

What You Need to Know Now: A Business Litigator's Perspective

Steve McConnico
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Things to Have on Your Radar:

- New and Noteworthy Cases
- Trends

New and Noteworthy Cases

1) SPOILIATION

- *Brookshire Bros., Lt v. Aldridge*, 438 S.W.3d 9 (Tex. 2014)

2) MINORITY SHAREHOLDER OPPRESSION

- *Ritchie v. Rupe*, 443 S.W.3d 856 (Tex. 2014)

3) ECONOMIC LOSS RULE

- *LAN/STV v. Martin K. Eby Const. Co., Inc.* , 435 S.W.3d 234 (Tex. 2014)

4) CONTRACT AMBIGUITY

- *Plains Exploration & Production Company v. Torch Energy Advisors, Inc.* (Tex. 2015)
- *Kachina Pipeline Company, Inc. v. Lillis* (Tex. 2015)

SPOILIATION

What is spoliation?

- *Intentional or negligent destruction or loss of evidence that is relevant to litigation*
 - Not a tort... an evidentiary concept
- Recognized in Texas since 1852, but limited guidance by Court
- July 2014– Texas Supreme Court articulated a framework for analysis for the first time

Brookshire Brothers v. Aldridge

FACTS:

- Slip and fall in grocery store
- Store's surveillance video captured incident
- Management preserved only 8 minutes of video
- Rest of the video was recorded over by camera

Brookshire Brothers v. Aldridge

FACTS:

- Side show at trial– evidence about destruction of videotape
- Trial court gave spoliation instruction
- Jury awarded \$1.06 million in damages
- Tyler Court of Appeals affirmed
- Texas Supreme Court reversed

Brookshire Brothers v. Aldridge

Two-Step Judicial Analysis by *Trial Court*:

- 1) Determine whether a party spoliated evidence (question of law)
 - a) Did the party have a duty to preserve the evidence?
 - b) Did the party intentionally or negligently breach?
- 2) If spoliation occurred, trial court (not the jury) assesses remedy.

Brookshire Brothers v. Aldridge

A Finding of Spoliation requires:

- 1) Party alleging spoliation must establish that the non-producing party had duty to preserve evidence
 - Duty arises when party knows litigation is likely and evidence is material
- 2) Non-producing party failed to exercise reasonable care to preserve evidence
- 3) Failure to preserve may be either intentional or negligent
- 4) Must be direct relationship between remedy and act of spoliation

Brookshire Brothers v. Aldridge

Spoliation Instruction

- Harsh sanction
- Only for *intentional* destruction of evidence
- Narrow caveat—
 - “On rare occasions, a situation may arise in which a party’s *negligent* breach of its duty to reasonably preserve evidence irreparably prevents the nonspoliating party from having any meaningful opportunity to present a claim or defense.”

Brookshire Brothers v. Aldridge

What does this mean for our clients?

- Develop data preservation procedures
- Implement a strict retention policy
- Distribute litigation hold letters

Brookshire Brothers v. Aldridge

What does the spoliating party's breach of duty "irreparably preventing" the non-spoliating party from having "any meaningful opportunity present a claim or defense" mean?

- *See Wackenhut Corp. v. Gutierrez*, --S.W.3d-- (Tex. 2015)
 - Negligent spoliation; no finding of irreparable prejudice
 - Abuse of discretion by trial court to give instruction

Minority Shareholder Oppression

What is shareholder oppression?

- Refusing to meet with prospective buyers of a minority shareholder's stock
- Refusing access to corporate financial info
- Receiving informal dividends or suppressing dividends
- Using corporate funds for a personal benefit

Ritchie v. Rupe

FACTS:

- Minority shareholder wanted to sell her shares
- She hired broker to sell her shares to outside party
- Potential buyer wanted to meet with executives as part of due diligence
- Majority shareholders refused to let potential buyers meet with executives

Ritchie v. Rupe

VERDICT:

- Jury found in favor of minority shareholder and valued stock at \$7.3 million
- Court rendered judgment and found “oppressive conduct.”
- Court of Appeals affirmed

Ritchie v. Rupe

HOLDING:

“We decline to create a Texas common-law cause of action for ‘minority shareholder oppression.’”

- “Absent a contractual or legal obligation, the officer or director has no duty to conduct the corporation’s business in a manner that suits an individual shareholder’s interests when those interests are not aligned with the interests of the corporation and the corporation’s shareholders collectively.”
- Supreme Court has reversed and remanded contrary verdicts
 - *See Cardiac Perfusion Services, Inc. v. Hughes*, 436 S.W.3d 790 (Tex. 2014)

Ritchie v. Rupe

What does this mean for your clients?

