

**Texas Supreme Court Docket Analysis  
September 1, 2010**

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**Chapter 3**



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Best Lawyers in America, Appellate Law, 2007-2009  
Top 50 Female Super Lawyers, *TexasMonthly Magazine* 2003, 2009  
Top 50 Lawyers Central and West Texas, *TexasMonthly Magazine* 2009  
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**SELECTED PUBLICATIONS**

*Interlocutory Appeals 2010*, University of Texas School of Law, 20th Annual Conference on State  
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*The "Shadow Docket" of Long-Pending Petitions Or Where Your Case Goes When It Falls Off the Conveyor  
    Belt*, State Bar of Texas, Practice Before the Supreme Court of Texas, April 2009.  
*Guide to Practice Before the Supreme Court of Texas*, Supreme Court Pro Bono Pilot Program (2007).  
*Certified Questions To and From the Texas Supreme Court*, 17 APPELLATE ADVOCATE 6 (Winter 2005).  
*Chutes and Ladders: Unusual Paths In and Out of the Appellate Courts*, State Bar of Texas, Advanced  
    Civil Appellate Practice Course, Sept. 2003.  
*Help! The Other Side Has Filed a Petition for Review — What Do I Do Now?* State Bar of Texas, Practice  
    Before the Supreme Court of Texas, April 2003.  
*The Civil Amicus Brief*, 13 APPELLATE ADVOCATE 4 (Fall 2000).  
*Petitions for Review: Frequently Asked Questions*, 12 APPELLATE ADVOCATE 3 (June 1999).



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# Texas Supreme Court Docket Analysis

## I. SCOPE

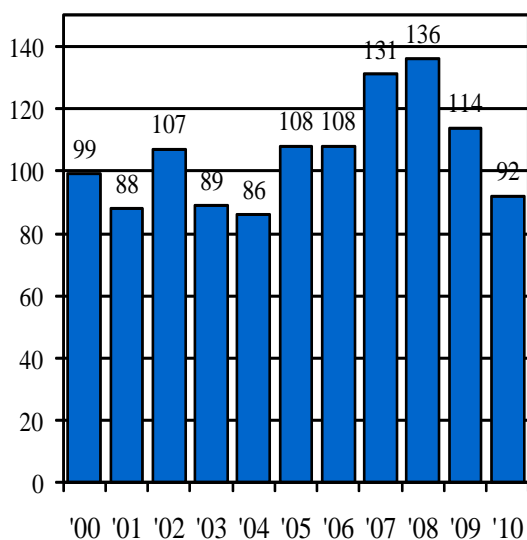
This paper examines the Court’s docket as of September 1, 2010. It presents statistical information about the fiscal year ended August 31, 2010 and cases pending on the Court’s docket as of September 1, 2010. All numbers for the term just ended are unofficial but should be quite close to the Court’s final official tallies.

## II. OPINIONS

In the term ended August 31, 2010, the Court issued 92 deciding opinions; in the prior two terms, the Court issued 114 and 136 deciding opinions.

The 92 opinions issued in the term ended August 31, 2010 consisted of 52 signed opinions and 40 per curiam opinions. The Court also issued one opinion on rehearing and a supplemental opinion on rehearing.

Opinions Issued



The predominant issues in opinions handed down in the term ended August 31, 2010 related to: (1) trial and appellate procedure, including arbitration, 29 cases (32%); (2) government cases (sovereign immunity, zoning and land use, and condemnation), 18 cases (20%); (3) insurance, 8

cases (9%); (4) products liability and non-healthcare torts, 7 cases (8%); and (5) healthcare liability, 6 cases (7%). These five areas accounted for 74% of the opinions issued in the term. Sovereign immunity was the leading issue, presented in 15 opinions (16%).

The Court reversed the lower court judgment in whole or in part or granted mandamus relief in 92% of the cases. About 83% of the opinions issued by the Court (counting per curiams) were issued without a concurrence or dissent, compared with 72% in the prior term. There were 17 mandamus opinions, or about 18% of output, compared with 28 mandamus opinion, or 25% of output, in the prior term.

Appendix C shows opinion output by each justice in the term ended August 31, 2010. Justice Green authored the most majority opinions, with 12, and the most per curiam opinions, with 11. Justice Green thus produced 23 of the Court’s 92 deciding opinions, or 25% of the Court’s output for the term. Chief Justice Jefferson authored the next highest number of deciding opinions, with 14, consisting of 8 majority and 6 per curiam opinions. Justice Willett authored 11 deciding opinions (8 majority, 3 per curiam); Justice O’Neill wrote 10 deciding opinion (4 majority, 6 per curiam); Justice Johnson authored 9 (6 majority, 3 per curiam); Justice Medina had 8 deciding opinions (6 majority, 2 per curiam); Justice Wainwright produced 7 deciding opinions (2 majority, 5 per curiam); and Justice Hecht and Justice Guzman each had 5 (3 majority, 2 per curiam). Justice Guzman took office after the term had started, in October 2009. Justice Lehrmann, who started in late June, produced no opinions.

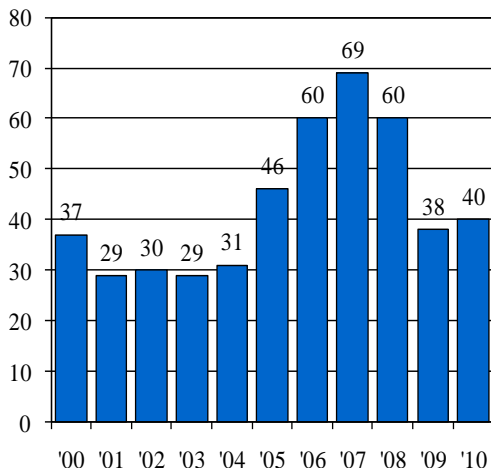
Justice Johnson was the justice most likely to write separately, with 3 dissenting opinions and 3 concurring opinions. Chief Justice Jefferson authored 3 dissenting opinions, as did Justice Wainwright (who also had one concurring opinion). Justice Willett wrote 3 concurring opinions and one dissent. The remaining totals are shown in Appendix C.

The causes came from all 14 courts of appeals. The following chart shows numbers for each intermediate court:

	Opinions	PCs	Total
1	6	5	11
2	3	2	5
3	4	4	8
4	4	4	8
5	4	8	12
6	1	2	3
7	2	1	3
8	1	3	4
9	1	1	2
10	4	4	8
11	1	2	3
12	3	0	3
13	10	2	12
14	8	1	9
Cert. Q.	0	0	0
Other	0	1	1
	52	40	92

Per curiam activity constituted a higher percentage of output. The Court issued 40 per curiam opinions, representing 43% of opinions issued for the term, compared with 38 opinions, or 33% of output, in the prior period.

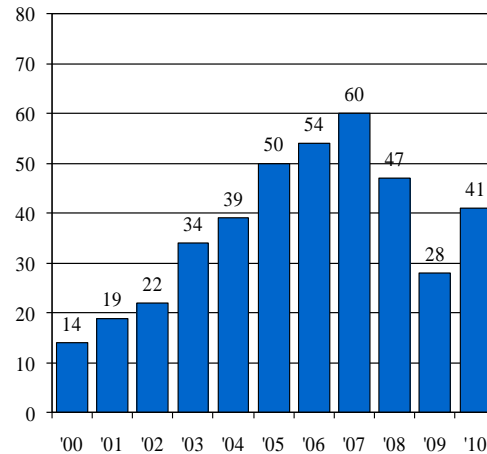
Per Curiam Opinions Issued



Although the United States Supreme Court issues a deciding opinion in the term in which a case is argued, the Texas Supreme Court does not. To the contrary, it often carries argued cases over several terms. One measure of the Court’s efficiency is to look at the number of cases carried over at the beginning of each term.

The Court had been reducing its backlog of argued cases over the last three years, whittling the backlog from a record high of 60 cases down to 28 at the end of fiscal year 2009. This term, however, the backlog rose substantially, to 41 cases argued and awaiting opinion.

Backlog: Argued Cases Carried Over



As of September 1, 2010, the Court had 66 cases granted and pending. Of these, 2 were argued in fiscal year 2007, 4 were argued in FY 2008, 2 were argued in FY 2009, 33 were argued in the term just ended, and 25 were set for argument in the fall. Two of the 66 cases have been abated.

The ten oldest cases by argument date are:

1. *Exxon Corp. v. Emerald Oil & Gas Corp.*, Nos. 05-0729 and 05-1076, argued February 13, 2007 (rehearing granted after opinion).
2. *Solar Applications Engineering, Inc. v. T.A. Op. Corp.*, No. 06-0243, argued October 16, 2007.
3. *Galveston Cent. Apprais. Dist. v. TRQ Captain’s Landing* No. 07-0010, argued January 15, 2008 (abated August 28, 2009).
4. *Bison Bldg. Materials Ltd. v. Aldridge*, NO. 06-1084, argued January 16, 2008.
5. *Robinson v. Crown Cork & Seal Co.*, No. 06-0714, argued February 26, 2008.
6. *Franka, M.D. v. Velasquez*, No. 07-0131, argued September 10, 2008).
7. *Yamada M.D. v. Friend*, No. 08-0262, argued March 10, 2009.

