dr. Lester Collins. Before filing the lawsuit, in compliance with Chapter 74, the Regians sent Dr. Collins notice of the health care liability claim along with the statutorily required form release of protected health information.[105] Soon after the Regians filed their petition, they sought a protective order that would prohibit the defendants from engaging in ex parte communications with Kelly Regian's treating physicians. The plaintiffs were attempting to prevent defendants from obtaining information "with a wink and a smile" that went beyond the plaintiff's medical records.[106] The trial court agreed and issued the protective order. Dr. Collins petitioned for mandamus relief. The Tyler Court of Appeals denied the relief, holding that the trial court did not abuse its discretion.[107]

The Texas Supreme Court disagreed. It acknowledged the unique privacy concerns of health care liability claims. However, it held that the statutory release authorized "non-party health care providers to orally convey relevant information to defendants."[108] The supreme court noted that the legislature provided a mechanism for a plaintiff to exclude medical records in the statutory release. Plaintiffs could then be the "gate-

101. No. 2-08-237-CV, 2009 WL 2751020, at *6 (Tex. App.—Fort Worth Aug. 31, 2009, pet. filed) (mem. op.).
102. Tex. Civ. Prac. & Rem. Code Ann. § 74.051(a) (Vernon 2005).
103. *Id.* §§ 74.051(a), 74.052.
104. 286 S.W.3d 911, 918 (Tex. 2009).
105. *See* Tex. Civ. Prac. & Rem. Code Ann. § 74.051(a).
106. *In re Collins*, 286 S.W.3d at 914.
107. *Id.* at 915.
108. *Id.* at 918.

keepers of their own privileged health information."[109] Further, plaintiffs are in the best position to identify in the first instance the information they deem privileged. In this case, the Regians did not limit their release but instead sought a protective order from the court. The supreme court held this was an improper use of a protective order.[110]

The Regians also contended that the statutory release did not comply with the federal Health Insurance Portability and Accountability Act (HIPAA) since it was mandated and not voluntary. Therefore, the plaintiffs argued, HIPAA barred the ex parte communications.[111] The supreme court disagreed, noting that the plaintiffs voluntarily filed the lawsuit. Furthermore, the supreme court noted that HIPAA would preempt state law only if it would be impossible for an entity to comply with both the federal and the state laws. Since state law authorized disclosure to the same extent that the federal law did, it was possible for an entity to comply with both laws, and HIPAA did not preempt the Chapter 74 release.[112]

IV. LIABILITY OF ARCHITECTS AND ENGINEERS

A. Important Differences Between Equitable and Contractual Subrogation

In cases of architectural and engineering malpractice, it is often the case that the project-gone-wrong is insured by multiple parties, including the professional's liability insurance and the owner's or client's casualty insurance. Accordingly, in these types of cases, the doctrine of subrogation may determine who is liable to pay for the damage and who can sue the allegedly negligent professional. In *Bay Rock Operating Co. v. St. Paul Surplus Lines Insurance Co.*,[113] the San Antonio Court of Appeals discussed the difference between equitable and contractual subrogation rights in the context of an engineering malpractice claim. In that case, a well operator—Hollimon—hired Bay Rock Operating Company (Bay Rock) to design, plan, and supervise the drilling of a well in Live Oak County, Texas. During the drilling, there was a blowout at the surface, which resulted in a fire at the rig. Hollimon filed a claim with its insurance company, St. Paul Surplus Lines Insurance Company (St. Paul), which ultimately paid $2,857,778 in settlement of that claim. St. Paul, as the subrogee to its insured, Holliman, then sued Bay Rock and obtained a favorable jury verdict against it.

