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## First Impressions

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### INTRODUCTION

“This case presents an issue of first impression.” In a common law system based on the evolution of judicial precedent,<sup>1</sup> this phrase has power. It suggests an elusive situation that has somehow evaded the courts, or an important event never seen before by judges. Definitionally, it means an absence of controlling precedent, such that a court must use persuasive authority or some other analytical technique to answer the question before it.<sup>2</sup>

This article looks for a practical meaning of the phrase “first impression,” surveying its use by Texas courts of record in 2010 and the first eight months of 2011. Federal courts were not included to keep the survey focused on a single judicial system. The survey included the Texas Supreme Court and Court of Criminal Appeals as key parts of the state system, although their discretionary dockets differ from those of intermediate appellate courts. Several opinions were excluded that used the phrase in an incidental way, unrelated

<sup>1</sup> For a general summary of the process by which precedent develops, see David Coale & Wendy Couture, *Loud Rules*, 34 PEPPERDINE L. REV. 715, 724-28 (2007). For a more theoretical background of issues in this article, focused on quantitative analysis of selected bodies of federal law, see Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin’s Chain Novel Theory: Studying the Path of Precedent*, 80 NYU L. REV. 1156 (2005) [*Path of Precedent*].

<sup>2</sup> See BLACK’S LAW DICTIONARY 243 (9th ed. 2004) (defining “case of first impression” as: “A case that presents the court with an issue of law that has not previously been decided by any controlling legal authority in that jurisdiction.”); see also *Path of Precedent*, 80 NYU L. REV. at 1129 (“A case of first impression is, by definition, one that presents a novel legal question and is not ruled by prior precedent.”). No case surveyed by this article defined the term.

to the legal analysis in the opinion. The remaining opinions were then categorized and analyzed.

The survey shows that courts use the phrase, “first impression,” in distinct ways for distinct reasons. While many opinions use the phrase for similar purposes, within a group of cases that use the phrase for a similar reason, there is little similarity in the legal analysis that follows. The survey concludes that the phrase signals certain types of argument, but does not preview the structure of the argument itself. The survey also observes that in certain situations—particularly in the context of statutory interpretation—use of the phrase is somewhat correlated with reversal of the lower court decision.

## **I. USE OF THE PHRASE, “FIRST IMPRESSION”**

This section of the article summarizes the main ways in which the surveyed opinions used the phrase, “first impression.”

### **A. Dissents and Concurrences—and Majorities**

Several dissenting opinions used the phrase “first impression” to characterize the issue addressed by the majority.<sup>3</sup> While the range of issues differs greatly across those

<sup>3</sup> See, e.g., *Wilkerson v. RSL Funding, L.L.C.*, No. 01-10-01001-CV, 2011 WL 3516147, at \*10 (Tex. App.—Houston [1st Dist.] Aug. 11, 2011, no pet.) (Keyes, J., dissenting) (“The majority thus derails an important case of first impression in a developing area of law in which internet website owners, search engine operators, and users are all in need of the legal guidance expressly sought by the parties here as a matter of law, not fact.”); *In re E.R.*, 335 S.W.3d 816, 827-28 (Tex. App.—Dallas 2011, pet. granted) (Murphy, J., dissenting) (“The majority also concludes, as a matter of first impression in Texas, subsection 161.211(b) is a jurisdictional bar regardless of whether attempted service of citation by publication is invalid and the trial court never acquired personal jurisdiction over the parent . . . Here, while the majority’s interpretation of subsection 161.211(b) would suggest the legislature intended to eliminate all avenues of attack six months after termination of a parent’s rights—including those where the court never obtained personal jurisdiction over the parent—another reasonable reading of the statute that presumes proper service would not lead to unconstitutional

opinions, they share a common tone. The characterization of the majority's issue as one of "first impression" appears designed to limit or otherwise diminish the opinion with

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results."); *Spectrum Healthcare Resources, Inc. v. McDaniel*, 306 S.W.3d 249, 255 (Tex. 2010) (Jefferson, C.J., dissenting) ("[T]oday's decision involves an issue of first impression whose resolution was not clearly foreshadowed (and on which our courts of appeals are in conflict."); *Brooks v. State*, 323 S.W. 3d 893, 930-31 (Tex. Crim. App. 2010) (Price, J., dissenting) ("Even so, the plurality today somehow manages to characterize the question of the jurisdiction of first-tier criminal appellate courts in Texas to conduct factual sufficiency review as one of first impression. But of course this is not an issue of first impression; if it were, there would be no *Clewis* (or, for that matter, *Watson*) to overrule." (footnote omitted)); *Gray v. Shook*, 329 S.W.3d 186, 201 n.2 (Tex. App.—Corpus Christi 2010, pet. filed) (Yañez, J., dissenting) ("I respectfully dissent because, unlike the majority, I do not agree that this case is a case of first impression nor distinguishable from *Lewelling v. Lewelling*. I would hold on this legal issue that *Lewelling* is controlling . . . .") (citation omitted); *Cambridge Holdings, Ltd. v. The Cambridge Condominiums Council*, No. 03-08-00353-CV, 2010 WL 3448216, at \*1 (Tex. App.—Austin Aug. 31, 2010, no pet.) (Henson, J., dissenting from denial of motion for en banc reconsideration) ("Because the type of continuous use necessary to support a finding of adverse possession by prescription of an easement for use as a fire escape is an issue of first impression, implicating public policy concerns regarding fire safety in multi-family residences, this case presents the type of 'extraordinary circumstances' that require en banc reconsideration."); *Limon v. State*, 314 S.W.3d 694, 708 (Tex. App.—Corpus Christi 2010, pet. granted) (Vela, J., dissenting) ("In this case of first impression, the majority holds that before police may gain warrantless entry into a home via third-party consent from a minor who is a close relative of the home owner, the officer must ask the minor certain questions to make sure the minor has authority to permit entry."); *Wheeler v. White*, 314 S.W.3d 225, 237-38 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (Frost, J., dissenting) ("The majority does not cite, and research does not reveal, any cases applying the rule stated in *Paragon Sales* and *Murphy* to the non-insurance context. In a case of first impression under Texas law, the majority decides to extend this rule to the non-insurance context. Though the majority concludes that there is no reason why the non-insurance context should be any different from the insurance context, material differences between these contexts provide strong support for not extending this rule to the non-insurance context.").

