

JURY CHARGE TRENDS

Karen S. Precella
HAYNES AND BOONE, LLP
201 Main Street, Suite 2200
Fort Worth, Texas 76102

State Bar of Texas
Advanced Civil Appellate Practice Course
September 4-5, 2008
Austin, Texas

CHAPTER 6

KAREN S. PRECELLA
HAYNES AND BOONE, LLP
201 Main Street, Suite 2200, Fort Worth, Texas 76102
Telephone: 817.347.6600 Fax: 817.347.6650
E-mail: karen.precella@haynesboone.com

EMPLOYMENT:

Haynes and Boone, LLP, Appellate Section, Fort Worth, Texas, 2001-Present, 1991-1996.

Jose, Henry, Brantley & Keltner, LLP, Appellate, Fort Worth, Texas, 1996-2001.

Adjunct Professor, Legal Research and Writing, Texas Wesleyan University School of Law, 1998-1999, 2000-2001.

BOARD CERTIFIED:

Civil Appellate Law, Texas Board of Legal Specialization (1996-Present).

PROFESSIONAL ASSOCIATIONS:

Admitted—Texas state courts; United States Supreme Court; United States Court of Appeals, Fifth Circuit; United States District Court, Northern District of Texas.

Member—State Bar of Texas, Appellate Section; American Bar Association, Council of Appellate Lawyers; Bar Association of the Fifth Federal Circuit; Tarrant County Bar Association, Appellate Section; College of the State Bar of Texas; Texas Bar Foundation; Eldon B. Mahon Inn of Court (Associate and Barrister terms); Tarrant County Bar Foundation; Women's Chamber of Commerce of Texas.

Committees—Chair, State Bar Pattern Jury Charge Committee, PJC IV/Business, Consumer, and Employment (Chair 2006-2009, Vice Chair, 2003-2006, Member, 2001-2009); Co-Chair, Rules and Statutes Subcommittee, Appellate Committee, ABA Litigation Section (2006-Present); Member, State Bar Pattern Jury Charge, Oversight Committee (2003-2005); Director, Tarrant County Bar Association (2007-2008); Chair/Vice-Chair/Secretary, Appellate Section, Tarrant County Bar Association (2004-2007); Chair-Elect, Judicial Evaluation Committee, Tarrant County Bar Association (Chair-Elect, 2007-2008, Member, 2000-2005); CLE/Brown Bag Seminar Committee, Tarrant County Bar Association (Chair, 2004-2007, Member 2001-2008); Member, Tarrant County Commissioner's Court, Law Library Committee.

HONORS:

- Elected American Law Institute (2007).
- Best Lawyers in America (2005, 2006, 2007, 2008).
- Top 50 Texas Female Lawyers, *Texas Monthly* (2004, 2005).
- Texas Super Lawyer, *Texas Monthly* (2003, 2004, 2005, 2006, 2007, 2008).
- Tarrant County Top Appellate Attorneys, *Fort Worth, Texas, Magazine* (2002, 2003, 2004, 2005, 2006, 2007).
- Recognized for Contributions to CLE, Tarrant County Bar Association (2006).
- Best Series of Articles in Local Bar Publication Award, State Bar of Texas (2007)

EDUCATION:

Southern Methodist University, J.D., with honors, May 1991.

University of Texas at Arlington, B.S., highest honors, 1979, M.B.A., 1983.

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Jury Charge Trends

I. INTRODUCTION

Jury charge issues usually fall in the following four general categories: (1) substance, (2) form, (3) preservation of error, and (4) harm/less error. This paper addresses each area, although extensive treatment of all areas is not possible. A review of these areas, however, reviews some basic current trends including the following:

- Use broad-form when possible.
- Proportionate responsibility submissions can be difficult.
- Fiduciary duty questions may not be one-size-fits all.
- Tortious interference with prospective relations submissions are still difficult.
- Preservation remains difficult such that objection and request (and other motions as well) may be advisable.
- Harm from broad-form errors may be presumed unless reasonably certain jury not influenced by it.
- Traditional harmless error applies in most other contexts, including inferential rebuttal instructions.

II. ISSUES OF SUBSTANCE

This section provides a sampling of issues recently arising with regard to various substantive claims and issues.

A. Liability issues

1. Antitrust

Because most antitrust suits are brought under the federal antitrust laws, Texas antitrust law is not well-developed. TEX. BUS. & COM. CODE §§ 15.01-52. Nevertheless, “[t]he provisions of the [Texas Antitrust] Act shall be construed to accomplish [the] purpose [of maintaining and promoting economic competition in trade and commerce] and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose.” As a result, Texas courts look to federal law to aid in antitrust jury submissions. *See Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 689 (Tex. 2006); *Caller Times Publ’g Co. v. Triad Communications, Inc.*, 826 S.W.2d 576, 580 (Tex. 1991); *Chromalloy Gas Turbine Corp. v. United Tech. Corp.*, 9 S.W.3d 324, 327 (Tex. App.—San Antonio 1999, pet. denied); *see also* SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, American Bar Association, Antitrust Section (3d ed. 1999).

Open questions remain with regard to several antitrust areas. For example, “[w]ithout a showing of

actual adverse effect on competition, [a plaintiff] cannot make out a case under the antitrust laws.” *Coca-Cola*, 218 S.W.3d at 689-90; *Scott v. Galusha*, 890 S.W.2d 945, 950 (Tex. App.—Fort Worth 1994, writ denied). That requires a difficult analysis of the relevant market purportedly harmed. Relevant market includes a relevant product market and a relevant geographic market. In *Coca-Cola*, the supreme court determined there was no evidence “any relevant market claimed” by plaintiffs was harmed. 218 S.W.3d at 689. The issue of how relevant market is submitted in state court was not discussed but is an interesting one. Relevant market – frequently one of the most hotly contested issues – controls the remainder of the findings and how the evidence can be reviewed on appeal. As such, careful consideration should be given to whether broad-form or granulation best obtains the necessary findings.

As to causation, “[a]ny person...whose business or property has been injured by reason any conduct declared unlawful” in the Act may recover damages as specified by the Act. TEX. BUS. & COM. CODE § 15.21. The court of appeals opinion in *Coca-Cola* noted that “a plaintiff must establish that the monopolization was a *proximate cause* of injury to the plaintiff.” 111 S.W.3d at 307.

Additionally, an issue exists on awarding treble damages under the statute. “[I]f the trier of fact finds that the unlawful conduct was willful or flagrant, it shall increase the recovery to threefold the damages sustained and the cost of suit, including a reasonable attorney’s fee.” TEX. BUS. & COM. CODE ANN. § 15.21(a)(1). The statute does not define willful or flagrant; thus, other case law must be reviewed to craft a definition of one or both for submission. *See, e.g., Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 453-54 (Tex. 1997); *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 210 (Tex. 1996); *Ware v. Paxton*, 359 S.W.2d 897, 898-99 (Tex. 1962); *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 749 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

2. (Unreasonable) Collections

According to one court:

Unreasonable collection is an intentional tort. But the elements are not clearly defined and the conduct deemed an unreasonable collection effort varies from case to case. The method of submission to a jury is as varied as the conduct giving rise to the tort. One of the more precise legal descriptions delineates the conduct giving rise to the tort as ‘efforts that amount to a

course of harassment that was willful, wanton, malicious, and intended to inflict mental anguish and bodily harm.’

EMC Mortg. Corp. v. Jones, 252 S.W.3d 857 (Tex. App.—Dallas 2008, no pet. h.) (citations omitted). The trial court asked the jury without objection as to a lack of definition of unreasonable, “Did EMC make any unreasonable efforts to collect the loan after the transfer to EMC from Washington Mutual?” The court of appeals held that omission of any guidance to the jury as to “unreasonable collection efforts” rendered the submission defective. The court, however, held there was sufficient evidence to support the defective finding. Thus, in submitting a common law collections case, consideration should be given to accompanying instructions to aid the jury.

3. Contract

a. Cross-material breaches

Cross-material breaches of contract may require modification of the usual contract charge. In *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195 (Tex. 2004), the parties argued competing affirmative findings of breach of contract resulted in a conflict. The supreme court disagreed because a prior material breach (of a “time is of the essence” clause) by the defendant was established as a matter of law, and the plaintiff’s breach was a subsequent one of nonpayment or cancellation. *Id.* The court noted that the conflict argument could have been avoided by submitting a single question with an instruction, e.g.,:

Did P or D fail to comply with the agreement?

A party fails to comply with the agreement if it is the first party to fail to comply with a material obligation of the agreement.

Id. at 200. The assumption being that (under the facts in *Mustang*) the answer will determine either that (1) the defendant committed the first material breach and thus nonpayment or cancellation by the plaintiff is excused (such that the answer is “D”), or (2) the defendant did not commit the first material breach and nonpayment or cancellation by the plaintiff is not excused (such that the answer is “P”). Under that formulation, the suggested disjunctive submission would avoid the conflict argued in *Mustang Pipeline*. See also *Casarez v. Alltec Constr. Co.*, 2007 Tex. App. Lexis 8825 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (memo opin.) (holding erroneous to submit breach of one party based on prior material breach of other party and reversing and remanding zero damage finding against second breaching party).

If circumstances exist in which the jury needs to resolve if only one (or neither) or both of the parties committed a breach and, if both, which occurred first, the broad-form suggestion might be modified slightly to reach the same result. See, e.g., *J&E Oil Co. v. Atofina Petrochemicals, Inc.*, No. 13-02-00675-CV, 2005 Tex. App. Lexis 8885 (Tex. App.—Corpus Christi Oct. 27, 2005, no pet.) (memo opin.) (involving claim and counterclaim). The *Mustang* conflict problem can be avoided with three questions in that circumstance: breach by one party, breach by the other party, and, if yes to both, which occurred first. See, e.g., *id.* (using multiple questions and including prior material breach with list of other excuses); *Feuerberg v. Bush*, 175 S.W.3d 442 (Tex. App.—Dallas 2005, no pet.) (listing three questions submitted by trial court to determine breaches and excuse).

b. Terms of agreement

Patterns exist on reaching an agreement but unique circumstances may require modification. In one case, a dispute existed as to an oral partnership agreement. The trial court submitted an issue that asked if the plaintiff was required (A) or was not required (B) to make a certain payment. The jury answered that he was not but no other finding established what consideration supported the claimed agreement. The court held that the burden of proof as submitted was improperly and harmfully placed on the defendant. See *Buhman v. McGaughy*, 2007 Tex. App. Lexis 5777 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (memo opin.). On the other hand, one court held that the contract question adequately resolved and placed the burden of proof when it instructed that the answer (of no or yes) had to be supported by a preponderance of the evidence. *Maxus Energy Corp. v. Occidental Chem. Corp.*, 244 S.W.3d 875, 883-84 (Tex. App.—Dallas 2008, pet. denied).

In yet another case, a dispute existed as to whether the contract had been modified. The jury charge included an instruction on contract modification but no question as to whether it had been modified. The court of appeals could not determine if the jury had found the contract, if modified, had been complied with. As a result, the court held reversible charge error occurred. *Red Roof Inns, Inc. v. Murat Holdings, LLC*, 223 S.W.3d 676 (Tex. App.—Dallas 2007, pet. denied). Thus, when modified contract questions are necessary, care should be taken to ensure the findings needed are secured.

4. Defamation

The PJC (Business) will include granulated defamation with several admonitions that, in appropriate cases, that the following defamation

elements may be combined: “the plaintiff must prove that the defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private [party], regarding the truth of the statement.” *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998); *see also Tex. Disp. Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563 (Tex. App.—Austin 2007, pet. denied).

5. Fiduciary Duty

PJC 104.2 provides a baseline pattern for a breach of fiduciary duty question. That pattern, however, should be modified as necessary to conform to the facts of any given case.

a. Contractual limitation or expansion of fiduciary duties

The supreme court recently confirmed that a contract between a principal and agent can, in effect, limit the fiduciary obligations owed by the agent to the principal. *Nat’l Plan Administrators, Inc. v. National Health Ins. Co.*, 235 S.W.3d 695 (Tex. 2007). In that case, a company agreed to market certain insurance policies underwritten by another company. The insuring company claimed that marketing competing policies breached the agent/marketing company’s general common-law fiduciary duty owed to the principal. The jury found a breach of fiduciary duty on that basis in a question patterned from PJC 104.2. The agreement between the parties expressly provided that the marketing company was an “independent contractor whose activities in administering and marketing insurance products were not exclusive” to the principal. *Id.* at 703. The supreme court thus refused to hold that actions in compliance with the parties’ agreement could be a breach of fiduciary duty. *Id.* The court further held that a general fiduciary duty question should not have been submitted at all when no such general duty was owed (also finding that the Insurance Code did not impose a general duty). *Id.*; *see also* TEX. REV. CIV. STAT. art. 6132b-4.04(f), Comment (1993) (provisions governing relationship between partners); *Sterling Trust Co. v. Adderly*, 168 S.W.3d 835, 846-47 (Tex. 2005) (discussing impact of Texas Trust Act on fiduciary duty and contractual modification). As such, when an agreement between the parties modifies the scope of a fiduciary duty, PJC 104.2 should be modified accordingly.

b. Knowing participation in breach

The Texas Supreme Court held long ago that liability could exist for knowing participation in a breach of fiduciary duty. *Kinzbach Tool Co. v. The*

Corbett-Wallace Corp., 160 S.W.2d 509, 574 (Tex. 1942). Courts of appeals confirm the knowing participation rule. *See, e.g., Kastner v. Jenkins & Gilchrist, PC*, 231 S.W.3d 571, 580 (Tex. App.—Dallas 2007, no pet.) (quoting but holding no evidence of knowing participation); *Helm Cos. v. Shady Creek Housing Partners, Ltd.*, No. 01-05-00743-CV, 2007 Tex. App. Lexis 5902 (Tex. App.—Houston [1st Dist.] July 26, 2007, pet. denied) (memo opin.) (listing elements and holding no-evidence summary judgment improper on claim for knowing participation).¹ The cases do not approve of a specific submission. The underlying analysis thus must be analyzed for a proper submission.

6. Fraud

a. Reliance

“The elements of common-law fraud are that: (1) a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the representation was made with the intention that it be acted upon by the other party; (5) the party *acted in reliance* upon the representation; and (6) the party suffered injury.” *Johnson & Higgins of Tex., Inc. v. Kenneco Energy Co.*, 962 S.W.2d 507, 524 (Tex. 1998) (emphasis added); *see also Trenholm v. Ratcliff*, 646 S.W.2d 927 (Tex. 1983) (approving fraud submission that did not include reasonable or justifiable reliance).

The supreme court also disapproved of a fraud submission that asked whether the plaintiff “was aware of facts that would have caused a prudent person to make an inquiry; and that such an inquiry, if made with due diligence, would have uncovered [the] fraud.” *Koral Indus. v. Security-Conn. Life Ins. Co.*, 802 S.W.2d 650, 651 (Tex. 1990). In doing so, the court noted that “[a]n affirmative answer to the requested special issue based upon what [the plaintiff] *should have known* would not...constitute[] a defense to the alleged fraud....Failure to use due diligence to suspect or discover someone’s fraud will not act to bar the defense of fraud to the contract.” *Id.* (emphasis original).