Bay Rock appealed the judgment against it arguing, among other things, that although St. Paul had established its "right to bring a subrogation action in the name of its insured, Hollimon," it had not established other elements necessary to prove its "ability *to recover* on that subroga-

109. *Id.* at 919.
110. *Id.*
111. *Id.* at 920.
112. *Id.*
113. 298 S.W.3d 216 (Tex. App.—San Antonio 2009, pet. denied).

tion right."[114] Bay Rock argued that St. Paul had not presented sufficient evidence that its settlement with Hollimon was for a "covered loss" or that Hollimon had any right to recover from Bay Rock.[115] The court of appeals began its analysis by discussing the differences between contractual subrogation and equitable subrogation. In cases of equitable subrogation, "a party must show it involuntarily paid a debt primarily owed by another which in equity should have been paid by the other party."[116] In contrast, the right to contractual subrogation is governed by the terms of the agreement between the parties; therefore, the "policy declares the parties' rights and obligations, which are not generally supplanted by court-fashioned equitable rules that might apply, as a default gap-filler, in the absence of a valid contract."[117] The court of appeals found that the additional requirements alleged by Bay Rock were derived from equitable subrogation cases and did not apply to the instant case.[118] Because the court of appeals concluded that St. Paul had demonstrated its right to subrogation under its contract with Hollimon, St. Paul stepped into the shoes of its insured and obtained Hollimon's right to sue Bay Rock for negligence.

B. Chapter 150 "Certificate of Merit" Must Be by a Professional Practicing in the Same Area

The Corpus Christi Court of Appeals examined a question of first impression related to claims against architects in *Landreth v. Las Brisas Council of Co-Owners, Inc.*[119] The defendants in that case, an architect and architectural firm, moved to dismiss the claims against them based on the plaintiff's failure to file a certificate of merit satisfying the requirements of Chapter 150 of the Texas Civil Practice & Remedies Code. Section 150.002 requires that in any action for damages arising out of the provision of professional services by certain professionals, including licensed architects and engineers, the plaintiff must file a certificate of merit by a professional with the same professional license, familiar with the same area of practice as the defendant, which sets forth "at least one negligent act, error, or omission."[120]

The defendants in *Landreth* argued that the plaintiff's certificate did not comply with the statute because the defendants were engaged in "design restoration architecture," and the professional who submitted the affidavit (1) did not affirmatively state in his initial affidavit that he practiced in that area and (2) conceded in deposition that he had never

114. *Id.* at 222-23.
115. *Id.* at 223.
116. *Id.* (citing Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d 765, 774 (Tex. 2007)).
117. *Id.* at 223-24 (quoting Fortix Benefits v. Cantu, 324 S.W.3d 642, 647-48 (Tex. 2007)).
118. *Id.* at 224.
119. 285 S.W.3d 492 (Tex. App.—Corpus Christi 2009, no pet.).
120. *Id.* at 494 (citing Tex. Civ. Prac. & Rem. Code Ann. § 150.002 (Vernon Supp. 2009)).

worked as a design restoration architect.[121] The plaintiff countered that the statute did not require such a specific match between areas of practice and also that, in supplemental affidavits, the expert had recited that he practiced in the same area of practice as the defendant architect. The court of appeals sided with the defendants, however, holding that the plain language of the statute compels the court to look only at the initial certificate filed, and not subsequent amendments.[122] Because the original certificate did not state that the expert practiced in the same area of practice as the defendant, the court should have granted the defendants' motion to dismiss plaintiff's professional negligence claims.

The court of appeals agreed with the plaintiff, however, that *only* the professional negligence claims should have been dismissed.[123] The *Landreth* court agreed with the holding of the San Antonio Court of Appeals in *Gomez v. STFG, Inc.*[124] that the lack of a complying certificate of merit requires the dismissal of negligence claims arising out of the "provision of professional services," but not any other claims. Accordingly, the plaintiff's non-negligence claims, such as breach of agency, breach of fiduciary duty, and breach of contract, should not have been dismissed.[125] The Austin Court of Appeals reached the same result in *Consolidated Reinforcement, LP v. Carothers Executive Homes, Ltd.*,[126] affirming the trial court's refusal to grant the defendant's motion to dismiss claims for breach of contract, breach of warranty, and deceptive trade practices. The court of appeals could not determine whether the plaintiff's claim for negligent misrepresentation "[arose] out of the provision of professional services," and so remanded that claim for the trial court to reconsider whether that claim should be dismissed pursuant to Chapter 150.[127]

