TEXAS BUSINESS LITIGATION JOURNAL

EXPERT WITNESSES AND ANTITRUST

FALL 2014 • VOLUME 36 • NUMBER 4

TABLE OF CONTENTS

click on title to jump to page

Cover: "Storm and Silos"
Photograph by Larry Gustafson, Dallas

December 15, 2014

Dear Section Members:

It is time for the fall edition of the *Journal*. This edition of the *Journal* has two great articles. The first is from Amy Stewart and Jasmine Robinson discussing developments in the area of expert witnesses. The second is by Leslie Hyman providing an update on the latest developments in the antitrust field. Thank you Amy, Jasmine and Leslie for preparing these important articles.

The Section is hard at work on planning the annual meeting at the State Bar's conference this summer in San Antonio on June 18 and 19. In addition to our annual CLE program, more news to come soon on that front, we will also be awarding our annual Distinguished Counselor Award. We hope you will make plans to attend the annual meeting. And, if you have any recommendations for the Distinguished Counselor Award, please let me or any member of the council know your thoughts. For a complete list of our council and for other important Section information, I invite you to visit the Section's website, http://texbuslit.org.

The Antitrust and Business Litigation council is constantly looking for ways to improve our service to our members. To do that effectively, we need your suggestions for ways the Section could assist you or your practice. Please send your comments to me or any other council member.

I hope you enjoy this edition of the *Journal*. If you are interested in submitting an article, please contact Mike Ferrill (amferrill@coxsmith.com).

I await your thoughts and suggestions.

Regards,

Thomas R. Jackson
Section Chair
(214) 220-3939
trjackson@JonesDay.com

Return to Table of Contents

This issue of the Journal features the annual survey articles on expert witness law and antitrust law.

As always, we solicit written contributions to the Journal. We currently have commitments for annual survey articles on antitrust, securities, RICO, business torts, arbitration, class actions D&O and expert witness developments. If you have an idea for a survey article in another area of business litigation, or an article focusing on a particular aspect of or development in the law (even if it falls within one of the broad survey categories), contact me at 112 E. Pecan, Suite 1800, San Antonio, Texas 78205 (210) 554-5282; (210) 226-8395 (fax), amferril@coxsmith.com.

A. Michael Ferrill
Editor

Return to Table of Contents

Expert Case Law Review

By Amy M. Stewart & Jasmine F. Robinson[1]

This article summarizes the noteworthy 2014 decisions of the Texas state and federal courts relating to the use and admission of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *E.I. du Point de Nemours & Co. v. Robinson*, 923 S.W. 2d 549 (Tex. 1995).

For Summary Judgment Purposes, a Review of Expert Opinion for Evidentiary Purposes is Not Equivalent to a *Robinson* Challenge Without a Hearing.

***Ortega v. National Oilwell Varco, L.P.*, 2014 WL 1691496 (Tex. App.—Amarillo, Apr. 24, 2014, review denied).**

In this personal injury case, Ortega sued National Oilwell Varco, L.P. ("NOV") for injuries he received while working on an oil rig manufactured by NOV. The trial court granted a no-evidence motion for summary judgment in favor of NOV, dismissing Ortega's claims of negligence and products liability. In response to the motion for summary judgment, Ortega offered an affidavit of an engineer who provided an expert opinion regarding NOV's liability. NOV objected to the affidavit and the trial court sustained the objections in part and granted the motion for summary judgment. On appeal, Ortega challenged the trial court's finding that the engineer lacked the qualifications to render the expert opinions given and that his testimony was conclusory, speculative, and lacked factual support.

The court of appeals reviewed the engineer's affidavit, which consisted of a description of the information he reviewed, a statement that he interviewed four persons, and his opinions. The appeals court found that the engineer's opinions and statements were conclusory—they stated that a component part failed, an unnamed safety system failed, there were unnecessary delays in the braking system, the brakes failed, and that safer alternative designs were available. The court of appeals found that the affidavit failed to explain or reveal key factual support for these opinions and upheld the trial court's opinion.

Further, the court of appeals addressed Ortega's suggestion that the trial court's rulings were equivalent to granting a *Robinson* challenge without a hearing. The court of appeals

Return to Table of Contents

explained that the trial court was not making a determination as to the reliability of the engineer and his opinions. Rather, the trial court was applying the "summary judgment tenet denuding conclusory statements of evidentiary value."[2] Although the engineer's opinions might be reliable, for summary judgment purposes, the trial court's decision that the engineer's opinions had no evidentiary value because no explanations or supporting facts were provided was correct.

An Expert's Opinion Should Not Be Admitted if it Does Not Apply to the Specific Facts of a Case.

***Diggs v. Citigroup, Inc.*, 551 Fed. Appx. 762, 2014 WL 54637 (5th Cir. Jan. 8, 2014).**

Plaintiff-Appellant ("Diggs"), a former employee of Defendant-Appellee Citigroup, Inc. ("Citi") signed an arbitration agreement that subjected all employment disputes to binding arbitration. Citi terminated Diggs' employment because of Diggs' alleged absenteeism. Diggs sued Citi alleging that she was wrongfully terminated because she missed work due to hospitalization and pregnancy complications, in violation of Title VII and the Family and Medical Leave Act. Citi then filed a motion to dismiss Diggs' lawsuit and to compel arbitration. In response to Citi's motion to dismiss, Diggs argued the arbitration agreement was unenforceable because of fraud, mistake or prior breach, that the arbitration policy was unconscionable, and that mandatory employment arbitration before the AAA violates public policy. Diggs relied on a study and affidavit by a Cornell University professor ("Colvin") to support her arguments and show that arbitration awards in employment disputes disproportionately favor employers over employees.

Colvin's study and the affidavit were not created for Diggs' case. Actually, Colvin completed the study and affidavit three years prior to the filing of Diggs' lawsuit. Colvin's study was based upon a sample of employment matters arbitrated with the AAA from 2003 to 2007 (5 to 7 years before Diggs' case was filed) and compared those outcomes to employment matters litigated in state and federal courts during 1996, 1999 and 2000.

