



agreements with retailers, commonly called “calendar marketing agreements” or “CMAs.” Some of the plaintiff bottlers operated in territories wholly outside of Texas; others operated in territories that included Texas and a neighboring state. None operated wholly within Texas. At trial, the jury found that the Coca-Cola bottlers, through CMAs, violated the TFEAA in a number of respects and awarded substantial damages to the plaintiffs. The Sixth Court of Appeals affirmed.

In its majority opinion, the Texas Supreme Court reversed the judgment of the court of appeals and rendered judgment that the plaintiffs take nothing on their claims of injury in Texas. The take-nothing judgment was limited to claims of injury in Texas because the first issue considered by the court was whether Texas courts can adjudicate and remedy an anti-competitive injury occurring in another state, either under the TFEAA or the law of that state. The majority held that they could not, holding that the TFEAA did not reach conduct occurring outside the state of Texas and that, as a matter of comity, Texas courts should not apply another state’s antitrust law to such conduct.

After dispensing with the claims relating to activity outside Texas, the majority then turned to the plaintiffs’ claims of injury within Texas. On those claims, the majority found that, under a rule of reason standard (which was the standard alleged by the plaintiffs), the plaintiffs’ failure to show substantial harm to competition in the relevant market was fatal. While plaintiffs adduced substantial evidence at trial that Coca-Cola’s CMAs made it more difficult for plaintiffs to compete, the court explained, they did not demonstrate that the CMAs foreclosed any specific or substantial percentage of competition in the market or caused consumers to pay higher prices generally. As the majority stated, “since there is evidence only that Coke’s CMA *could* have had an adverse effect on competition in a relevant market, not that they actually did, existence of the CMAs *alone* cannot prove Coke engaged in predatory or anticompetitive conduct.”

Suffice it to say, the dissenting opinion in *Harmar* takes issue with nearly every substantive assertion of the majority opinion, and taken together, both opinions will provide fertile ground for argument in future antitrust cases under the TFEAA.

Looking Ahead

On balance, 2006 proved to be a tough year for antitrust plaintiffs, and it already appears that 2007 will include a number of antitrust cases that might erect other barriers to recovery. In November, the U.S. Supreme Court heard argument on two cases — *Bell Atlantic v. Twombly* and *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* — that may impact the pleading standard for conspiracies between competitors and the viability of “predatory purchasing” claims against firms with significant market power. These and other antitrust cases percolating in the Texas and U.S. courts should make for an interesting 2007.

Notes

1. 126 S. Ct. 860 (2006).
2. 126 S. Ct. 1276 (2006).
3. 126 S. Ct. 1281 (2006).
4. 50 Tex. Sup. Ct. J. 21, 2006 WL 2997436 (Tex. 2006).

DAVID R. MCATEE II

is a partner in the Dallas office of Haynes and Boone, L.L.P. He serves on the *Texas Bar Journal* board of editors.

TEXAS SUPREME COURT

BY KENT RUTTER

The Texas Supreme Court kicked off 2006 with a double surprise.

On Jan. 6, the court withdrew its opinion and scheduled a second oral argument in *Excess Underwriters at Lloyd’s v. Frank’s Casing Crew & Rental Tools*. In its original opinion, the court held that an excess insurance carrier that disputes coverage but settles a third-party claim against its insured may, in some circumstances, recoup the settlement payments from its insured. Business groups and others urged the court to reconsider.¹ Why a second oral argument? Only four of the justices who participated in the 2003 argument remained on the court in 2006.

On Jan. 20, the court scheduled a second oral argument in another closely watched case, *Hyundai Motor Co. v. Vasquez*. The second argument in *Hyundai* was all the more unusual because the court had not issued an opinion, so the case was not on rehearing. Only six justices participated in the first argument because two were recused and Justice Michael Schneider recently had been confirmed to the federal bench, leaving a vacancy on the court. After the argument, Justice Priscilla Owen was confirmed to the Fifth Circuit, leaving another vacancy. The five remaining justices were most likely divided three to two.² When the court heard argument for the second time, the vacancies had been filled and court of appeals Justices Jane Bland and John Cayce were assigned to participate in the case.

Hyundai, authored by Justice Bland and issued less than a month after the second argument, was one of the most widely discussed decisions of the year. The case was brought by the parents of a 4-year-old killed in an automobile accident. During voir dire, the trial judge refused to allow the plaintiffs’ lawyers to ask potential jurors whether they could consider returning a verdict for the plaintiffs even though the child was not wearing a seat belt. In a 6-3 decision, the court held that a trial court may refuse to allow a voir dire question that asks potential jurors whether a particular piece of relevant evidence will determine their verdict.³

A New Era of Stability?

