STATE AND FEDERAL PROCEDURE

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Civil Appellate Practice 101

Austin, TX

September 5, 2018

1. MANDAMUS

In re: Prudential Ins. Co. of Am., 148 S.W.3d 124 (Tex. 2004)

"Prudential must meet two requirements. One is to show that the trial court ***clearly abused its discretion***. . . . The other requirement Prudential must meet is to show that it has ***no adequate remedy by appea***l."

As to adequacy of remedy of appeal:

"This determination is not an abstract or formulaic one; it is practical and prudential. It resists categorization, as our own decisions demonstrate. Although this Court has tried to give more concrete direction for determining the availability of mandamus review, ***rigid rules are necessarily inconsistent with the flexibility that is the remedy's principal virtue***."

In re: DePuy Orthopaedics, Inc., 870 F.3d 345 (5th Cir. 2017)

"***Despite finding serious error***, a majority of this panel denies the writ that petitioners seek to prohibit the district court from proceeding to trial on plaintiffs' cases."

"Petitioners claim that appeal is not an adequate remedy because the cost of having to defend more bellwether trials is 'unjustifiable' given the strength of their personal-jurisdiction claims. . . . At oral argument, the parties represented that each of the previous three bellwether trials lasted several weeks. But for appeal to be an inadequate remedy, there must be 'some obstacle to relief beyond litigation costs that renders obtaining relief not just expensive but effectively unobtainable.' ***Nor is the 'hardship [that] may result from delay'—such as the risk of substantial settlement pressure—grounds for granting a mandamus petition***."

In re: Crystal Power Co., 641 F.3d 82 (5th Cir. 2011)

"We confess puzzlement over why respondents insist on litigating this case in federal court even though, as our previous opinion explained, ***any judgment issued by the district court will surely be reversed*** — no matter which side it favors — for lack of federal jurisdiction due to improper removal."

Mandamus Practice
State v. Federal

2. DISCOVERY

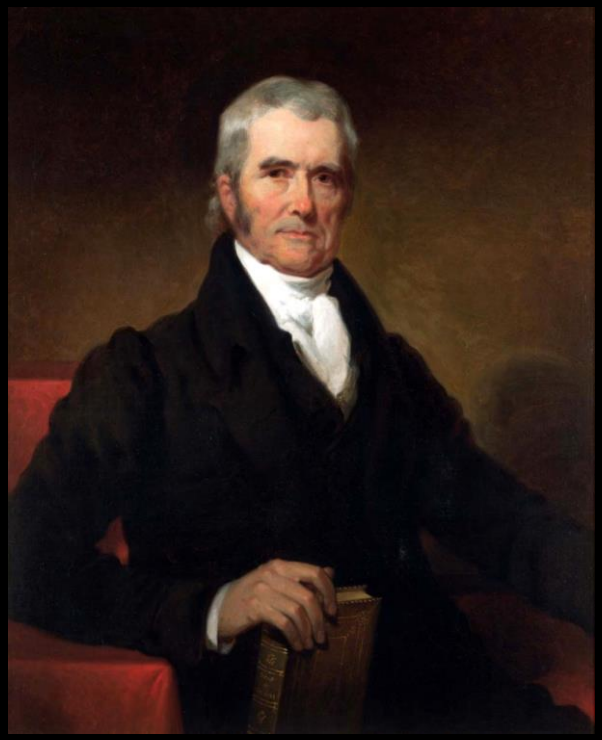
In re: State Farm Lloyds, 520 S.W.3d 595 (Tex. 2017)

"Under our discovery rules, neither party may dictate the form of electronic discovery. The requesting party must specify the desired form of production, ***but all discovery is subject to the proportionality overlay embedded in our discovery*** rules and inherent in the reasonableness standard to which our electronic-discovery rule is tethered."

Heller v. City of Dallas,
No. 3:13-cv-4000-P (N.D. Tex. Nov. 12, 2014)

"In light of the ***relative sparsity of case law in this circuit*** on responding to discovery requests 'subject to' and 'without waiving' objections and of Plaintiffs' not raising this as a ground for sanctions, the Court finds that Rule 26(g)(3) sanctions are not warranted in this instance for Defendant's responding to many of the discovery requests "[s]ubject to and without waiving its general and specific objections."

Appellate Discovery Oversight
State v. Federal



3. PLEADINGS

Mastronardi v. Wells Fargo Bank, N.A.,
No. 15-11028 (5th Cir. June 29, 2016)

"The Mastronardis' claims against Estrada and Marin are insufficiently pled under either the federal standard or ***the revised Texas standard, which now tracks the federal standard***. See Tex. R. Civ. P. 91a . . . . "

First Pentecostal Church of Beaumont v. Parker,
514 S.W.3d 214 (Tex. 2017)

"***[T]he fair-notice standard*** measures whether the pleadings have provided the opposing party sufficient information to enable that party to prepare a defense or a response."