which the dissenter disagrees. Concurring opinions also use the phrase to cast the majority opinion in a light that warrants additional discussion.<sup>4</sup>

A counterpoint to these cases is *Wilson v. State*, a 5-4 opinion from the Texas Court of Criminal Appeals with three separate dissents. 311 S.W.3d 452 (Tex. Crim. App. 2010). The majority begins with a powerful opening line that previews both the significance of the issue at hand and somewhat explains the unusually fragmented presentation: “In this case of first impression, we must decide whether article 38.23 of the Code of Criminal Procedure bars the

<sup>4</sup> See, e.g., *State v. Chupik*, 343 S.W.3d 144, 149 (Tex. Crim. App. 2011) (Johnson, J., concurring) (“The state also asserts that this appears to be a case of first impression, saying that it is unaware of any case law from this Court that has addressed the present issue. However, *Johnson v. State* is directly on point.”) (citation omitted); *Robin Singh Educ. Servs., Inc. v. Test Masters Educ. Servs., Inc.*, No. 14-09-00974-CV, 2011 WL 1044210, at \*3 (Tex. App.—Houston [14th Dist.] Mar. 8, 2011, no pet.) (Frost, J., concurring) (“Rather than summarily affirm the trial court’s judgment based on the failure to challenge both grounds, the majority affirms based on the first ground. In affirming on this ground, the majority holds, as a matter of first impression under Texas law, that a document in the form of an email cannot be converted as a matter of law, even though the same document could be converted if the email were printed or if it had been created in hard-copy form. In reaching today’s holding the majority fails to address or analyze several key questions relevant to this cutting-edge legal issue.”); *In re ADM Investor Servs., Inc.*, 304 S.W.3d 371, 376-77 (Tex. 2010) (Willett, J., concurring) (“I join the Court’s result and write separately only to add a brief word on the evidentiary burden borne by a party asserting medical hardship to escape a forum-selection clause, an issue of first impression in this Court.”); *In re Higby*, 325 S.W.3d 740, 744 (Tex. App.—Houston [1st Dist.] 2010, orig. proceeding) (Keyes, J., concurring) (“This original proceeding thus presents a legal issue of first impression that is dispositive of Higby’s right to a writ of mandamus, namely whether an ethics grievance committee of a professional medical organization constitutes a ‘medical peer review committee’ under the laws of the State of Texas and, if so, whether the medical peer review privilege applies to communications made to the committee by a member of the organization in connection with a grievance filed against another member.”).

admissibility of a confession if the interrogating officer fabricates documentary evidence in violation of Texas Penal Code section 37.09 and uses it to persuade a suspect to confess.”<sup>5</sup> *Id.* at 454.

The Texas Supreme Court began its 7-2 opinion in *Waffle House v. Williams* in a similar way, stating in the second paragraph, “This case poses several issues, including this one of first impression: may a plaintiff recover negligence damages for harassment covered by the [Texas Commission on Human Rights Act].” 313 S.W.3d 796, 799 (Tex. 2010); *see also In re Reece*, 341 S.W.3d 360, 362 (Tex. May 27, 2011) (“It is well-rooted in our jurisprudence that contempt is a broad and inherent power of a court. But, we have also recognized that despite the breadth and necessity of that power, it is a power that must be exercised with caution. Today, we decide as a matter of first impression whether a trial court may hold a litigant in contempt for perjury committed during a deposition.”). This introduction previewed a lengthy and thorough majority opinion, as well as a reasoned dissent. *See Waffle House*, 313 S.W.3d at 814 (O’Neill, J., dissenting).

## **B. Introduction to Persuasive Authority**

Another group of cases uses the phrase to introduce a legal analysis based on something other than a directly controlling case.