The second oral arguments in *Frank's Casing and Hyundai* were the latest symptoms of the turnover that characterized the court through 2005. Between 2001 and 2005, 11 new justices were sworn in.

In 2006, the most notable change at the court was the lack of change. There were no arrivals or departures, and the court completed its first fiscal year without any turnover since 1997. In the 2006 elections, Chief Justice Wallace B. Jefferson and Justices Nathan Hecht, David Michael Medina, Phil Johnson, and Don Willett all kept their seats on the court.

Trends and Statistics

With newfound stability came increased productivity. The court decided 108 causes during the first 11 months of 2006, compared with 81 during the first 11 months of 2005 and 92 during the first 11 months of 2004.

Another factor in the court's productivity was the prevalence of per curiam opinions, which typically are shorter than signed opinions and are issued without oral argument. Between 2001 and 2004, the court decided approximately one-third of causes with per curiam opinions. During fiscal year 2005, the percentage of per curiam opinions rose to 43 percent. During the first 11 months of 2006, the percentage of per curiam opinions climbed still higher, to 58 percent — marking the first time in recent history that per curiam opinions outnumbered signed opinions.⁴

Despite the prevalence of per curiam opinions, there were also disagreements on the court. Dissenting opinions, after declining steadily for several years, made a comeback in 2006. Expressed as a percentage of deciding opinions (i.e., per curiam opinions and signed majority or plurality opinions), dissenting opinions declined from 40 percent in 2001 to 11 percent in 2005.⁵ In the first 11 months of 2006, the percentage rose to 19 percent. Justice Johnson was the most frequent dissenter, followed by Justices Harriet O'Neill and J. Dale Wainwright.⁶ Chief Justice Jefferson and Justices Scott Brister, Paul Green, and Willett were most frequently in the majority.

Notable Decisions

Other notable decisions, in addition to *Hyundai*, included:

- *Tooke v. City of Mexia* — Texas statutes and municipal charters providing that a government entity may “sue or be sued” do not, in and of themselves, waive immunity from suit.
- *Hoover Slovacek, L.L.P. v. Walton* — A payment-on-termination provision in an attorney's contingent fee contract is contrary to public policy and unenforceable.
- *In re Palacios* — An order compelling arbitration under the Federal Arbitration Act ordinarily is not subject to mandamus review.
- *Fiess v. State Farm Lloyds* — The standard Homeowners Form B insurance policy does not cover losses caused by mold.

- *GuideOne Elite Insurance Co. v. Fielder Road Baptist Church* — An insurance company's obligation to defend its insured ordinarily must be determined from the “eight corners” of the policy and the plaintiff's petition, even if extrinsic evidence establishes that the allegations in the petition are false.
- *Alex Sheshunoff Management Services v. Johnson* — A non-compete covenant is not initially enforceable against an at-will employee if the employer has no corresponding enforceable obligation, but it becomes enforceable when the employer performs the promises it made in exchange for the covenant.

A New Clerk

Although the justices remained the same, another key position changed when the court appointed a new clerk, Blake Hawthorne. Before becoming clerk, Hawthorne served as the court's staff attorney for mandamus proceedings. Hawthorne replaces Andrew Weber, who returned to private practice after completing his four-year term. Weber won high praise from appellate practitioners for making the court one of the most user-friendly courts in Texas.

Billable paralegal hours.

VS.

Non-Billable paralegal hours.

In 8 weeks, we can help you turn your paralegal expenses into revenue for only \$1895.

To find out how, call Tami Russell at 866-374-0876, or visit our website at www.pdi.org.

Online classes enrolling now.

PDI Professional Development Institute
UNIVERSITY OF NORTH TEXAS



Notes

1. As of Nov. 30, 2006, the court had not issued its decision on rehearing.
2. When the case was ultimately decided, Justices Nathan Hecht, Harriet O'Neill, and Scott Brister joined the majority, and Justices J. Dale Wainwright and David Michael Medina dissented.
3. In September 2006, the court once again showed its interest in the jury selection process when it appointed a 19-member task force to suggest reforms, including procedures to assure random jury selection.
4. The court issued 63 per curiam opinions and 46 signed opinions during the first 11 months of 2006. Fifteen of the per curiam opinions were reversals of sovereign immunity decisions in light of *Tooke v. City of Mexia* and *Reata Construction Corp. v. City of Dallas*. Even if those cases were subtracted from the total, per curiam opinions would have outnumbered signed opinions.
5. According to the Office of Court Administration, the court issued 35 dissents and 88 deciding opinions in FY 2001, 25 dissents and 107 deciding opinions in FY 2002, 25 dissents and 89 deciding opinions in FY 2003; 14 dissents and 86 deciding opinions in FY 2004; and 12 dissents and 108 deciding opinions in FY 2005.
6. Justice Johnson authored five dissents and joined four others. Justice O'Neill authored four dissents and joined four others. Justice Wainwright authored four dissents and joined three others.