V. DIRECTOR AND OFFICER LIABILITY

A. Courts Clarify the Rules Concerning Derivative Actions

While wading through demand requirements in derivative actions, the Texas Supreme Court commented on the difference between Jimmy Buffett and Warren Buffett in *In re Schmitz*.[128] In that case, the supreme court explored and further clarified article 5.14 of the Texas Business Corporation Act, which requires a shareholder to make a written demand with particularity, regardless of whether such demand is futile, prior to

121. *Id.* at 497-98.
122. *Id.* at 499-500.
123. *Id.* at 500.
124. *Id.* (citing Gomez v. STFG, Inc., No. 04-07-00223-CV, 2007 WL 2846419 (Tex. App.—San Antonio Oct. 3, 2007, no pet.))
125. *Id.*
126. 271 S.W.3d 887, 894 (Tex. App.—Austin 2008, no pet.).
127. *Id.* at 894-95. The *Landreth* case also included a claim for negligent misrepresentation, but that opinion is not clear with regard to whether that claim was subject to dismissal. *See generally* Landreth v. Las Brisas Council of Co-Owners, Inc., 285 S.W.3d 492 (Tex. App.—Corpus Christi 2009, no pet.).
128. 285 S.W.3d 451 (Tex. 2009).

commencing a derivative proceeding.[129] Acknowledging that it had never specified what constitutes an adequate demand, the supreme court found that the *Schmitz* demand was inadequate because it did not identify a shareholder and because it was not made with sufficient particularity.[130]

The supreme court began its analysis with the history behind the demand requirement in Texas, starting with the 1941 requirement in the rules of civil procedure and ending with the revisions to the Texas Business Corporation Act in 1997. The supreme court addressed the policy behind the 1997 revisions, stating that they were made "to provide Texas with modern and flexible business laws which should make Texas a more attractive jurisdiction in which to incorporate."[131] The supreme court also noted that unlike during the prior century, Texas law now requires that demand be made regardless of futility.[132]

Although the *Schmitz* plaintiffs provided a demand, albeit two sentences, it did not identify the complaining shareholder.[133] Holding that demand cannot be made anonymously, the supreme court focused on the language of article 5.14 for justification, noting that it "presumes that a corporation knows the identity of the shareholder making the demand."[134] First, article 5.14 contemplates that a corporation will notify or advise a shareholder of a demand's rejection.[135] Consequently, the corporation must know the identity of the shareholder. Second, the supreme court, acknowledging the difference between a demand made by Warren Buffett from a demand made by Jimmy Buffett, found that the identity of the shareholder plays an important role in how the corporation responds to a demand.[136] For example, the identity of the complaining shareholder affects the credibility of the demand itself. Third, the supreme court noted that a corporation should not be expected "to incur the time and expense involved in fully investigating a demand without verifying that it comes from a valid source," that is, a shareholder who owns stock both at the time of filing suit and continuously throughout the lawsuit.[137] Finally,

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129. *Id.* at 455.
130. *Id.* at 455-58.
131. *Id.*
132. *Id.*
133. Specifically, the demand letter stated in its entirety:

> We write to insist that you confirm to us, in writing, no later than noon on Wednesday, December 21, 2005, that, in light of a superior offer having been received for the Lancer Corporation ("Lancer" or the "Company") at $23 per share, you are taking no further steps to consummate or in any way facilitate the previously announced sale to Hoshizaki America, Inc. ("Hoshizaki") at $22 per share. Your fiduciary obligations require that you fully and fairly consider all potential offers and that you disclose to the shareholders all of your analysis that leads to your recommendation regarding the pending sale to Hoshizaki or any other offers made.