### **1. Policy**

Many cases used a policy analysis to resolve the perceived issue of first impression. One of the most policy-focused analyses in the survey period is *Wilson v. State*—the 5-4 Court-of-Criminal-Appeals opinion discussed earlier. The majority cited case law and a police training manual about “trickery and deception” during interrogations, and then distinguished that authority with a strongly-worded policy

<sup>5</sup> The majority’s legal analysis is discussed in the next section.

argument: “If police officers were free to manufacture physical evidence and fabricate documents to use in interrogating suspects, courts would no longer be able to routinely rely upon law enforcement or crime-lab reports as being accurate and reliable.” *Wilson*, 311 S.W.3d at 463; *see also id.* at 465-71 (Meyer, Keasler & Hervey, JJ., dissenting) (largely focusing on issues of procedure and other technical points). The court then reversed lower court decisions that had allowed interrogation using a deliberately falsified lab report.

The same court offered one of the most detailed policy analysis during the survey period in *Ex parte Doster*, which begins: “The cognizability of [Interstate Agreement on Detainers (IAD)] claims on pretrial habeas is an issue of first impression in this Court, and we take the opportunity to address it now.” 303 S.W.3d 720, 724 (Tex. Crim. App. 2010). From that starting point, the court reviewed the general restrictions on habeas corpus relief,<sup>6</sup> noted an exception to those restrictions for a particular defense about a defect in a charging instrument,<sup>7</sup> and then found that the rationale for that exception—judicial economy—did not apply in the IAD context.<sup>8</sup> Based on that foundation, the court distinguished other habeas authority. The court thoroughly discussed different policies implicated by the rules about habeas and interlocutory proceedings, as well as the case law about those goals.

The Texas Supreme Court resolved a complex real property issue with a policy analysis in *Severance v. Patterson*:

On this issue of first impression, we hold that Texas does not recognize a “rolling” easement on Galveston’s West Beach. Easements for public use of

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 724-25.

<sup>8</sup> *Id.* at 725-26.

private dry beach property do change along with gradual and imperceptible changes to the coastal landscape. But, avulsive events such as storms and hurricanes that drastically alter pre-existing littoral boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property. This holding shall not be applied to use the avulsion doctrine to upset the long-standing boundary between public and private ownership at the mean high tide line. That result would be unworkable, leaving ownership boundaries to mere guesswork. The division between public and private ownership remains at the mean high tide line in the wake of naturally occurring changes, even when boundaries seem to change suddenly. The State, as always, may act within a valid exercise of police power to impose reasonable regulations on coastal property or prove the existence of an easement for public use, consistent with the Texas Constitution and real property law.<sup>9</sup>

345 S.W.3d 18, 34(Tex. 2010) (footnote omitted). While *Severance* has had a complicated subsequent history, it does not bear on this use of the phrase.<sup>10</sup>

In *Waffle House v. Williams*, the Texas Supreme Court considered whether negligence damages could be recovered in

<sup>9</sup> 345 S.W.3d 18, ¶46(Tex. Nov. 5, 2010) (footnote omitted).

<sup>10</sup> Rehearing was granted by the Texas Supreme Court on March 11, 2011 on the joint motion of both sides. Then, on July 29, 2011, the Court issued a per curiam opinion addressing the sale of the property in question during the pendency of the rehearing. Because the sale of the property may render the underlying lawsuit moot, the Court has abated its consideration of the case until the United States Court of Appeals for the Fifth Circuit has made a determination as to the mootness of the suit. *Severance v. Patterson*, No. 09-0387 (Tex. July 29, 2011), available at <http://www.supreme.courts.state.tx.us/opinions/HTMLOpinionInfo.asp?OpinionID=2001759>.

a suit under a Texas anti-harassment statute. *Waffle House*, 313 S.W.3d at 799. The Court noted that Texas does not recognize a common-law claim for sexual harassment. *Id.* at 804. Building on that background, the Court described “manifold” differences between the existing statutory claim for harassment and a common-law negligence claim in such areas as administrative review, limitations, defenses, and remedies. *Id.* at 805-07. Concluding with a review of Texas common law about negligent infliction of emotional distress, along with other features of the Texas anti-harassment statute, the Court found that the common-law claim was not viable. *Id.* at 808-12.

Similarly, in *Ochoa v. State*, the First Court of Appeals reviewed the policies behind several criminal statutes to conclude, as a question of first impression, “[w]hether the statutory term ‘dating relationship’ is ambiguous concerning its applicability to same-sex relationships” in the context of a criminal assault law. 355 S.W.3d 48, 52 (Tex. App.—Houston [1st Dist.] 2010, pet. dismiss’d). The court concluded that the purpose of that law—detering and punishing a particular type of violence—was advanced by applying the statute to same-sex dating relationships. *Id.* at 52-54. In the same vein, the El Paso Court of Appeals in the case of *In re SJC* considered the appealability of a “juvenile court’s finding that a parent contributed to her son’s delinquency,” as to which it said: “We have been unable to find any cases addressing this particular issue, and therefore we address it as one of first impression.” 304 S.W.3d 563, 568-69 (Tex. App.—El Paso 2010, no pet.). The court noted that the legal consequences of such an order resembled others that were appealable, noting the “serious social stigma” involved, and held that the matter was appealable. *Id.* at 570; *see also In re A.M.*, 312 S.W.3d 76, 80, 84 (Tex. App.—San Antonio 2010, no pet.) (concluding that, “in an issue of first impression before this court,” an evidentiary hearing was not warranted



in a dispute about State consent to an adoption, noting a lack of express statutory authorization for such an inquiry, and the potential policy consequence of continuing and disruptive examinations of the State’s decisionmaking).