The district court referred Citi's motion to dismiss and to compel arbitration to a magistrate. The magistrate's findings and recommendation that Citi's motion be granted were adopted by the district court. Further, the district court found that the arbitration agreement was valid, that the dispute fell within the scope of the agreement, and that the agreement did not

Return to Table of Contents

violate public policy. The district court disregarded Colvin's study because it did not satisfy the standard set forth in Fed. R. Evid. 702, *Daubert* and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Diggs appealed.

The Fifth Circuit explained that *Daubert* requires that any scientific testimony or evidence admitted be relevant and reliable, and agreed with the district court's finding that Colvin's study and affidavit provided only a general assessment and did not explain how Colvin's study concerned the case before the court. The Fifth Circuit emphasized that "*Daubert* and *Kumho* call for "evidentiary reliability" and "a valid… connection to the pertinent inquiry as a precondition to admissibility."[3] Accordingly, the Fifth Circuit held that the district court did not abuse its discretion by disregarding the study and accompanying affidavit.

Scientific Expert Testimony Not Excluded Where the Objection to Testimony Relates to the Weight the Testimony Should Be Given and Not its Admissibility.

***Jimenez v. United States*, 2014 WL 3891361 (W.D. Tex. 2014).**

In this personal injury case, Jimenez sued the United States for damages she suffered after her vehicle was struck by a United States Postal Service vehicle. The U.S. designated Dr. Richard Harding to testify to the vehicle impact, occupant kinematics, and injury mechanisms involved in the collision. The plaintiff deposed Harding and then filed a motion to exclude Harding's testimony on the grounds that he was not qualified to testify as an expert and that his proposed testimony was not reliable and would not assist the trier of fact.

The district court honed in on the *Daubert* two-pronged test for the admission of scientific expert testimony: (1) is the expert opinion based on scientific method, and (2) is there a "fit" between the expert testimony and the disputed issues in the case.[4] Further, the district court recognized that the Fifth Circuit requires trial courts to determine that the reasoning and methodology underlying a proffered expert opinion are scientifically valid and that the reasoning and methodology were applied properly to the facts of the case.

On the issue of whether Harding was a qualified expert, the district court found that Harding's education, training, and experience demonstrated that he was qualified to testify about the causation of Jimenez's injuries but not qualified to debate the evaluation, diagnosis or

treatment provided by Jimenez's physicians. On the issue of the reliability of Harding's testimony, the district court applied the analysis required by *Daubert* and *Allen v. Pennsylvania Eng'g Corp.*, 102 F.3d 194 (5th Cir. 1996). The district court concluded that Harding's fields of biomechanics, physiology, and ICA were legitimate and that it could not conclude that applying the laws of physics to a vehicle collision was not a reliable methodology or that Harding's theories had not been adequately tested or peer reviewed. Specifically, the district court found that Jimenez's challenges were matters that related to the weight to be given the testimony, and not its admissibility. The district court concluded that Harding's testimony was sufficiently reliable, and that his opinions were based upon sufficient facts, and the product of reliable principles and methods. Further, the court concluded that Harding reliably applied the principles and methods to the facts of the case.

Challenges That Expert Risk-Utility Analysis Regarding Unreasonable Dangerous Product Design is More Appropriate for Cross-Examination and Precise Boundaries of What an Expert Can Opine On Are More Appropriately Determined Through Motions in Limine or Objection at Trial.

***Timoschuk v. Daimler Trucks North America*, 2014 WL 2533789 (W.D. Tex. 2014).**

The plaintiffs filed a wrongful death and survival lawsuit following the death of Jeffrey Timoschuk in a tractor-trailer accident. Timoschuk was a passenger in a 2007 Daimler tractor with his co-driver. The tractor struck a drill rig truck and caught fire. Allegedly, Timoschuk was alive moments immediately after the accident, but he was trapped in the burning tractor, which was not equipped with an emergency exit. The plaintiffs asserted causes of action against Daimler for negligence, defective design, failure to warn and breach of warranty. Daimler filed a motion to limit the following experts' testimony: (1) Gerald Rosenbluth, the proffered expert on truck cab design, (2) David Smith, the fire causation and spread expert, and (3) Dr. Mary Case, a pathologist and the plaintiffs' medical expert.

The district court considered whether Rosenbluth's experience qualified him to testify on the subject of heavy truck design. The court found that Rosenbluth was qualified as an expert based on his education, experience, and affiliations described in his curriculum vitae. However, Daimler argued that Rosenbluth was not qualified to testify because he had never designed "sleeper doors, pop-out windows or any other form of egress from a heavy truck." The district

court found Daimler's argument to be a mischaracterization of the relevant inquiry in that it impermissibly narrowed the scope of potential experts. Further, the court noted that the plaintiffs claimed that the truck design itself was defective because it lacked sufficient emergency exits, not that the emergency exits themselves were defectively designed. Furthermore, because the plaintiffs' inquiry focused on the design of the tractor trailer and not on the exits themselves, there was no merit in the attack on Rosenbluth's lack of particularized experience with emergency exits. Therefore, the district court found Rosenbluth qualified to testify to vehicle design and safety, which are both relevant issues in a design defect case.

Daimler also sought to exclude Rosenbluth's testimony as based on an unreliable foundation in that the studies were immaterial to the question of whether the design was defective. The district court first determined that the studies, from reputable institutions, formed an adequate basis for Rosenbluth's conclusion that the risk of fire made sleeper cabs without emergency exits unreasonably dangerous. The district court then turned to Daimler's contention that Rosenbluth's testimony was unreliable because he did not conduct an "appropriate risk-utility analysis." Rosenbluth used a mock truck and an individual of similar age and build to Timoschuk to show that he would have been able to escape the truck if an additional exit had been available. Rosenbluth also relied on eyewitness testimony that Timoschuk was alive and trying to escape the truck before he died.

While Rosenbluth's surrogate testing might be questioned because the surrogate had not been in an accident and thus would not have had Timoschuk's physiological or psychological impairment, the district court found that, as a whole, Rosenbluth had sufficient foundation for his opinion. Further, the district court found that Daimler's arguments regarding Rosenbluth's risk-utility analysis, for example, flaws in Rosenbluth's analysis, overstating risks, underestimating the costs associated with his proposal, and ignoring potential drawbacks from adding in a new exit, were more appropriate topics for vigorous cross-examination as opposed to the grounds for a *Daubert* motion. The court similarly rejected Daimler's argument there was too great an analytical gap between the data and Rosenbluth's opinion, noting that it was undisputed that some sleeper cabs in fact did come with emergency exits.