- 8. *Tex. Comptroller v. Dallas Morning News*, No. 08-0172, argued September 10, 2009.
- 9. *Univ. of Tex. Sw. Med. Ctr. v. Aracibia*, No. 08-0215, argued September 10, 2009.
- 10. *Basic Capital Mgmt., Inc. v. Dynex Comm., Inc.*, No 08-0244, argued September 10, 2009.

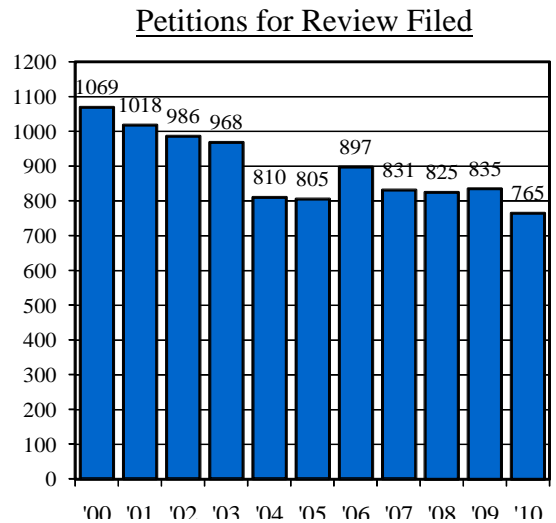
The growing backlog and timeliness of the Court’s opinions has been an issue in recent campaigns for all justices, as there is no public information on whether some or all of the justices are responsible. The most recent appropriation bill reflects legislative concern with the backlog and timeliness of opinions issued by the Court, as well as assessing responsibility. A rider to the appropriations act requires the Chief Justice to report on compliance by each individual justice with the Court’s internal operating deadlines:

9. Supreme Court Performance Measures. The Chief Justice of the Supreme Court of Texas shall file a report with the Legislative Budget Board and the Governor compiling data on each Justice’s compliance with the Court’s internal deadlines. The report shall be due no later than December 1 of each year and compile data from the prior fiscal year. The first report must be filed no later than August 31, 2011.

[http://www.lbb.state.tx.us/Bill\\_81/6\\_FSU/81-6\\_FSU\\_0909\\_Art4\\_thru\\_Art8.pdf](http://www.lbb.state.tx.us/Bill_81/6_FSU/81-6_FSU_0909_Art4_thru_Art8.pdf) Art. IV, § 1 ¶ 9 (emphasis added). Another provision imposes performance measures of a 105% clearance rate and an average time for disposition of all matters of 100 days. *Id.* ¶ 1.A.

**III. PETITIONS FOR REVIEW**

The trend of declining filings continued in the term ended August 31, 2010. In the term just ended, approximately 765 petitions for review were filed, making this the tenth successive term with lower filings. Prior to 2001, the average number of petitions exceeded 1,000. There has been a 25% drop in filings in the last 10 years. The chart graphically displays this significant change in filings:



The author has undertaken several studies over the years to determine odds of a grant at various stages of a case. The studies generally show that responses are filed, either voluntarily or at the request of the Court, in 40-50% of the cases and briefs on the merits are requested in about 20% of cases. At each stage, the odds of a grant increase.

The charts below summarize both past studies and the current study in progress.

Stages of a case

	2009 %	2010 %
Voluntary response	10.5	8.3
Response requested	39.0	33.3
Total responses	49.5	41.6
Full briefing	20.5	20.0
Grant or PC	11.0	3.6*
Deny or dismiss	88.5	85.6
Still pending	0.5	10.6*
Total	100%	100%

\* Study not complete. Because 10% of cases in the study remain pending, the grant rate could range from a low of 3.6% to a high of 14.2%.

Summary of Odds of a Grant by Stage

	Past studies	2009 study
PFR	13%	11%
PFR after response	25%	22%
PFR after full briefs	45+%	54%

The Court had 66 causes granted and pending on its docket on September 1, 2010. Of these, 20 involved issues relating to government, comprising 30% of the docket; sovereign immunity was at issue in 9 of these cases, or 14% of the docket. The next four areas of significant docket impact are: healthcare, 8 cases (12%); non-healthcare torts and products liability, 8 cases (12%); procedural issues (trial, appellate, and arbitration), 8 cases (12%); and real property and oil gas, 7 cases (11%). These five areas comprise 80% of the Court's docket.

Granted cases came from all of the courts of appeals except the El Paso court. The most grants were from Austin, 13 cases, which is not surprising given that government issues comprise a third of the Court's docket. The next three courts of appeals in terms of raw grant numbers are: Dallas, 11 cases; Houston 14<sup>th</sup>, 8 cases; and Corpus Christi, 7. Cases from these four courts comprise nearly 60% of granted cases as of September 1, 2010.

The docket continues to consist predominantly of cases in which corporations, businesses, government, insurance companies, and healthcare providers are the petitioners. These entities were petitioners in 51 of the 66 cases, or 77% of the docket. This is a drop from the prior year, when those entities were petitioners in 84% of granted and pending cases.

**IV. MANDAMUS ACTIVITY**

In 2004, the Texas Supreme Court issued its opinion in *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004), which altered the standard for granting mandamus relief. Many appellate practitioners believed that the opinion would result in an increase in mandamus filings and acceptances by the Court (mandamus cases are "accepted" for review; the term "grant"

indicates that relief is granted). What the numbers show is that, unlike petitions for review where filings have dropped 25% in the last decade, mandamus filings have remained steady, varying at most by 5%. This arguably could be attributed to the Court's expanded mandamus standard announced in *Prudential*.

Mandamus Filings, Dispositions, and Review

FY	Filed	Disp.	PC	Arg.	Total	%
2010	245	262	13	11	24	9.1
2009	273	255	13	4	17	6.7
2008	244	261	11	9	20	7.7
2007	231	252	16	11	27	10.7
2006	235	238	14	14	28	11.7
2005	255	256	22	15	37	14.5

It is also useful to review mandamus in the context of the Court's entire docket. In the term ended August 31, 2010, mandamus cases comprised 20% of accepted cases – in other words, 1 in 5 of cases in which the Court grants discretionary review will involve a request for mandamus relief.

Mandamus: Percentage of Cases In Which Review Is Granted

FY	Pets.	Mand.	Total	% of grants
2010	96	24	120	20
2009	85	17	102	17
2008	112	20	132	15
2007	125	27	152	18
2006	119	28	147	19
2005	109	37	146	25

**V. SPEED: HOW LONG DOES IT TAKE?**

All clients want to know how long a Supreme Court appeal will take. According to statistics kept by the Court, in the term just ended, it has taken on average 152 days, or 5 months, for a decision on a petition for review. Mandamus petitions average 94 days, or 3 months. It is important to bear in mind these are averages; as the shadow docket illustrates, some cases take much longer to get to a ruling. The following

table compares the current term numbers with the term ended August 31, 2009 (FY 2009):

Time to Disposition: PFRs and Mandamus

	Average Time to Disposition	
	FY 2009	FY 2010
PFRs	139 days (4.5 mos.)	152 days (5 mos.)
Mandamus	89 days (3 mos.)	94 days (3 mos.)

The Court average time to issue opinions increased slightly. Based on the docket sheets in 46 of the 48 cases decided after oral argument in the term ended August 31, 2010, the average time from initial filing to issuance of an opinion in an argued case was 27 months (as opposed to 26 months for the prior year period), ranging from a low of 16 months to a high of 40 months. These cases took on average 15 months from initial filing to oral argument, ranging from 8-32 months, and averaged 12 months from oral argument to issuance of an opinion, with a range of 2 to 28 months. These numbers exclude the *In re Kennedy Mem. Found.* and *In re Frost Nat'l Bank* cases, which took 70 months from filing of the petition to issuance of the opinions in those cases, because the cases were abated for some of the time.

The chart below summarizes time to disposition.

Time to Disposition: Argued Cases

	Filing to Submission	Submission to Issuance	Filing to Issuance
Average	15 mos.	12 mos.	27 mos.
Range	8-32 mos.	2-28 mos.	16-40 mos.

The average time to disposition was confirmed in an independent study of administrative law cases, where the average time to Supreme Court disposition was 2.2 years. Steven Baron, State Bar of Tex., 5<sup>th</sup> Annual Advanced Tex. Admin. Law Seminar, *Winning: Some reflections and empirical observations about judicial review in Texas administrative law cases* at 8 (Sept. 2010).

For non-argued cases, the time from filing to issuance remained the same as the prior term, averaging 14 months, ranging from a low of 6 months to a high of 28 months.