In the case of *Physio GP, Inc. v. Naifeh*, the Fourteenth Court of Appeals addressed “whether an individual, as opposed to the employer, can be held personally liable for a *Sabine Pilot* violation[, which] appears to be an issue of first impression in Texas.” 306 S.W.3d 886, 887 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The court observed that no party had cited Texas authority, but that “several other states” had addressed the point. Acknowledging that some states did allow individual liability, primarily as a deterrent to wrongful conduct, the court reasoned that in an “at-will” jurisdiction such as Texas, only an employer could be liable for the specific harm of employee coercion addressed by the *Sabine Pilot* cause of action. *Id.* at 887-89. While citing a range of precedent from several states, the opinion turned on a balancing of the policies implicated by liability for a *Sabine Pilot* claim and how those should weigh in Texas.

A similar analysis of other state’s case law occurred in *Rachal v. Reitz*. In that recent case presenting “an issue of first impression in Texas”, the Dallas Court of Appeals examined “whether a provision stating the settlor’s intent that disputes involving [a] trust be resolved by arbitration is enforceable as in a contract . . . .” No. 05-09-01422-CV, 2011 WL 2937442, at \*3 (Tex. App.—Dallas July 22, 2011, pet. filed). The court noted that only Arizona and California had previously considered the issue, and that “[b]oth have concluded that a trust is not a contract and that a beneficiary of a trust cannot be compelled to arbitrate disputes arising under the trust.” *Id.* Engaging in its own analysis in light of these decisions, the court followed the policy analysis of these two courts and stated: “It is for the Texas Legislature to decide whether and to what extent the settlor of this type of a trust should have

the power to bind the beneficiaries of the trust to arbitrate any future dispute arising from the trust.” *Id.* at \*5.

Another case, *Commint Technical Services v. Quickel*, involved “an interesting question of law, which appears to be issue [sic] of first impression in Texas”—specifically, a claimed tension between the definition of a compulsory counterclaim in Texas Rule of Civil Procedure 97(a) and the main Texas Supreme Court opinion construing that rule.” 314 S.W.3d 646, 652 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The court of appeals reasoned that one side’s reading of that opinion allowed a party to “easily escape” the rule by filing a new lawsuit. The court concluded that the Texas Supreme Court did not intend “such an easy path of avoidance and thereby increase the number of lawsuits filed,” and resolved the issue based on that policy observation. *Id.*

The Texas Supreme Court, in *Lancer Insurance Co. v. Garcia Holiday Tours*, recently decided an issue “of first impression in this state and perhaps the country” regarding “whether the transmission of a communicable disease from the driver of a motor vehicle to a passenger is a covered loss under a business auto policy, which affords coverage for accidental bodily injuries resulting from the vehicle’s use.” 345 S.W.3d 50, 51 (Tex. 2011). After scrutinizing language found in the auto policy in question as well as comparable case law, the Court concluded that transmission of such a disease from a bus driver to passengers “was not a risk assumed by the insurance carrier under this business auto policy because the passengers’ injuries did not result from the vehicle’s use but rather from the bus company’s use of an unhealthy driver.” *Id.* at 59.

The El Paso Court of Appeals used the phrase to introduce a detailed analysis of Delaware law in determining “whether a writ of mandamus should issue because the trial court denied a motion to compel advancement of litigation expenses.” *In re*

*Aguilar*, 344 S.W.3d 41, 43-44 (Tex. App.—El Paso 2011, orig. proceeding). The court elaborated further:

We are presented with an issue of first impression for this State. If Aguilar obtains a favorable jury verdict, he cannot appeal, and his right to advancement will be lost forever. If the verdict is unfavorable to him, it would be difficult for Aguilar to establish how the denial of advancement prejudiced his case and thereby constitutes reversible error. Even if he met this standard, the full value of the right to advancement would already be lost. Accordingly, we conclude that Aguilar does not have an adequate remedy by appeal.

*Id.* at 56. The court granted the petition for a writ of mandamus on the condition that the trial court refuses to vacate its order denying the appellant’s motion to compel advancement. *Id.*

## 2. Statutory analysis

Other courts use the phrase to introduce the nonbinding, persuasive authority upon which the opinion is based, such as a survey of authority from other Texas judicial districts. A case in this vein is *Isassi v. State*, in which the Court of Criminal Appeals observed, “The use of the improper influence statute in the manner that it was used here is, as far as we can tell, truly a matter of first impression in state courts.” 330 S.W. 3d 633, 640 (Tex. Crim. App. 2010). It then compared the Texas statute to the comparable federal one, and used that comparison as the standard to assess the evidence. *Id.* at 640-45.

In the same spirit, in *Turner v. Franklin*, the Dallas Court of Appeals characterized the issue as follows:

To resolve the Turners’ argument, we must first assess the meaning of ‘willful and wanton negligence.’ The statute does not define this phrase. The parties agree it is equivalent to gross negligence. However, the

meaning of ‘willful and wanton negligence’ for purposes of section 74.153 [of the Civil Practice and Remedies Code] is an issue of first impression in this court.

325 S.W. 3d 771, 780 (Tex. App.—Dallas 2010, pet. dism’d). After phrasing the issue in this manner, the court considered legislative history and cases applying a similar term in other statutes, to conclude that “willful and wanton negligence” meant “gross negligence,” and went on to apply case law about gross negligence to resolve the remaining matters before the court. *Id.* at 780-83.