Daimler challenged Smith's testimony on the additional ground that Smith should not be permitted to opine that Timoschuk could have, or would have, escaped through an additional emergency exit. Daimler contended that Smith was neither a medical doctor nor behavioral expert; therefore, he was not qualified to offer an opinion on what Timoschuk likely would have done in response to the fire.

This district court found there was some merit in Daimler's argument that Smith could not testify to Timoschuk's physical capabilities. However, the precise delineations of what opinions an expert can offer are more appropriately the subject of a motion in limine and/or an objection at trial. Thus, the district court denied Daimler's motion to limit Smith's testimony and found that Smith's opinions that Timoschuk could have exited the truck based on Smith's understanding of how the fire spread, was within his realm of expertise.

Daimler also argued that Case's testimony "regarding Timoschuk's thought processes or the choices he might have made" should have been excluded because it lacked reliable support.[5] The district court found that, as with Smith's testimony the "precise boundaries of what Dr. Case could opine on were more appropriately determined through a motion in limine or an objection at trial.[6] In fact, Daimler conceded that testimony from Case regarding what Timoschuk could have been physically capable of, under the circumstances, would be appropriate. Therefore, the district court denied Daimler's motion.

In Estate Matters, Estate Accounting Experience is Not Required for an Accounting Expert.

***Holt v. Kelso*, 2014 WL 858345 (Tex. App.—Austin Feb. 26, 2014).**

This case involved an action to recover estate assets. A decedent's nephews and nieces ("Collateral Descendants") applied to administer the decedent's estate and claimed they were the owners of all of the estate. The probate court appointed an ad litem to represent the unknown heirs. The ad litem located the decedent's granddaughter ("Holt") and determined that Holt's rights had not been severed when she was given up for adoption. Holt filed an application to administer the estate, was named the administrator of the estate, and brought an action against the Collateral Descendants under theories of breach of fiduciary duty, conversion, theft, and civil conspiracy.

At issue was one of the Collateral Descendants' use of the decedent's power of attorney to transfer the decedent's assets to the other Collateral Descendants. The trial court entered a judgment for Holt and awarded her damages. The Collateral Descendants raised six issues on appeal. In regards to expert testimony, the Collateral Descendants challenged the trial court's admission of Holt's brother's testimony. Holt's brother was an accountant who testified regarding the amount of decedent's money transferred to the Collateral Descendants. The Collateral Descendants argued that Holt failed to show that her brother had estate accounting experience, therefore, he was not qualified to testify and his testimony was not relevant and reliable.

The court of appeals, citing *Robinson,* explained that expert testimony is admissible if: (1) the expert is qualified and (2) the testimony is relevant and based on a reliable foundation. The court of appeals noted that although the testimony of an accountant specializing in probate matters may have been entitled to more weight, it could not conclude that Holt's brother's testimony was not qualified where the Collateral Descendants testified to the amounts they received, the transfer documents were admitted for the court's review, and Holt's brother testified regarding his education and work as an accountant. Further, on the issue of relevancy and reliability, the court of appeals found that Holt's brother's testimony regarding the amount of assets transferred was based on sworn accountings and documents admitted as exhibits at trial which was not disputed or contradicted by the Collateral Descendants. Therefore, the court of appeals concluded that the trial court did not abuse its discretion by admitting Holt's brother's testimony concerning the sworn accountings.

Expert Testimony Not Admissible as Evidence of Habit Where the Testimony is Based on Assumed Facts That Vary From Actual Undisputed Facts.

***Club Vista Development II, Inc. v. Oncor Electric Delivery Company, LLC,* 2014 WL 4057434 (Tex. App.—Dallas Aug. 15, 2014).**

In this property damage case, Club Vista Development II, Inc. sued Oncor Electric Delivery Company, LLC asserting claims of negligence, res ipsa loquitor and nuisance. Club Vista alleged that Oncor negligently maintained and operated unprotected electrical equipment that emitted sparks and ignited a fire that damaged Club Vista's property. Club Vista amended its petition twice. The petition was first amended to allege that the fire began in the immediate

vicinity of a telephone pole that had been negligently maintained and operated with unprotected electrical equipment on top of the pole, and that Oncor defectively designed its power lines. The petition was amended again to allege that the winds were high on the day of the fire which caused a power outage; that an Oncor employee ("Morrison") was dispatched to investigate the outage, and that Morrison either caused the fire or failed to exercise reasonable care when he failed to extinguish the fire. Club Vista was forced to abandon its theories regarding the fire when it learned that the electrical equipment was de-engerized at the time of the fire. Club Vista then alleged that the fire was caused by Morrison's careless cigarette smoking. Oncor filed a traditional and no-evidence motion for summary judgment arguing, among other things, that there was no evidence to support Club Vista's negligence theories. Club Vista filed a response to Oncor's summary judgment motion.

Club Vista's response was supported by the affidavits of fire reconstruction experts Michael Klassen and Freeman Reisner and psychologist Antonio Cepeda-Benito. Klassen's testified was that based upon the small size of the fire Morrison saw, the fire started after Morrison arrived and exited his truck. Klassen opined that some act or omission of Morrison started the fire because Morrison was the only person present. Additionally, Klassen opined that because Morrison was a smoker, he had exited his work truck shortly before he saw the fire, and that the fire began at a gate that Morrison needed to open for entry. Therefore, he concluded that the cause of the fire was careless disposal of a cigarette. Klassen also testified that this was the first wildfire case or case involving smoking materials in which he had been designated an expert. Reisner conducted an experiment to determine whether a cigarette could ignite material like those that would have been at the site of the fire. He concluded and that "the fire could have easily been ignited by a carelessly disposed cigarette."[7]

Cepeda-Benito prepared a report regarding Morrison's propensity to smoke after he exited his work truck. Cepeda-Benito's report stated that: (1) Morrison is a smoker; (2) Morrison and another Oncor employee ("Freeze") testified that Morrison did not smoke inside the cabin of Oncor's trucks; (3) Freeze reported that Morrison smoked when he exited his work truck; and (4) smoking is habit forming and largely controlled by contextual clues; therefore, smokers learn routines that dictate when and where they smoke. Cepeda-Benito concluded that it was more

likely than not that Morrison smoked on the day of the fire after he parked and exited his work truck.