Although the supreme court has listed the fraud elements as quoted above in a number of cases, in *Ernst & Young*, the court included an “*actually and justifiably relied* upon the representation” element. *See Ernst & Young, L.L.P. v. Pac. Mut. Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001) (citing *Trenholm*). But

¹ Although limited to its facts, the supreme court recently noted a lack of clarity as to whether knowing participation in a breach of fiduciary duty differed from a conspiracy to breach. *See Chu v. Hong*, 249 S.W.3d 441 (Tex. 2008).

that case involved representations made in an audit report not specifically directed at the plaintiff. In that context, the court held the intent element of fraud is met if the maker of a representation intends or has reason to expect a certain class of persons will act in reliance on the representation. *Id.* at 579. Because the *Ernst & Young* defendant negated the “intent to induce reliance” element, the court did not consider the “alternative argument that [the plaintiff’s] reliance was not justifiable.” *Id.* at 582. “Justifiable” reliance under *Ernst* the third party context.

Other cases not involving the third party context have also referred to reasonable or justified reliance after *Koral*. In *Haase v. Glazner*, 62 S.W.3d 795, 800 (Tex. 2001), the court (with Enoch writing) refused to affirm a summary judgment on a pure fraud claim on the reliance element when the defendant did not “move for summary judgment on the grounds that there was no evidence of *reasonable reliance*.” See also *American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 436 (Tex. 1997) (Cornyn, J.) (“Just as with affirmative misrepresentations, the allegedly defrauded party must have *reasonably relied* on the silence to his detriment.”). Sections 537 through 547 of Restatement (Second) of Torts discuss *actual and justifiable reliance* required for fraud.

Additionally, in *Koral*, the Texas Supreme Court noted: “*In the absence of knowledge to the contrary, he would have a right to rely and act* upon such statements, and certainly the wrongdoer in such a case cannot be heard to complain that the other should have disbelieved his solemn statements.’ Therefore, only the insurer’s actual knowledge of the misrepresentations would have destroyed its defense of fraud. ‘The test always is, to avoid the defense of fraud as to a material fact upon the score of waiver, the company must know the identical statement as made is untrue.’” 802 S.W.2d at 651 (citations omitted). Thus, justifiable or reasonable reliance may extend beyond the third party context; courts of appeal appear to agree. See, e.g., *Graybar Elec. Co. v. Lem & Assocs. LLC*, No. 252 S.W.3d 536 (Tex. App.—Houston [14th Dist.], no pet.) (listing cases requiring reasonable/justifiable reliance); see also *Pleasant v. Bradford*, 2008 Tex. App. Lexis 4821 (Tex. App.—Austin 2008, pet. filed).

b. Waiver of reliance as inferential rebuttal

One court held that the trial court did not err in refusing to submit a waiver question, holding it was an “inferential rebuttal” of the reliance element. *Pleasant*, 2008 Tex. App. Lexis 4821.

c. Fraud by nondisclosure

Disclosure is not required absent a duty to do so. As reflected in the cases cited in comment to PJC

105.4, although courts of appeal routinely cite to four contexts (including partial disclosure) in which a duty arises, the Texas Supreme Court has not yet decided the scope of the duty to disclose. See TEXAS PATTERN JURY CHARGES 105.4 cmt; see also *Solutioners Consulting Ltd v. Gulf Greyhound Partners, Ltd.*, 237 S.W.3d 379, 385 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (listing four bases for duty to disclose). Nor has the court adopted the broad commercial duty set out in section 551 of the Restatement (Second) of Torts from which the four contexts derive. See *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001); *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 352 (Tex. 1995).

Mixing fraud theories, such as fraud by nondisclosure with affirmative fraud, when a duty to disclose is unclear thus *may* be a circumstance in the finding may fail post-verdict or on appeal. See, e.g., *Baribeau v. Gustafson*, 107 S.W.3d 52 (Tex. App.—San Antonio 2003, pet. denied) (finding error not preserved on improper mixing of actual and constructive fraud in a single question). That is, if post-verdict or on appeal, the court finds no duty to disclose, a broad-form submission could leave the court unable to tell whether the jury relied on a valid or invalid theory of liability. See *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000). One court held that submission of fraud by nondisclosure was not error over an objection of lack of duty when no definition or instruction was tendered on duty. *McCarthy v. Wani Venture, A.S.*, 2007 Tex. App. Lexis 5059 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (memo opin.). The court held so despite no finding of a fiduciary duty and an objection that no such duty existed as a matter of law. *Id.*

Another issue that may arise in a fraud by nondisclosure case relates to the “recklessness” standard. “[A] representation is recklessly made if the speaker knows that he does not have sufficient information or basis to support it, or if he realizes that he does not know whether or not the statement is true.” *Kenneco*, 962 S.W.2d at 527. But a promise of future performance is fraudulent if, at the time made, the maker had no intent to perform as promised. *Formosa Plastics Corp. USA v. Presidio Eng’rs & Contractors, Inc.*, 960 S.W.2d 41, 46-48 (Tex. 1998). As such, some courts define fraud in future performance cases as follows: “(1) the defendant made a promise to the plaintiff to perform a particular action in the future; (2) at the time the promise was made the defendant did not intend to perform; (3) the plaintiff relied on such promise; (4) the plaintiff acted upon the promise to its detriment; and (5) plaintiff suffered the damage thereby.” *Wolf v. Fernandez*, 733 S.W.2d 695, 697 (Tex. App.—San Antonio 1987, writ ref’d n.r.e.); see also *Campbell v. C.D. Payne and*

Geldermann Securities, Inc., 894 S.W.2d 411, 425-26 (Tex. App.—Amarillo 1995, writ denied) (upholding finding with “intentional” element); *Taylor v. Johnson*, 677 S.W.2d 680, 683 (Tex. App.—Eastland 1984, writ ref’d n.r.e.) (holding recklessly in one question would not suffice but subsequent question with intent finding sufficient to support claim on promise of no intent to perform promise).

The PJC patterns include the “reckless” standard from *Trehholm* (and other cases). PJC 105.2, 105.3B and 105.3D result in the following fraud submission:

Fraud occurs when—

- a. a party makes a material misrepresentation,
- b. the misrepresentation is made with knowledge of its falsity or *made recklessly without any knowledge of the truth* and as a positive assertion,
- c. the misrepresentation is made with the intention that it should be acted on by the other party, and
- d. the other party relies on the misrepresentation and thereby suffers injury.

“Misrepresentation” means:

A promise of future performance *made with an intent*, at the time the promise was made, not to perform as promised, or

A statement of opinion that the maker *knows to be false*.

TEXAS PATTERN JURY CHARGES 105.2, 105.3B, 105.3D; *see also Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 276 (Tex. 1995) (statement of opinion “may be actionable if the speaker knows it is false). *Cf. Bentley v. Bunton*, 94 S.W.3d 561, 591 (Tex. 2003) (in defamation context: “Knowledge of falsehood is a relatively clear standard; reckless disregard is much less so.”). In any given case, a practitioner should consider whether “recklessly” conflicts in any way with (1) “intent not to perform” or (2) “knows to be false.” *Cf. Forgetaboutit, Inc. v. Warner*, 2005 Tex. App. LEXIS 10018 (Tex. App.—Beaumont 2005, no pet.) (memo opin.) (holding negative answer to knowingly and intentionally under DTPA created fatal conflict with fraud finding on reckless and intentional that precluded formation of judgment).

7. Insurance

a. Statutory action for unfair claim settlement practices

The supreme court merged a statutory cause of action for unfair claim settlement practices with a

common law *Stowers* claim and listed the elements of the statutory claim, although authority in other contexts admonishes courts to track the statutory language. *Rocor Int’l, Inc. v. Nat’l Union Fire Ins. Co.*, 77 S.W.3d 253, 262 (Tex. 2002). The comment to PJC 102.18 provides a suggested instruction to reflect the court’s holding in *Rocor*. TEXAS PATTERN JURY CHARGES 102.18 cmt.

b. “Manifestation trigger” for coverage

In a mold case, one court held that the manifestation trigger applied to progressive property damage. *Allstate Ins. Co v. Hunter*, 242 S.W.3d 137 (Tex. App.—Fort Worth 2007, no pet.). The jury question had omitted the word “easily” from the question of whether the fungi was “capable of being perceived, recognized and understood”; the insured also had argued two trigger points. *Id.* Moreover, there was no evidence to support a finding of the proper trigger. As a result, the court reversed and rendered judgment for the insurer. *Id.* Thus, when a “trigger” is important, the submission should track the requirement.

8. Spoliation presumption.

Spoliation does not present an independent ground for recovery under Texas law. *Trevino v. Ortega*, 969 S.W.2d 950, 952 (Tex. 1998); *Rangel v. Lapin*, 177 S.W.3d 17 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (memo opin.). When faced with spoliation of evidence, however, “[a] trial judge should have discretion to fashion an appropriate remedy to restore the parties to a rough approximation of their positions if all evidence were available. These remedies must generally be fashioned on a case-by-case basis.” *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 721 (Tex. 2003) (citing *Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998)).²

² Justice Baker’s *concurring* opinion in *Trevino* discusses two types of instructions a trial court could use as a remedy:

...Depending on the severity of prejudice resulting from the particular evidence destroyed, the trial court can submit one of two types of presumptions. *See Welsh*, 844 F.2d at 1239. **The first and more severe presumption is a rebuttable presumption.** This is primarily used when the nonspoliating party cannot prove its prima facie case without the destroyed evidence. *See Welsh*, 844 F.2d at 1248; *Sweet*, 895 P.2d at 491; *Valcin*, 507 So.2d at 599. The trial court should begin by instructing the jury that the spoliating party has either negligently or intentionally destroyed evidence and, therefore, the jury should presume that the destroyed evidence was unfavorable to the spoliating party on the

Despite Baker's concurrence in Trevino trying to set out some guidelines, in *Wal-Mart*, the supreme court recognized that it had yet to fashion the standards applicable to spoliation charge instructions:

Our courts of appeals have generally limited the use of the spoliation instruction to two circumstances: [1] the deliberate destruction of relevant evidence and [2] the failure of a party to produce relevant evidence or to explain its non-production. Under the first circumstance, a party who has deliberately destroyed evidence is presumed to have done so because the evidence was unfavorable to its case. Under the second, the presumption arises because the party controlling the missing evidence cannot explain its failure to produce it. Although the parties argue their respective positions under this second circumstance at length, we need not decide whether a spoliation instruction is justified when evidence is

particular fact or issue the destroyed evidence might have supported. Next, the court should instruct the jury that the spoliating party bears the burden to disprove the presumed fact or issue. *See Welsh*, 844 F.2d at 1247; *Sweet*, 895 P.2d at 491-92; *Valcin*, 507 So.2d at 600; *Lane v. Montgomery Elevator Co.*, 225 Ga. App. 523, 484 S.E.2d 249, 251 (1997). This means that when the spoliating party offers evidence rebutting the presumed fact or issue, the presumption does not automatically disappear. It is not overcome until the factfinder believes that the presumed fact has been overcome by whatever degree of persuasion the substantive law of the case requires. *See Sweet*, 895 P.2d at 492 (quoting *Valcin*, 507 So.2d at 600-01).

...

The second type of presumption is less severe. It is merely an adverse presumption that the evidence would have been unfavorable to the spoliating party. *See H.E. Butt Grocery Co. v. Bruner*, 530 S.W.2d 340, 344 (Tex. Civ. App.—Waco 1975, writ dismissed by agr.); *see also, Vodusek*, 71 F.3d at 155; *DeLaughter*, 601 So.2d at 821-22; *Hirsch*, 628 A.2d at 1126. The presumption itself has probative value and may be sufficient to support the nonspoliating party's assertions. *See Bruner*, 530 S.W.2d at 344. However, it does not relieve the nonspoliating party of the burden to prove each element of its case. *See DeLaughter*, 601 So.2d at 822. Therefore, it is simply another factor used by the factfinder in weighing the evidence.

Trevino, 969 S.W.2d at 960-61 (Baker, J., concurring) (emphasis added).

unintentionally lost or destroyed, or if it is, what standard is proper. Rather we begin and end our analysis here with the issue of duty, the initial inquiry for any complaint of discovery abuse.

Id. at 721-22 (citations omitted). The court then held *Wal-Mart* had no duty to preserve the evidence and left open the question of what standards apply for deliberate vs. unintentional destruction of evidence.

Appellate courts frequently uphold a trial court's decision not to submit a spoliation instruction, holding no abuse discretion for the refusal where the evidence suggests the information in question did not exist or where the destruction was otherwise not intentional (or at least not negligent). *See, e.g., Whirlpool Corp. v. Camacho*, 251 S.W.3d 88 (Tex. App.—Corpus Christi 2008, pet. filed [BOM requested]) (holding even if duty to preserve, scene was preserved as practicably as possible such that no abuse of discretion in not submitting spoliation instruction); *Hopper v. Swann*, No. 12-02-00269-CV, 2004 WL 948526, (Tex. App.—Tyler Apr. 30, 2004, no pet.) (memo opin.) (no duty to preserve when no anticipated litigation and no abuse of discretion in not instructing on spoliation); *Rebel Drilling Co., L.P. v. Nabors Drilling USA, Inc.*, No. 14-02-00841-CV, 2004 WL 2058260, at *11-12 (Tex. App.—Houston [14th Dist.] Sept. 16, 2004, no pet.) (spoliation instruction not proper when no evidence requested files existed); *Dunn v. Bank-Tec South*, 134 S.W.3d 315, 326-27 (Tex. App.—Amarillo 2003, no pet.) (spoliation instruction not required on loss of defendant's videotape depicting accident; trial court could not reasonably infer its destruction was intentional because plaintiffs did not cite, and court did not find, any evidence indicating who destroyed or lost it or the circumstances surrounding its destruction or loss); *Ordonez v. M.W. McCurdy & Co. Inc.*, 984 S.W.2d 264, 273 (Tex. App.—Houston [1st Dist.] 1998, no pet.) (evidence destroyed after six months pursuant to normal policy did not support spoliation presumption); *see also Martinez v. Abbott Labs.* 146 S.W.3d 260, 270 (Tex. App.—Fort Worth 2004, pet. denied) (at summary judgment stage, spoliation presumption not appropriate where there was no duty to preserve evidence).

Moreover, submission of a spoliation instruction when it should not be given (such as in the absence of a duty to preserve the evidence destroyed) is harmful error. *Wal-Mart*, 106 S.W.3d at 723-24 (the "very purpose" of a spoliation instruction is to "nudge" or "tilt" the jury and "the likelihood of harm from the erroneous instruction is substantial, particularly in a closely contested case"); *Albertson's, Inc. v. Arriaga*, 2004 WL 2045389 (Tex. App.—San Antonio 2004,

no pet.) (memo opin.) (trial court erred in submitting spoliation instruction where a “reasonable explanation” was provided for evidence’s absence; error was harmless).