Another case used the phrase both as a preview to a survey of authority, and as a way of actively distinguishing some of that authority. In *Gumpert v. ABF Freight System, Inc.*, the Dallas Court of Appeals characterized the issue before it as follows:

The specific issues of whether the costs of videotaping depositions and copying deposition transcripts are taxable as court costs are issues of first impression in this court. ABF cites several cases to support its argument that those costs are taxable. Only three of those cases, however, dealt with the specific issues confronting us, and two of those did not reach the merits.

312 S.W.3d 237, 241 (Tex. App.—Dallas 2010, no pet.). After further discussing details of the “three . . . cases,” the court went on to favorably refer to other analogous authority, and ultimately concurred with those other cases, holding that “because no statute or rule authorizes the recovery of the costs to videotape a deposition or obtain a copy of a deposition transcript” those costs were not recoverable.<sup>11</sup> *Id.*

<sup>11</sup> *Id.* at 242; see also *Noble Mortg. & Inv., LLC v. D&M Vision Inv.*, 340 S.W.3d 65, 77-78 (Tex. App.—Houston [1st Dist.] Mar. 17, 2011, no

at 241 (“Conversely, other courts have concluded that the costs to videotape depositions and obtain copies of deposition transcripts are not recoverable as taxable costs.”), 242. The phrase “first impression” both introduced the survey and linked to part of the survey.

Similarly, the Dallas Court of Appeals in *Main v. Royall* used the phrase to launch into a statutory analysis, as well as distinguish the three cases relied upon by the appellant:

In resolving the jurisdictional question, we first must determine whether the legislature intended the language “member of the electronic or print media” to include book authors and publishers. Section 51.014(a)(6) [of the Texas Civil Practice and Remedies Code] does not define “print media” or who is “a member of the electronic or print media.” We have not found and the parties do not cite any Texas cases that decide this issue directly. As a result, it appears to be an issue of first impression.

348 S.W.3d 381, 385 (Tex. App.—Dallas 2011, no pet.) (citations omitted). After this analysis, the court determined that the legislature intended section 54.014(a)(6) to include

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pet.) (Using the phrase in a similar manner, the court addressed “whether recording of a sale on an execution docket in compliance with Rule 656 of the Texas Rules of Civil Procedure is a ‘recording’ for the purpose of putting subsequent creditors and purchasers on constructive notice under sections 13.001 and 13.002 of the Texas Property Code.”); *Urtado v. State*, 333 S.W.3d 418, 428 (Tex. App.—Austin 2011, pet. filed) (“Because Galvan’s prior conviction was for a misdemeanor offense, it is not admissible under Rule 609(a) unless the offense was a crime of moral turpitude. In what appears to be a case of first impression, Urtado urges this Court to hold that interference with an emergency telephone call represents a crime of moral turpitude, and therefore that the trial court abused its discretion in excluding evidence of Galvan’s conviction for this offense.”).

authors and publishers of traditional books as “member[s] of the electronic or print media.” *Id.* at 387.

In the case of *Texas Department of Public Safety v. Garcia*, the Austin Court of Appeals considered whether a sex offense under Oregon criminal law came within the scope of a Texas statute about public registration as a sex offender. 327 S.W.3d 898, 902 (Tex. App.—Austin 2010, pet. dism’d) (“As a matter of first impression, we consider whether section 163.435 of the Oregon Revised Statutes is substantially similar to an offense listed as reportable in [the Texas Sex Offender Registration Act], pursuant to article 62.001(5)(H) of the Texas Code of Criminal Procedure, and whether the Department and reviewing courts may consider the facts and circumstances of the offender’s prior conviction in determining substantial similarity.”). The court compared the statutory provisions and, noting that, “[W]e are not fully persuaded by the reasoning of either party,” found that the Oregon statute was broader than the comparable Texas one, and this did not automatically give rise to a duty to register.” *Garcia*, 327 S.W.3d at 905.

*Reinke v. State* presented the Austin Court of Appeals with “an issue of first impression involving recent statutory amendments governing the long-term commitment of defendants who are found incompetent to stand trial.” 348 S.W.3d 373, 374 (Tex. App.—Austin 2011, pet. granted). In considering the plain meaning of the statute, the court stated:

Texas cases have not addressed the application of article 46B.0095 in the face of an offense enhanced by prior felonies. Considering this matter of first impression, we disagree with the State’s argument that the maximum term of commitment under article 46B.0095(a) goes beyond the maximum term for the indicted offense to include increased time for punishment enhancements. Such an interpretation

would be contrary to the statute’s plain language, which correlates calculation of an accused’s “maximum term” of commitment not to the total potential punishment, but to the indicted offense . . . .

*Id.* at 378. The court concluded that the plain language of the Texas Code of Criminal Procedure provision at issue “limits commitment to the maximum term for the offense for which the defendant was to be tried.” *Id.* at 380.