Oncor filed a motion to strike Club Vista's summary judgment evidence. At the summary judgment hearing, it did not appear to the trial judge that Klassen or Reisner had "any real experience with wildfires" and that there was an analytical gap in the experts' analysis and opinion that the fire was more probable than not caused by a cigarette.[8] Accordingly, the court struck the testimony.[9] The trial court also granted Oncor's motion to strike as to Cepeda-Benito because the trial judge did not "think that the record provide[d] adequate data for [Cepeda-Benito] to reach the conclusions that he is trying to offer."[10] Club Vista appealed.

The district court reviewed the trial court's ruling for abuse of discretion, emphasizing that it would uphold a trial court's evidentiary ruling on expert testimony if a legitimate basis for the ruling exists and would reverse only if the trial court acted arbitrarily, unreasonably, or without reference to any guiding rules or principles.[11] The undisputed facts in the case were that Morrison was a smoker; however, while he worked, he did not smoke. Instead he dipped snuff. Further, there was no evidence that Morrison was in possession of any smoking materials or cigarettes on the day of the fire. Noting that "a court cannot simply accept expert testimony at face value because unreliable expert testimony constitutes no evidence," the district court found that neither Klassen nor Reisner had experience with wildfires like the one at issue.[12]

The district court also found that too great of an analytical gap existed between the data and methodology applied by Klassen and Reisner and their opinions. Klassen's conclusion was based on reports that Morrison smoked on breaks during work hours and Reisner's conclusion was based on a laboratory test. Both conclusions were based on assumed facts that differed from the actual undisputed facts.

Regarding Cepeda-Benito's testimony, Club Vista argued that the testimony was admissible as evidence of habit. The district court found that Cepeda-Benito's testimony was based on the assumption that Morrison did not smoke in his work truck, and that Morrison smoked when he exited the truck; therefore, Morrison formed a habit of smoking as soon as he left his work truck. Again, the district court found that the Cepeda-Benito's opinion was based

on assumed facts that differed from the undisputed facts. In conclusion, the district court affirmed the trial court's decision to strike the testimony of Lassen, Reisner and Cepeda-Benito.

---

[1] Amy M. Stewart is a partner at Estes Okon Thorne & Carr, PLLC. Jasmine F. Robinson is an associate at the law firm White & Wiggins, LLP.

[2] *Ortega v. National Oilwell Varco, L.P.*, 2014 WL 1691496 at *3 (Tex.App.—Amarillo, Apr. 24, 2014, review denied).

[3] *Diggs v. Citigroup, Inc.*, 551 Fed. Appx. 762, 765, 2014 WL 54637 at *2 (5th Cir. Jan. 8, 2014) (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149, 119 S.Ct. 1167 (1999)) (citing Daubert *v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590–92 (1993)).

[4] *Jimenez v. United States*, 2014 WL 3891361 (W.D. Tex. 2014) citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593 (1993).

[5] *Timoschuk v. Daimler Trucks North America*, 2014 WL 2533789 at *6 (W.D. Tex. 2014).

[6] *Id*.

[7] *Club Vista Development II, Inc. v. Oncor Electric Delivery Co., LLC*, 2014 WL 4057434 *5 (Tex.App.—Dallas Aug. 15, 2014).

[8] *Id*. at *7.

[9] *Id*.

[10] *Id*.

[11] *Id*. at *8 (citing *Weingarten Realty Investors v. Harris Cnty. Appraisal Dist.*, 93 S.W.3d 280, 283(Tex. App.—Houston [14th Dist.] 2002, no pet) and *Harris Cnty. Appraisal Dist. v. Hartman Reit Operating P'ship*, 186 S.W.3d 155, 157 (Tex. App.—Houston [1st Dist.] 2006, no pet)).

[12] *Id*. at *9 citing *Exxon Corp. v. Makofski*, 116 S.W.3d 176, 180 (Tex. App. —Houston [14th Dist.] 2003, pet. denied).

Antitrust Update

By Leslie Hyman

For the past several years, the Texas courts have been quiet on antitrust issues. This year was no exception; there were no substantive reported Texas state court decisions addressing antitrust claims. The Fifth Circuit and the federal district courts in Texas addressed pleading requirements, antitrust standing, and market definition.

Pleading a Restraint of Trade

A baseball bat manufacturer, Marucci Sports, L.L.C., sued the NCAA, the National Federation of State High School Associations ("NFHS"), and Washington State University ("WSU") under section 1 of the Sherman Act, alleging that the standard established by the NCAA and NFHS for baseball bats was designed to "protect the NCAA's interest in receiving sponsorship money from larger bat manufacturers" and illegally restrained the market for non-wood baseball bats. *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 372 (5th Cir. 2014). The standard in question, known as the Bat-Ball Coefficient of Restitution Standard, measures how fast a ball comes off the bat. WSU conducts the certification testing. The federal district court dismissed the complaint and Marucci Sports appealed.

The Fifth Circuit began its analysis by recalling the Supreme Court's holding in *Nat'l Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984), that rules set by the NCAA for the conditions of the sports it governs "are presumptively procompetitive and are not generally deemed unlawful restraints on trade." 751 F.3d at 374. Turning to the elements of the causes of action, the Fifth Circuit determined that the complaint presented only "conclusory allegations that support one of many inferential possibilities" of conspiracy and thus

Return to Table of Contents

failed to set forth facts sufficient to demonstrate a meeting of the minds between the alleged conspirators.

Nor had Marucci Sports alleged an actionable restraint of trade. Marucci Sports complained primarily of an injury to itself and had failed to allege how the standard injured competition among non-wood baseball bat manufacturers.

Finally, Marucci Sports had failed to allege facts sufficient to support its conclusory allegations of anticompetitive features of the standard. Marucci Sports alleged only that some, but not all, of its products were excluded under the standard, which the Fifth Circuit concluded would likely have at most a minimal effect on the market. Marucci Sports had not alleged that any competitor dropped out of the market, had not alleged any effect on prices, and had not alleged that the standard diminished the quality of non-wood bats. Given these pleading deficits, and the fact that the bat standard in question fell within the category of a rule defining the conditions of the sport, and was therefore presumptively pro-competitive, the Fifth Circuit concluded that dismissal was proper.