When the evidence establishes a duty and sufficiently egregious state-of-mind, appellate courts will uphold submission of a spoliation instruction. *Conditt v. Morato*, 2007 Tex. App. Lexis 7532 (Tex. App.—Fort Worth 2007, pet. denied) (memo opin.) (holding complaints on appeal regarding instruction not made in trial court and sufficient evidence supported instruction as sanction); *Cresthaven Nursing Residence v. Freeman*, 134 S.W.3d 214 (Tex. App.—Amarillo 2003, no pet.) (involving instruction similar to *Wal-Mart* instruction but holding no abuse of discretion when a scintilla of evidence supported theory of spoliation); *Morgan v. Verlander*, No. 08-00-00556-CV, 2003 WL 22360942, *8 (Tex. App.—El Paso, Oct. 16, 2003, pet. denied) (memo opin.) (evidence supported submission of instruction that “the failure to produce evidence within a party’s control and/or falsification or alteration of evidence raises a presumption that if the true evidence were produced it would operate against him”); *see also Cire v. Cummings*, 134 S.W.3d 835 (Tex. 2004) (upholding striking of pleadings for refusal to disclose and later destruction of secret audiotapes). *Cf. State v. Gonzalez*, 82 S.W.3d 322, 330 (Tex. 2002) (“We need not decide whether the spoliation instruction was erroneous. That is because Gonzalez produced no evidence showing that the missing logbook would have contained any information relevant to the “actual notice” issue under subsection (a)(3). Consequently, the jury could not presume that the missing logbook contained unfavorable evidence.”).

Until the applicable standards are clarified, a review of actual or requested submissions in other cases must be conducted to determine the appropriate language for a spoliation instruction under Texas law. *See Wal-Mart*, 106 S.W.3d at 723-24; *Roytberg v. Wal-Mart Stores, Inc.*, 111 S.W.3d 843 (Tex. App.—Dallas 2003, no pet.); *Albertson’s*, 2004 WL 2045389; *Cresthaven*, 2003 WL 253283; *Morgan*, 2003 WL 22360942; *Ordonez*, 984 S.W.2d at 273; *see also Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155 (4th Cir. 1995). The instructions should be reviewed both for the standard and for the result of the presumption.

9. Texas Securities Act

The submission of actions under the Texas Securities Act derives from the language of the statute and authority construing the language, not (as yet) from patterns. As noted above, statutory actions should generally track the statutory language. TEX. REV. CIV. STAT. art. 581-4 (defining terms for Texas

Securities Act). Most statutes, however, do not define all terms necessary for jury resolution. Certain requirements are also sometimes super-imposed on the statutory language in certain circumstances. Further, although the federal patterns discussed above may assist a drafter, the drafter should be aware that the Texas Securities Act does not wholly mirror the federal securities statutes in all respects. Below is a discussion of some of the fact and legal issues that may arise in a securities fraud action (a topic whose full treatment is beyond the scope of this article).

a. Securities

Some question may exist as to whether the question of whether securities are involved is a legal or fact issue. The weight of authority suggests a legal question. *See Grotjohn Precise Connexiones Intern., S.A. v. JEM Financial, Inc.*, 12 S.W.3d 859, 868 (Tex. App.—Texarkana 2000, no pet.) (“The determination of whether the documents are securities within the purview of our Texas statute is a matter of law and is determined de novo. *Campbell v. C.D. Payne & Geldermann Sec., Inc.*, 894 S.W.2d 411, 417-18 (Tex. App.—Amarillo 1995, writ denied); *S.E.C. v. Life Partners, Inc.*, 87 F.3d 536, 540-41 (D.C. Cir. 1996).”); *see also Griffitts v. Life Partners, Inc.*, No. 10-01-00271-CV, 2004 WL 1178418, at *1 (Tex. App.—Waco May 26, 2004, no pet.) (memo opin.) (trial court did not err in concluding by summary judgment that interests in life insurance policies did not constitute securities). *But see Bailey v. State*, No. 8-02-00422-CR, 2004 WL 1926706, at *1 (Tex. App.—El Paso Aug. 31, 2004, no pet.) (in criminal case, concluding “that whether a nominal certificate of deposit is or is not a security under the Texas Security Act depends on the facts and the determination of that issue must be left to a jury under instructions defining ‘securities’ under the Texas Security Act and Certificate of deposits under the Texas Business and Commerce Code”). If a fact question, reference should be made to the statutory definition along with the cases discussing the test for applying the definition to any particular fact pattern.

b. Seller

“A seller of securities may be liable [to the person buying from him] if it offers or sells a security by means of an untrue statement of a material fact or an omission of a material fact necessary to prevent statements made from being misleading. *See TEX. REV. CIV. STAT. ANN. art. 581-33A(2)* (Vernon Supp. 2001).” *Crescendo Investments, Inc. v. Brice*, 61 S.W.3d 465, 475 (Tex. App.—San Antonio 2001, pet.

denied);³ *Aegis Ins. Holding Co., LP v. Gaiser*, 2007 Tex. App. Lexis 2364 (Tex. App.—San Antonio 2007, pet. denied) (memo opin.).

“The Texas Securities Act applies to persons and corporations who offer or sell unregistered securities. *Flowers*, 472 S.W.2d at 115....The Act applies if the seller is any link in the chain of the selling process. *Rio Grande Oil Co. v. State*, 539 S.W.2d 917, 922 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref’d n.r.e.)” *Texas Capital Sec., Inc. v. Sandefer*, 58 S.W.3d 760, 775-76 (Tex. App.—Houston [1 Dist.] 2001, pet denied).

Thus, these provisions raise fact issues on, at a minimum, whether the seller offered or sold [the securities] to plaintiff by means of an untrue statement or omission of material fact. Moreover, defensive issues might exist regarding the plaintiff’s or defendant’s knowledge or “due diligence.” See TEX. REV. CIV. STAT. ANN. art. 581-33.

c. Control Person

A person who “directly or indirectly” controls the seller is also liable. TEX. REV. CIV. STAT. art. 581-33(F). “The TSA does not define ‘control person.’ However, control is used in the same broad sense as in federal securities law and means the possession, direct or indirect, of the power to direct or cause the direction of the management or policies of a person, whether through the ownership of voting securities, by contract, or otherwise. *Id.* [A state court] may also look to the federal courts’ interpretations of control under federal securities law in construing control person liability under the TSA. See *Frank v. Bear, Stearns & Co.*, 11 S.W.3d 380, 384 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).” *Barnes v. SWS Financial Services, Inc.*, 97 S.W.3d 759, 763-65 (Tex. App.—Dallas 2003, no pet.).

Primary liability will need to be established (regardless of whether the primary violator is a party). As a result, thought should be given to how to attain fact findings on those primary liability issues by one or more questions as a predicate for control person liability. Whether a party is a control person also may be a question of fact. *Sandefer*, 58 S.W.3d at 769. Additionally, the primary fact question as to the controlling person will pertain to liability for either actually inducing or participating (or at least holding the power to induce or participate) in the transaction. *Barnes*, 97 S.W.3d at 763-65; *Sandefer*, 58 S.W.3d at 769, *Frank*, 11 S.W.3d at 384. Study of these cases and the tests applied therein must be conducted to determine what fact issues must be submitted to the jury. Additionally, as with the seller, defensive issues

in the form of “good faith” or “due diligence” may also exist. TEX. REV. CIV. STAT. art. 581-33.

d. Aider

The Texas Securities Act also creates aider liability, also generally a fact issue for the jury. *Brice*, 61 S.W.3d at 475; see also TEX. REV. CIV. STAT. art. 581-33(F)(2). The supreme court addressed aider liability, which requires primary liability, in *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835 (Tex. 2005).

Two earlier cases had defined aider liability as follows: “Under the Texas Securities Act, to establish liability of an aider and abettor, a plaintiff must show the following: (1) a primary violation of securities laws occurred; (2) the aider had **general awareness** of its role in this violation; (3) the aider rendered substantial assistance in this violation; and (4) the aider either intended to deceive plaintiff or acted with reckless disregard for the truth of the representations made by the primary violator.” *Brice*, 61 S.W.3d at 475 (emphasis added); see also *Frank*, 11 S.W.3d at 384. In *Adderly*, the defendant argued that the trial court should have submitted a “general awareness” instruction regarding its role in the securities violation. *Id.* at 318. The supreme court agreed, holding that harmful error occurred by the trial court’s refusal to submit a “subjective awareness requirement.” *Id.* at 843. The court, however, held that the defendant need not have had any contact with the plaintiff for aider liability. *Id.* The supreme court agreed that a finding that the defendant lacked knowledge of the seller’s fraud absolved the defendant of primary liability but not of aider liability. *Id.*

10. Tortious interference with prospective relations

The Texas Supreme Court sought to clarify the scope of the tort of tortious interference with prospective relations (“TIPR”), but the clarification of scope left how to submit the tort claim to the jury cloudy. *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001). The submission in *Sturges* was almost identical to former PJC 106.2 (2000):

PJC 106.2	<i>Sturges</i>
Did D wrongfully interfere w/P’s prospective relations?	Did W wrongfully interfere w/P’s agreement to lease property to TP?
Wrongful interference occurred if: (a) a reasonable probability P would have entered K relations and (b) D intentionally prevented the K	Wrongful interference occurred if: (a) there was a reasonable probability the Ps would have entered K relation, and (b) W intentionally prevented the contractual

³ As to issuers, see Tex. Rev. Civ. Stat. Ann. art. 581-33C.

relations from occurring for purpose of harming P.	relationship from occurring with the purpose of harming Ps.
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The court noted that PJC 106.2 was “not entirely correct,” but did not confirm the elements of the claim or explain how to correct the submission in former PJC 106.2. *Id.* at 715. The court, however, did hold that the alleged interference must be conduct that is “independently tortious or unlawful. By ‘independently tortious’ [the court said it meant] conduct that would violate some other recognized tort duty . . . [—] conduct that is already recognized to be wrongful under the common law or by statute.” *Id.* at 713. Thus, in its opinion, the court referred to tortious, wrongful, unlawful, illegal, or statutory violations conduct that could support a TIPR claim. *Id.* at 713, 720-26. The court also noted: “[W]e do not mean that the plaintiff must be able to prove an independent tort. Rather, we mean only that the plaintiff must prove the defendant’s conduct would be actionable under a recognized tort.” *Id.* at 725. “Independently tortious or wrongful” thus encompasses quite a range of conduct.

Additionally, “[j]ustification and privilege are defenses in a claim for tortious interference with prospective relations only to the extent that they are defenses to the independent tortiousness of the defendant’s conduct.” *Sturges*, 52 S.W.3d at 725; *see also Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 209 (Tex. 2002); *Prudential Ins. Co. of Am. v. Financial Review Servs., Inc.*, 29 S.W.3d 74, 81 (Tex. 2000).

Relying upon *Sturges* and *Bradford v. Vento*, 48 S.W.3d 749 (Tex. 2001), the Waco Court of Appeals listed the elements of TIPR as follows:

- (1) a reasonable probability that the parties would have entered into a contractual relationship;
- (2) an ‘independently tortious or unlawful’ act by the defendant⁴ that prevented the relationship from occurring;⁵

⁴ In *Community Initiatives, Inc. v. Chase Bank of Texas*, 153 S.W.3d 270 (Tex. App.—El Paso 2004, no pet.), the El Paso Court recognized that “the supreme court has stated that a plaintiff may recover for tortious interference from a defendant who makes fraudulent statements about the plaintiff to a third party, without proving that the third party was actually defrauded.” The court, however, held that the evidence did not raise a fact issue on independently tortious because the letter at issue did not contain any false information and did “nothing more” than raise a “suspicion” that the defendants had been spreading false information about the plaintiff. *Id.*

- (3) the defendant did such act with a conscious desire to prevent the relationship from occurring or he knew that the interference was certain or substantially certain to occur as a result of his conduct; and
- (4) the plaintiff suffered actual harm or damage as a result of the defendant’s interference.

Ash v. Hack Branch Distrib. Co., 54 S.W.3d 401, 414-15 (Tex. App.—Waco 2001, pet. denied). Other courts have adopted those elements. *See, e.g., Pecos Petroleum Co. v. McMillan*, No. 04-02-00187-CV, 2003 WL 1823389 (Tex. App.—San Antonio Apr. 9, 2003, pet. denied) (memo opin.); *Allied Capital Corp. v. Cravens*, 67 S.W.3d 486 (Tex. App.—Corpus Christi 2002, no pet.); *Baty v. Protech Ins. Agency*, 63 S.W.3d 841 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). The quotes around “independently tortious or unlawful” indicate something more is required on that element. Thus, even if those elements are correctly stated, the question of what and how to submit the claim and defense is not apparent from the list.

TIPR therefore has several potential issues to contemplate when proposing requested questions, instructions, and definitions, such as what exactly are the elements, who holds the burden on the underlying conduct and defenses, how is the underlying tortious or wrongful conduct submitted (if it is), and how do you fashion a submission when a defense goes to some but not all of the wrongful conduct.

11. Instructions on liability or specific evidence

A generic consideration across claims concerns instructions that direct or tilt the jury to a certain result. When the underlying basis for the instruction is reversed or held erroneous on appeal, reversible error is generally found. *See, e.g., Scott Bader, Inc. v. Sandstone Prods., Inc.*, No. 01-05-00940-CV, No. 01-06-00593-CV, 2008 Tex. App. Lexis 1473 (Tex. App.—Houston [1st Dist.] Feb. 28, 2008, no pet. h.) (reversing sanctions that jury would be instructed on failure to meet product specification such that “binding instructions” on which damage finding was based resulted in harmful error); *Liberty Mut. Ins. Co. v. Camacho*, 228 S.W.3d 453, 459-61 (Tex. App.—

⁵ The Dallas court construed “this element to require, at minimum, that the tortious conduct constitute a cause in fact that prevented the prospective business relationship from coming to fruition in the form of a contractual agreement.” *COC Services, Ltd. v. CompUSA, Inc.*, 150 S.W.3d 654, 679 (Tex. App.—Dallas 2004, pet. denied).

Beaumont 2007, pet. denied) (reversing for erroneous instruction that jury was to “give no special weight” to the decision of the Texas Workers’ Compensation Commission when the jury could have given it weight and commented on weight of the evidence). As such, instructions that essentially direct a liability finding are made with a potentially high risk of reversal.

B. Causation, actual damages, exemplary damage and attorneys’ fees

1. Definition of producing (and perhaps proximate) cause.

The Texas Supreme Court recently provided a preferred definition of “producing cause” that differs from the definition that currently appears in the PJC patterns. *See Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007). The court recognized that it had in the past discussed producing cause as defined in PJC 70.1: “an efficient, exciting, or contributing cause that, in a natural sequence, produces the incident in question.” *Id.* The court determined that such language was incomplete and of little guidance to the jury, concluding:

Defining producing cause as being a substantial factor in bringing about an injury, and without which the injury would not have occurred, is easily understood and conveys the essential components of producing cause that (1) the cause must be a substantial cause of the event in issue and (2) it must be a but-for cause, namely one without which the event would not have occurred. This is the definition that should be given in the jury charge.