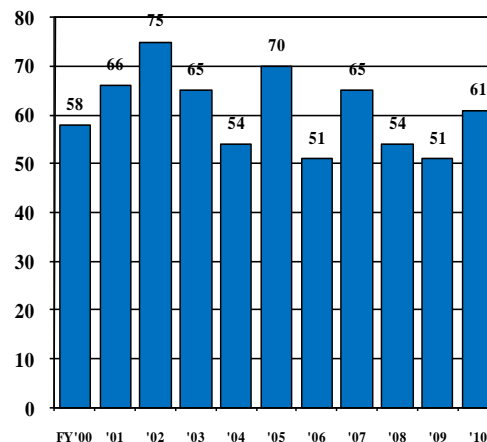
Time to Disposition: Cases Without Argument

	Initial Filing to Issuance
Average	14 mos.
Range	6-28 mos.

**VI. ORAL ARGUMENTS**

In recent terms, the Court had been concluding arguments in late March or early April, resulting in fewer oral arguments. That trend changed this year, when the Court set more arguments. The chart below show the trend in number of cases set for argument:

Oral Arguments



## VII. MOTIONS STATISTICS

The Court has adopted internal procedures that result in timely, efficient rulings on motions from the routine, like extension motions, to the urgent, such as a request for an emergency stay. In the current term, the average time for disposition of a motion for extension of time is 8 days. Most motions are ruled on within 4 days, but the average is affected by motions filed without fees, where the Court will not rule on the motion until the fee is paid. Most of the motions are handled by the clerk's office. Blake A. Hawthorne, *Supreme Court of Texas Internal Operating Procedures*, State Bar of Texas, Practice Before the Texas Supreme Court (April 2009).

Rulings on requests for an emergency stay averaged 9 days in the current term. These motions are immediately forwarded to the mandamus staff attorney and presented to the Court promptly. *Id.*

Rulings on whether to accept a certified question are even more prompt. This year, the Court reduced the time for ruling by 12.5% from the prior year, averaging 3.5 days rather than 4!

Rulings on motions for rehearing of petitions for review averaged 48 days. Of 171 motions, only 2 were granted, yielding a grant rate of 1.2%. Rulings on motions for rehearing of mandamus petitions averaged 37 days, with all 29 denied or dismissed, with a grant rate of 0%.

Rulings on rehearings of causes must be presented at conference; in the current term, the average time to disposition was 66 days. Four motions out of 37 were granted, yielding a grant rate of 10.8%. A grant does not mean that the Court reversed its original judgment; it is more likely that the Court granted rehearing to correct a mistake in the judgment. See Kurt Kuhn, *Why They Grant: A Study of Motions for Rehearing in the Texas Supreme Court* at 6, State Bar of Texas, Advanced Civil Appellate Law Course, (Sept. 2005) ("It appears that, overwhelmingly, motions for rehearing of causes are being used to correct mistakes in the relief granted or the costs assessed.").

## VIII. E-BRIEFS AND E-FILING

The Court adopted an amended order effective May 31, 2010 requiring electronic submission of most court documents. Under the amended order:

- Paper copies of all documents must still be submitted to the Court;
- Electronic copies of most documents (basically everything except routine motions like extension motions) must be submitted to the Court on the same day the original paper document is submitted;
- Electronic copies must be e-mailed to lead counsel at the same time they are sent to the Court;
- E-mail address of lead counsel are required by the order and should be added to the standard signature block; lead counsel must also sign up for Casemail in each case;
- Primary e-documents must be converted directly from the original to PDF compatible format and may not be scanned;
- Appended materials may be scanned but conversion is preferred;
- All e-materials must be text-searchable; and
- E-documents must be named as provided in the amended order; generally the format is: docket no.documenttype.pdf  
10-1111.pfr.pdf

A party's name is inserted if there are multiple petitioners or respondents:

10.111.pfr.johndoe.pdf

The Court's order is posted on the website at:

<http://www.supreme.courts.state.tx.us/miscdocket/10/10906500.PDF>.

Although not required, parties can add enhanced formats to their electronic documents, including bookmarks and hyperlinks. Bookmarks appear in a sidebar when a PDF document is opened and provide a table of contents that links to the referenced section of the document. Hyperlinks allow the reader to click on a cite or record reference and be directed to the reference. It really is possible to add these features without an IT staff. A recent article posted on the Court's website provides a good step-by-step guide for generating e-documents with added features. Don Cruse & Blake A. Hawthorne, *Appellate Briefs of the Future*,

Univ. of Tex. School of Law, 20<sup>th</sup> Annual Conf. on State & Fed. Appeals (June 2010), <http://www.supreme.courts.state.tx.us/pdf/AppellateBriefsOfTheFuture.pdf>.

**IX. THE “SHADOW DOCKET” OF LONG-PENDING PETITIONS**

**A. Current State of the Shadow Docket**

For the past five years, the author has studied cases that remain pending on the Court’s docket for more than 12 months without being granted or denied. Appendix B lists the cases pending on the shadow docket as of July 31, 2010, which at that time consisted of 45 cases, together with the author’s best guess for the reason that no action had been taken.

The 45 cases are consistent with the number of cases pending on the shadow docket last year at the same time, when 43 cases had been pending a year without action. Prior year totals varied significantly, both lower and higher, with 28 cases pending more than a year as of July 31, 2008, 63 cases pending more than a year without action as of July 31, 2007, and 70 cases as of July 31, 2006.

The odds of a grant, and particularly a grant by per curiam opinion, are high for cases on the shadow docket, as shown by the following chart examining the shadow docket:

Shadow Docket Grant Rates

Shadow dkt. July 31	Cases Pend.	PC	Grant	Grant Rate %
2006	70	39	5	63
2007	63	28	5	52
2008	28	10	11	81*
2009	43	11	11	67**
2010	45	n/a	n/a	n/a
Average:				66%

\* Excludes 2 cases still pending.

\*\* Excludes 8 cases still pending and 2 disciplinary appeals.

As of July 31, 2010, the ten oldest cases on the shadow docket without action were:

1. *Nealon MD v. Williams*, No. 06-0752 (health-care liability and sovereign immunity)
2. *Tejada v. Rowe MD*, No. 07-0061 (healthcare liability and sovereign immunity)
3. *Clark v. Sell*, No. 07-0647 (sovereign immunity)
6. *Lowell v. City of Baytown*, No. 07-1011 (sovereign immunity)
7. *Tex. New Mex. Pwr. Co. v. PUC*, No. 08-0187 (administrative law).
8. *Omaha Healthcare Ctr., LLC v. Johnson*, No. 08-0231 (healthcare)
9. *Escalante, M.D. v. Rowan*, No. 08-0248 (healthcare)
10. *Rolling Plains Groundwater Dist. v. City of Aspermonte*, 08-0591 (sovereign immunity)

**B. Where the Shadow Docket Comes From: Internal Procedure Overview**

The Texas Supreme Court has adopted internal operating procedures that place time constraints on actions by the justices with the goal of disposing of cases in a timely fashion. Those procedures are described in detail in Blake A. Hawthorne, *Supreme Court of Texas Internal Operating Procedures*, State Bar of Texas, Practice Before the Texas Supreme Court (April 2009). Readers should refer to that article for a detailed understanding of court procedures. For purposes of this paper, it is only necessary to have a general understanding of how a case progresses through the Court.

After a petition for review is filed, it remains in the clerk’s office until the earlier of three actions: the filing of a response, the filing of a letter waiving a response, or the expiration of thirty days. The petition for review will then be forwarded on the following Tuesday to all of the justices, and they will have 28 days to take action or the petition will automatically be denied on the next set of court orders (which is the 31st day after the forward date). Non-emergency mandamus petitions follow this same procedure, except that they are forwarded immediately.

If no response has been filed at the time the petition is forwarded, the most common action by the Court is to request a response, which requires the vote of one justice.

If a response has been filed initially or if one is filed at the request of the Court, then the question before the Court is whether to request full briefing on the merits. When the Court requests a response, the case will be set for the next conference following 30 days after the response is filed (if the Court has granted an extension of time to file a reply, the case will be set for the next conference more than a week after the reply is filed). If no affirmative action is taken by the justices, the petition will be denied on the next set of orders. It takes three votes to request full briefing. There are other actions that the justices can take besides requesting full briefing, including marking the case for discussion at the next conference (one vote), studying the case (one justice), or holding the case for another pending case with similar issues (6 votes).

If full briefing is requested, a court attorney will prepare a study memo. The memo is due 30 days after the filing of respondent's brief on the merits, although the Court may give the attorney additional time (this time deadline may also be altered if an extension of time to file a reply has been granted). The case will be discussed at the next conference after the study memo is distributed to the justices. Possible actions are to grant review and set the case for argument (4 votes for petition for review, 5 for mandamus), attempt to dispose of the case by per curiam opinion (6 votes), hold the case for another pending case with similar issues (6 votes), or study the case further (1 justice). If the Court does not vote to take any of these actions, the petition will be denied on the next set of orders following the conference.

The Court generally holds conference once a month, although it meets more often in June and does not meet during July and the first half of August. The conference schedule is posted at <http://www.supreme.courts.state.tx.us/calendar/current.asp>.