In *RJ Machine Company, Inc. v. Canada Pipeline Accessories Co.*, 2013 U.S. Dist. LEXIS 186426 (W.D. Tex. Nov. 22, 2013), the United States District Court for the Western District of Texas likewise held that an antitrust plaintiff had failed to allege an illegal restraint of trade. The parties were manufacturers of machine parts for use in the oil industry. Canada Pipeline manufactured flow conditioners using the NOVA 50E design, for which it had obtained a patent license. Canada Pipeline identified its flow conditioners as the CPA-50E and had obtained a trademark for the terms “CPA-50E” and “50E” for use with flow conditioners.

The patent expired and RJ Machine wished to enter the market for 50E design flow conditioners to compete with Canada Pipeline. RJ Machine alleged that Canada Pipeline had

recently sued another competitor, Canalta Controls, for trademark and trade dress infringement for marketing flow conditioners with a similar design to the CPA-50E. RJ Machine petitioned the United States Patent and Trademark Office to cancel Canada Pipeline's marks but Canada Pipeline successfully requested that the PTO suspend the cancellation action pending the lawsuit against Canalta Controls. RJ Machine asked Canada Pipeline for assurances that RJ Machine would not be sued for marketing flow conditioners with the 50E trade dress. Canada Pipeline refused to give such assurances.

RJ Machine then sued Canada Pipeline for violations of section 2 of the Sherman Act, violations of the Texas Free Enterprise and Antitrust Act ("TFEAA"), and unfair competition and unfair trade practices, and seeking a declaration that Canada Pipeline's trademarks were invalid. Regarding the antitrust claims, RJ Machine alleged that Canada Pipeline had used threats of enforcing its trademarks to monopolize and attempt to monopolize the flow conditioner market. Canada Pipeline moved to dismiss, arguing that RJ Machine could not demonstrate antitrust injury. The court agreed, holding that Canada Pipeline's enforcement activity could not be considered the type of conduct the antitrust laws seek to protect as RJ Machine could still produce and market its product under a different name.

The court recognized that Canada Pipeline's conduct had potentially anticompetitive effects, considering the nature of the market and trademarks, because RJ Machine would be hampered in its ability to meaningfully compete if it was unable to use the term "50E" to describe its product or the design of the 50E flow conditioner. Moreover, if RJ Machine was correct in its allegations that the 50E design is functional, competition would require use of the same functional design, which Canada Pipeline was claiming as its trade dress. Nevertheless, the

Return to Table of Contents

court concluded that potential anticompetitive effects do not transform a trademark dispute into an antitrust claim.

In *In re: Online Travel Company (OTC) Hotel Booking Antitrust Litigation*, 2014 U.S. Dist. LEXIS 19691 (N.D. Tex. Feb. 18, 2104), the United States District Court for the Northern District of Texas dismissed the state and federal antitrust claims in a putative class action on the ground that the alleged conspiracy was not plausible. The plaintiffs were consumers who alleged that the defendants, major hotel chains and online travel agencies ("OTAs"), had engaged in an industry-wide conspiracy to eliminate price competition among hotel room booking websites. The defendants had allegedly done so through (1) horizontal agreements between the OTAs not to compete with each other and (2) vertical resale price maintenance agreements between the individual hotel defendants and the individual OTAs containing most favored nation clauses, which provided that the published rates each OTA would offer would be as favorable as the published rate offered to any other OTA or published by the hotel itself.

Analyzing the defendants' motion to dismiss, the court explained that under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), allegations of parallel behavior are, by themselves, insufficient to plead a conspiracy. Instead, a plaintiff is required to plead "factual enhancements" or "plus factors" pointing towards a meeting of the minds. The plaintiffs here identified as factual enhancements: (i) the pre-agreement online hotel bookings price competition; (ii) the OTAs market power; (iii) the defendants' common motives; (iv) pricing discussions between the parties at travel conferences; (v) coordinated pricing efforts; (vi) that absent collective action, the defendants' actions would be against their business interests, (vii) coercion of the RPM agreements; (viii) that other industry players would like to offer lower prices, but cannot due to the restrictive agreements; and (ix) government investigations of wrongdoing outside the United

Return to Table of Contents

States. The defendants argued that these allegations were no more than parallel business activity resulting from each defendant's independent efforts to protect its business interests.

The court held that the defendants' "parallel adoption of similar business strategies is not suspicious or suggestive of an agreement" because there was a natural alternative explanation for why the parties entered into the agreements. Specifically, the hotels benefitted from the agreements because they allowed the hotels to control the prices at which their rooms were sold online. The OTAs would benefit from the agreements because "[h]aving given up the right to discount prices below each [hotel's] published rate, each OTA . . . would naturally want an assurance that competitors would also be prohibited from offering a lower rate than the published rate." The court rejected the plaintiffs' conclusory assertion that the defendants shared a common motive because it was, at best, merely consistent with a conspiracy. The court likewise rejected their conclusory assertion that the defendants' actions went against their business interests because, in the court's eyes, the assertion was demonstrably untrue.

Nor did the court find that the factual enhancements saved the plaintiffs' allegations. The coordinated pricing efforts, coercion of the RPM agreements, and restrictions on other industry players were simply more specific allegations of parallel conduct. The government investigation factual enhancement was rejected by the court as providing no inference of conspiracy at all because investigations of foreign wrongdoing may involve conduct that is not wrongful in the United States and the plaintiffs failed to connect the government investigations to the specific wrongdoing alleged in their complaint. Finally, the court concluded that none of the remaining alleged factual enhancements – pricing discussions at conferences, price competition preceding the conspiracy, and the OTAs market power – were sufficient to raise the suggestion of a conspiracy. The court concluded that the allegations of discussions at conferences demonstrated

Return to Table of Contents

only the opportunity to conspire and a misreading of topic headings at the conferences. The changing price competition was likewise merely consistent with, not probative of, conspiracy as it could be explained by a change in pricing among companies aware of each other's activities. And the market share held by the OTA defendants merely indicated that a conspiracy could have formed. Because the court concluded that the plaintiffs' factual allegations were insufficient to plausibly suggest a conspiracy, the court granted the defendants' motion to dismiss.