Id.
134. *Id.* at 455-56.
135. *Id.* at 456.
136. *Id.*
137. *Id.*

the supreme court acknowledged the potential for abuse by lawyers if demands were allowed to be sent without identifying the complaining shareholders.[138] Ultimately, the supreme court held that for all the reasons stated above and because stating a shareholder's name in a demand costs nothing and does not cause delay, the "demand required by the article must name the shareholder on whose behalf it is made."[139]

The supreme court was less specific on what "with particularity" means. It declined to provide a laundry list of required elements that might satisfy the "particularity" requirement, noting instead that whether or not a demand is adequate "will depend on the circumstances of the corporation, the board, and the transaction involved in the complaint."[140] Other than a $1 share price difference, the demand in this case did not give a reason why one offer was inferior to the other. The supreme court acknowledged, however, that "[a] large number of variables affect the inherent value" of stock and "one cannot say whether a $23 offer [is] superior to [a] $22 offer without knowing a lot more."[141] The supreme court also noted that the demand in question did not suggest how the board of directors had failed to consider other offers or what information the board might have withheld.[142]

The *Schmitz* case changes the landscape of derivative actions in at least two ways. First, plaintiffs will no longer be permitted to file lawsuits after providing vague and ambiguous demand letters failing to identify the complaining shareholders. Consequently, defendants will be able to test the standing of the complaining shareholder more quickly. Second, if there was any question before, the supreme court has made clear that in Texas "a shareholder can no longer avoid a demand by proving it would have been futile."[143]

The Houston First Court of Appeals addressed standing and the scope of fiduciary duties owed by officers and directors in the context of a merger in *Somers v. Crane*.[144] Although the procedural history in the case is relatively complicated, the two issues of the greatest interest are simple. The first concerned breach of fiduciary duty claims brought by a class against directors and officers in the context of a cash-out merger where the corporation would no longer exist in its pre-merger form and the shareholders would be dispossessed of any interest in the corporation after the merger. The class alleged that the directors of the corporation owed a fiduciary duty directly to the shareholders of the corporation in this scenario. The court of appeals noted that this duty does not run to

138. The supreme court specifically referred to "a California law firm whose principal prosecuted hundreds of stockholder derivative actions, and later pleaded guilty to paying kickbacks to shareholders recruited for that purpose." *Id.* (citations omitted).

139. *Id.* at 457.

140. *Id.* at 458.

141. *Id.* at 457.

142. *Id.*

143. *Id.* at 455.

144. 295 S.W.3d 5 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

shareholders, including majority shareholders. Unless there is a contract or confidential relationship between the directors and shareholders, the duty runs only to the corporation.[145] The court of appeals rejected the argument that a special relationship between the directors and shareholders was created in the context of a cash-out merger, noting specifically that "fiduciary relationships are of an 'extraordinary nature' and should not be recognized lightly."[146] Consequently, the court of appeals declined to recognize a fiduciary relationship between a director and a shareholder in this context.[147]

The court of appeals also considered an individual shareholder's standing to sue derivatively on the corporation's behalf when the shareholder may have had standing prior to the cash-out merger, but lost it as a result of the merger. Specifically at issue in this case was whether a shareholder is required to own stock both at the time of filing the derivative suit and continuously through the completion of the suit to maintain derivative standing. The court of appeals analyzed the only other Texas case to squarely address this issue under article 5.14(B), *Zauber v. Murray Savings Association.*[148] In that case, the Dallas Court of Appeals held that a shareholder is required not only to own stock at the time of the wrongful transaction but also to maintain that status throughout the lawsuit.[149] The *Somers* court rejected the plaintiff's argument that legislative amendments to article 5.14(B) in 2003 somehow changed its continuous ownership requirement after *Zauber.*[150]