4. PERSONAL JURISDICTION

"The burden of establishing personal jurisdiction over a non-resident defendant ***lies with the plaintiff***."
Ainsworth v. Moffett Eng'g, Ltd. 716 F.3d 174 (5th Cir. 2013)

"Under the Texas long-arm statute, the plaintiff bears the initial burden of pleading allegations sufficient to confer jurisdiction. . . . When the initial burden is met, the burden ***shifts to the defendant*** to negate all potential bases for personal jurisdiction the plaintiff pled."
Moncrief Oil Int'l, Inc. v. OAO Gazprom, 414 S.W.3d 142 (Tex. 2013).

Personal Jurisdiction Standards State v. Federal

5. CHARGE ERROR

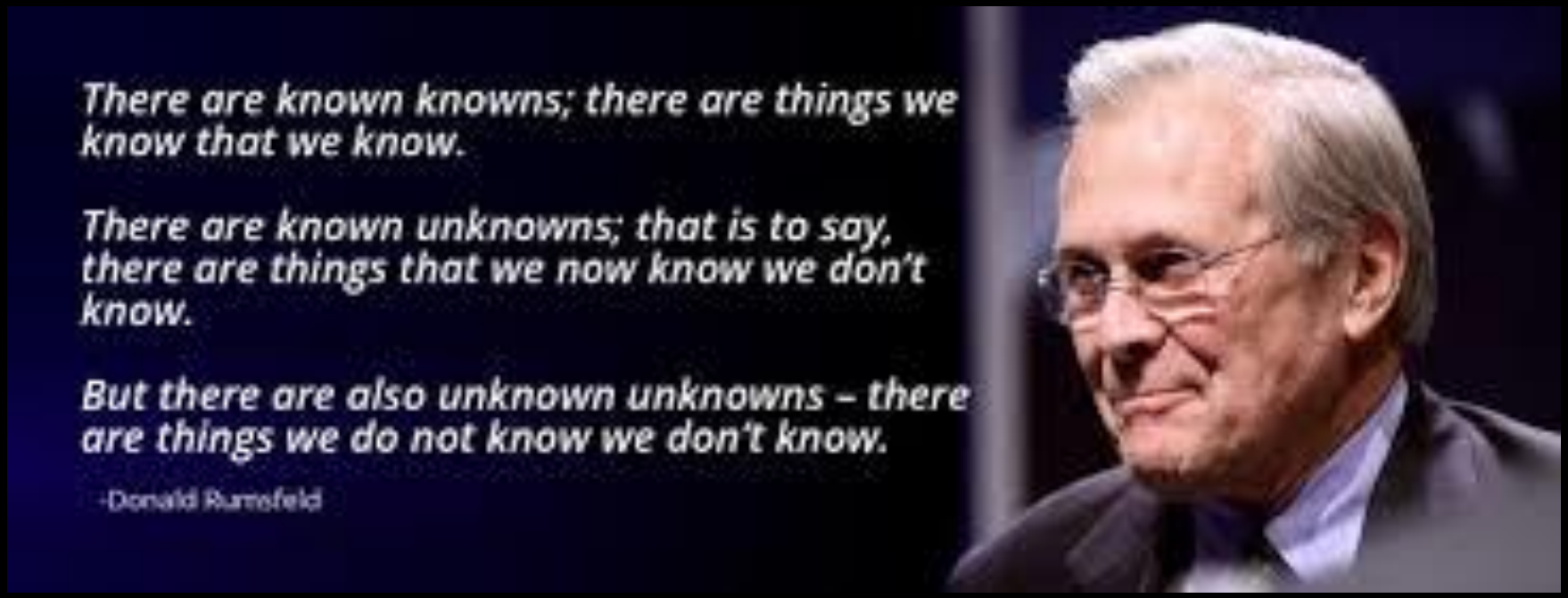
Crown Life Ins. Co. v. Casteel, 22 S.W.3d 378 (Tex. 2000)

"When a single broad-form liability question erroneously commingles valid and invalid liability theories and the appellant's objection is timely and specific, ***the error is harmful when it cannot be determined*** whether the improperly submitted theories formed the sole basis for the jury's finding.“

Nester v. Textron, Inc., 881 F.3d 151 (5th Cir. 2018)

"[W]hen 'jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error' but . . . '[q]uite the opposite is true . . . when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence.'" (quoting *Griffin v. United States*, 502 U.S. 46, 59-60 (1991)).