- Not a license to run over minority shareholders
 - Other causes of action still exist (breach of fiduciary duty)
- Minority shareholders should protect themselves at the outset
 - Negotiate shareholder agreements that contain buy-sell, first refusal, and other provisions

Economic Loss Rule

What is the economic loss rule?

- Common law doctrine that restricts recovery of purely economic damages unaccompanied by injury to the plaintiff or his property
- Precludes recovery of economic damages in negligence suit between strangers to the contract
- Reflects a preference for allocating economic risks by contract rather than by law

LAN/STV v. Martin K. Eby Construction Co.

FACTS:

- DART contracted with LAN/STV to prepare plans for light rail in downtown Dallas.
- DART asked for bids from contractors based on LAN/STV plans.
- DART contracted with Eby to do work.
- Eby discovered plans were full of errors.
- Eby lost nearly \$14 million on project.

LAN/STV v. Martin K. Eby Construction Co.

FACTS:

- Eby sued LAN/STV for negligent misrepresentation.
- Jury found in favor of Eby.
- Court of Appeals affirmed.

LAN/STV v. Martin K. Eby Construction Co.

ISSUE:

- Does the economic loss rule permit a contractor to recover the increased cost of performing contract against the architects for bad plans?

LAN/STV v. Martin K. Eby Construction Co.

HOLDING:

- Economic loss rule precludes Eby (the contractor) from recovering damages from LAN/STV (the architect)
- DART was contractually responsible to Eby for providing accurate plans for the job.
- Eby's only claims are against DART

LAN/STV v. Martin K. Eby Construction Co.

What this means for your clients?

- Claims against non-contracting parties in construction projects are not viable.
- Clients will be limited to claims against parties with whom they've contracted
- Design professionals, owners and contractors should negotiate at the front end

LAN/STV v. Martin K. Eby Construction Co.

Unanswered questions?

- Court noted that application of the economic loss rule “depends on an analysis of its rationales in a particular situation.”
- How will the courts analyze the rule going forward?

CONTRACT AMBIGUITY

- A contract is not ambiguous if its language can be given a definite or certain meaning.
- If a contract is subject to two or more reasonable interpretations applying rules of construction, the contract is ambiguous.
- Cannot create ambiguity by admitting extrinsic evidence of parties' intent, but can consider circumstances surrounding contract's execution to determine whether ambiguity exists.

Kachina Pipeline Company, Inc. v. Lillis (Tex. 2015)

- FACTS:

- Kachina Pipeline owns natural gas gathering system; purchased gas from Lillis
- 2005 Agreement: “If Buyer installs compression to effect delivery of Seller’s gas, Buyer will deduct from proceeds payable to Seller hereunder a value equal to Buyer’s actual cost to install, repair, maintain and operate compression, plus 20% of such costs to cover management, overhead, and administration.”

Kachina Pipeline Company, Inc. v. Lillis (Tex. 2015)

- ISSUE:

- Does contract allow Kachina to charge Lillis for compression cost after Lillis transfers gas to Kachina?

- HOLDING:

- Trial Court— Contract unambiguously **allows** Kachina to deduct such compression costs after transfer.
- Court of Appeals— Contract unambiguously **does not allow** Kachina to charge for such compression cost after transfer.

Kachina Pipeline Company, Inc. v. Lillis (Tex. 2015)

- Texas Supreme Court:
 - Provision unambiguously allows Kachina to deduct any compression costs installed during term of agreement if required to overcome working pressure in Kachina's system.
 - Do not consider parties' intent, but do consider facts and circumstances surrounding the contract.

Plains Exploration & Production Company v. Torch Energy Advisors, Inc. (Tex. 2015)

- FACTS

- Torch sells offshore oil and gas leases; Plains ends up with leases.
- Federal Court rules: Federal government had repudiated leases; couldn't be developed.
- Plains was paid restitution of base bonus payments; more than \$83 million.
- Torch claims Plains owes Torch more than half of bonus paid to Plains.

Plains Exploration & Production Company v. Torch Energy Advisors, Inc. (Tex. 2015)

- Supreme Court:

- 1996 sale agreement from Torch to Plains unambiguous. Torch did not retain any ownership.