In a dispute about the validity of a motion to strike the designation of a responsible third party, the San Antonio Court of Appeals stated, “This is a case of first impression. The parties have cited no authority for their arguments, and our search has likewise yielded no results. We, therefore, turn to the plain meaning of the statute.” *Flack v. Hanke*, 334 S.W.3d 251, 261 (Tex. App.—San Antonio 2010, pet. dismissed). The court then resolved the issue by focusing on the use of the term “party” in the key portions of that statute. *Id.* at 261-63 (construing TEX. CIV. PRAC. & REM. CODE § 33.004(1)); *see also In re CAT*, 316 S.W.3d 202, 206-209 (Tex. App.—Dallas 2010, no pet.) (resolving, as “an issue of first impression in Texas,” a question of child support obligation, by reference to “the plain meaning and common understanding” of the relevant statute).

Similarly, in *Safeshred, Inc. v. Martinez*, the Austin Court of Appeals characterized the question of whether a *Sabine Pilot* cause of action for wrongful discharge supported an award of punitive damages without evidence of an independent tort as “an issue of first impression in this Court.” 310 S.W.3d 649, 659 (Tex. App.—Austin 2010, pet. granted). The court resolved the question by analogy to a statutory cause of action under the Texas Labor Code, and concluded that such damages were available. *Id.* at 658-61 (analyzing TEX. LAB. CODE § 451.001).

Another detailed statutory analysis occurred in *University Interscholastic League v. Southwest Officials Association, Inc.*, to

analyze “the question of the UIL’s legal status under the current statutory scheme for purposes of sovereign immunity [which] appears to be an issue of first impression.” 319 S.W.3d 952, 956 (Tex. App.—Austin 2010, no pet.). After detailed review of the statutes creating and granting authority to the UIL, and briefly noting analogous federal case law, the court concluded that the UIL was a government entity entitled to immunity. *Id.* at 962-63. The Fourteenth Court of Appeals undertook a similar review of the statutory provision in question, as well as consideration of persuasive federal law, in *Stephanie M. v. Coptic Orthodox Patriarchate Diocese of Southern US*. No. 14-10-00004-CV, 2011 WL 1761353, at \*1 (Tex. App.—Houston [1st Dist.] Mar. 17, 2011, pet. denied) (“In an issue of first impression, appellant, Stephanie M., asks this court to determine whether the five-year statute of limitations applicable to personal injuries arising as a result of sexual assault extends to parties whose alleged negligence was a proximate cause of the conduct that caused her injuries.”).

In the case of *Appell v. Muguerza*, the Fourteenth Court of Appeals considered “an issue of first impression in this court”; namely, the test for whether a claim is a “health care liability claim” under applicable Texas statutes because the claimant alleges a “departure from accepted standards of . . . safety or professional or administrative services directly related to health care.” 329 S.W.3d 104, 114 (Tex. App.—Houston [14th Dist.] 2010, pet. filed) (citing TEX. CIV. PRAC. & REM. CODE § 74.001(a)(13)). The court considered two possible constructions of this phrase, and concluded that “as a whole and in accordance with rules of grammar,” the phrase “directly related to health care” modifies the phrase “safety or professional or administrative services.” *Id.* at 115. The court noted that six of the seven other courts of appeals that had addressed this issue used this construction, and went on to find that the plaintiff’s claim did not satisfy the requirements of this construction. *Id.* at 115-16;



*see also Celestine v. Dep't of Family & Protective Servs.*, 321 S.W.3d 222, 229 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (after stating that “this is a matter of first impression for this Court, we note that the other courts of appeals that have already addressed this issue disagree as to whether the Family Code’s continuing and exclusive jurisdiction provision is truly jurisdictional or merely a matter of dominant jurisdiction, more closely akin to the rules of venue,” and then holding that it is a matter of true jurisdiction).

A similar opinion is *In re de Brittingham*, addressing whether a former judge’s involvement with an earlier appeal from a probate case disqualified that judge from acting as counsel in a later appeal from that proceeding, under Texas Disciplinary Rule 1.11. 318 S.W.3d 95 (Tex. App.—San Antonio 2010, orig. proceeding). The court observed, “This is an issue of first impression in this court and we are aware of no other Texas court that has considered the issue.” *Id.* at 98. The court then went on to review the comments to the rule, followed by the general structure of probate proceedings, to conclude that the judge’s representation was within the scope of the rule.<sup>12</sup> *Id.* at 98-99.

### 3. Other variations

The case of *In re Marburger* involved a comparison of two Texas Probate code provisions as to the requirements for guardians *ad litem*. 329 S.W. 3d 923, 928-30 (Tex. App.—Corpus Christi 2010, no pet.). The court of appeals held, “as a matter of first impression,” that certain certifications were required for the appointed guardian, and then reversed for abuse of discretion for not requiring that certification in this

<sup>12</sup> The case of *In re Mabray* analyzed the policy ramifications of a “collaborative law” arrangement as an issue of first impression; notably though, the substantive question before the Court was “whether cooperative law agreements violate public policy.” 355 S.W.3d 16, 25 (Tex. App.—Houston [1st Dist.] Aug. 31, 2010, no pet.).

case. *Id.* at 930. Interestingly, the “first impression” phrase came at the end rather than the start of the opinion.