Charge Error Summary



7. SUFFICENCY

TEXAS: *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex.2005)

5th CIR: *Boeing Co. v Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc), *overruled in part on other grounds*, *Gautreaux v. Scurlock Marine, Inc*., 107 F.3d 331 (5th Cir. 1997) (en banc)

". . . Said Court of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. Provided, ***that the decision of said courts shall be conclusive on all questions of fact brought before them*** on appeal or error . . . ."

Tex. Const. art. V § 6(a)

8. PRIVILEGE

COMPARE: **"**The attorney-client privilege holds a special place among privileges: it is 'the oldest and most venerated of the common law privileges of confidential communications.' As 'the most sacred of all legally recognized privileges,' 'its preservation is essential to the just and orderly operation of our legal system.'" *Paxton v. City of Dallas*, 509 S.W.3d 247 (Tex. 2017).

WITH: **"**Because the attorney-client privilege 'has the effect of withholding relevant information from the fact-finder,' it is interpreted narrowly and 'applies only where necessary to achieve its purpose.'" *EEOC v. BDO USA, LLP*, 876 F.3d 690 (5th Cir. 2017).

9.

INTERLOCUTORY APPEALS

TEXAS: "Because temporary restraining orders ***are not appealable***, there is no remedy by appeal." *Pin re: Elevacity, LLC*, No. 05-18-00135-CV (Feb. 16, 2018, orig. proceeding)

5TH CIR: ***"In general***, a TRO is not appealable." *Bd. of Governors of the Fed. Res. Sys. v. DLG Fin. Corp*., 29 F.3d 993, 1000 (5th Cir. 1994)

TEXAS: **Tex. Civ. Prac. & Rem. Code § 51.014(a)** ("A person may appeal from an interlocutory order of a district court, county court at law, statutory probate court, or county court that: ***[does one of 13 specified things]***)

5TH CIR: **28 U.S.C. § 1292(b)** (discussing potential interlocutory appeal of an order that "***[1]*** involves a controlling question of law ***[2]*** as to which there is substantial ground for difference of opinion and that ***[3]*** an immediate appeal from the order may materially advance the ultimate termination of the litigation")

10.

FEDERAL CASES → STATES
STATE CASES → FEDERAL

TEXAS: *"*While Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are obligated to follow only higher Texas courts and the United States Supreme Court*." Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294 (Tex. 1993)

5TH CIR: "In making an *Erie* guess, we defer to intermediate state appellate court decisions, unless convinced by other persuasive data that the higher court of the state would decide otherwise." *Cerda v. 2004-EQR1 L.L.C.,* 612 F.3d 781, 794 (5th Cir. 2010)

C.

A wrongful-foreclosure claim under Texas law has three elements: "(i) 'a defect in the foreclosure sale proceedings'; (ii) 'a grossly inadequate selling price'; and (iii) 'a causal connection between the defect and the grossly inadequate selling price.'"[3] The plaintiff must allege a grossly inadequate selling price in "all but a specific category of cases" where the plaintiff alleges that the

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[2] *Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991); *Ortega v. City Nat'l Bank*, 97 S.W.3d 765, 777 (Tex. App.—Corpus Christi 2003, no pet.) ("Where the only duty between parties arises from a contract, a breach of this duty will ordinarily sound only in contract, not in tort.").

[3] *Miller v. BAC Home Loans Servicing, L.P.*, 726 F.3d 717, 726 (5th Cir. 2013) (quoting *Sauceda v. GMAC Mortg. Corp.*, 268 S.W.3d 135, 139 (Tex. App.—Corpus Christi 2008, no pet.)).

11. ANTI-SLAPP

Youngkin v. Hines, 546 S.W.3d 675 (Tex. 2018)

"Hines's argument that Youngkin cannot invoke the TCPA because the First Amendment right to petition does not encompass Youngkin's in-court statements attempts to add a requirement to the statute that does not exist in its text. ***It does not follow from the fact that the TCPA professes to safeguard the exercise of certain First Amendment rights that it should only apply to constitutionally guaranteed activities***."

Block v. Tanenhaus, 867 F.3d 585 (5th Cir. 2017)

"Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law. If there is a 'direct collision' between a state substantive law and a federal procedural rule that is within Congress's rulemaking authority, federal courts apply the federal rule and do not apply the substantive state law. . . . ***The applicability of state anti-SLAPP statutes in federal court is an important and unresolved issue in this circuit***."

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