If the Court hears argument in a case or votes for disposition by per curiam opinion, there are

internal deadlines for distributing a draft of the opinion and for drafting any separate concurring or dissenting opinions. It is perhaps an understatement to say that these deadlines are very loosely enforced.

So, in summary, there are four distinct times in this process when the practitioner can expect action to be taken on a case: (1) 31 days after the case is forwarded to the Court; (2) after the first conference following 30 days after the filing of a requested response; (3) after the first conference following 30 days after the filing of respondent's brief on the merits; and (4) 12 months after oral argument. Each of these expected action times is discussed below together with possible reasons for non-action. There is also a summary chart of non-action on page 10 of the paper.

### **C. Chart Summary: Possible Bases for Non-Action**

A chart summarizing the times at which action is expected on a case, together with a listing of possible reasons for non-action, appears on the following page. For a more complete explanation of the chart and the times at which action should be expected, *see* last year's paper, Pamela Stanton Baron, *Texas Supreme Court Docket Analysis September 1, 2009*, State Bar of Texas, Advanced Civil Appellate Law Course (Sept. 2009).



Action	Expected action time	Possible reasons for non-action
Deny petition (with or without a response) or request response (when response has been waived or no response has been filed)	Deny petition: Orders following 31 days from date forwarded to the court.	<ol style="list-style-type: none"> <li>1. A justice may want to discuss the case at conference; denial or letter requesting response will be deferred to next conference week.</li> <li>2. A justice has pulled the case for study; action will be deferred until next conference; this action may be repeated over multiple conferences.</li> <li>3. If a response has been filed voluntarily, one or more justices may want to discuss whether to request full briefing; case will be set for the next conference.</li> </ol>
	Request response: Letter will usually be mailed no later than 31 days after the case is forwarded to the court.	
After a response has been filed, deny petition or ask for full briefing	Deny petition: Orders following first conference after expiration of 30 days following filing of response.	<ol style="list-style-type: none"> <li>1. If reply date has been extended and the reply is due after the Tuesday preceding the next scheduled conference, action may be deferred until next conference. This may not apply if multiple extensions are granted.</li> <li>2. Discussion may have been deferred to next conference; action will appear on orders or by letter issued following next conference.</li> <li>3. A justice has pulled the case for study; action will be deferred until next conference; this action may be repeated over multiple conferences.</li> <li>4. Case is being held for another case presenting the same issue and court has deferred decision whether to request full briefs until after the other case has been decided.</li> </ol>
	Full briefing: Letter requesting full briefing will usually be mailed no later than the Friday of the first conference week after expiration of 30 days following filing of response.	
Deny or grant petition after full briefing	Deny or grant review: Orders following first conference after expiration of 30 days following filing of respondent's brief on the merits.	<ol style="list-style-type: none"> <li>1. If the court has granted an extension of time to file petitioner's reply brief on the merits and the reply is due after the Tuesday preceding the next scheduled conference, action may be deferred until next conference.</li> <li>2. Discussion may have been deferred to next conference or court may have requested supplemental study memo; action will appear on orders following next conference.</li> <li>3. A justice has pulled the case for study; action will be deferred until next conference; this action may be repeated over multiple conferences.</li> <li>4. Case is being held for another case presenting the same issue; action will be deferred until other case is decided.</li> <li>5. Court is writing a per curiam opinion.</li> </ol>
Issue opinion after argument	One year or so later.	<ol style="list-style-type: none"> <li>1. Case has generated a separate opinion.</li> <li>2. Case has been assigned to a backlogged chambers or separate opinion is being written by backlogged chambers.</li> <li>3. A justice has pulled the case for study; action will be deferred until next conference; this action may be repeated over multiple conferences.</li> </ol>

## X. ISSUES CURRENTLY PENDING BEFORE THE TEXAS SUPREME COURT

Below is a brief summary of the issues raised in cases granted and pending in the Texas Supreme Court as of September 1, 2010, organized by subject matter. This list is not intended to be a comprehensive discussion of pending cases, but is designed to alert the reader to pending issues the determination of which is likely to affect other cases. Additional information can be obtained by reference to the court of appeals' opinion (cited when available), by reference to briefs on the merits posted on the Court's website: <http://www.supreme.courts.state.tx.us/ebriefs>, and by watching the oral argument video available at <http://www.stmarytx.edu/law/webcasts>.

### A. Trial and appellate procedure

#### 1. Arbitration

Enforceability of agreement and applicability of federal act. *In re Olshan Found. Repair Co.*, Nos. 09-0432, 09-0433, 09-0474, 09-0703, consolidated for argument March 23, 2009. These consolidated cases present the issue of whether an agreement that provides for arbitration by AAA "pursuant to the arbitration laws of your state" is arbitrable under the federal act or only under the Texas act; whether the arbitrator or the court decides if the contract is void under the Home Solicitation Act; and whether the expense of arbitration makes the agreement unconscionable. Court of appeals' opinions: 2008 WL 4661810 and 4661815 (Tex. App.—Fort Worth Oct. 2, 2008) (per curiam); 2009 WL 1886648 (Tex. App.—Waco July 1, 2009); 227 S.W.3d 124 (Tex. App.—Dallas 2009).

Scope of arbitration agreement in mortgage financing contract. *In re Rubiola*, No. 09-0309, argument September 16, 2010. At issue is whether an arbitration clause in a mortgage financing agreement requires arbitration of claims relating to the underlying house sale when the arbitration clause covers all disputes between the parties and their agents and the seller of the house was an officer of the mortgage company. Court of

appeals' opinion: 2009 WL 542174 (Tex. App.—San Antonio Mar. 4, 2009).

Permissibility of contractual modification of scope of review of arbitrator's award under Texas act. *NAFTA Traders, Inc. v. Quinn*, No. 08-0613, argument October 8, 2009. At issue is whether the Texas Arbitration Act, like its federal counterpart, prohibits contractual expansion of the scope of review of an arbitrator's award. Court of appeals' opinion: 257 S.W.3d 795 (Tex. App.—Dallas 2008).

Appealability when award vacated and no remand ordered. *Bison Bldg. Materials Ltd. v. Aldridge*, No. 06-1084, argument January 16, 2008. At issue is whether a trial court order vacating in part an arbitration award but not directing a remand is appealable. Also at issue is whether a post-injury release is subject to the fair notice requirements. Court of appeals' opinion: 2006 WL 2641280 (Tex. App.—Houston [1<sup>st</sup> Dist.] Sept. 14, 2006).

#### 2. Discovery

Time frame for responses from 1800 plaintiffs. *In re Allied Chem. Corp.*, No. 09-0264, argument originally set for February 16, 2010, then reset for March 24, 2009, then abated for possible settlement before argument. At issue is whether the trial court abused its discretion in setting discovery response times for the 1800 plaintiffs over a 9-55 month time period. Court of appeals' opinion: 2009 WL 866764 (Tex. App.—Corpus Christi Mar. 31, 2009).

#### 3. Pleading

Necessity of verified plea denying capacity of affiliate of contracting party. *Basic Capital Mgmt., Inc. v. Dynex Comm., Inc.*, No 08-0244, argument September 10, 2009. In this breach of loan commitment case, the Court will determine whether a challenge to capacity was waived when the objecting party failed to file a verified plea denying the capacity of affiliated parties to sue on the contract. Court of appeals' opinion: 254 S.W.3d 508 (Tex. App.—Dallas 2008).

#### 4. Appellate jurisdiction and procedure

Availability of interlocutory appeal to charter school. *LITS Charter School, Inc. v. C2 Constr., Inc.*, No. 09-0794, argument December 7, 2010. The Court will decide whether an open enrollment charter school is a governmental unit entitled to an interlocutory appeal from a trial court order denying a plea to the jurisdiction under Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). Court of appeals' opinion: 288 S.W.3d 31 (Tex. App.—Dallas 2009).

### B. Areas of substantive law

#### 1. Administrative law

Factors for public interest standard. *Railroad Comm'n v. Tex. Citizens For A Safe Future & Clean Water*, No. 08-0497, argument April 14, 2010. At issue is whether, in approving an oil and gas waste injection well permit under a public interest standard, the Commission was required specifically to consider traffic-safety issues. Court of appeals' opinion: 254 S.W.3d 492 (Tex. App.—Austin 2007).

Rate setting by PUC in electric deregulation. *State of Texas v. PUC*, No. 08-0421, argument October 6, 2009. The Court will decide whether the PUC properly determined costs – true up costs and excess mitigation credits – recoverable as part of the transition to retail competition. Court of appeals' opinion: 252 S.W.3d 1 (Tex. App.—Austin 2008).

Rate setting by PUC in electric deregulation redux. *Tex. Indus. Energy Consumers v. Centerpoint Energy Houston Elec., L.L.C.*, No. 08-0727, argument October 6, 2009. At issue is whether the PUC properly included and excluded various costs in setting the amount Centerpoint could recover as a competition transition charge. Court of appeals' opinion: 263 S.W.3d 448 (Tex. App.—Austin 2008).