Antitrust Standing/Market Definition

TriStar Investors, Inc. v. American Tower Corp., 2014 U.S. Dist. LEXIS 45936 (N.D. Tex. April 3, 2014), concerned competition for cellular communication towers. TriStar owns and operates towers and derives revenue by charging rent to the wireless carriers whose equipment is located on the towers. Its business model is to acquire an interest in the land under cell towers and then take over operation of the towers after the expiration of the then-current tower operator's property interest. TriStar agrees to share with the landowner a percentage of the money received from the wireless carriers. TriStar was targeting cell towers owned and operated by American Tower Corporation and related companies ("ATC"). ATC's business model is to pay land owners monthly rent for land rights under the towers and then rent space on the towers to wireless companies. TriStar entered into standstill agreements with two other tower operators (SBA and Crown) pursuant to which SBA and Crown purchased interests in TriStar and in exchange, TriStar agreed not to seek property rights in the land under cell towers operated by those companies. ATC alleged that these standstill agreements and TriStar's business model constituted an anticompetitive scheme to raise prices for property rights under cell towers in the hope that TriStar could obtain a similar agreement with ATC.

Return to Table of Contents

In response to TriStar's business model and the SBA/Crown standstill agreements, ATC began to be more proactive in seeking property interests under its tower cites. TriStar contended that in doing so, ATC made false statements to landowners and engaged in sham litigation in an attempt to exclude TriStar from the market.

TriStar sued ATC for, among other things, violations of section 2 of the Sherman Act. ATC counterclaimed against TriStar for, among other things, violations of section 1 of the Sherman Act, and the parties filed cross-motions for summary judgment. Regarding ATC's section 1 claim, the court held that ATC lacked antitrust standing. First, the court held that ATC lacked injury in fact. ATC alleged that it was injured by the standstill agreements as a competitor of SBA, Crown, and TriStar for cell tower sites because the agreements removed TriStar as a rival competing for sites under SBA and Crown towers. The court held that even if the standstill agreements restrained trade, ATC was not harmed by a reduction in the number of bidders for land rights but instead benefitted from the presence of fewer competitors. ATC further alleged that it was injured as a landowner because TriStar had restrained the market for property rights. The court held that this claim was precluded by the summary judgment evidence, which indicated that ATC would not have done business with TriStar even if TriStar had been a bidder for property interests in land owned by ATC. Thus, the standstill agreements were not the cause of TriStar's absence as a competitor for property rights at sites owned by ATC.

The court also held that ATC lacked antitrust injury. ATC had argued that the funds TriStar received under the standstill agreements allowed TriStar to overbid against ATC, causing an artificial increase in the price ATC had to pay for property rights. The court recognized that ATC would have suffered the same injury had TriStar obtained its funding in some other manner and that ATC failed to allege that it was harmed as a tower operator because of any allegedly

Return to Table of Contents

anticompetitive effect of the standstill agreements. Because ATC was not complaining that it was damaged by a reduction in competition, it was not complaining of antitrust injury.

Turning to TriStar's claims against ATC for monopolization, the court rejected TriStar's contention that the relevant market was a market for cell tower operation both nationwide and in single-site geographic submarkets. The court held that because TriStar's claims centered on acquisition of property interests, the proper product market was property interests at cell tower sites, rather than tower operations. The court further held that TriStar's proffered submarket definition would "fragment the relevant geographic market to the point of absurdity" and that the appropriate scope was nationwide. The summary judgment evidence showed that ATC had only 17% of that market and that there was robust competition. The court therefore concluded that TriStar's monopolization claim failed as a matter of law and that there was no dangerous probability of successful monopolization, which doomed TriStar's attempted monopolization claim.

Antitrust Standing

In *McPeters v. LexisNexis*, 2014 U.S. Dist. Lexis 43068 (S.D. Tex. March 31, 2014), the United States District Court for the Southern District of Texas considered whether the plaintiffs' challenges to the e-filing fees charged by certain Texas courts were actionable as antitrust claims under TFEAA. In 2012, the court had denied the defendant's motion to dismiss the antitrust claims, holding that the e-filing fees in question might be illegal per se. *Id.* at *8 (citing *McPeters v. LexisNexis*, 910 F. Supp. 2d 981 (S.D. Tex. 2012)). The court based its decision on the fact that, contrary to the Texas Government Code, the fees had not been specifically approved by the Texas Supreme Court, the uncertainty as to whether state district court clerks could delegate fee-setting authority to a private company such as LexisNexis, and the plaintiffs' allegation that the

contract between the counties and LexisNexis had been approved in circumvention of the competitive bidding requirements of the Texas Local Government Code. *Id.*

As the case progressed, the court determined that it was "necessary to undertake a more searching review of whether the state law violations that troubled the [c]ourt . . . are cognizable as antitrust and monopoly claims." *Id.* at *9. The court determined first that the law of the case doctrine, which under some circumstances limits a court's ability to reexamine questions of law, did not prevent the court from revisiting its prior ruling. Because the defendant had filed an answer after its original motion to dismiss was denied, the court treated its analysis as one for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), rather than the Rule 12(b)(6) motion made by the defendant. However, this change in nomenclature did not affect the court's standard.

The court next addressed whether TFEAA plaintiffs, like federal antitrust plaintiffs, must demonstrate "antitrust standing" in addition to Article III standing. Rejecting the plaintiffs' argument that "imposing such a requirement would 'convert' their claims from state to federal law," the court relied on Texas caselaw interpreting the Texas Legislature's mandate that Texas antitrust law be "'construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent'" with the law's purposes of maintaining and promoting "'economic competition in trade and commerce . . .and to provide the benefits of that competition to consumers in the state.'" *Id.* at **14-15 (quoting TEX. BUS. & COM. CODE § 15.04). The court concluded that "because antitrust standing is a requirement for suits brought under the Sherman Act . . . first principles would seem to dictate that claims brought under the TFEAA require no less." *Id.*

Return to Table of Contents

The court then considered whether the plaintiffs were complaining of "injury of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful," and if so, whether the plaintiffs were the "proper plaintiff[s] to sue for damages." *Id.* at **18-19 (internal quotations and citations omitted). The court concluded that in complaining of violations of the Texas Government Code and Texas Local Government Code and the terms of the LexisNexis contract with the counties, the plaintiffs were not, in fact, complaining of wrongdoing by LexisNexis. Rather, the statutes in question were intended to proscribe the conduct of government officials. The plaintiffs' injuries, therefore, flowed not from anything the antitrust laws were designed to prevent, but instead from the government officials' alleged failure to comply with the law. The court concluded that the plaintiffs "lack antitrust standing because their factual allegations -- that certain statutory directives were not heeded -- inculpate county courts, clerks, and judges, not LexisNexis." *Id.* at **31-32.