Occasionally a party, and not the court, characterizes a particular issue as one of first impression. An example of this use is *Brannan v. State*, where the First Court of Appeals noted, “The Three Intervening Owners contend their houses cannot be an ‘encroachment’ on the public beach under the Open Beaches Act due to the facts that the houses are stationary and the rolling easement moved landward to the houses. They assert this is a matter of first impression.”<sup>13</sup>

<sup>13</sup> See also *Gonzalez v. State*, No. 08-10-00130-CR, 2011 WL 2348478, at \*2 (Tex. App.—El Paso June 8, 2011, no pet.) (“In what he characterizes as an issue of first impression, Appellant maintains that the District Attorney had a ministerial duty to issue the detainer once the State learned he was confined by another jurisdiction. But the State’s knowledge of Appellant’s incarceration on a separate federal offense does not result in a change in the basis for his confinement, nor does it alter his status.”); *Gutierrez v. Transtar Builders*, No. 01-09-00811-CV, 2011 WL 1432195, at \*2 (Tex. App.—Houston [1st Dist.] Apr. 14, 2011, pet denied) (“In issue 1, Gutierrez contends the trial court erred in rendering summary judgment based on a lack of duty because the Occupational Safety and Health Act and the regulations adopted pursuant to the Act impose a duty of care on general contractors to nonemployee workers and, thus, preempt Texas law. Gutierrez claims this is an issue of first impression in Texas.”) (citation omitted); *In re Dacus*, 337 S.W.3d 501, 505 (Tex. App.—Fort Worth 2011, no pet.) (“The State argues that the IADA provisions are inapplicable in this case. Specifically, the State asserts that it ‘expeditiously disposed of’ the capital murder indictment eleven days after Relator arrived in Texas, and therefore, an ‘untried indictment’ no longer existed against Relator when the State sent him back to Kansas—a condition precedent to application of the IADA. The State asserts that this is a question of first impression in Texas and federal jurisprudence because the IADA does not directly address the instant issue and because there is no controlling authority on point.”) (citation omitted); *In re Tasty Moments*, No. 13-10-00274-CV, 2011 WL 1204093, at \*4 (Tex. App.—Corpus Christi Mar. 31, 2011, orig. proceeding) (disagreeing with real party’s contention that “the primary issue to be determined by the Respondent was a question of first impression, as stated in the Order signed by United States District Judge John D. Rainey. Since this is a ‘novel question of Texas law’ and Respondent essentially based her decision on supporting evidence and

No. 01-08-00179-CV, 2010 WL 375921, at \*14 (Tex. App.—Houston [1st Dist.] Feb. 4, 2010, pet. filed).

### C. “Spin”

The phrase, “first impression,” also appears in surveys of prior case authority. In some instances, use of the phrase is purely descriptive and seems intended only to note an interesting bit of background,<sup>14</sup> or to explain why an earlier case took a particular analytical approach.<sup>15</sup>

Other situations use the phrase to help limit a leading case. In the case of *In re Jefferson County Appraisal District*, the court noted that, “As a matter of first impression, the Supreme Court held [in *In re Christus*] that expert-disclosure rules set forth in [TEX. R. CIV. P. 192.3] precluded the

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case law as submitted by the parties, there can be no arbitrary or unreasonable ruling and there is no ‘clear duty’ . . . . Where the law is not settled, a trial judgment cannot act in violation of a clear duty to act. Nor can a trial judge’s action constitute an abuse of discretion.”); *Kendall v. Kendall*, 340 S.W.3d 483, 497 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (“[Appellee] acknowledges that subject-matter jurisdiction cannot be waived, but argues that—as a matter of first impression in Texas—this Court should conclude the procedural mechanics for registering a foreign order are procedural, not jurisdictional.”).

<sup>14</sup> See, e.g., *In re United Scaffolding, Inc.*, 301 S.W.3d 661, 663 (Tex. 2010, orig. proceeding) (referring to an earlier mandamus case as presenting a legal issue of first impression); *Caffe Ribs, Inc. v. State*, 328 S.W. 3d 919, 930 n.5 (Tex. App.—Houston [14th Dist.] Dec. 28, 2010, no pet.) (cataloging opinions from other states on an issue of eminent domain law and characterizing one as dealing with “an issue of first impression”); *Jackson v. Jackson*, 319 S.W.3d 76, 80-81 (Tex. App.—San Antonio 2010, no pet.) (describing Oregon precedent on a marital property law issue as having “presented an issue of first impression in Oregon”); *Bakhtari v. Estate*, 317 S.W.3d 486, 493 (Tex. App.—Dallas 2010, no pet.) (following a Waco opinion which described the issue before it as “a case of first impression”).