KENT RUTTER

is a partner in the appellate practice group of Haynes and Boone, L.L.P. in Houston.

APPELLATE LAW

BY WARREN W. HARRIS

Several Supreme Court decisions in the past year reflect the court's emphasis on hearing appeals based on their merits and deciding appeals based on their specifics, rather than their technicalities. In *City of San Antonio v. Hartman*, 49 Tex. Sup. Ct. J. 1011 (Aug. 31, 2006), the Supreme Court decided the jurisdictional question of whether a motion for en banc reconsideration qualifies as a motion for rehearing that extends the deadline for filing a petition for review. The city filed its petition for review less than 45 days after the court of appeals denied its "Motion for Rehearing En Banc." The city argued that its petition for review was filed within the deadline of 45 days after the court of appeals overruled all timely filed motions for rehearing. The Hartmans argued that the city's petition for review was untimely because rule 53.7 of the Texas Rules of Appellate Procedure sets the filing deadline as 45 days from the denial of motions for rehearing, but the rule does not mention motions for en banc reconsideration. The Supreme Court determined that the term "motion for rehearing" includes a motion for en banc reconsideration. Although there is no deadline in the rules for filing a motion for en banc reconsideration, the city's motion was timely because it was filed while the court of appeals still had plenary power. The court stated: "Because this motion walked, talked, and quacked like a motion for rehearing, we decline to call it something else." The

court held that the petition for review was filed timely. Proposed amendments to rules 49 and 53 to clarify issues relating to motions for en banc reconsideration are pending with the Supreme Court Rules Advisory Committee.

In *Guest v. Dixon*, 195 S.W.3d 687 (Tex. 2006) (per curiam), the Supreme Court addressed the requirements for a motion to reinstate a case that has been dismissed for want of prosecution. Rule 165a(3) of the Texas Rules of Civil Procedure provides that a timely motion to reinstate extends the deadline for perfecting appeal. The rule also requires the motion to be verified by the movant or the movant's attorney. The court of appeals held that a motion to reinstate verified by the movant's former attorney was insufficient to extend the deadline to appeal. Although the Supreme Court has previously held that an unverified motion to reinstate does not extend the deadline to perfect an appeal, the court held that the motion in this case was properly verified. The motion was verified by the attorney who was counsel for much of the time the case was pending, and his affidavit may have been the best evidence available. The court noted that it has "repeatedly stressed that procedural rules should be construed and applied so that the right of appeal is not unnecessarily lost to technicalities."

Rule 24.2(a)(1) of the Texas Rules of Appellate Procedure requires a judgment debtor that desires to supersede a judgment based on its net worth to file an affidavit from which its net worth can be ascertained. This is a relatively new rule with few cases interpreting it. In *In re Smith*, 192 S.W.3d 564 (Tex. 2006) (per curiam), the court addressed a challenge to the net worth affidavit used to establish the amount of security to supersede the judgment. The trial court found that the debtor's net worth affidavit was insufficient to establish the debtor's net worth and, without stating the basis for its calculation, the trial court found the debtor's net worth to be \$1,142,951. The Supreme Court exercised its mandamus jurisdiction to review the trial court's order. The court held that the trial court abused its discretion because it failed to state with particularity the factual basis for its determination of the debtor's net worth. The court also noted that the trial court did not make any findings that would permit a reviewing court to ascertain the basis for that determination.

In two cases, the Supreme Court reversed dismissals made on technical grounds by the court of appeals. In *Higgins v. Randall County Sheriff's Office*, 193 S.W.3d 898 (Tex. 2006) (per curiam), the court of appeals dismissed a pro se inmate's appeal. Because the inmate filed his notice of appeal without a filing fee or affidavit of indigence, the court of appeals notified him to pay the filing fee within 10 days or his appeal would be dismissed. Nine days later, the inmate filed his affidavit of indigence. The court of appeals dismissed his appeal because the affidavit was not accompanied by a motion for extension of time. The Supreme Court reversed, noting that the court did not give the inmate a reasonable time to correct the defect.