The court explained that its holding was consistent with the general proposition that a plaintiff cannot create a private right of action under a statute where none exists simply by alleging that violation of the statute satisfies an element of another claim. Likewise, the fact that the legislature had imposed a duty on one person does not necessarily mean that the legislature has conferred a correlating right on another person.

Return to Table of Contents

ANTITRUST AND BUSINESS LITIGATION SECTION

OFFICERS

CHAIR:

Thomas R. Jackson (Tom)
Jones Day
2727 North Harwood Street
Dallas, Texas 75201
Phone: 214.969.2978
Fax: 214.969.5100
Email: trjackson@jonesday.com

CHAIR-ELECT:

William G. Whitehill (Bill)
Gardere Wynne Sewell, LLP
1601 Elm St., Suite 3000
Dallas, TX 75201
Phone: 214.999.4633
Fax: 214.999.3633
Email: bwhitehill@gardere.com

SECRETARY-TREASURER:

Richard Milvenan
McGinnis, Lochridge & Kilgore, L.L.P.
600 Congress Avenue, Suite 2100
Austin, TX 78701
Phone: 512.495.6005
Fax: 512.505.6305
Email: rmilvenan@mcginnislaw.com

IMMEDIATE PAST CHAIR:

William Frank Carroll (Frank)
Cox Smith Matthews Incorporated
1201 Elm Street, Suite 3300
Dallas, Texas 75270
Phone: 214.698.7828
Fax: 214.698.7899
Email: fcarroll@coxsmith.com

NEWSLETTER EDITOR:

A. Michael Ferrill
Cox Smith Matthews Incorporated
112 E. Pecan, Suite 1800
San Antonio, Texas 78205
Phone: 210.554.5282
Fax: 210.226.8395
Email: amferrill@coxsmith.com

WEBSITE CONTACT:

Justice Jim Moseley
Fifth District Court of Appeals
600 Commerce Street
Second Floor
Dallas, Texas 75202
Phone: 214.712.3413
Fax: 214.745.1083
Email: Jim@JusticeJimMoseley.com

Board Advisor: Brent Benoit

Alternate Advisor: William Frank Carroll (Frank)

Return to Table of Contents

COUNCIL

TERMS EXPIRE 2015

Bruce A. Blefeld
K&L Gates, LLP
1000 Main Street, Suite 2550
Houston, Texas 77002
Phone: 713.815.7318
Fax: 713.815.7301
Email: bruce.blefeld@klgates.com

Carrie Huff
Haynes & Boone, L.L.P.
901 Main Street, Suite 3100
Dallas, Texas 75202
Phone: 214.651.5509
Fax: 214.200.0478
Email: carrie.huff@haynesboone.com

Todd Murray
Gardere
Thanksgiving Tower, Suite 3000
1601 Elm Street
Dallas, Texas 75201
Phone: 214.999.4862
Fax: 214.999.3862
Email: tmurray@gardere.com

John Shoemaker
El Paso Corporation
1001 Louisiana Street, Suite E2743C
Houston, Texas 77002
Phone: 713.420-6876
Email: john.shoemaker@elpaso.com

Bradley Weber
Locke Lord LLP
2200 Ross Ave., Suite 2200
Dallas, TX 75201
Phone: 214.740.8497
Fax: 214.756.8497
Email: bweber@lockelord.com

Nicole Williams
Thompson & Knight LLP
1722 Routh Street, Suite 1500
Dallas, Texas 75201
Phone: 214.969.1149
Fax: 214.999.1508
Email: Nicole.Williams@tklaw.com

TERMS EXPIRE 2016

David Coale
Lynn, Tillotson, Pinker & Cox, LLP
2100 Ross Avenue, Suite 2700
Dallas, Texas 75201
Phone: 214.981.3800
Fax: 214.981.3839
Email: dcoale@lynnllp.com

J. Bruce McDonald
Jones Day
717 Texas, Suite 3300
Houston, Texas 77002-2712
Phone: 832.239.3822
Fax: 832.239.3600
Email: bmcdonald@jonesday.com

Return to Table of Contents

Professor Paul C. Rogers III
Dedman School of Law
Southern Methodist University
3315 Daniel Avenue
Dallas, Texas 75205

Phone: 214.768.2700
Fax:
Email: crogers@mail.smu.edu

Kim Van Winkle
Chief, Antitrust Section
Office of the Attorney General
300 W. 15th Street, 7th Floor
Austin, Texas 78701

Phone: 512.463.1266
Fax: 512.320.0975
Email:
kim.vanwinkle@texasattorneygeneral.gov.

Mark C. Walker
Cox Smith Matthews Incorporated
221 N. Kansas Street, Suite 2000
El Paso, Texas 79901

Phone: 915.541.9322
Fax: 915.541.9399
Email: mwalker@coxsmith.com

TERMS EXPIRE 2017

Darryl Anderson
Fulbright & Jaworski
1301 McKinney St, Suite 5100
Houston, TX 77010

Phone: 713.651.5562
Fax: 713.651.5246
Email: danderson@fulbright.com

Ken Carroll
Carrington Coleman Sloman & Blumenthal LLP
901 Main Street, Suite 5500
Dallas, TX 75202

Phone: 214.855.3029
Fax: 214.855.1333
Email: kcarroll@ccsb.com

Barry Golden
Gardere Wynne Sewell LLP
1601 Elm St, Suite 3000
Dallas, TX 75201

Phone: 214.999.4746
Fax: 214.999.3746
Email: bgolden@gardere.com

Kenneth Held
Schiffer, Odom, Hickst, Johnson PLLC
700 Louisiana Street, Suite 1200
Houston, Texas 77002