Id. The court stated that the second sentence of the PJC definition was correct: “There may be more than one producing cause.” *Id.* Because the cause-in-fact component of proximate cause has been likened to producing cause, *see Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 770 (Tex. 2007), a change to the definition of proximate cause also may be appropriate.

2. Inferential causation rebuttal instructions

a. Single rather than multiple inferential rebuttal instructions

Under Rule 277, inferential rebuttals are to be submitted as instructions. Over the years, five different variations of inferential rebuttals have developed. *See Dillard v. Tex. Elec. Coop.*, 157 S.W.3d 429, 434 (Tex. 2005). In *Dillard*, the defendant complained that the trial court had not submitted a sole cause instruction, instead submitting only an unavoidable accident instruction. In other words, the defendant wanted more than one inferential rebuttal instruction. The court first noted that an

inferential rebuttal instruction serves the purpose of eliminating the potential implication of the usual negligence question that the occurrence must have been caused by *someone’s* negligence. *Id.*

“With respect to inferential rebuttal issues, jurors need not agree on what person or thing caused an occurrence, so long as they agree it was not the defendant...Just as jurors may find against a defendant without agreeing on precise acts, they should be able to find the opposite without agreeing on the precise reason.” *Id.* In short, a broad-form negligence question with a single inferential rebuttal instruction suffices.

b. Omission of inferential rebuttal instruction

In *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448 (Tex. 2006) (Medina, J., with Jefferson, C.J., O’Neill, J., and Wainwright, J.), the supreme court considered the omission of an inferential rebuttal instruction on “new and independent cause.” The plurality concluded no evidence supported submission of the intervening cause instruction. *Id.* The concurring opinion referred back to the “rejection of automatic reversal” for inferential rebuttal instructions of *Dillard* and concluded the new and independent cause instruction would have made no difference under the facts of the case. *Id.* (Brister, J., concurring, with Willett, J.) (emphasis added). Finally, the dissent noted that new and independent cause is submitted as part of the proximate cause instruction and, when proper under the evidence, broad-form should not be used “to deny a party the correct charge to which the party would otherwise be entitled.” *Id.* (Johnson, J., dissenting, with Hecht, J., and Green, J.). The dissenters would have found the refusal of the new and independent language reversible error because it was not “harmless.” *Id.*

c. Inclusion of inferential rebuttal instruction

Similarly, when faced with the allegedly improper inclusion of an unavoidable accident inferential rebuttal instruction, the supreme court held not only that *Casteel* did not apply but that its inclusion was harmless. *Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753, 757 (Tex. 2006). The court found no harm when the instruction served only an explanatory role and it was “reasonable to conclude that [plaintiff] failed to carry his burden of proof. *Id.* The two-justice dissent noted that trash cans do not usually fall from shelving without human intervention and criticized the court’s harmless error reasoning as assuming that the jury would have found no damages in the second question if the predication had not instructed the jury not to answer. *Id.* at 762. Nevertheless, the remainder of the court had little difficulty finding inclusion of the instruction harmless.

See also *Gonzalez v. Cruz*, 2008 Tex. App. Lexis 5285 (Tex. App.—Corpus Christi 2008, no pet. h.) (memo. opin.) (inclusion of sudden emergency instruction proper and, even if not, harmless despite finding of no negligence); *Harris v. Vazquez*, 2008 Tex. App. Lexis 4117 (Tex. App.—Austin 2008, no pet. h.) (memo. opin.) (inclusion of unavoidable accident instruction proper and, even if not, harmless despite finding of no negligence).

3. Segregated damages

The general rule is that valid and invalid elements should not be combined in a single broad-form submission. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002);⁶ see also *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 772 (Tex. 2003) (rejecting defendant’s argument that the splitting of physical impairment into two separate elements violated the broad-form mandate of Rule 277 when no showing of harm). Segregation also may be necessary to calculate prejudgment interest or the exemplary damages cap and may be advisable if the a question exists whether an element of damage is recoverable (at all or for a particular claim). See TEX. CIV. PRAC. & REM. CODE § 41.008 (calculating cap with economic and noneconomic damages); TEX. FIN. CODE § 304.1045 (applies to final judgments signed or subject to appeal on or after Sept. 1, 2003, and precludes prejudgment interest on future damages); *Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003) (holding Texas does not recognize action for parent’s loss of consortium for non-fatal injury to child).

⁶ Courts of appeal routinely enforce the *Harris County* segregation-of-damage rule when no evidence supports an element of an unsegregated damage finding (at least when the error was preserved by objection to the form). See e.g., *Hong v. Bennett* 209 S.W.3d 795 (Tex. App.—Fort Worth 2007, no pet.); *Lozano v. Lozano*, 2003 WL 22076661 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (memo. opin.) (remanding when legally insufficient evidence of future medical care and charge failed to segregate damages); see also *Tagle v. Galvan*, 155 S.W.3d 510, 515-16 (Tex. App.—San Antonio 2004, no pet.) (applying *Harris County* to unsegregated finding of fact after bench trial). But, even if submitted broad-form, a court may find harmless error if each element is supported by the law and sufficient evidence. See, e.g., *Durham Transp. Co. v. Beetner*, 201 S.W.3d 859 (Tex. App.—Waco 2006, pet. denied); *Ontiveroas v. Lozano*, 2006 Tex. App. Lexis 3669 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (memo. opin.); *Manon v. Tejas Toyota, Inc.*, 162 S.W.3d 743, 755-56 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *Sunbridge Healthcare Corp. v. Penny*, 160 S.W.3d 230 (Tex. App.—Texarkana 2005, no pet.) (single damage line not segregating damages before and after date of fall did not commingle invalid elements of damage or deny proper review on appeal).

Additionally, dissenting in *Pleasant Glade Assembly of God v. Schubert*, 51 Tex. Sup. Ct. J. 1086 (June 27, 2008), Chief Justice Jefferson suggested that a damage instruction or proximate cause formulation could have served to protect religious freedom rights without precluding any recovery for damages suffered for intentional torts. That is, he suggested the jury could be instructed to award mental anguish for damages only for injuries that would have been suffered from a secular actor acting in a secular setting. *Id.*

As a result, unsegregated damage findings may still be used in some cases – particularly if such a finding is a strategy choice of plaintiff or defendant and, perhaps, if there is no objection to the form of the question or the evidence in support thereof. But segregated rather than broad-form damages are the general rule rather than the exception and additional segregation may serve further substantive purposes.

4. Attorneys’ Fees Segregation

When “attorneys’ fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. Intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated....[W]hen it cannot be denied that at least some of the attorneys’ fees are attributable only to claims for which fees are not recoverable, segregation of fees ought to be required....” *Tony Gullo Motors, LP v. Chapa*, 212 S.W.3d 299, 313-14 (Tex. 2006); see also *K-2, Inc. v. Fresh Coat, Inc.*, 2008 Tex. App. Lexis 2767 (Tex. App.—Beaumont 2008, no pet.) (memo. opin.) (holding failure to segregate waived in absence of objection); *Allen v. Am. Gen. Fin., Inc.*, No. 04-06-00273-CV, 2007 Tex. App. Lexis 9236 (Tex. App.—San Antonio Nov. 28, 2007, pet. filed [BOM requested]) (memo. opin.) (refusing to reinstate remitted amount when plaintiff failed to provide evidence that would have allowed trier of fact to award fees only on claim that could support fees).

Moreover, the jury is often instructed in the factors to consider the “results obtained.” When actual damages attributed to various theories of liability are reduced on appeal, the fee finding may result in harmful error. See *Barker v. Eckman*, 213 S.W.3d 306, 314 (Tex. 2006). In *Barker*, the court held: “Not every appellate adjustment to the damages which a jury considered as ‘results obtained’ when making attorney’s fees findings will require reversal. In this case, however, considering the absolute value of the difference between the erroneous and correct amounts of damage, and the fact that the correct damages were one-seventh of the erroneous damages,

we are not reasonably certain that the jury was not significantly influenced by the error.” *Id.* This issue is, in main, an evidentiary issue arising from a proper charge (rather than an erroneous charge).

5. Corporate liability for exemplary damages

Exemplary damages may only be recovered against a corporation when it is clear that the act giving rise to punitive damages was the act of “the corporation itself.” *See Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387 (Tex. 1997). Acts that are solely attributable to agents or employees must be distinguished from acts that are directly attributable to the corporation; respondeat superior liability is not enough to hold a corporation liable for punitive damages.

A corporation is liable for exemplary damages based on the conduct of its agent only if (1) the corporation authorizes the doing and the manner of the act, (2) the corporation ratifies the conduct, (3) the corporation recklessly hired an unfit agent, or (4) a vice principal commits the gross negligence. *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921-22 (Tex. 1998); *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 391-92 (Tex. 1997); *Purvis v. Prattco, Inc.*, 595 S.W.2d 103, 104 (Tex.1980); *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 630 (Tex.1967); *King v. McGuff*, 234 S.W.2d 403, 405 (Tex. 1950) (adopting Restatement (Second) of Torts) § 909). “‘Vice’ Principal encompasses: (a) corporate officers; (b) those who have authority to employ, direct, and discharge servants of the master; (c) those engaged in the performance of nondelegable or absolute duties of the master; and (d) those to whom the master has confided the management of the whole or a department or a division of the business.” *Ellender*, 968 S.W.2d at 922.

In the context of a bifurcated trial, one court held that the finding for corporate liability for punitive damages belongs in the liability phase of the trial. The court held it is error (but finding it harmless in that case when exemplary damages were not awarded) to instruct the jury concerning the master’s vicarious liability for exemplary damages during the second phase of the trial [as in PJC 110.34] because it deprives the plaintiff of its right to have a bifurcated trial. *See Minyard Food Stores, Inc. v. Goodman*, 50 S.W.3d 131, 142 (Tex. App.—Fort Worth 2001), *rev’d on other grounds*, 80 S.W.3d 573 (Tex. 2002). The court relied on section 41.009 of the CPRC language to hold that it required a “liability” finding in the first phase of the trial. *Id.*

Additionally, while all grounds need not (and should not in the absence of any evidence in support) be submitted, only the grounds submitted can support

any finding when some grounds are submitted.⁷ In *Hammerly Oaks*, the court instructed the jury:

[I]n order for Hammerly Oaks, Inc. to be grossly negligent, you must find that Rose Britton, Frank Smotek, Marilyn Montgomery, Roman Gonzales, and/or Gabriel Gonzalez were acting in their capacities as vice-principal of Hammerly Oaks, Inc. A ‘vice-principal’ of a corporation is a person who has the authority to hire, discharge, and direct employees of the corporation or who has the authority to manage the entire corporation or a department or division of its business.

The vice principal instruction did not include an instruction that a vice principal includes a person engaged in the performance of a nondelegable duty, nor did the plaintiff object. *See id.* at 393.

On appeal, the supreme court held that punitive damages were improperly awarded against the corporation because one employee listed (although a manager) did not commit the complained-of acts, other listed employees did not have the authority to hire, and plaintiff waived any argument that another employee was a vice principal based on his performance or nonperformance of a nondelegable duty by failing to object or request a definition of “vice principal” that included the concept of nondelegable duties. *See id.* at 393.

Finally, the patterns—not surprisingly—do not set out how to submit a nondelegable duty. Juries do not generally find “duties,” as those exist (or not) as a matter of law (even if a disputed fact issue must first be resolved). In *Hammerly Oaks*, the supreme court held as follows:

To the extent that a nondelegable duty is erected by the...ordinance, an issue we do not decide, [plaintiff’s] argument incorrectly assumes that the failure to keep the doors

⁷ While the burden of proof is on the plaintiff, the absence of an instruction altogether may not deter an appellate court from reviewing the evidence in favor of an implied finding. *See Borden, Inc. v. Rios*, 850 S.W.2d 821, 829 (Tex. App.—Corpus Christi 1993, writ granted w.r.m.) (“Any resulting liability for exemplary damages that Borden faces can be seen to comport with the ideals embodied in Restatement (Second) of Torts § 909.”); *Missouri Pacific R. Co. v. Lemon*, 861 S.W.2d 501, 521 (Tex. App.—Houston [14th Dist.] 1993, writ dismissed by agr.) (“plaintiff must establish the agent who was grossly negligent or who acted with malice was acting within the scope of employment and was something more than a mere servant”).

locked is a violation of the...ordinance as a matter of law. The jury was not asked to consider the ordinance, and we cannot say as matter of law that there was negligence per se when the door was left unsecured. Second, if the failure to keep the doors locked was a breach of a nondelegable common law duty to keep the premises safe for invitees such as [plaintiff]—a question we do not resolve in this case—such a claim is a premises defect claim. This case was not tried on a premises liability theory.

Thus, *Hammerly Oaks* suggests the charge should identify and submit to the jury whatever fact issues are necessary to resolve that a nondelegable duty is the basis for the jury's liability finding and as such can support imposing exemplary damages against the corporation.

6. Chapter 41 issues

One court recently suggested that complaints about procedural defects with submissions of the statutory factors for consideration in assessing punitive damages (including a "net worth" factor) requires complaint about the form of the submission. *See Bennett v. Reynolds*, 242 S.W.3d 866, 902 (Tex. App.—Austin 2007, no pet.). That holding may result in practitioners making an objection to the statutory/*Kraus* factors.

Another court held that no error was preserved in the absence of an objection to a lack of malice finding and the burden of proof. *See Morris v. Morris*, 2007 Tex. App. Lexis 5878 (Tex. App.—Corpus Christi 2007, no pet.). The court went on to review the sufficiency of the evidence as to the amount of damages.

Another court refused to consider a Chapter 41 "cap buster" argument when no jury finding was secured to support any specific provision, including the proper state-of-mind. *See Madison v. Williamson*, 241 S.W.3d 145, 161 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (citing additional cases holding the same).

House Bill 4 imposed a unanimity requirement in exemplary damage cases in amending section 41.003. The supreme court promulgated a new jury certificate pursuant to Texas Rule of Civil Procedure 226a. That certificate recognizes that no one-size-fits all jury certificate exists anymore and allows trial court discretion in fashioning appropriate certification.

Because the certificate is a "fill-in-the-blank," care should be used to ensure that the verdict returned is complete and free of conflicts and, if not, to poll the jury when necessary to preserve the points related to unanimity. For example, if you have a liability

question (e.g., No. 1) with two defendants, does a listing of "1" in the certification blank sufficiently certify a "yes" finding as unanimous? Probably not. Perhaps if it certified both 1(a) and 1(b). Other issues can arise but are beyond the scope of this paper. *See Karen Precella, Unanimous Jury Findings: How Difficult Can It Be?*, *The Advocate* (State Bar of Texas, Litigation Section, Winter 2004) (discussing other issues with unanimity requirements)

7. Out-of-state or other conduct (exemplary damages)

The United States Supreme Court held as follows: "A state cannot punish a defendant for conduct that may have been lawful where it occurred." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). "Nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." *Id.* However, "[l]awful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed...that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *Id.* at 1522-23.