The court of appeals also rejected the plaintiff's creative interpretation of article 5.03(M) of the Texas Business Corporation Act, which states that "[t]o the extent a shareholder of a corporation has standing to institute or maintain derivative litigation on behalf of the corporation immediately before a merger, nothing in this article may be construed to limit or extinguish the shareholder's standing."[151] The court of appeals distinguished the effect of a cash-out merger from a merger where the shareholder receives stock in the newly-created corporation. The court of appeals agreed that when the shareholder receives stock the stockholder "might continuously maintain an economic interest in the derivative recovery."[152] In a cash-out merger, however, the shareholder is left with no ownership interest, which defeats standing.[153]

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145. *Id.* at 11.

146. *Id.* at 12.

147. *Id.*

148. 591 S.W.2d 932, 935 (Tex. Civ. App.—Dallas 1979), *writ ref'd*, 601 S.W.2d 940 (Tex. 1980) (per curiam).

149. *Id.* at 937.

150. Somers v. Crane, 295 S.W.3d 5, 15 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

151. *Id.* (quoting TEX. BUS. CORP. ACT ANN. art. 5.03, § M (Vernon 2008)).

152. *Id.*

153. *Id.*

B. Courts of Appeals Tackle Capacity and Service

During this Survey period, both the Austin and Dallas Courts of Appeals addressed the significance of how an officer signs corporate documents. Although the issues were different in both cases, the rulings indicate that unless an officer indicates he is signing specifically in his individual capacity, courts will not bind the officer individually. In *InvestIN.com Corp. v. Europa International Ltd.*, the Dallas Court of Appeals held that a president of a corporation was neither personally, nor jointly and severally, liable for payments to be made by the corporation pursuant to a settlement agreement that the president signed individually when the president did not agree to make payments personally.[154] In that case, a corporation and its president were sued for breach of three contracts, none of which the president had signed. Although the president was not personally liable for any of the contracts, he did not raise capacity as a defense in the underlying lawsuit concerning those contracts. When the parties reached a settlement agreement, the president signed the settlement agreement individually and on behalf of the corporation. Significantly, however, all of the payment terms in the settlement agreement specifically identified the corporation as the party responsible for making payments. Although the release language in the settlement agreement identified consideration, including payments, releases, and representations, the court of appeals rejected the plaintiff's theory that the president promised payments as consideration for his release.[155] Ultimately, the court of appeals held that the president was not personally liable for payments under the settlement agreement, because he was not a party to or responsible for the obligations in the underlying contracts, there was no specific language in the settlement agreement indicating personal liability, and the president did not make any promises individually to make payments pursuant to the settlement agreement.[156]

Similarly, the Austin Court of Appeals in *First ATM, Inc. v. Onedoz, Inc.*[157] found that the president of a corporation did not personally guarantee a contract despite the existence of the term "individual guarantor" in the contract because there was no evidence that the president executed the contract in his individual capacity. The underlying issue in *First ATM* concerned whether or not the court could exercise personal jurisdiction over an officer of the corporation, but jurisdiction hinged on whether the president of the corporation had entered into a contract in his individual capacity. The president's name, not the corporation's (Onedoz, Inc.'s) name, was printed on the merchant name line. The contract also defined the contracting merchant as "the entity receiving goods and services from

154. 293 S.W.3d 819, 828-29 (Tex. App.—Dallas 2009, pet. denied).

155. *Id.* at 828.

156. *Id.* at 827-28.