Phone: 713.255.4107
Fax: 713.357.5160
Email: kheld@sohjlaw.com

Brian Robison
Gibson, Dunn & Crutcher
2100 McKinney Avenue, Suite 1100
Dallas, TX 75201

Phone: 214.698.3100
Fax: 214.571.2928
Email: brobison@gibsondunn.com

Return to Table of Contents

PAST CHAIRS

L. James Berglund, II
Thompson & Knight, LLP
One Arts Plaza, 1722 Routh Street, Suite 1500
Dallas, Texas 75201
Phone: 214.969.1385
Fax: 214.880.3283
Email: James.Berglund@tklaw.com
(2012-2013)

Wallis M. Hampton
Skadden, Arps, Slate, Meagher & Flom LLP
1000 Louisiana, Suite 6800
Houston, Texas 77002
Phone: 713.655.5116
Fax: 888.329.0756
Email: wallis.hampton@skadden.com

Michael D. Rubenstein
Liskow & Lewis
1001 Fannin Street, Suite 1800
Houston, Texas 77002
Phone: 713-651-2953
Fax: 713-651-2952
Email: mdrubenstein@liskow.com

Leslie Sara Hyman
Pulman, Cappuccio, Pullen, Benson & Jones, LLP
2161 N.W. Military Highway, Suite 400
San Antonio, Texas 78213
Phone: (210) 222-9494
Fax:
Email: lhyman@pulmanlaw.com

Randy D. Gordon
Gardere Wynne Sewell LLP
1601 Elm Street, Suite 3000
Dallas, Texas 75201-4761
Phone: 214.999.4527
Fax: 214.999.3527
Email: rgordon@gardere.com
(2007-2008)

Justice Jim Moseley
Fifth District Court of Appeals
600 Commerce Street
Second Floor
Dallas, Texas 75202
Phone: 214.712.3413
Fax: 214.745.1083
Email: Jim@JusticeJimMoseley.com
(2006-2007)

Larry A. Gaydos
Haynes & Boone, L.L.P.
901 Main Street, Suite 3100
Dallas, TX 75202
Phone: 214.651.5622
Fax: 214.651.5940 (fax)
Email: gaydosl@haynesboone.com

Kathleen M. LaValle
Jackson Walker L.L.P.
901 Main Street, Suite 6000
Dallas, Texas 75202-3777
Phone: 214.953.6144
Fax: 214.661.6664
Email: klavalle@jw.com
(2004-2005)

Lin Hughes
(Retired)
Phone:
Fax:
Email:
(2003-2004)

Return to Table of Contents

James K. ("Jim") Spivey
Spivey Valenciano, PLLC
McAllister Plaza
9601 McAllister Freeway, Ste. 130
San Antonio, Texas 78216

Phone: 210.787.4653
jkspivey@svtxlaw.com
(2002-2003)

Curtis L. ("Curt") Frisbie, Jr.
Gardere Wynne Sewell LLP
3000 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201-4761

Phone: 214.999.4757
Fax: 214.999.3757
Email: cfrisbie@gardere.com
(2001-2002)

N. Henry Simpson, III, Chair
Simpson, Woolley, McConachie, L.L.P.
700 The Quadrangle
2828 Routh Street, Suite 700
Dallas, TX 75201

Phone: 214.871.5080
Fax: 214.871.5090
Email: simpson@swmdallas.com
(2000-2001)

Karl S. Stern
Vinson & Elkins, L.L.P
1001 Fannin, Suite 2300
Houston, TX 77002-6760

Phone: 713.758.3828
Fax: 713.615.5603
Email: kstern@velaw.com
(1999-2000)

Rufus W. Oliver, III
Baker & Botts, L.L.P.
910 Louisiana
Houston, TX 77002

Phone: 713.229.1366
Fax: 713.229.1522
Email: rufus_oliver@bakerbotts.com
(1998-1999)

Karen B. Willcutts
JAMS
8401 N. Central Expwy., Ste. 610
Dallas,TX 75225

Phone: 214-744-5267
Email: karen.willcutts@jamsadr.com
(1997-1998)

Jorge C. Rangel
The Law Offices of Jorge C. Rangel, P.C.
P.O. Box 2683
Corpus Christi, TX 78403-2683

Phone: 361.883.8500
Fax: 361.883.2611
Email: jorge.c.rangel@rangellaw.com
(1996-1997)

Kenneth E. ("Ken") McNeil
Susman Godfrey L.L.P.
1000 Louisiana Street, Suite 5100
Houston, TX 77002-5096

Phone: 713.651.9366
Fax: 713.654.3388
Email: kmcneil@susmangodfrey.com
(1995-1996)

Robert M. ("Bob") Cohan
Jackson Walker LLP
901 Main Street, Suite 6000
Dallas, TX 75202-3777

Phone: 214.9536046
Fax: 214.953.5822
Email: bcohan@jw.com
(1994-1995)

Return to Table of Contents

Allene D. Evans
1106 Yaupon Valley Road
Austin, TX 78746-4329

Phone: 512.327.6031
Fax: 512.327.4114
Email: allene@allenedevans.com
(1993-1994)

Layne E. Kruse
Fulbright & Jaworski, L.L.P.
1301 McKinney Street, Suite 5100
Houston, TX 77010-3095

Phone: 713.651.5151
Fax: 713.651.5246
lkruse@fulbright.com
(1992 - 1993)

Gregory S. C. Huffman (1991-1992)
A. Michael Ferrill (1990-1991)
Max Hendrick, III (1989-1990)
Ernest R. Higginbotham (1988-1989)
W. Royal Furgeson, Jr. (1987-1988)
Richard N. Carrell (1986-1987)
Barry F. McNeil (1985-1986)
Keith E. Kaiser (1984-1985)
Gary V. McGowan (1983-1984)
Robin P. Hartmann (1982-1983)
Jack . Price (1981-1982)
Charles T. Newton (1980-1981)
B. J. Bradshaw (1979-1980)
J. Burleson Smith (1978-1979)
James E. Coleman, Jr. (1977-1978)
Stephen D. Susman (1976-1977)

DLI-6487600v1
Antitrust and Business Litigation Section (DBA)
Last Edited: 12/11/14

Return to Table of Contents