State Farm does not clarify whether that holding requires only a limiting instruction with the admission of evidence and/or a limiting instruction in the court's charge. Limiting instructions in the charge, however, are used in other contexts. *See, e.g., Swarb v. State*, No. 01-02-01080-CV, 2003 WL 22862191 (Tex. App.—Houston [1st Dist.] Dec. 4, 2003, no pet.) (memo opin.) ("[T]he court's limiting instruction [on extraneous criminal offenses in criminal case] to the jury both after the testimony was admitted and again in the jury charge indicates that the trial court admitted the evidence for purposes other than character conformity."). But the more difficult question may be how to submit the instruction.

The Supreme Court later stressed again that the Constitution requires that "a court provide assurance that the jury will ask the right question, not the wrong one." *Phillip Morris USA v. Williams*, 127 S. Ct. 1057, 1064 (2006). When a significant risk exists that a jury may punish a party for a constitutionally impermissible reason, a court should give additional instruction to guard against that risk. *Id.* at 1065. Thus, although evidence that a defendant's conduct caused harm to persons not before the court might be relevant to the reprehensibility of conduct, the jury should be instructed that it may not punish the

defendant for any harm caused to nonparties. *Id.* 1060, 1064-65.

A *State Farm* or *Phillip Morris* pattern is difficult because of the variations of evidence and defendants in cases. Moreover, other questions exist, e.g., does a *State Farm* instruction apply only to out-of-state lawful conduct, what about out-of-state unlawful conduct against plaintiff or against others, how is what conduct is “lawful” or “unlawful” conveyed to the jury (and whose burden to prove and decide), how do choice/conflict of law principles come into play, what is the “nexus” required, etc. *But cf. Haggard Clothing Co. v. Hernandez*, 164 S.W.3d 407 (Tex. App.—Corpus Christi 2003) (holding no abuse of discretion in refusing to limit conduct considered in punitive damage question when “other acts” were admissible to show malice), *rev’d on other grounds*, 164 S.W.3d 386 (Tex. 2005).

C. Apportionment and indirect liability issues

1. Apportioning responsibility

House Bill 4 increased the number of persons who can be submitted in the proportionate liability question. That is, House Bill 4 changed the definition of a “responsible third party” to include the following: “any person who is alleged to have *caused or contributed to causing in any way the harm* for which recovery is sought, whether by negligent act or omission, by an defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these.” TEX. CIV. PRAC. & REM. CODE § 33.011(6) (2003) (emphasis added). A “responsible third party” previously was defined as one who could have been sued and “*is or may be liable* to the plaintiff for all or a part of the damages claimed against the named defendant or defendants.” *Id.* (prior to 2003 amendments, emphasis added). That change should not modify how the proportionate responsibility question is worded, just who should be submitted in the question. On the other hand, the prior version appeared to incorporate the same legal standard for RTPs as for defendants. The current version does not appear to do so—using a “caused or contributed to causing in any way the harm” standard and allowing criminal conduct as a basis for the RTPs inclusion. *Id.* § 33.004 (see Jane and John Doe provisions). The current version, however, does carry forward the proviso that sufficient evidence is required to support submission of a party in the proportionate responsibility question. As a result, some evidence of causation is required for submission; the question is what conduct and how it should be submitted.

The supreme court recently held:

Chapter 33 requires “[t]he trier of fact, as to each cause of action asserted, [to] determine

the percentage of responsibility...for [each claimant, defendant, settling person, and responsible third party who has been joined under Section 33.004] with respect to each person’s causing or contributing to cause in any way the harm for which recovery of damages is sought...” This statutory mandate is not discretionary; failing to correctly apply the law is an abuse of discretion.

FFP Operating Partners, L.P. v. Duenez, 237 S.W.3d 680, 694 (Tex. 2007) (citations omitted). *Cf. G.E. Co. v. Moritz*, 51 Tex. Sup. Ct. J. 1030 (June 13, 2008) (Green, J., dissenting) (disagreeing with refusal to apply proportionate responsibility in premises claim with open condition). As such, proper submission of a proportionate responsibility question requires an accurate assessment of what claims to which the question applies and of what parties the question should include; failure to submit properly often results in reversible error.

a. Claims to which Chapter 33 applies

Chapter 33 applies to any *cause of action based in tort* or the DTPA but expressly excludes certain workers’ compensation actions to recover exemplary damages, exemplary damages based on claims otherwise covered by Chapter 33, and actions for damages from methamphetamine manufacturing. TEX. CIV. PRAC. & REM. CODE § 33.002. Other actions may (or may not) fall under Chapter 33’s apportionment provisions.

For example, in *Southwest Bank v. Information Support Concepts, Inc.*, 149 S.W.3d 104 (Tex. 2004), the Texas Supreme Court held that “[t]he UCC contains a comprehensive and carefully considered allocation of responsibility among parties to banking relationships....Applying Chapter 33’s proportionate responsibility framework to claims involving Revised Article 3, therefore, could disrupt the UCC’s carefully allocated liability scheme....We should not disturb that decision by applying Chapter 33 to those UCC-based conversion claims for which the drafters and the Legislature chose not to apportion responsibility.”

In *JCW Electronics, Inc. v. Garza*, 51 Tex. Sup. Ct. J. 1104 (June 27, 2008), the supreme court rejected the argument that an implied warranty under article 2 can never be “a cause of action based in tort.” It also rejected the idea that *Southwest Bank* compelled a different result, noting that article 2, unlike article 3, does not have a “comprehensive fault scheme.” As a result, the court held that Chapter 33 applies to implied warranty claims, claimant includes the “decedent” (who was found strangled with a telephone cord in a holding cell), and a 60% proportionate

responsibility found as to the decedent barred any recover. Chief Justice Jefferson agreed with the applicability of Chapter 33 but clarified how he believed the implied warranty and negligence claims should be submitted for proportionate responsibility purposes.

Other courts have followed suit in other statutory contexts. *Davis v. Estridge*, 85 S.W.3d 308 (Tex. App.—Tyler 2001, pet. denied) (statutory fraud); *Coca-Cola Co. v. Harmar Bottling Co.*, 111 S.W.3d 287, 310 (Tex. App.—Texarkana 2003) (antitrust), *rev'd on other grounds*, 218 S.W.3d 671 (Tex. 2006); *Mims v. Dallas County*, No. 3-04-CV-2754-M, 2006 WL 398177, at *6-7 (N.D. Tex. Feb. 17, 2006) (magistrate holding that Chapter 33 would frustrate purposes of § 1983 claim, i.e., compensation and deterrence).

b. Claims, theories and parties” to be included in the apportionment question

The erroneous inclusion or exclusion of a claim, theory, or party within the proportionate responsibility question may be reversible error. *See Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 227-28 (Tex. 2005). In *Romero*, the issue was erroneous inclusion of a theory (i.e., certain conduct) in the scope of the apportionment question. The negligence question included a hospital (yes), two doctors (yes) and a nurse (no), and the malicious credentialing question included the hospital (yes). The jury apportioned responsibility amongst the hospital (40%), one doctor (40%), and the other doctor (20%). The jury thus considered two separate types of conduct in regard to the hospital, but the supreme court held the malicious credentialing claim failed. Because that claim failed along with other factors (such as closing argument), the supreme court concluded that an appellate court could not be reasonably certain that the jury was not influenced by the erroneous inclusion of the insupportable claim. *Id.*; *see also Heritage Houston Dev. v. Carr*, 199 S.W.3d 560 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (holding parent corporation should not have been submitted in proportionate responsibility question that included parent [45%], subsidiary [40%] and five individual defendants [collectively 5%] and remanding for new trial).

Thus, the *Romero* expectation upon re-trial would be that the 40/40/20 apportionment would change between the three defendants found to be negligent. *Id. Cf. Providence Health Ctr. v. Dowell*, 51 Tex. Sup. Ct. J. 935 (May 23, 2008) (Wainwright, J., dissenting) (urging that adult who committed suicide (but not his parents) should have been submitted in proportionate responsibility question based on pre-suicide conduct); *Isaacs v. Bishop*, 249 S.W.3d 100 (Tex. App.—Texarkana 2008, pet.

denied) (holding that trial court’s separate damage and proportionate responsibility question were not error when not based on same actions and lump sum damage and apportionment questions could have created error); *W. Reserve Life Assur. Co. v. Graben*, 233 S.W.3d 360, 379 (Tex. App.—Fort Worth 2007, no pet.) (memo opin.) (no error in excluding brokers from proportionate responsibility question when no predicate finding of liability).

In another case, the supreme court held (on rehearing) that the erroneous exclusion of a party from the proportionate responsibility question was reversible error. *Duenetz*, 237 S.W.3d at 694. In that Dram Shop Case, the trial court had severed the contribution claim against the intoxicated patron into a separate cause and did not submit the patron as a responsible third party in the main action. The court concluded that both the Dram Shop and the intoxicated patron should have been included in the negligence and proportionate responsibility questions. *Id.* The court reached that conclusion, in part, because it held that Chapter 33 mandates that a dram shop provider is not vicariously liable for the acts of an intoxicated patron but for those of its employees. *Id.* The court thus refused to analogize to respondeat superior or negligent entrustment. *Id.* at 686-87.

In the context of respondeat superior or negligent entrustment, the supreme court noted that liability is vicarious because the employer is in control of the employee or the vehicle owner controls the vehicle that is entrusted to another. *Duenetz*, 237 S.W.3d at 686-87. The Dallas Court of Appeals had earlier held that because the elements of the negligence and negligent hiring differ there was no harm in submitting additional instructions or two questions on the theories. *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643, 653 (Tex. App.—Dallas 2002, pet. denied). The court also held that, like respondeat superior, the employer need not be separately included in the proportionate responsibility question. *Id.* In a similar fact pattern, the Fort Worth Court of Appeals had held that “the proper submission of a negligent hiring claim, based upon sufficient evidence to warrant the submission, is to include the alleged negligent hiring or entrusting employer in an initial liability question and in the comparative negligence question.” *Bedford v. Moore*, 166 S.W.3d 454 (Tex. App.—Fort Worth 2005, no pet.). The court, however, held that erroneous submission harmless when the jury had found the plaintiff 60% responsible, barring recovery. *Id.*; *see also Wooldridge v. TXU Elec. Delivery Co.*, 236 S.W.3d 484 (Tex. App.—Dallas 2007, no pet.) (holding no reversible error from proportionate responsibility finding that included person for whom employee/independent contractor may not have been responsible).

Justice O'Neill's dissent in *Duenez* agreed with the *Rosell* holding and the *Bedford* reasoning (that the hiring or entrustment is a subpart of the agent's or actor's conduct). The majority did not disagree with but instead distinguished that analysis. As such, the *Duenez* discussion may support not submitting the principal in truly vicarious situations.

Criminal conduct of an employee (or third parties) also may come up in various contexts. For example, in *Fleming v. Astroworld, L.P.*, No. 01-06-00094-CV, 2007 WL 2446981 (Tex. App.—Houston [1st Dist.] Aug. 30, 2007, no pet.) (memo opin.), the trial court granted a summary judgment that the court of appeals affirmed in the absence of a duty with regard to the criminal conduct of others. If a duty to warn had existed but a lack of control over the third party, the case may have been analogous to a *Duenez* situation in which both parties would be submitted. Similarly, in the context of an employee's criminal conduct, analysis must be made with regard to the employer's responsibility, which is limited at common law and by Texas Civil Practice and Remedies Code § 41.005. Depending upon the circumstances it may be similar to a *Duenez* or a *Rosell* submission.

The omission of a responsible third party or a settling person from the charge can result in reversible error. See *Tex. Dept. of Public Safety v. Boswell*, No. 13-06-00327-CV, 2007 Tex. App. Lexis 7152 (Tex. App.—Corpus Christi Aug. 31, 2007, no pet.) (memo opin.) (holding omission of driver of car in second accident from proportionate responsibility question was error); *Omega Contracting, Inc. v. Torres*, 191 S.W.3d 828 (Tex. App.—Fort Worth 2006, no pet.) (omission of settling party error); *Olympic Arms, Inc. v. Green*, 176 S.W.3d 567 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (settling persons erroneously omitted); see also *In re Unitec Elevator Services Co.*, No. 01-05-00005-CV, 2005 WL 1309049, *10 -11 (Tex. App.—Houston [1st Dist.] June 2, 2005, orig. proceeding) (refusing to review failure to join RTP by mandamus but recognizing result would be remand if judgment entered against defendant); *In re Arthur Andersen*, 121 S.W.3d 471, 478 n.20 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding). (reviewing by mandamus refusal to join banks as RTPs to avoid waste of resources that would be necessitated by re-trial). Cf. *Hernandez v. Atieh*, 2008 Tex. App. Lexis 3737 (Tex. App.—Houston [1st Dist.] 2008, no pet. h.) (memo opin.) (holding allowing late designation of RTP harmless when jury answered in negative as to defendant). As a result, motions to designate should be reviewed and ruled on carefully.

A few cases pending before the supreme court could impact submission of proportionate responsibility questions. Although the responsibility of the plaintiff is generally submitted with the liability

question, the trial court in one case submitted the contributory negligence issue in a trifurcated portion of the trial. See *Columbia Med. Ctr. v. Hogue*, 132 S.W.3d 671, 678-79 (Tex. App.—Dallas 2004, pet. granted). Because the issue was ultimately submitted and answered in the negative, the court of appeals found any error harmless. *Id.* Petitioners argue in the supreme court that the liability issues are indivisible and the trifurcation unfairly nudged the jury to answer in the negative. In another apportionment case, the court held that objection to the apportionment question was not required for preservation if there was a no-evidence objection to one of the underlying negligence questions. See *Mo. Pac. RR Co. v. Limmer*, 180 S.W.3d 803, 822-23 (Tex. App.—Houston [14th Dist.] 2005, pet. granted). The court also held that one of the independently submitted theories of negligence was not an independent basis of liability and thus fell within *Romero*, requiring reversal. The opinions in those cases may provide insight into preservation of error, proportionate responsibility, and broad-form submission of negligence.

2. Joint enterprise

In a plurality opinion, the supreme court held that a joint enterprise instruction's third element should require a "community of pecuniary interest in [the common] purpose [of the enterprise], among its members." *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 530 (Tex. 2002) (plurality) (holding charge [and PJC 7.11 (2000)] erroneously stated third element as 'a common business or pecuniary interest').⁸ "While the broader definition of joint enterprise has been previously embraced by [the] Court, [it] determined that the definition set forth in the Restatement § 491, comment c is better reasoned and is adopted. By limiting the application of the doctrine to an enterprise having a business or pecuniary purpose, [the doctrine] will henceforth be avoiding the imposition of a basically commercial concept upon relationships not having this characteristic." *Id.* at 526. Thus, because "the charge's wording...in the disjunctive ... would [have] permit[ted] the jury to find that the third element of the joint enterprise test was met after finding either a 'common business interest' or a 'common pecuniary interest,'" the court held the submission to the erroneous. *Id.* at 527. Thus, "the

⁸ O'Neill (joined by Phillips) concurred in the judgment as follows: "Although I do not agree with all of the plurality's analysis, I concur in the judgment because I do not believe St. Joseph and the Foundation shared the requisite community of pecuniary interest in the residency program to establish a joint enterprise." 94 S.W.3d at 544 (emphasis added).

third element of a joint enterprise is, and has been since *Shoemaker*, whether there is “a community of pecuniary interest in [the common purpose of the enterprise], among the members [of the group].” *Id.* at 526.