157. No. 03-08-00286-CV, 2009 WL 349164, at *4 (Tex. App.—Austin, Feb. 13, 2009, no pet. h.).

FATM, as both institution and as *individual guarantor*."[158] The plaintiff, First ATM, conceded that Onedoz was the principal obligor of the contract and that the corporation, not the president, was the entity receiving goods and services. FATM relied on the definition of merchant to support its position that the president was the individual guarantor. However, because Onedoz was the only entity receiving goods and services, the court of appeals found that, if anything, the language at issue identified Onedoz as the "individual guarantor."[159] FATM also argued that a sentence within the insurance provision of the contract stating that "the individual executing this Agreement shall be personally liable for all amounts due to FATM under this agreement" made the president a guarantor, but the court of appeals rejected this argument because there was no evidence that the president executed the contract in his individual capacity.[160] Because the signature on the contract did not specifically identify that the president was signing in his individual capacity, the assent that the "'individual executing the contract is personally liable' was made solely in his representative capacity," and the president "never agreed in his individual capacity to be bound by any provision in the contract."[161] Consequently, the president did not execute the contract in his individual capacity, and jurisdiction was not proper.

The Beaumont Court of Appeals addressed how to compel a non-party director deposition in *In re Reaud*.[162] In that case, Huntsman Corporation brought suit against a bank, alleging interference with a merger. The bank attempted to serve a notice of deposition on one of the corporation's outside directors by mailing it to the corporation's counsel. The bank failed to provide a subpoena to the individual director. After the corporation's counsel advised the bank that the director was not subject to its control, the bank filed a motion to compel the deposition. The bank argued that the corporation controlled the director because it compensated the director with cash, stock, stock options, and bonuses for serving as a director. Additionally, the bank essentially asserted waiver, arguing that the corporation had voluntarily provided depositions of other directors in the same case. The trial court denied the director's request for a protective order and ordered the deposition, simply stating with no analysis: "He's a director."[163] The director filed a writ of mandamus, and the court of appeals reversed, finding that the corporation did not maintain control over the director.[164] First, the court of appeals noted that, by law, the directors manage the corporation, not vice versa.[165] Additionally, the court of appeals looked at Texas Rules of Civil Procedure 199.3

158. *Id.* at *4 (emphasis added).
159. *Id.*
160. *Id.*
161. *Id.*
162. 286 S.W.3d 574 (Tex. App.—Beaumont 2009, no pet. h.).
163. *Id.* at 578.
164. *Id.* at 583.
165. *Id.* at 579.

and 205.1 to assess which non-parties may be required to attend depositions without being subpoenaed. Those non-parties include employees, retained experts, and those individuals who are "otherwise subject to the control of the party."[166] The court of appeals noted that corporations have the power to terminate the relationship of both an employee and a retained expert and therefore, applying *noscitur a sociis* ("a word is known by the company it keeps"), a corporation is required to exercise the same type of control over the third class of non-parties as it does over employees and retained experts.[167] The court noted that if the corporation's bylaws or articles of incorporation included a provision that allowed for termination or removal from certain committees for a director's failure to comply with a deposition notice, the corporation could be found to exercise the control contemplated by the rules.[168] No articles or bylaws were in the record, however, and therefore there was no evidence that the director was subject to termination, demotion, or a reduction in his fees as a director based upon his refusal to attend the deposition.

C. Texas Supreme Court Continues To Refine Notice Requirements for Director and Officer Insurance Coverage

The Texas Supreme Court addressed a second director and officer case during this Survey period—this one on the notice requirements in director and officer insurance policies.[169] In 2008, the Texas Supreme Court changed the rules with regard to notice requirements, holding that "an insured's failure to timely notify its insurer of a claim or suit does not defeat coverage if the insurer was not prejudiced by the delay."[170] *PAJ, Inc. v. Hanover Insurance Co.*[171] involved an occurrence-based commercial general liability policy with a prompt-notice provision that required the insured to notify the insurer of an occurrence as soon as practical. This year, the Texas Supreme Court examined a claims-made policy in the *Prodigy* case. Prodigy Communications merged with Flashnet Communications in 2000. Flashnet was named in a suit as a defendant in November 2001, and Prodigy was served with a copy of the complaint in June 2002. A settlement was reached in 2003, and Prodigy, allegedly believing the insurance company, AESIC, already had notice of the suit, notified the insurance company in June 2003 that a settlement had been reached, and requested consent to the proposed settlement agreement. The insurance company immediately denied coverage on the ground that the June