#### 2. Attorneys and attorney's fees

Fee contract with individual or firm. *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, No. 08-0833, argument September 14, 2010. At issue is whether a contingent-fee agreement on firm letterhead by an of-counsel attorney on behalf of the firm is a personal contract with the attorney

after he changes firms. Court of appeals' opinion: 267 S.W.3d 454 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2008).

#### 3. Commercial and corporate law

Non-reliance clause. *Italian Cowboys Ptrs., Ltd. v. Prudential Ins. Co.*, No. 08-0989, argument April 14, 2010. The Court will consider whether disclaimer of reliance and merger clauses in a commercial lease bar a suit for fraudulent inducement to contract and for constructive eviction. Court of appeals' opinion: 270 S.W.3d 192 (Tex. App.—Eastland 2008).

Enforceability of non-compete. *Marsh USA Inc. v. Cook*, No. 09-0558, argument October 16, 2010. The Court will decide whether a non-compete agreement signed by an employee in exchange for the purchase of stock under a stock option plan is enforceable under Tex. Bus. & Comm. Code § 15.50(a). Court of appeals' opinion: 287 S.W.3d 378 (Tex. App.—Dallas 2009).

Assignability of lottery proceeds. *Tex. Lottery Comm'n v. First State Bank of Dequeen*, No. 08-0523, argument December 16, 2009. The Court will determine whether provisions of the Uniform Commercial Code override enforcement of a statute that bars a lottery winner from assigning the last two years of payments. Court of appeals' opinion: 254 S.W.3d 677 (Tex. App.—Austin 2008).

Entitlement of general contractor to statutory retainage. *Solar Applications Engineers Inc. v. T.A. Operating Corp.*, No. 06-0243, argument October 16, 2007. At issue is whether a general contractor's substantial performance excuses performance of a condition to provide lien releases before it is entitled to final payment of the 10% retainage the owner was statutorily required to retain for the benefit of unpaid subcontractors. Court of appeals' opinion: 191 S.W.3d 173 (Tex. App.—San Antonio 2006).

#### 4. Constitutional law

Tax on bars offering nude entertainment. *Comptroller of Pub. Accts. v. Tex. Entertainment Ass'n*, No. 09-0481, argument March 25, 2010. At issue is whether a state imposed fee on patrons

of bars offering live nude entertainment violates the free speech provisions of the state and federal constitutions. Court of appeals' opinion: 287 S.W.3d 852 (Tex. App.—Austin 2009).

Constitutionality of limitation on successor liability for asbestos claims. *Robinson v. Crown Cork & Seal Co.*, No. 06-0714, argument February 7, 2008. The Court will address a challenge to the constitutionality of a provision in House Bill 4 that created a new affirmative defense to successor liability for asbestos claims by limiting the cumulative successor liability of certain corporations to the fair market value of the predecessor company as of the time of the merger or consolidation. Court of appeals' opinion: 2006 WL 1168782 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2006).

## 5. Family law

When child support can be based on earnings potential: voluntary unemployment. *Iloff v. Iloff*, No. 09-0753, argument October 13, 2010. The Court will decide whether, in order to set child support based on the obligor's earning potential rather than actual income, the trial court must first determine that the obligor's voluntary unemployment was for the primary purpose of avoiding child support. Court of appeals' opinion: 2009 WL 2195559 (Tex. App.—Austin July 21, 2009).

## 6. Government

### a. Sovereign immunity

Notice of suit against county as jurisdictional requirement in 1983 action. *Roccaforte v. Jefferson Cty.*, No. 09-0326, argument October 14, 2010. The Court will decide whether, in a 1983 action, the plaintiff must comply with the notice required under Section 89.0041 of the Local Government Code and whether actual notice can substitute for notice by certified mail. Court of appeals' opinion: 281 S.W.3d 230 (Tex. App.—Beaumont 2009).

Suit against city for noncompliance with state requirements. *Sharyland Water Supp. Corp. v. City of Alton*, No. 09-0223, argument March 24, 2010. At issue is whether the water supplier can

sue the city for failure to comply with state requirements governing insulation and installation of sewer lines. Court of appeals' opinion: 277 S.W.3d 132 (Tex. App.—Fort Worth 2009).

Ordinance as written contract subject to waiver of sovereign immunity. *City of Houston v. Williams*, No. 09-0770, argument October 13, 2010. At issue is whether a city's civil service ordinance is a "written contract" qualifying for the limited waiver of governmental immunity in Tex. Local Gov't Code § 271.152. Court of appeals' opinion: 290 S.W.3d 260 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2009).

Sovereign immunity and declaratory judgment. *City of Dallas v. Albert*, No. 07-0284, argument December 17, 2009. At issue is whether a declaratory judgment action is properly brought to challenge the application and interpretation of, as opposed to the validity of, a civil service compensation statute. Court of appeals' opinion: 214 S.W.3d 631 (Tex. App.—Dallas 2006).

*Consolidated with: City of Dallas v. Martin*, No. 07-0288; same issue. Court of appeals' opinion: 214 S.W.3d 638 (Tex. App.—Dallas 2006).

Sovereign immunity and exhaustion of administrative remedies as bar to worker's comp retaliatory discharge suit. *Travis Cent. Appraisal Dist. v. Norman*, No. 09-0100, argument December 16, 2009. At issue is whether Chapter 451 of the Labor Code waives sovereign immunity for a worker's comp retaliatory discharge suit and whether exhaustion of the district's grievance procedures is a jurisdictional prerequisite to suit. Court of appeals' opinion: 274 S.W.3d 902 (Tex. App.—Austin 2008).

Permissible declaratory judgment action or trespass to title suit barred by sovereign immunity? *Tex. Parks & Wildlife Dep't v. Sawyer Trust*, No. 07-0945 (granted on rehearing), argument Nov. 19, 2009. At issue is whether a declaratory judgment action to determine navigability (and thus ownership of a river bed) is in fact a trespass to title suit barred by sovereign immunity. Court of appeals' opinion: 2007 WL 2390434 (Tex. App.—Amarillo Aug. 22, 2007).

Retroactivity of statute making pre-suit notice jurisdictional under the Tort Claims Act. *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Estate of Arancibia*, No. 08-0215 (granted on rehearing), argument September 10, 2009. The Court will decide whether a 2005 statute – making notice of suit under the Tort Claims Act a jurisdictional prerequisite to suit – applies retroactively. Court of appeals’ opinion: 244 S.W.3d 455 (Tex. App.—Dallas 2007).

Election of remedies: suit against governmental employees. *Franka, M.D. v. Velasquez*, No. 07-0131, argument September 10, 2008. The Court will examine the 2003 amendments to the Tort Claims Act to determine whether suit against a doctor and a resident must be dismissed because suit “could have been brought” against their employer UT Health Sciences Center. Court of appeals’ opinion: 216 S.W.3d 409 (Tex. App.—San Antonio 2006).

#### **b. Condemnation; takings**

Valuation testimony by owner-officer. *Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, No. 09-0396, argument October 12, 2010. In this condemnation case, the Court will consider whether the rule that a non-expert owner can testify as to the value of property extends to agents of corporations and partnerships and whether the owner must use the same measure as an expert. Court of appeals’ opinion: 282 S.W.3d 652 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2009).

Regulatory taking of groundwater. *Edwards Aquifer Auth. v. Day*, No. 08-0964, argument February 17, 2009. The Court will decide whether the grant of a permit to withdraw groundwater in an amount less than requested affects vested property rights and can form the basis of an inverse condemnation action. Court of appeals’ opinion: 274 S.W.3d 742 (Tex. App.—San Antonio 2008).

Estoppel effect of administrative finding of nuisance. *City of Dallas v. Stewart*, No. 09-0257, argument February 16, 2010. The question presented is whether an administrative finding of public nuisance upheld on substantial-evidence grounds precludes a takings claim when the

condemned structure is demolished. Court of appeals’ opinion: 2008 WL 5177168 (Tex. App.—Dallas Dec. 11, 2008).

Fees related to stolen property. *City of Dallas v. VSC, LLC*, No. 08-0265, argument January 19, 2010. The Court will determine whether a police seizure of stolen vehicles from a towing company constitutes a compensable taking of storage and towing fees that would have been charged to the vehicle owners. Court of appeals’ opinion: 242 S.W.3d 584 (Tex. App.—Dallas 2008).

Beachfront access easement. *Severance v. Patterson*, No. 09-0387, argument November 19, 2009. The Court will answer certified questions: (1) whether Texas recognizes a “rolling” public beachfront access easement; (2) if so, whether the rolling easement derives from common law or the Open Beaches Act; and (3) to what extent the landowner would be entitled to compensation for the migration of the easement. Certified Question from the Fifth Circuit.

#### **c. Open records**

Open records: information posing threat of physical injury. *Tex. Dep’t of Public Safety v. Cox Tex. Newspapers, L.L.C.*, No. 09-0530, argument September 15, 2010. At issue is whether the Public Information Act recognizes a common-law exception to prevent disclosure of information that poses a threat of physical injury, and specifically whether the DPS must disclose travel vouchers submitted by the governor’s security detail officers. Court of appeals’ opinion: 287 S.W.3d 390 (Tex. App.—Austin 2009).