- Law:

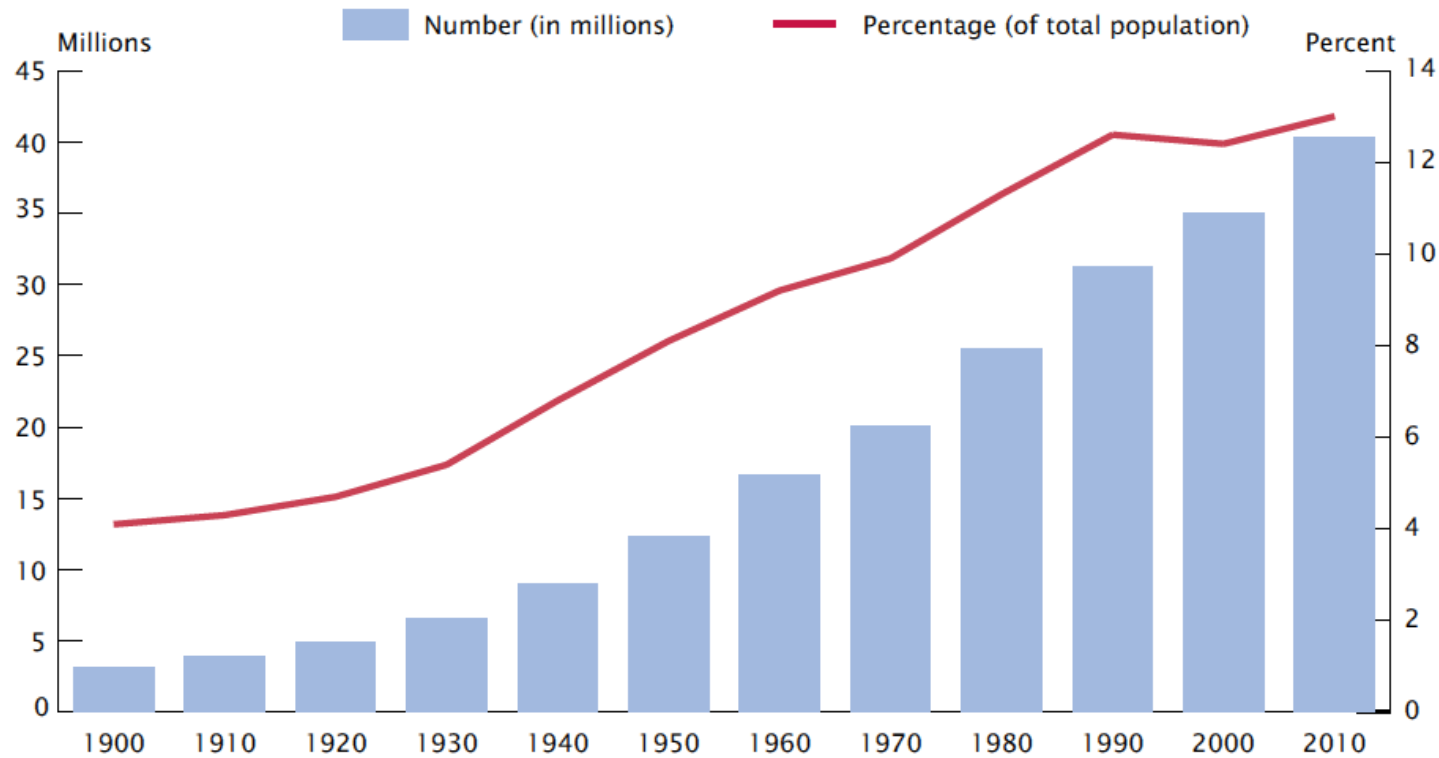
- Construe contracts from a utilitarian standpoint bearing in mind business activity to be served.
- No single provision taken alone is given controlling effect; each must be considered in the context of the instrument as a whole.

Trends to Keep in Mind

Figure 2.

Population 65 Years and Older by Size and Percent of Total Population: 1900 to 2010

(For more information on confidentiality protection, nonsampling error, and definitions, see www.census.gov/prod/cen2010/doc/sf1.pdf)



Sources: U.S. Census Bureau, decennial census of population, 1900 to 2000; *2010 Census Summary File 1*.

Number of Texas Residents 65 or older:

- July 1, 1995: **1,915,000**
- July 1, 2005: **2,297,000**
- July 1, 2015: **3,089,000**
- July 1, 2025: **4,364,000**
- 2000-10: 65 and older population increased 25.5%

Trends to Keep in Mind

Our clients are changing. . .

- Longer lives
- Multiple marriages
- Children from earlier marriages

What that means for us:

- New issues re: transfer and division of wealth

Trends to Keep in Mind

- **Probate and family law bleeding into business litigation**
 - What duties are owed to spouse of business owner?
 - How do you value and divide community property involving business interests?
 - What is the value of corporate goodwill? Personal goodwill? What's the difference?
 - Is the manager of the business sabotaging the business to drive down its value?

Trends to Keep in Mind

Other recent trends:

- **Jurisdiction fights/Long arm statute**
 - Internet makes it possible to do business anywhere
 - Global economy complicates jurisdiction issues
 - Ex: You invest in a fund in California that owns property in Texas
- **Oil and Gas losing its value**
 - As royalty payments go down, lessors start to question lessee's royalty calculations.
 - Lessees slow down the pace of drilling and lessors bring failure to develop claims.

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