3. Common law indemnity from agent

One court held that a question seeking common law indemnity based on respondeat superior that only asks about undefined “misconduct” is erroneous. *Vecellio Ins. Agency, Inc. v. Vanguard Underwriters Ins. Co.*, 127 S.W.3d 134 (Tex. App.—Houston [1st Dist.] 2003, no pet.). The underlying coverage dispute was settled by the insurer who subsequently sued its agent for indemnity based on alleged improprieties in issuing the homeowner’s policy without including the subject property. Thus, the noncoverage matter between the insurer and the insured was resolved without any tort findings as to the insurer’s agent’s allegedly fraudulent conduct. *Id.*

The trial court submitted the following question: Did Vanguard Underwriters Insurance Company have an obligation to defend Nicholas DeLeonardis solely as a proximate cause of the misconduct, if any, of Vecellio Insurance Agency?

The court of appeals held that the charge should have included (1) a predicate establishing the commission of a tort by an agent and (2) a question establishing that the defendant was vicariously liable for the agent’s tort under the theory of respondeat superior. *Id.*

4. Single Business Enterprise

a. Validity of theory

While several courts of appeal have affirmed single business enterprise as a basis for vicarious liability, the Texas Supreme court on several occasions has reiterated that it has not decided that a theory of “single business enterprise” is a necessary addition to Texas law regarding the theory of alter ego for disregarding the corporate structure. *S. Union Co. v. City of Edinburg*, 129 S.W.3d 74, 85-87 (Tex. 2003); *PHC-Minden, LP v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 173-174 (Tex. 2007) (“single business enterprise—a theory never endorsed”). Instead, in *Southern Union*, the court determined that article 2.21 of the Texas Business Corporation Act controlled and required actual fraud to reach the corporate shareholder. *Id.*

b. Actual fraud.

The court in *Southern Union* noted that any veil-piercing theory submitted under article 2.21 should

track the language of the statute. *Id.* The trial court submitted the following instruction:

You are instructed that a single business enterprise exists when two or more corporations associate together and rather than operate as separate business entities, integrate their resources to achieve a common business purpose.

In order to answer this question ‘Yes’, you must find that such single business enterprise was used for the purpose of perpetrating and did perpetrate an actual fraud on the City of Edinburg primarily for the direct personal benefit of the single business enterprise. ‘Actual fraud’ as used above means conduct involving dishonesty of purpose or intent to deceive.

Id. The court held that “[t]his instruction does not track article 2.21 precisely, but even under this instruction there is no evidence to support the finding that RGVG or any of the Valero entities perpetrated an actual fraud on the City.” *Id.* The case suggests a closer tracking of article 2.21 is appropriate.⁹ Moreover, the court has stressed that the statutory language “or any similar theory” includes more than alter ego or even single business enterprise, applying the statute to a ratification theory used to reach shareholders. *See Willis v. Donnelly*, 199 S.W.3d 262, 272-73 (Tex. 2006).

III. ISSUES OF FORM

Even if the basic substance is adequate, the form in which the questions and instructions may create

⁹ The definition of actual fraud submitted in *Southern Union* is derived from *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986). *Southern Union* does not discuss whether that definition applies under that statute. *See also Country Village Homes, Inc. v. Patterson*, 236 S.W.3d 413, 443 (Tex. App.—Houston [1st Dist.] 2007, pet. granted, judgment dismissed with prejudice) (holding separate fraud finding not required and reviewing evidence under *Castleberry* definition submitted in single business enterprise question). Some courts submit or require a traditional material misrepresentation. *See Bates v. de Tournillon*, No. 07-03-0257-CV, 2006 Tex. App. Lexis 956 (Tex. App.—Amarillo Feb. 3, 2006, no pet.) (memo opin.) (citing *Harco Energy, Inc. v. Re-Entry People, Inc.*, 23 S.W.3d 389, 393 (Tex. App.—Amarillo 2000, no pet.), and *Menetti v. Chavers*, 974 S.W.2d 168, 173 (Tex. App.—San Antonio 1998, no pet.)). Courts also hold that the fraud must relate to the transactions at issue. *See, e.g., Metal Bldg. Components, LP v. Raley*, No. 03-05-00823-CV, 2007 Tex. App. Lexis 186 (Tex. App.—Austin Jan. 10, 2007, no pet.) (memo opin.).

other issues. The extent of broad-form has varied over the years and may now be at a middle ground.

A. The transition from “always” to “if possible”

1. *Lemos* (1984): Broad issues “demanded”

“Prior to 1913 there was such a gradual accumulation of instructions considered helpful to juries, that an errorless charge became almost impossible. In 1913, to escape from the unsuccessful general charge, the Texas Legislature enacted article 1984a. The new procedure required the use of special issues that would be submitted separately and distinctly. In 1973, after sixty years, it became apparent that Texas courts, while escaping from the voluminous instructions to jurors, had substituted in the place of instructions, a jury system that was overloaded with granulated issues to the point that jury trials were again ineffective.” *Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984) (citations omitted). “Judicial history teaches that broad issues and accepted definitions suffice and that a workable jury system *demand[s] strict adherence to simplicity* in jury charges.” *Id.* (emphasis added).

2. *E.B.* (1990): Broad-form mandated “absent extraordinary circumstances”

Six years later, the court confirmed: “*Unless extraordinary circumstances exist*, a court must submit such broad-form questions.” *Tex. Dept. of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990) (emphasis added). “Broad-form questions reduce conflicting answers, thus reducing appeals and avoiding retrials. Rule 277 expedites trials by simplifying the charge conference making questions easier for the jury to comprehend and answer.” *Id.* Thus, the court held that broad-form is to be used “*in any or every instance* in which it is capable of being accomplished.” *Id.*

The court held that all ten jurors only needed to agree that a mother had endangered either of her two children “by doing one or the other of the things listed” in the Family Code. *Id.* That is, when “[t]he controlling question...was whether the parent-child relationship should be terminated,” the jury needed only to agree on the controlling issue (not necessarily one of the particular grounds listed). *Id.*

3. *Westgate* (1992): Broad-form not absolute

The court early in the process recognized that broad-form may not always be feasible. Thus, in evaluating a novel theory in a condemnation/inverse condemnation case, the court noted, “Although we adhere to the principles of *broad-form submission*, *it is not absolute*; it mandates broad-form submission ‘whenever feasible.’ Submitting alternative liability standards when the governing law is unsettled might

very well be a situation where broad-form submission is not feasible.” *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 n.6 (Tex. 1992) (citations omitted, emphasis added).

4. *Spencer* (1994): Broad-form not proper if too broad

The court next noted that overbroad questions or missing instructions may fail to properly limit the jury’s consideration to the legal and factual theories at issue and thus may not secure the proper findings for each theory of recovery or defense. In *Spencer v. Eagle Star Insurance Co. of America*, the jury question did not track the statutory language regarding insurance practices but instead used broad language that could have encompassed more than the statutory provisions. 876 S.W.2d 154, 157 (Tex. 1994). Specifically, the court held that the Insurance Code “by its express terms does *not refer to every such practice imaginable* but only to those specified by certain other statutes and regulations. Without an instruction specifying the actions for which [the insurer] could be liable, [the question] was improper.” *Id.* The court noted that “[l]iability cannot be imposed on any of the claims asserted...on *so broad and ill-defined a finding*.” *Id.* Similarly, failure to limit the questions and issues to the proper factual theories can result in insupportable findings. *Galveston County Fair & Rodeo v. Glover*, 940 S.W.2d 585, 586 (Tex. 1996) (“While the trial court had the discretion to submit questions separately...or to submit an instruction...limiting the jury’s consideration of that single broad issue, it did not have discretion to refuse to make any correction.”).¹⁰

5. *Hyundai* (1999): Broad-form proper as long as feasible

Next the court noted that a single question *may* suffice for multiple legal or factual theories in certain circumstances:

A single question may relate to multiple legal theories...Indeed, submission of a single question relating to multiple theories may be necessary to avoid the risk that the jury will become confused and answer questions inconsistently. The goal of the charge is to submit to the jury the issues for decision *logically, simply, clearly, fairly,*

¹⁰ See also *Tri v. JTT*, 172 S.W.3d 552 (Tex. 2005) (predication of a conspiracy finding on a sole negligence question resulted in improperly basing conspiracy on negligent conduct).

correctly, and completely. Toward that end, the trial judge is accorded broad discretion *so long as the charge is legally correct.*

Hyundai Motor Co. v. Rodriguez, 995 S.W.2d 661, 664 (Tex. 1999) (emphasis added). In that products liability case, two theories (strict liability and breach of warranty) were held to involve the same controlling issue on defect were functionally identical and a single question avoided a potential conflict. *Id.* The court also had earlier noted, that under broad-form, “defensive issues may be submitted by instruction or be otherwise combined with non-defensive issues, provided that the burden of proof is properly placed.” *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 651 (Tex. 1988).

6. *Casteel* (2000): Valid/invalid theory commingling infeasible

The court next faced with a charge that included a single question with a single answer that could have been based on any one of thirteen independent grounds. Of the five DTPA laundry list grounds included, the plaintiff did not satisfy the required consumer status on four of those grounds. The jury could have based its affirmative answer solely on one or more of the erroneously submitted theories. The court held that commingling valid and invalid theories of liability in a single question represents reversible error. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 387-88 (Tex. 2000). Further, the court advised that “when the trial court is *unsure whether it should submit a particular theory of liability, separating liability theories best serves the policy of judicial economy underlying Rule 277 by avoiding the need for a new trial when the basis for liability cannot be determined.*” *Casteel*, 22 S.W.3d at 390.

7. *Harris County* (2002): Valid/invalid damage element commingling infeasible

Next, relying upon its reasoning in *Casteel*, the court concluded:

Just as in 1923, a litigant today has a right to a fair trial before a jury properly instructed on the issues authorized and supported by the law governing the case....We conclude that the trial court erred in overruling [defendant’s] timely and specific objection to the charge, which *mixed valid and invalid elements of damages in a single broad-form submission*, and that such error was harmful because it prevented the appellate court from determining ‘whether the jury based its verdict on an improperly submitted invalid’ element of damage.”

Harris County v. Smith, 96 S.W.3d 230, 234 (Tex. 2002) (emphasis added). The court continued:

Neither our decision today nor *Casteel is a retrenchment from our fundamental commitment to broad-form submission....* When properly utilized, broad-form submission can simplify charge conferences and provide more comprehensible questions for the jury. But we recognize that it is *not always practicable to submit every issue in a case broadly.*

Id. at 235 (emphasis added).

8. *Guidry* (2005): General instructions with broad-form question may not obtain necessary findings

A variation of the “too broad” problem arose with a general instruction complaint. A recent supreme court case cautions reconsideration of how general instructions are used. *See Diamond Offshore Management Co. v. Guidry*, 171 S.W.3d 840 (Tex. 2005). In that case, course of employment instructions in a Jones Act case were correctly stated in the general instructions. A simple negligence question was asked without specific reference to those instructions. The supreme court concluded:

The plaintiff argues, as the court of appeals concluded, that the instructions clearly informed the jury of the requirement that [employees] were acting in the course of their employment. While that is true, the liability question made *no reference to the requirement or allowed the jury to take it into account.* The jury was asked to find only negligence and causation....While *the trial court could certainly have inquired about the separate issues of negligence, causation, and course of employment in a single question with proper instructions*, [defendant] was not obligated to request such a question. It was required only to object to the absence of any inquiry, which the trial court acknowledged [defendant] had done with its requested questions. Moreover, the jury was not asked whether [negligent co-employee] was acting in the scope of employment at the time of the accident, a prerequisite, the plaintiff concedes, for imposing vicarious liability on [defendant], his employer. Because the evidence on this issue, too, was conflicting,

the trial court erred in not requesting a finding from the jury.

Id. (emphasis added). The general instructions thus did not create any actual or implied findings of an element of the claim submitted.

9. Romero (2005): Single apportionment question tied to valid and invalid theories may make broad-form infeasible.

The court was next faced with a single apportionment question tied to two liability questions. Citing to *Casteel* and *Harris County*, the supreme court held that a single apportionment question that allowed the jury to consider both a valid (negligence) and invalid (malicious credentialing) theory in apportioning responsibility was error when one theory of liability failed for lack of evidentiary support. *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 227-28 (Tex. 2005). The court explained:

While in other instances a jury may simply ignore a factor in the charge that lacks evidentiary support, there are other instances – and this case is one – where the jury is as misled by the inclusion of a claim without evidentiary support as by a legally erroneous instruction. In all circumstances in which ‘[a] trial court’s error in instructing a jury to consider erroneous matters, whether an invalid liability theory or an unsupported element of damage, prevents the appellant from demonstrating the consequences of the error on appeal’, the same analysis must be applied.

Id.

In terms of the holding’s impact on broad-form, the supreme court noted:

[Plaintiffs] argue that we have retreated from the mandate of Rule 277 of the Texas Rules of Civil Procedure that issues must be submitted to a jury in broad form “*whenever feasible*”. This Court’s adoption of broad-form jury submissions was intended to simplify jury charges for the benefit of the jury, the parties, and the trial court. It was certainly *never intended to permit, and therefore encourage, more error in a jury charge*. We continue to believe, as we stated in *Harris County*, that ‘[w]hen properly utilized, broad-form submission can simplify charge conferences and provide more comprehensible questions for the jury.’ But *‘it is not always practicable to submit*

every issue in a case broadly,’ and broad-form submission cannot be used to broaden the harmless error rule to deny a party the correct charge to which it would otherwise be entitled.

Id. at 230 (emphasis added).

10. Dillard (2005): Single inferential rebuttal instruction compared to broad-form negligence question

As discussed above, the court first noted that an inferential rebuttal instruction serves the purpose of eliminating the potential implication of the usual negligence question that the occurrence must have been caused by *someone’s* negligence. *Dillard v. Tex. Elec. Coop.*, 157 S.W.3d 429, 434 (Tex. 2005). Justice O’Neill noted, “Just as jurors may find against a defendant without agreeing on precise acts, they should be able to find the opposite without agreeing on the precise reason.” *Id.*; see also *Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753, 757 (Tex. 2006). A broad-form negligence question with a single inferential rebuttal instruction suffices.