Open records: date of birth. *Tex. Comptroller of Pub. Accts. v. Dallas Morning News*, No. 08-0172, argument September 10, 2009. The Court will determine whether a public employee’s date of birth is public information subject to disclosure under the Public Information Act. Court of appeals’ opinion: 244 S.W.3d 629 (Tex. App.—Austin 2008).

#### **d. Elections**

Voter standing. *Andrade v. NAACP of Austin*, No. 09-0420, argument October 12, 2010. At issue is whether plaintiff-voters have shown sufficiently concrete injury to demonstrate

standing to challenge the failure of the state to require paper ballots to verify votes in the event of a recount. Court of appeals' opinion: 287 S.W.3d 240 (Tex. App.—Austin 2009).

Standing to challenge City enforcement of competing ordinances on ballot. *Robinson v. White*, No. 08-0658, argument November 18, 2009. The Court will decide whether the plaintiff-voters have standing to challenge a city ballot proposal when they worked to support a competing proposal, in a situation where the first proposal purported to negate any competing proposal that received fewer votes. Court of appeals' opinion: 260 S.W.3d 463 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2008).

#### e. Taxes

Tax on sale of geophysical data. *TGS-NOPEC Geophysical Co. v. Combs*, No. 08-1056, argument April 15, 2010. At issue is whether 1998 amendments to the tax code to impose a franchise tax on the use of a license in Texas applies to the sale of geophysical data under a license agreement. Court of appeals' opinion: 268 S.W.3d 637 (Tex. App.—Austin 2008).

### 7. Healthcare liability

Whether expert report so non-compliant as to constitute no report. *Scoresby, M.D. v. Santillan*, No. 09-0497, argument November 9, 2010. At issue is whether a healthcare expert report that fails to comply with statutory requirements is no report at all, requiring outright dismissal, or is a deficient report that can be corrected. Court of appeals' opinion: 287 S.W.3d 319 (Tex. App.—Fort Worth 2009).

Effect of responsible third-party designation on limitations. *Molinet v. Kimbrell MD*, No. 09-0544, argument October 13, 2010. At issue in this agreed interlocutory appeal is whether Chapter 33 allowing designation of responsible third parties extends the statute of limitations for a healthcare liability claim. Court of appeals' opinion: 288 S.W.3d 464 (Tex. App.—San Antonio 2008).

Effect of deficient presuit notice on tolling of limitations. *Carreras, M.D. v. Marroquin*, No. 09-0857, argument October 14, 2010. At issue is whether presuit notice tolls limitations for 75 days

in a medical malpractice case when the notice is not accompanied by the required authorization for release of protected health information. Court of appeals' opinion: 297 S.W.3d 420 (Tex. App.—Corpus Christi 2009).

Diligence as affecting time for serving healthcare expert report. *Stockton v. Offenbach*, No. 09-0446, argument March 25, 2010. The court will decide whether the 120-day time period for serving an expert report in a healthcare liability suit is tolled when the plaintiff makes a diligent attempt to serve but cannot locate the healthcare provider. Court of appeals' opinion: 285 S.W.3d 517 (Tex. App.—Dallas 2009).

Unavoidable accident instruction. *Jelinek, M.D. v. Casas*, No. 08-1066, argument February 18, 2009. The Court will determine preservation of and propriety of an unavoidable accident instruction, as well as the legal sufficiency of the evidence, in a medical negligence case in treating an infection when the plaintiff also suffers from cancer and infections from surgery to treat the cancer. There is also an issue of whether a medical expert report under former 4590i is sufficient when it fails to address causation. Court of appeals' opinion: 2008 WL 2894889 (Tex. App.—Corpus Christi July 29, 2008).

Refusal to grant extension of time to file expert report. *Samlowski, M.D. v. Wooten*, No. 08-0667, argument November 18, 2009. The court will decide whether the court of appeals erred in reversing the trial court's denial of a 30-day extension to cure a deficient expert report that the trial court found not to be a good faith effort to comply with the statute. Court of appeals' opinion: 282 S.W.3d 82 (Tex. App.—Waco 2008).

Whether late-filed claims against hospital relate back for limitations purpose to time of filing against doctor. *Univ. of Tex. Health Sci. Ctr. at San Antonio v. Bailey*, No. 08-0419, argument October 7, 2009. At issue is whether a plaintiff can join a hospital as defendant in a suit after limitations has expired under the relation back tolling provision, Section 16.068 of the Texas Civil Practice & Remedies Code. Court of appeals' opinion: 261 S.W.3d 147 (Tex. App.—San Antonio 2008).

Common-law tort or statutory healthcare claim? *Yamada, M.D. v. Friend*, No. 08-0262, argument March 10, 2009. The Court will decide whether a negligence action against a doctor for providing advice resulting in improper placement of defibrillators at a water park states a healthcare claim subject to the expert report requirements. Court of appeals' opinion: 2008 WL 553690 (Tex. App.—Fort Worth Feb. 28, 2008).

Election of remedies: suit against governmental employees. *Franka, M.D. v. Velasquez*, No. 07-0131, argument September 10, 2008. The Court will examine the 2003 amendments to the Tort Claims Act to determine whether suit against a doctor and a resident must be dismissed because suit “could have been brought” against their employer UT Health Sciences Center. Court of appeals' opinion: 216 S.W.3d 409 (Tex. App.—San Antonio 2006).

## 8. Insurance

Use of racially-disparate credit scores to set prices. *Ojo v. Farmers Group, Inc.*, No. 10-0245, argument October 14, 2010. The Court will answer a certified question from the Ninth Circuit asking whether Texas law permits an insurance company to price insurance by using credit-score factors that have a racially disparate impact that, were it not for the McCarran-Ferguson Act, would violate the FHA. Certified question.

Coverage of weather-related stand-by costs. *Offshore Specialty Fabricators, Inc. v. Wellington Underwriting Agencies, Ltd.*, No. 08-0890, granted on rehearing, argument September 14, 2010. An issue is whether a policy covering damage to an offshore well platform includes weather stand-by costs when storms required repair vessels to delay repairs. Court of appeals' opinion: 267 S.W.3d 277 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2008).

Prejudice from non-compliance with notice and settlement provisions. *Am. Home Assurance Co. v. Md. Cas. Co.*, No. 09-0226, argument November 9, 2010. The Court will consider the proper standard for determining whether an insurer has been prejudiced as a matter of law by the breach of a notice and settlement-without-consent provision in an additional-insured policy.

Court of appeals' opinion: 277 S.W.3d 107 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2009).

Traveling employees – extent of course and scope. *Leordeanu v. Am. Prot. Ins. Co.*, No. 09-0330, argument April 15, 2010. The Court will decide whether a traveling salesperson who is injured while driving a company car was acting in the course and scope of her employment or whether the “coming and going” doctrine applies even when the employee has no work premises other than a home office. Court of appeals' opinion 278 S.W.3d 881 (Tex. App.—Austin 2009).

Scope and viability of bad faith workers comp action. *Tex. Mut. Ins. Co. v. Ruttinger*, No. 08-0751, argument April 14, 2010. At issue is whether recovery is permitted in a bad-faith workers compensation suit for aggravation of an injury because of a delay in surgery and whether Texas should continue to recognize a bad-faith claim. Court of appeals' opinion: 265 S.W.3d 651 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2008).

## 9. Juveniles and other civil/criminal proceedings

Compensation under the Texas Wrongful Imprisonment Act. *In re Smith*, No. 10-0048, argument November 10, 2010. The Court will decide whether the Act's prohibition against compensation when the claimant is serving a concurrent sentence for another crime bars compensation when the claimant is on parole for another crime. Court of appeals' opinion: None.

Jurisdiction over criminal contempt for perjury. *In re Reece*, No. 09-0520, argument October 12, 2010. At issue in this contempt proceeding is whether the Supreme Court or Court of Criminal Appeals has habeas jurisdiction over a criminal contempt order for perjury, whether civil mandamus is a proper method of review, and whether criminal contempt can be levied for perjury outside of the presence of the court. Court of appeals' opinion: 2009 WL 1623668 (Tex. App.—Dallas June 11, 2009).

## 10. Non-healthcare torts

Scope of statute limiting recovery to expenses actually paid or incurred. *Haygood v. Escabedo*,

No. 09-0377, argument September 16, 2010. At issue is whether Tex. Civ. Prac. & Rem. Code § 41.0105, which provides that recovery of medical expenses incurred is limited to the amount actually incurred or paid on behalf of the claimant, extends to amounts incurred but written off or adjusted under Medicare requirements. Court of appeals' opinion: 283 S.W.3d 3 (Tex. App.—Tyler 2009).