166. Tex. R. Civ. P. 199.3.
167. *In re Reaud*, 286 S.W.3d at 579-80.
168. *Id.* at 580.
169. Prodigy Commc'ns Corp. v. Agric. Excess and Surplus Ins. Co., 288 S.W.3d 374 (Tex. 2009).
170. *Id.* at 375 (quoting PAJ, Inc. v. Hanover Ins. Co., 243 S.W.3d 630, 636-37 (Tex. 2008)).
171. 243 S.W.3d 630 (Tex. 2008).

2003 letter did not comply with the policy's notice requirements. The policy was a claims-made policy requiring that the insured, as a condition precedent, give notice of a claim as soon as practicable, but in no event later than ninety days after the expiration of the policy period.[172] AESIC moved for summary judgment arguing that Prodigy had failed to meet the policy's condition precedent that notice of a claim be given as soon as practicable.

Although the parties disputed whether notice of the claim had been given as soon as practicable, they agreed that the claim had been made within the ninety-day cutoff period. The trial court granted AESIC's motion for summary judgment, and the court of appeals affirmed, holding that (1) Prodigy was required to give notice as soon as practical notwithstanding the ninety-day period, (2) notice was given almost one year after the filing of the lawsuit against Prodigy, which was not "as soon as practical" as a matter of law, and (3) the insurance company was not required to show that it was prejudiced by Prodigy's late notice.[173]

The Texas Supreme Court framed the issue as

> whether, under a claims-made policy, an insurer can deny coverage based on its insured's alleged failure to comply with a policy provision requiring that notice of a claim be given "as soon as practicable," when (1) notice of the claim was provided before the reporting deadline specified in the policy and (2) the insurer was not prejudiced by the delay.[174]

Noting that whether or not notice as a condition precedent was not the sole issue, the supreme court analyzed in detail the difference between a claims-made policy and an occurrence policy. Ultimately, the supreme court found that the main difference between the two types of policies is that a claims-made policy provides "unlimited retroactive coverage and no prospective coverage, while an 'occurrence' policy provides unlimited prospective coverage and no retroactive coverage."[175] The supreme court noted that a claims-made policy requiring notice as soon as practicable "serves to maximize the insurer's opportunity to . . . set reserves and control or participate in negotiations," whereas the requirement that the claim be made during a certain period within the policy period provides "temporal boundaries of the policy's basic coverage."[176] In other words, it defines the limits of the insurer's obligation. Ultimately, the supreme court held that if notice is made outside the policy's specified timeframe, an insurer need not demonstrate prejudice to deny coverage.[177] However, "when an insured gives notice within the policy period or other specified reporting period, the insurer must show that the insured's noncompliance with the policy's 'as soon as practicable' notice

172. *Prodigy Commc'ns Corp.*, 288 S.W.3d at 376.
173. *Id.* at 377.
174. *Id.*
175. *Id.* at 379.
176. *Id.* at 380.
177. *Id.* at 381-82.

provision prejudiced the insurer before it may deny coverage."[178] Because AESIC conceded it was not prejudiced by the delayed notice and notice was within the reporting deadline specified by the policy, summary judgment was not proper.

VI. CONCLUSION

Whether discussing Jimmy Buffett, clarifying privity and damages issues in malpractice cases, acknowledging unsettled law concerning medical expert reports, or addressing notice requirements for director and officer insurance coverage, the Texas Supreme Court was active in cases concerning professional liability. It remains to be seen whether the large number of supreme court opinions and the diverse topics covered by the appellate courts reflect an upward trend in the number of professional liability cases filed, or merely an increased interest in the outcome of these cases by the Texas courts. What is certain, however, is that it continues to be important for the professional liability lawyer to stay on top of the changing legal landscape.

178. *Id.* at 382.