11. Summary: broad-form at middle ground

Under a broad-form-no-matter-what approach, whoever wins – plaintiff or defendant – is quite happy because appellate review of the evidence and findings becomes difficult if not impossible – multiple theories and defenses lumped together leave the jury with many alternative permutations to a “yes” or “no,” the reasons for which often can never be known. That problem must be balanced with the undeniable positives of broad-form – less conflicts, less jury confusion, and more simplicity to reduce the number of juror questions. The problem with seeking the balance is that some problems are not always entirely foreseeable (although other problems can be foreseen). A party and the trial court may believe that there is evidence to support a claim or element of damage, only to learn otherwise later on appeal. A party and the trial court also may believe a legal basis exists for submitting a claim, again only to learn otherwise on appeal. A frustration understandably arises in predicting such matters. Moreover, just like broad-form for broad-form sake can be unworkable, granulation for granulation sake likewise results in problems, including conflicts and juror confusion. Thus, courts and practitioners should strive to use broad-form whenever possible but recognize that sometimes the number of plaintiffs or defendants or theories or the novel nature of the proceedings render pure, simple broad-form unlikely to withstand scrutiny.

In short, broad-form has progressed from “always” to “if possible,” seeking to balance the need for simplicity to avoid conflicts and jury confusion with the rights of parties to proper proof and findings on all claims and defenses properly pleaded.

B. Broad-form issues to monitor

1. Commingling valid/invalid theories

As noted above, commingling valid and invalid theories of liability in a single question represents reversible error. *Casteel*, 22 S.W.3d at 387-88. Moreover, as noted above, *Harris County* involved failure of sub-parts of a damage question on legal sufficiency of the evidence grounds; as such, that case indicates that there may be circumstances in which broad-form does not work with multiple theories. *Harris County*, 96 S.W.3d 23-35.

Courts of appeals routinely draw the *Casteel* line between valid and invalid theories of liability with reversal resulting from improper commingling. See, e.g., *Valence Operating Co. v. Texas Genco, LP*, 2008 Tex. App. Lexis 1561 (Tex. App.—Waco 2008, no pet. h.) (holding valid claim and counterclaim both supported by evidence properly submitted together and no objection on that ground at trial); *Ridgecrest Ret. & Healthcare v. Urban*, 135 S.W.3d 757 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (including improper negligence per se claim with common law negligence required reversal under *Casteel*); *In re M.P.*, 126 S.W.3d 228 (Tex. App.—San Antonio 2003, no pet.) (holding one of two penal counts submitted in single question in juvenile case invalid and required reversal); *Kansas City S. Ry. v. Stokes*, 20 S.W.3d 45, 51 (Tex. App.—Texarkana 2000, no pet.) (when trial court submitted various duty instructions throughout charge, some of which were improper, court held reversal required under *Casteel* when court unable to determine whether jury relied on proper or improper instructions); *In re Stevenson*, 27 S.W.3d 195, 202 (Tex. App.—San Antonio 2000, pet. denied) (although not citing *Casteel*, holding that instructing jury that it could terminate parental rights under either of two grounds, one of which was improperly submitted, caused harmful error when court could not determine whether jury relied on proper theory).¹¹

¹¹ On the other hand, most courts of appeals are reluctant to overturn the broad-form mandate in the context of family law cases and instead continue to find *E.B.* binding. See, e.g., *In re S.T.*, 127 S.W.3d 371 (Tex. App.—Beaumont 2004, no pet.); *Carr v. Tex. Dept. of Prot. Servs.*, No. 03-03-00273-CV, 2004 WL 3252080 (Tex. App.—Austin Jan. 8, 2004, no pet.) (memo opin.). That result may fit with the negligence discussion below.

Similarly, most courts of appeals do not apply *Casteel* unless the error leaves the court unsure whether the jury based its finding on a valid legal **theory of liability**. See *Am. Title Co. v. Bomac Mortgage Holdings, L.P.*, 196 S.W.3d 903 (Tex. App.—Dallas 2006, *dism'd w.o. ref. merits*) (conspiracy and unconscionable DTPA claims submitted in single question not error when both valid claims supported by evidence); *North Am. Van Lines, Inc. v. Emmons*, 50 S.W.3d 103, 122-24 (Tex. App.—Beaumont 2001, *pet. denied*) (no error in combining multiple grounds under federal regulations for negligence per se claim when each theory valid); *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.*, 78 S.W.3d 425, 452-53 (Tex. App.—Tyler 2001, *pet. dismiss'd by agr.*) (no error when issue submitted valid theories and were supported by evidence); *Excel Corp. v. Apodaca*, 51 S.W.3d 686 (Tex. App.—Amarillo 2001) (holding *Casteel* inapplicable when (1) no alternative theories of liability were involved, (2) no unsettled law was involved, and (3) no theories of which the trial court was unsure whether to submit), *rev'd on other grounds*, 81 S.W.3d 817 (Tex. 2002).

2. Multiple defamatory statements.

Commingling allegedly defamatory statements in a single question is another area to monitor. For example, a finding of malice as to each statement may be necessary for constitutional or privilege reasons as to some statements but not others. Care thus should be used in lumping such multiple statements in broad-form questions. See, e.g., *Scott v. King*, 2008 Tex. App. Lexis 2215 (Tex. App.—Houston [1st Dist.] 2008, *pet. filed*) (memo opin.) (refusing to reach issue as not preserved). *But cf. Beaumont v. Basham*, 205 S.W.3d 608 (Tex. App.—Waco 2006, *pet. denied*) (rejecting complaint of commingling of allegedly defamatory statements when no reason offered for why invalid or improperly commingled).

3. Multiple bases of single claim: contract, negligence, employment.

Courts of appeals are less likely to apply *Casteel* to multiple bases for a single type of claim. For example, questions with different bases for breach of **contract** have been upheld. See *Recognition Communications, Inc. v. Am. Auto. Ass'n*, 154 S.W.3d 878, 885-87 (Tex. App.—Dallas 2005, *pet. denied*) (four bases of contract submitted in single question not reversible when no harm based on manner in which case tried); *Alamo Community College Dist. v. Browning Constr. Co.*, 131 S.W.3d 146, 161 (Tex. App.—San Antonio 2004, *pet. dismiss'd*) (no showing either of contract theories submitted invalid).

The same is true for the broad-form mandate for general **negligence** actions. *See, e.g., Christus Spohn Health Sys. Corp. v. De La Fuente*, No. 13-04-00485-CV, 2007 Tex. App. Lexis 6542 (Tex. App.—Corpus Christi Aug. 16, 2007, pet. vacated) (memo opin.) (holding argument that complaint related to theory included in negligence issue was complaint of lack of causation, noting *Casteel* not applicable to single liability theory); *Moore v. Mem. Hermann Hosp. Sys., Inc.*, 140 S.W.3d 870, 877 (Tex. App.—Houston [14 Dist.] 2004, no pet.) (different duties owed by employer to employee not required to be submitted in negligence question regarding safe workplace); *Columbia Med. Ctr. v. Bush*, 122 S.W.3d 835 (Tex. App.—Fort Worth 2003, pet. denied) (negligence only theory even if different factual bases); *see also Sunbridge Healthcare Corp. v. Penny*, 160 S.W.3d 230 (Tex. App.—Texarkana 2005, no pet.) (different factual bases of negligence did not support dividing single damage element into before/after date of fall).

As noted above, in *Dillard*, the supreme court noted, “Under broad-form submission rules, jurors need not agree on every detail of what occurred so long as they agree on the legally relevant result. Thus, jurors may agree that a defendant failed to follow approved safety practices without deciding each reason that the defendant may have failed to do so.” 157 S.W.3d at 434. In short, the opinion suggests that broad-form negligence is appropriate without listing bases. The court has since repeated that concept several times. *See also Jackson v. Axelrad*, 221 S.W.3d 650, 653 (Tex. 2007) (“each party asserted several reasons why the other was negligent, so jurors did not have to agree on any one reason so long as they agreed on the result”); *Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753, 757 (Tex. 2006) (“When, as here, the broad-form questions submitted a single liability theory [negligence] to the jury, *Casteel’s* multiple-liability-theory analysis does not apply.”); *see also TXI Transp. Co. v. Hughes*, 224 S.W.3d 870 (Tex. App.—Fort Worth 2007, pet. granted) (quoting *Bed, Bath & Beyond*).

The PJC recommends submitting **employment** discharge and discrimination on the basis of disability in a single question. The Corpus Christi court agreed that both theories are valid and can be submitted in a single question. *See Haggard Apparel Co. v. Leal*, 100 S.W.3d 303, 312 (Tex. App.—Corpus Christi 2002) (holding a lack of preservation by failing to object to the broad-form submission precluded reversal in any event), *rev’d on other grounds*, 154 S.W.3d 98 (Tex. 1004). The court held legally sufficient evidence supported the jury’s finding that “disability discrimination was a motivating factor in [the] decision to terminate” and that “disability was a motivating factor in [the] decision to discharge” the

plaintiff.” *Id.*; *see also S.W. Bell Tel. Co. v. Garza*, 58 S.W.3d 214 (Tex. App.—Corpus Christi 2001) (any error as to commingling discrimination and discharge theories waived when not brought to trial court’s attention), *aff’d*, 164 S.W.3d 607 (Tex. 2005). Because the court held that both claims were legally valid theories and supported by pleadings and evidence, a *Casteel* “broad-form is infeasible” issue did not come into play. *Leal*, 100 S.W.3d at 312; *see also Autozone, Inc. v. Reyes*, 2006 Tex. App. Lexis 11118 (Tex. App.—Corpus Christi 2006, pet. filed [BOM requested]) (memo. opin.) (both theories of discrimination and discharge valid and supported by evidence such no *Casteel* error). On the other hand, one court held *Casteel* did apply to different grounds in an employment context. *See Laredo Medical Group Corp. v. Mireles*, 155 S.W.3d 417 (Tex. App.—San Antonio 2004, pet. denied) (relying on *Casteel* in *Sabine Pilot* employment discharge case and holding reversal and remand required after holding subparts (a)-(c) supported by insufficient evidence even though subpart (d) supported by legally sufficient evidence). The question may be whether the subparts in *Mireles* represented theories of liability or bases of a single theory. That is, is it like *Casteel* or *Dillard*?

Overall, courts generally apply *Casteel* to independent theories as opposed to grounds of a single theory, although there could be circumstances in which that demarcation may not work.

4. Multiple defenses

Courts may apply *Casteel* to multiple defenses or parties combined in a single question. In *Pantaze v. Welton*, No. 05-96-00509-CV, 1999 WL 673448 (Tex. App.—Dallas Aug. 31, 1999, no pet.) (n.d.p.), when one broad-form excuse question with a single answer allowed the jury improperly to base its answer on waiver or properly to base its answer on equitable estoppel, the court held reversible charge error occurred. *Id.*; *see also Ramex Constr. Co. v. Tamcon Servs., Inc.*, 29 S.W.3d 135, 140 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (concurring opinion on rehearing) (when one party failed to plead waiver and other party pleaded waiver but charge failed to limit waiver instruction to proper party, concurring judge reasoned that court could not be satisfied that “properly submitted theories constituted the basis of the jury’s verdict”). Affirmative defenses may differ from inferential rebuttal instructions as discussed above and below. *Gibbins v. Berlin*, 162 S.W.3d 335 (Tex. App.—Fort Worth 2005, no pet.) (suggesting affirmative defenses unlike inferential rebuttal issues should be submitted by separate question). Multiple grounds for a defense such as waiver might fall within the same sphere as discussed above with contracts and negligence. *See J&E Oil*

Co. v. Atofina Petrochemicals, Inc., No. 13-02-00675-CV, 2005 Tex. App. Lexis 8885 (Tex. App.—Corpus Christi Oct. 27, 2005, no pet.) (memo opin.) (showing broad-form submission of waiver).

5. Multiple liability questions tied to single damage question

Prior to *Casteel*, courts also upheld a single damage finding when one or more of the multiple liability findings on which it was predicated failed. Since *Casteel*, some courts hold *Casteel* does not apply and no error results from the failure of one of the tied theories of liability. See *Manon v. Tejas Toyota, Inc.*, 162 S.W.3d 743 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (no request for remand and theories appeared supported); *Barnett v. Coppell N. Tex. Court, Ltd.*, 123 S.W.3d 804, 821-21 (Tex. App.—Dallas 2004, pet. denied) (linking three theories of liability to single damage question harmless despite failure of one theory when evidence supported one theory and damage resulting from same); *Union Pac. R.R. Co. v. Loa*, 153 S.W.3d 162, 173 (Tex. App.—El Paso 2004, no pet.) (no double recovery despite failure of one question); *Durban v. Guajardo*, 2002 WL 1042161 (Tex. App.—Dallas 2002, no pet.) (n.d.p.) (judgment can rest on damage finding if either of underlying liability findings find support in law and evidence); *Z.A.O., Inc. v. Yarbrough Drive Center Joint Venture*, 50 S.W.3d 531 (Tex. App.—El Paso 2001, no pet.) (even though several of questions on different theories of liability failed, remaining question also tied to same damage question did not leave the court wondering whether jury based its award on valid theory); *Colonial County Mut. Ins. Co. v. Valdez*, 30 S.W.3d 514, 518-19 (Tex. App.—Corpus Christi 2000, no pet.) (*Casteel* error in one question to which single damage question tied rendered harmless in light of survival of other liability question tied to same damage question); see also *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.*, 78 S.W.3d 425, 452-53 (Tex. App.—Tyler 2001, pet. dism'd by agr.) (any error from multiple liability/single damage submission waived when no objection made to damage question for predication on multiple theories).

Other courts find harm arises from the tying damages to multiple theories, one of which fails. See *First United Bank v. Panhandle Packing & Gasket Co.*, 190 S.W.3d 10 (Tex. App.—Amarillo 2005, no pet.) (linking negligence and conversion to single damage question caused reversible error when conversion claim failed); *Royal Maccabees Life Ins. Co. v. James*, 146 S.W.3d 340, 351-42 (Tex. App.—Dallas 2004, pet. denied) (linking seven theories to single damage question reversible particularly when mental anguish not recoverable for breach of

contract); *San Antonio Credit Union v. O'Connor*, 115 S.W.3d 82, 102 (Tex. App.—San Antonio 2003, pet. denied) (linking intentional infliction, malicious prosecution, and defamation to single damage question reversible error when intentional infliction claim failed as a matter of law); *Custom Residential Paint Contracting, Inc. v. Klein*, No. 05-98-01858-CV, 2001 WL 1318420 (Tex. App.—Dallas Oct. 29, 2001) (n.d.p.), (holding jury's DTPA finding defective and initially ordering remand for new trial even though contract question predicated on same damage finding left in tact but later accepting remittitur rather than remand), *judgment vacated* (based on finding of no harm in light of voluntary remittitui), 2002 WL 660200 (Tex. App.—Dallas Apr. 23, 2002).

The supreme court recently refused to reach a question involving a single damage question on contract and tort, holding instead the complaint was not preserved. *Equistar Chems. v. Dresser-Rand Co.*, 240 S.W.3d 864 (Tex. 2007).

6. Multiple liability questions tied to single apportionment question

The supreme court held that a single apportionment question that allowed the jury to consider both a valid (negligence) and invalid (malicious credentialing) theory in apportioning responsibility was reversible error when one theory of liability failed for lack of evidentiary support. *Romero v. KPH Consol., Inc.*, 166 S.W.3d 212, 227-28 (Tex. 2005).