Allocation of fault and future mental anguish. *Hyde Park Baptist Church v. Turner*, No. 09-0191, argument September 14, 2010. In this case involving an intentional tort by a pre-school teacher, the Court will decide whether the negligent employer can be held liable for future mental anguish damages and what the standard should be in reviewing the jury's allocation of fault of only 20% to the intentional tortfeasor and 80% to the negligent employer. Court of appeals' opinion: 2009 WL 211586 (Tex. App.—Austin Jan. 30, 2009).

Equine Activities Act. *Loftin v. Lee*, No. 09-0313, argument January 21, 2010. The Court will decide whether, under the Equine Activities Act, a trail-ride leader is immune when the horse provided reacts to a natural hazard and injures the rider. Court of appeals' opinion: 277 S.W.3d 519 (Tex. App.—Tyler 2009).

Enforceability of post-injury release. *Bison Bldg. Materials Ltd. v. Aldridge*, No. 06-1084, argument January 16, 2008. At issue is whether a trial court order vacating in part an arbitration award but not directing a remand is appealable. Also at issue is whether a post-injury release is subject to the fair notice requirements. Court of appeals' opinion: 2006 WL 2641280 (Tex. App.—Houston [1<sup>st</sup> Dist.] Sept. 14, 2006).

## 11. Oil and gas; real property

Recordation: lost documents. *Genesis Tax Loan Svcs., Inc. v. Kothmann*, No. 09-0828, argument November 10, 2010. The Court will examine the proper procedure for recording a tax lien when the clerk loses the original document prior to recordation and whether an affidavit plus photocopy is sufficient. Court of appeals' opinion: 288 S.W.3d 503 (Tex. App.—Amarillo 2009).

Third-party beneficiary status of lessor under JOA. *Tawes v. Barnes*, No. 10-0581, argument November 9, 2010. At issue is whether a lessor is a third-party beneficiary under a joint operating agreement and who has responsibility for payment of royalty when the lessor's lessee goes non-consent under the JOA. Certified question.

Duty of holder of executive leasing right to develop the minerals. *Lesley v. Veterans Land Bd.*, No. 09-0306, argument September 15, 2010. In this oil and gas case, the Court will decide whether the holder of the executive leasing rights breaches a duty to the non-executive rights holder when it imposes a non-drilling covenant on the property. Court of appeals' opinion: 281 S.W.3d 602 (Tex. App.—Eastland 2009).

Time for election under joint operating agreement. *XTO Energy Inc. v. Smith Production Inc.*, No. 09-0270, argument September 15, 2010. The Court will decide whether a party to a joint operating agreement for oil and gas leases can change its election to participate in a subsequent operation if the election is changed within the 30-day period provided in the agreement. Court of appeals' opinion: 282 S.W.3d 672 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2009).

Applicability of discovery rule to cause of action for waste. *Exxon Corp. v. Emerald Oil & Gas Co., L.P.*, No. 05-1076, argued February 13, 2007, opinion issued March 27, 2009, rehearing granted November 20, 2009. The Court will reconsider whether limitations barred a suit by royalty owners and their subsequent lessee in an action for waste based on the improper plugging of oil and gas wells by a prior lessee. The Court originally held (8-0, with Justice O'Neill not sitting) that the statutory and common law waste and negligence per se claims were time barred but reversed the trial court's directed verdict as to the fraud claim based on Exxon's inaccurate filings with the Railroad Commission. Court of appeals' opinion: 180 S.W.3d 299 (Tex. App.—Corpus Christi 2005).

Statutory cause of action for waste. *Exxon Corp. v. Emerald Oil & Gas Co., L.P.*, No. 05-0729, argued February 13, 2007, opinion issued March 27, 2009, rehearing granted November 20, 2009. The Court will reconsider whether, under



Section 85.321 of the Natural Resources Code, a new oil and gas lessee has a cause of action for waste based on the improper plugging of a well on the lease by a prior lessee. The Court originally held (8-0, with Justice O'Neill not sitting) that Section 85.321 creates a private cause of action that does not extend to subsequent lessees. Court of appeals' opinion: 2005 WL 3163157 (Tex. App.—Corpus Christi Nov. 29, 2005).

Equitable ownership as sufficient to claim property tax exemption. *Galveston Cent. Appraisal Dist. v. TRQ Captain's Landing*, No. 07-0010, argument January 15, 2008, abated August 28, 2009. The Court will decide whether a community housing service organization, which is the equitable but not the legal owner of a property, qualifies for a property tax exemption. Court of appeals' opinion: 212 S.W.3d 726 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2006).

## 12. Products liability

Legal sufficiency of evidence of defect and malice. *Bic Pen Corp. v. Carter*, No. 09-0039, argument March 23, 2010. This case presents issues of whether some evidence supports the jury verdict of a manufacturing defect in a lighter and whether there was some evidence of malice to support the award of punitive damages. Court of appeals' opinion: 2008 WL 5090757 (Tex. App.—Corpus Christi Dec. 4, 2008).

Preemption by NHTSA regulations. *MCI Sales & Serv., Inc. v. Hinton*, No. 09-0048, argument March 24, 2010. The Court will decide whether NHTSA regulations specifying equipment required on motorcoach buses preempts a common-law products suit for design defects based on failure to install seatbelts and side window glazing. Court of appeals' opinion: 272 S.W.3d 17 (Tex. App.—Waco 2008).

Havner doubling of the risk requirement. *Merck & Co. v. Garza*, No. 09-0073, argument January 20, 2010. In this Vioxx case, at issue is whether general causation may be proved with

expert testimony based on clinical trials that do not show a doubling of the risk at a similar dose and duration. Court of appeals' opinion: 277 S.W.3d 430 (Tex. App.—San Antonio 2008).

Constitutionality of limitation on successor liability for asbestos claims. *Robinson v. Crown Cork & Seal Co.*, No. 06-0714, argument February 7, 2008. The Court will address a challenge to the constitutionality of a provision in House Bill 4 that created a new affirmative defense to successor liability for asbestos claims by limiting the cumulative successor liability of certain corporations to the fair market value of the predecessor company as of the time of the merger or consolidation. Court of appeals' opinion: 2006 WL 1168782 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2006).

## XI. APPENDIX

Appendix A is a chart compiling published statistics on Texas Supreme Court docket activity for the period September 1, 1980 through August 31, 2009, and unofficial statistics for the term ended August 31, 2010. Appendix B is the shadow docket list as of July 31, 2010. Appendix C list opinions by author for the term ended August 31, 2010.

## Appendix A: Texas Supreme Court Statistics, 1980-2009\*\*

Term beginning Sept. 1:	Total deciding opinions	Total majority opinions	Number of per curiam dispositions	Percent Per curiam opinions (%)	Reversal rate (%) <sup>1</sup>	Petitions or applications filed	Petitions or applications disposed of	Petitions or applications granted	Effective grant rate
1980	107	83	24	22	76	876	860	86	10
1981	107	84	23	21	77	765	777	113	15
1982	125	100	25	20	71	703	705	119	17
1983	106	91	15	14	75	987	885	87	10
1984	153	106	47	31	79	998	1018	141	14
1985	131	84	47	36	85	1044	982	113	12
1986	125	93	32	26	77	983	1066	159	15
1987	118	93	25	21	85	997	951	110	12
1988	110	68	42	38	87	821	781	76	10
1989	102	66	36	35	85	866	876	84	10
1990	119	82	37	31	n/a	1055	1051	130	12
1991	127	71	56	44	85	1096	1154	145	13
1992	145	94	51	35	87	1171	1243	167	13
1993	146	88	58	40	86	1054	1093	125	11
1994	146	80	66	45	81	1021	997	132	13
1995	133	63	70	53	91	989	1011	150	15
1996	118	56	62	53	93	983	936	104	11
1997	141	91	50	36	72	1004	1104	127	12
1998	118	70	48	43	87	1012	1006	113	11
1999	99	62	37	38	73	1069	1063	97	9
2000	88	59	29	33	69	1018	1020	111	11
2001	107	77	30	28	77	986	1001	116	12
2002	89	60	29	33	92	968	973	116	12
2003	86	55	31	36	80	810	791	82	10
2004	108	62	46	43	89	805	823	109	13
2005	108	48	60	56	94	897	822	119	14
2006	131	62	69	53	92	831	919	125	14
2007	136	76	60	44	89	825	874	112	13
2008	114	76	38	33	93	835	787	85	11
2009*	92*	52*	40*	43*	92*	765*	808*	96*	12*

<sup>1</sup> Reversal rate is all cases in which the lower court's judgment was reversed in whole or in part.

\*Unofficial statistics as of August 31, 2010.

\*\*This chart is copyrighted by the author.