<sup>15</sup> *Scarborough v. Metro. Transit Auth. of Harris Cnty.*, 326 S.W.3d 324, 335 (Tex. App.—Houston [1st Dist.] 2010, pet. dism’d) (“Because it was dealing with a case of first impression, the supreme court in *Williams* looked to federal cases dealing with the issue of ‘what constitutes expending public funds’” (citations omitted)).

snap-back of documents inadvertently produced so long as the expert remained designated to testify at trial. 315 S.W.3d 229, 236 (Tex. App.—Beaumont 2010, orig. proceeding) (per curiam) (citation omitted). The court found *Christus* distinguishable on the facts as to how the expert at issue received the documents.<sup>16</sup> *Id.*

#### D. Other Miscellaneous Uses

One case used the phrase to explain why it focused on a more limited issue, in lieu of what the court characterizes as an issue of first impression. *See, e.g., In re Islamorada Fish Co. Tex., L.L.C.*, 319 S.W.3d 908, 912 (Tex. App.—Dallas 2010, orig. proceeding) (opinion on motion for en banc rehearing) (“We do not consider whether punitive damages are recoverable generally under the Dram Shop Act, an issue of first impression in this Court, because we conclude that they are not recoverable under the facts of this case under section 41.005(a) of the Texas Civil Practice and Remedies Code.”). Another used the phrase to chide an appellant for sketchy citation to authority.<sup>17</sup> *Ruiz-Angeles v. State*,

<sup>16</sup> A similar—although more subtle—use was employed by the Austin Court of Appeals in *Deinhart v. McGrath-Stroatman*. No. 03-09-00283-CV, 2010 WL 4595708, at \*6 (Tex. App.—Austin Nov. 10, 2010, pet. dismiss’d) (“Because it was facing an issue of first impression in applying the state’s public policy imperatives to interpret the modification standards in the relocation context, the *Lenz* court reviewed various factors considered by other jurisdictions . . .”).

<sup>17</sup> *See also Haagensen v. State*, 346 S.W.3d 758, 763 (Tex. App.—Texarkana June 10, 2011, no pet.) (“The State notes Haagensen has not provided any cases which have reversed a drug-free-zone finding based on the definition of a school. The State further asserts it has been unable to find any cases in its own research. The State, though, has not provided this Court with any cases—and we have not discovered any in our own research—that hold the State is not required to prove a day-care center qualifies as a school under TEX. HUM. RES. CODE ANN. § 42.002. Although it appears this may be an issue of first impression, the State must prove all the statutory elements of the enhancement.”); *Dodge v. Dodge*, 314 S.W.3d 82, 85 n.2 (Tex. App.—El Paso 2010, no pet.) (“nor do

351 S.W.3d 489, 498 (Tex. App.—Houston [14th Dist.] Aug. 9, 2011, pet. ref'd) (“Appellant presents only his bare assertion, unsupported by authority. He characterizes this as an issue of first impression, but makes no argument as to how such facts would constitute a violation of his constitutional right to due process.”). Another simply acknowledged the parties’ agreement that an analogous body of law controlled the issue before the court, in the absence of more direct controlling authority. See *Richardson v. State*, 328 S.W.3d 61, 65-66 (Tex. App.—Fort Worth 2010, pet. dismissed) (“This appears to be a case of first impression. We, like the parties, were unable to find any prior case law addressing a sufficiency challenge to the possession element of fraudulent use or possession of identifying information. However, we agree with the parties that the proper law to apply in this case is the body of law pertaining to affirmative links developed in controlled substance cases. Therefore, we apply the linking rule to determine whether the evidence was legally and factually sufficient to show that [Defendant] was in possession of [the information].” (citations omitted)).

## II. “FIRST IMPRESSION” AND APPELLATE RESULTS

Excluding cases that use the phrase incidentally or descriptively, reversals occur at a higher rate than in the ordinary course of appellate practice. While the survey size is not big enough to draw a sweeping conclusion from this observation, that result seems to follow sensibly from the nature of the issue defined.

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they attempt to argue that this is a case of first impression”); *Marin v. IESI TX Corp.*, 317 S.W.3d 314, 332 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (“[Appellant cites no authority for this proposition [about pleading as to the statutory punitive damages cap], stating it is a matter of first impression. We decline to create a new pleading requirement in exemplary damages cases.”).

The sample contains only those specific cases in which the reviewing court itself (as opposed to a party) has labeled an issue one of first impression, and only those opinions which feature the majority's characterization of the issue in this way. Applying these restrictions, the sample size is roughly 30 cases. Of those 30 cases, approximately 60% were reversals of at least the issue characterized as one of first impression, if not additional issues addressed by the opinion.

Within the categories for use of the phrase "first impression," some appear more susceptible to reversal. In particular, of cases reviewed in the Statutory Analysis section above, twice as many reversals occurred as compared to affirmances. Cases which use the phrase to introduce a detailed policy analysis are more balanced in terms of reversals, as roughly 50% of those cases were reversed, with the remaining 50% affirmed. Cases in which the court used the phrase to draw attention to an appellant's sketchy use of authority are somewhat more likely to be affirmed. Finally, although not included in the original sample size of 30 cases, for cases in which a party (rather than the reviewing court), labeled an issue as one of first impression, the court affirmed the lower court substantially more often than not.

## CONCLUSION

The survey shows that courts use the phrase in distinct ways to advance distinct goals. *See generally Path of Precedent*, 80 NYU L. REV. at 1187 ("Absent clear precedential guidelines, judges have more discretion to effect their preferences"). While many opinions use the phrase for similar purposes, within a group of cases that use the phrase for a similar purpose, there is little similarity in the legal analysis that follows. The survey concludes that the phrase is a signal for a certain kind of argument, but does not preview the structure of the argument itself. *See generally id.* at 1186-87 (summarizing reasons why judges hesitate to identify issues as ones of first impression). It also observes that in some

situations, particularly cases involving issues of statutory interpretation, use of the phrase has some correlation with reversal of the lower court.

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