## Appendix B

## THE SHADOW DOCKET: CASES PENDING OVER 12 MONTHS AS OF JULY 31, 2010

Dkt. no.	Case name	Subject matter	Best guess why no action taken
06-0752	<i>Nealon MD v. Williams</i>	Healthcare/sovereign immunity	Hold for No. 07-0131, <i>Franka M.D. v. Velasquez</i> , argued Sept. 10, 2008.
07-0061	<i>Tejada v. Rowe MD</i>	Healthcare/sovereign immunity	Hold for No. 07-0131, <i>Franka M.D. v. Velasquez</i> , argued Sept. 10, 2008.
07-0647	<i>Clark v. Sell</i>	Sovereign immunity	Hold for No. 07-0131, <i>Franka M.D. v. Velasquez</i> , argued Sept. 10, 2008.
07-1011	<i>Lowell v. City of Baytown</i>	Sovereign immunity (back pay)	Resolve in light of No. 06-0778, <i>City of El Paso v. Heinrich</i> , decided May 1, 2009.
08-0187	<i>Tex. New Mex. Pwr. Co. v. PUC</i>	Administrative law	Hold for <i>Tex. Indus. Energy Consumers v. Centerpoint Energy Houston Elec., L.L.C.</i> , No. 08-0727, argument October 6, 2009.
08-0231	<i>Omaha Healthcare Ctr., LLC v. Johnson</i>	Healthcare (spider bite at nursing home)	Resolve in light of <i>Marks v. St. Luke's Episcopal Hosp.</i> , No. 07-0783, decided on rehearing on August 27, 2010.
08-0248	<i>Escalante, M.D. v. Rowan</i>	Healthcare (lost chance)	Resolve in light of <i>Columbia Rio Grande Healthcare L.P. v. Hawley</i> , No. 06-0372, decided June 5, 2009.
08-0591	<i>Rolling Plains Groundwater Conserv. Dist. v. City of Aspermonte</i>	Sovereign immunity.	Possible per curiam opinion.
08-0611	<i>Briggs v. Huntsville Indep. School Dist.</i>	Sovereign immunity	Denied Aug. 20, 2010.
08-0634	<i>AEP Tex. Cent. Co. v. Public Util. Comm'n</i>	Administrative law (rate case)	Hold for <i>Tex. Indus. Energy Consumers v. Centerpoint Energy Houston Elec., L.L.C.</i> , No. 08-0727, argument October 6, 2009.
08-0673	<i>Farmer v. Rogers</i>	Appellate record in criminal case	No e-briefs available. Possible per curiam opinion.
08-0842	<i>Ammons v. Wilson N. Jones Mem. Hosp.</i>	Healthcare liability	Possible per curiam opinion.
08-0908	<i>FDIC v. Lenk</i>	Probate	Resolve in light of <i>Jefferson State Bank v. Lenk</i> , No. 09-0269, decided Aug. 27, 2010.
08-0943	<i>TexDOT v. Sefzik</i>	Sovereign immunity	Resolve in light of No. 06-0778, <i>City of El Paso v. Heinrich</i> , decided May 1, 2009.
08-0960	<i>City of Mesquite v. PKG Contracting, Inc.</i>	Sovereign immunity	Possible per curiam opinion in light of <i>State v. Lueck</i> , 290 S.W.3d 876, 883 (Tex. 2009).

Dkt. no.	Case name	Subject matter	Best guess why no action taken
09-0014	<i>Kelly v. Am. Interstate Ins. Co.</i>	Insurance (workers comp)	Hold for <i>Tex. Mut. Ins. Co. v. Ruttinger</i> , No. 08-0751, argument April 14, 2010.
09-0025	<i>Harris Meth. Fort Worth v. Ollie</i>	Healthcare liability	Resolve in light of <i>Marks v. St. Luke's Episcopal Hosp.</i> , No. 07-0783, decided on rehearing on August 27, 2010.
09-0026	<i>Wind Mtn. Ranch, LLC v. City of Temple</i>	Real property	Possible per curiam opinion
09-0079	<i>Thota MD v. Young</i>	Healthcare liability	Denied Aug. 31, 2010.
09-0084	<i>Tex. GLO v. Koch</i>	Sovereign immunity	Resolve in light of <i>Tex. Parks &amp; Wildlife Dep't v. Sawyer Trust</i> , No. 07-0945, argued Nov. 19, 2009.
09-0128	<i>SWB, LP v. Combs</i>	Administrative law	Possible grant.
09-0137	<i>Tobin v. Weaver</i>	Procedure (election of remedies) and attorney's fees	Possible per curiam opinion.
09-0185	<i>In re Minter Elec. Co.</i>	Procedure (plenary power)	Denied Aug. 27, 2010.
09-0208	<i>Rodriguez v. Mercy Reg'l Med. Ctr.</i>	Healthcare liability	Denied Aug. 20, 2010.
09-0300	<i>UT Austin v. Hayes</i>	Sovereign immunity	Possible per curiam opinion.
09-0324	<i>Vantage Sys. Design, Inv. v. Raymondville ISD</i>	Sovereign Immunity	Possible per curiam opinion.
09-0326	<i>Roccaforte v. Jefferson County</i>	Sovereign Immunity	Granted Aug. 27, 2010.
09-0340	<i>Ins. Co. of Pa. v. Muro</i>	Insurance (workers comp) and attorney's fees	Hold for <i>Transcontinental Ins. Co. v. Crump</i> , decided Aug. 27, 2010.
09-0369	<i>Colquitt v. Brazoria Cty.</i>	Sovereign immunity	Hold for <i>Univ. of Tex. Sw. Med. Ctr. at Dallas v. Estate of Arancibia</i> , No. 08-0215, argument September 10, 2009.
09-0399	<i>BP Am. Prod. Co. v. Marshall</i>	Oil and gas	Possible grant.
09-0411	<i>In re Guardianship of Cantu</i>	Probate/real property	Denied Aug. 20, 2010.
09-0412	<i>Wilkins v. McManemy MD</i>	Healthcare/sovereign immunity	Hold for No. 07-0131, <i>Franka M.D. v. Velasquez</i> , argued Sept. 10, 2008.
09-0441	<i>In re Cantu</i>	Probate	Denied Aug. 20, 2010.
09-0443	<i>In re Tex. Mut. Ins. Co.</i>	Insurance (workers comp)	Hold for <i>Tex. Mut. Ins. Co. v. Ruttinger</i> , No. 08-0751, argument April 14, 2010.

<b>Dkt. no.</b>	<b>Case name</b>	<b>Subject matter</b>	<b>Best guess why no action taken</b>
09-0465	<i>Sweed v. Nye</i>	Appellate (amended notice of appeal)	Briefing not complete
09-0472	<i>Wheatley v. Med. Hosp. of Buna, Tex.</i>	Healthcare	Denied Aug. 27, 2010.
09-0480	<i>In the Interest of C.H.C.</i>	Appellate	Possible per curiam opinion.
09-0497	<i>Scoreby MD v. Santillan</i>	Healthcare	Granted Aug. 27, 2010.
09-0506	<i>Patel v. City of Everman</i>	Government (condemnation)	Hold for <i>City of Dallas v. Stewart</i> , No. 09-0257, argument February 16, 2010.
09-0508	<i>In re Tex. Mut. Ins. Co.</i>	Insurance (workers comp)	Hold for <i>Tex. Mut. Ins. Co. v. Ruttinger</i> , No. 08-0751, argument April 14, 2010.
09-0535	<i>White v. Baylor All Saints Med. Ctr.</i>	Healthcare expert report	Denied Aug. 20, 2010.
09-0581	<i>Shelton v. UTMB</i>	Healthcare	Denied Aug. 27, 2010.
09-0585	<i>In re Dallas Cty., Tex.</i>	Mandatory venue	Dismissed on motion.
09-0613	<i>Turtle Healthcare Group, LLC v. Linan</i>	Healthcare	Resolve in light of <i>Marks v. St. Luke's Episcopal Hosp.</i> , No. 07-0783, decided on rehearing on August 27, 2010.
09-0628	<i>Willens, M.D. v. Johnson</i>	Healthcare expert report	Possible per curiam opinion.

## Appendix C: Opinions by Justice for Term Ended August 31, 2010

	Majority	Per Curiam	Concur	Dissent	Concur & Dissent	Denied with Per Curiam	On Rehearing	Total
Chief Justice Wallace Jefferson	8	6	0	3	1	0	0	18
Justice Nathan L. Hecht	3	2	0	1	0	0	0	6
Justice Harriet O'Neill	4*	6	0	2	0	0	1*	13
Justice Dale Wainwright	2	5	1	3	1	0	0	12
Justice David Medina	6	2	0	0	0	0	1	9
Justice Paul Green	12	11	1	0	0	0	0	24
Justice Phil Johnson	6	3	3	3	0	0	0	15
Justice Don Willett	8	3	3	1	0	0	0	15
Justice Eva Guzman	3	2	0	0	1	0	0	6
Justice Debra Lehrmann	0	0	0	0	0	0	0	0
Total	52*	40	8	13	3	0	2*	118

\* The asterisked numbers in this table will likely differ from the Court's official count. The Court's yearly tallies include in the majority opinions column opinions on rehearing if the original opinion was issued in a prior term, but not if the original opinion was issued in the same term. The asterisked numbers reflect one opinion issued on rehearing in the current term, where the original opinion was issued in a prior term, counting it as an opinion on rehearing. The Court will likely count the opinion as a majority opinion.