7. Multiple liability theories with differing limitations tied to single damage question

Linking multiple theories to one damage question also might create issues if a limitations defense could bar recovery for one claim but not another. See *First United Bank v. Panhandle Packing & Gasket Co.*, 190 S.W.3d 10 (Tex. App.—Amarillo 2005, no pet.).

8. Multiple liability theories tied to a single penalty damage question

Similar to the actual damage context, linking multiple theories of liability (and thus conduct) to a single penalty question may also cause a potential error if one theory fails on appeal. *Schrock v. Sisco*, 229 S.W.3d 392 (Tex. App.—Eastland 2007, no pet.) (reversing when exemplary damage finding predicated on intentional infliction and assault findings but infliction claim failed); *San Antonio Credit Union v. O'Connor*, 115 S.W.3d 82, 102 (Tex. App.—San Antonio 2003, pet. denied) (malice finding linked to reversed intentional infliction claim required reversal of punitive damages); *Atrium Cos. v. Bethke*, No. 05-02-00293-CV, 2002 WL 31892204 (Tex. App.—Dallas Dec. 31, 2002, no pet.) (n.d.p.) (finding of

waiver of any *Casteel* error in linking single knowingly issue to multiple DTPA findings).¹² The issue is whether any penalty was assessed for conduct that does not create any liability.

IV. ISSUES IN PRESERVATION

The method of preserving errors in the form of the charge is not always clear. How those rules apply to form errors may depend on the type of error involved. The following progression indicates that a *Payne*-type preservation test may apply to errors of form.

A. The rules

The Texas Rules of Civil Procedure set forth the following general rules of preservation:

- | | |
|---|---------|
| a. <i>Defective</i> Question, Definition, or Instruction: | Object |
| b. <i>Omitted</i> Definition or Instruction: | Request |
| c. <i>Omitted</i> Question— | |
| Party's Burden: | Request |
| Opponent's Burden: | Object |

TEX. R. CIV. P. 274, 278, 279; *see Lyles v. TEIA*, 405 S.W.2d 725, 727 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.) (explaining requirements of rules); *see also Mason v. Southern Pac. Transp. Co.*, 892 S.W.2d 115, 117 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (written request serves same purpose as objection and thus in case of omitted question on which party does not hold the burden, request suffices).

B. The standards for preservation emerging from supreme court

1. *Payne* (1992): General rule is to make the trial court aware of the complaint to allow an opportunity for correction.

Those rules made preservation difficult, and the supreme court adopted a more practical approach in 1992:

The rules governing charge procedures are difficult enough; the caselaw applying them has made compliance a labyrinth daunting to the most experienced trial lawyer.... There should be but one test for determining if a party has preserved error in the jury charge, and that is *whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling*. The more specific requirements of the rules should be applied, while they remain, to serve rather than defeat this principle.

State Dept. of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235, 24-41 (Tex. 1992) (emphasis added).

When a pre-charge complaint is necessary, a party may decide to state its complaint repeatedly to “make the court aware” of the nature of the party’s complaint. For example, in *S.E. Pipe Line Co. v. Tichacek*, 997 S.W.2d 166, 172-73 (Tex. 1999), the supreme court held that a trial court’s failure to include a “pre-pooling” limiting instruction rendered the question defective in an oil and gas drainage case. The lessors argued that error was waived by a failure to object to the drainage issue. In deciding whether the error was preserved, the court looked to the entire record, not just the charge conference and requests.

Relying on *Payne*, the court noted that counsel had first raised the issue when asking to bifurcate the drainage issue from a bad-faith pooling claim. *Id.* Counsel further explained in detail the need to segregate the pooling and drainage issues in the charge when the court asked for a proposed charge. *Id.* While noting that those complaints at that early stage alone would not suffice, the court found that a re-urged objection at the charge conference to first submit the pooling issues before determining if any need existed to submit the drainage issue properly preserved the error. *Id.* In other words, after counsel explained the issue three times to the court, those explanations satisfied *Payne* by making the trial court plainly aware of the impact of the pooling issues on the drainage issue—even though counsel did not object at the charge conference to the form of the drainage question or make a written request to add a limiting instruction to the question.

Along the same line of analysis, discussions at the informal charge conference referenced during the formal charge conference have also assisted with establishing preservation under *Payne*. *See In re Stevenson*, 27 S.W.3d 195, 202 (Tex. App.—San Antonio 2000, pet. denied) (despite court responding to objection with “all right” rather than ruling, record indicated requested instruction discussed with trial court during informal charge conference and read into record during formal charge conference sufficed to

¹² *See also Green Tree Fin. Corp. v. Garcia*, 988 S.W.2d 776, 783-84 (Tex. App.—San Antonio 1999, no pet.) (failure to properly instruct on *Hammerly Oaks* bases allowed jury to award punitive damages against corporation based on a broad range of conduct including acts that could not satisfy *Hammerly Oaks* as a matter of law). *But cf. Haggard Clothing Co. v. Hernandez*, 164 S.W.3d 407 (Tex. App.—Corpus Christi 2003) (holding no abuse of discretion in refusing to limit conduct considered in punitive damage question when “other acts” were admissible to show malice), *rev'd on other grounds*, 164 S.W.3d 386 (Tex. 2005).

preserve error under *Payne*); *Green Tree Fin. Corp. v. Garcia*, 988 S.W.2d 776, 783-84 (Tex. App.—San Antonio 1999, no pet.) (refusing to rely on distinction between informal and formal charge conferences and holding that objection, reference to PJC, and court’s assurance that he had the requisite PJC together established that trial court was clearly aware of the defendant’s complaint).

Failure to bring forward a full record can result in a waiver or presumptions that preclude reversal on the basis of charge error. See, e.g., *Birnbaum v. The Law Offices of G. David Westfall*, 120 S.W.3d 470 (Tex. App.—Dallas 2003, pet. denied) (partial record limited to closing argument and sanctions hearing precluded review of complaint regarding to refusal to submit excuse defense), *cert. denied*, 125 S. Ct. 875 (U.S. 2005); *Munden v. Reed*, 2003 WL 57751 (Tex. App.—Dallas 2003, no pet.) (memo opin.) (partial record precluded review of alleged charge error).

2. *Casteel* (2000): Objection to inapplicability of theory may suffice

As the court has reviewed more broad-form scenarios, questions have arisen as to how such “form” errors are preserved. In *Casteel*, the supreme court held that an objection to each sub-part of same question on identical grounds was not necessary to preserve the error regarding the commingling of valid and invalid theories. Instead, the defendant’s *objection to the entire question that the plaintiff did not have consumer standing to bring any DTPA-based Article 21.21 claims sufficed to preserve the error*. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000) (emphasis added). The objection thus was not specifically to the form but to the substance of the question. However, modifying the substance would have corrected the form problem.

3. *In re BLD* (2003): No fundamental charge error

Unpreserved complaints about the broad form of a charge will not be heard, even as fundamental error (in a family law case). *In re B.L.D.*, 113 S.W.3d 340 (. 2003) (Tex emphasis added).

Given this need to preserve error, courts of appeal continue to routinely find waiver of charge error. See, e.g., *Bobbora v. Unitrin Ins. Servs.*, 2008 Tex. App. Lexis 2928 (Tex. App.—Dallas 2008, no pet.) (holding complaint on appeal did not match objection); *Akin, Gump, Strauss, Hauer & Feld, LLP v. Nat’l Dev. Corp.*, 232 S.W.3d 883, 894 (Tex. App.—Dallas 2007, no pet.) (no objection to measure of damage) *KMG Kanal-Muller-Gruppe Deutschland GMBH & Co. v. Davis*, 175 S.W.3d 379 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (waiver when no objection on manner in which parties submitted in

liability question); *Texas First Nat’l Bank v. Ng*, 167 S.W.3d 842, 865 (Tex. App.—Houston [14 Dist.] 2005, pet. granted, judgment vacated w.r.m.) (request not in clerk’s record or dictated in record resulting in inability to show offered in substantially correct form); *Greenburg Traurig of N.Y. P.C. v. Moody*, 161 S.W.3d 56, 81 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (no objection regarding omission of intent element from conspiracy definition); *The Ray Malooly Trust v. Juhl*, 2004 WL 1375542 (Tex. App.—El Paso 2004, pet. denied) (memo opin.) (party did not object or request but additionally record indicated trial court believed party wanted it both ways – not have it in but preserve error for instruction on lost profits not being included); *In re S.S.G.*, 153 S.W.3d 479 (Tex. App.—Amarillo 2004, pet. denied) (no objection as to time period of acts jury could consider).

4. *In re AV* (2003): No fundamental charge error

In a family law case, the supreme court held that error was not preserved when the complaining party “did not object in the trial court to the form of the charge” and “did not argue to the trial court that because the charge was based on a theory without evidentiary support, the charge should not be submitted in broad form.” *In re A.V.*, 113 S.W.3d 355 (Tex. 2003).

5. *Harris County* (2002): Objection on no-evidence-to-support-element ground may suffice

In *Harris County*, the supreme court may have relied on a no evidence objection to an element of damage to find error preserved error as to the broad-form submission of valid and invalid elements of damage. *Harris County*, 96 S.W.3d at 236. The court of appeals noted that the objection to form was not complained of on appeal.¹³ The supreme court noted an objection to form and a no evidence objection were made. Then stated, “Harris County pointed out to the trial court that particular elements of damage had no support in the evidence and should not be included in the broad-form”—apparently referring to a no evidence objection. *Id.* at 231-32. Ultimately, the

¹³ The court of appeals had noted the following: “In addition to objecting to including the challenged elements of damages in the charge, Harris County objected to submitting the elements of damages globally, and asked the trial court to segregate each element of damages by listing each separately, with a blank beside each for any amount the jury might award. The trial court overruled this objection and submitted the elements globally, but Harris County has not challenged this ruling on appeal.” 66 S.W.3d 326, 330 n.2 (Tex. App.—Houston [1 Dist.] 2001).

court held “[a] *timely objection, plainly informing the court that a specific element of damages should not be included in a broad-form question because there is no evidence to support its submission, therefore preserves error for appellate review.*” *Id.* at 236. If the no-evidence objection were granted, the element would have been removed from the charge and the broad-form finding would not have been reversible error if unsupported elements were removed.

6. Romero (2005): Objection to liability question may preserve complaint about apportionment question

In *Romero*, the defendant objected that there was no evidence to support a malicious credentialing claim and that the apportionment question that allowed the jury to consider both the credentialing and negligence claims to apportion responsibility would not support rendition of a proper judgment. 166 S.W.3d at 225-229. The trial court offered to cure the problem by submitting two apportionment questions. *Id.* Neither the plaintiffs nor the defendant wanted two such questions. *Id.* In assessing an “invited error” type waiver argument, the supreme court held that the defendant was not required to accept the two apportionment questions because *the solution would have been the dropping of the insupportable claim in response to the valid objection to the claim’s submission.* *Id.* In summary of its preservation discussion, the court noted as follows:

We need not consider whether [the defendant] was required to object not only to the lack of evidence for the malicious credentialing claim but also to the form of the apportionment question that included the claim because it did both. Also, neither the [plaintiffs nor the defendant] argues that the error preservation question is answered by Rule 278 of the Texas Rules of Civil Procedure, and so we do not consider the impact of that rule here.

A footnote to that paragraph contains the following cite and parenthetical: “*Pan Eastern Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1124 (5th Cir. 1988) (calling the issue of whether an objection must be made to the form of the submission ‘a close and difficult question’).” The footnote cites to Rule 278 merely quotes the language of the rule without further annotation or discussion. Thus, depending upon the complaint, the supreme court may find preservation based on a complaint regarding the substance, the evidence, or the form.

7. Coley (2007): Payne may impact what is “substantially correct” form of request

In *Baylor University v. Coley*, 221 S.W.3d 599 (Tex. 2007), the following issue was presented to supreme court: “May a party preserve a complaint about jury charge error by submitting a proposed instruction which is erroneous and merely brings to the trial court’s attention the party’s contention that it disagrees with the trial court’s proposed instruction?” The majority held that error was preserved (citing *Payne* and ignoring imperceptible differences) but holding the plaintiff ultimately was wrong on the law. *Id.* At 605. The dissenters would have held the proffered request not in substantially correct form as a comment on the weight of the evidence.

8. Equistar (2007): No-evidence directed verdict without objection to single damage question or instruction did not preserve economic loss rule complaint.

The supreme court refused to hold that a single damage question (combining tort and contract damages) was reversible error when the defendant did not plead the economic loss rule, make any motions referencing it, or objecting to the jury charge on those grounds. *Equistar Chems. v. Dresser-Rand Co.*, 240 S.W.3d 864 (Tex. 2007).

C. Objection to form traditionally expected by courts of appeals

Most courts of appeal traditionally have required a specific objection as to form to preserve a complaint about broad-form submission on invalidity or evidentiary grounds. *See Kemp v. Havens*, 2006 Tex. App. Lexis 3655 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (memo opin.) (complaint regarding failure to segregate damages for separate injuries not preserved without objection to lump sum damage answer form); *Tesfa v. Stewart*, 135 S.W.3d 272 (Tex. App.—Fort Worth 2004, pet. denied) (lack of objection to form of damage question in not requiring granulated damages waived any error); *Barnett v. Coppell N. Tex. Court, Ltd.*, 123 S.W.3d 804, 821-21 (Tex. App.—Dallas 2004, pet. denied) (any error in linking three theories of liability to single damage question when fraud finding failed waived when no complaint about such predication made in trial court); *Holmes v. Concord Homes, Ltd.*, 115 S.W.3d 310, 313 (Tex. App.—Texarkana 2003, no pet.) (failure to request segregation of attorneys’ fees between claims and defendants at the time evidence introduced or with charge waived any error); *Baribeau v. Gustafson*, 107 S.W.3d 52 (Tex. App.—San Antonio 2003, pet. denied) (failure to object to any improper commingling of fraud theories waived in the absence of a *Casteel* objection); *Atrium Cos. v. Bethke*, 2002 WL 31892204 (Tex. App.—Dallas 2002, no pet.)

(n.d.p.) (finding waiver of any *Casteel* error in linking single knowingly issue to multiple DTPA findings); *Columbia HCA Healthcare Corp. v. Cotter*, 72 S.W.3d 735 (Tex. App.—Waco 2002, no pet.) (failure to object to segregation of damages between past and future waived any issue on point); *El Paso Ref., Inc. v. Scurlock Permian Corp.*, 77 S.W.3d 374, 386-87 (Tex. App.—El Paso 2002, pet. denied) (finding *Casteel* inapplicable without objection to inclusion of invalid theory in charge); *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.*, 78 S.W.3d 425, 452-53 (Tex. App.—Tyler 2001, pet. dismissed by agr.) (any error from multiple liability/single damage submission waived when no objection made to damage question for predication on multiple theories); *Molina v. Moore*, 33 S.W.3d 323, 328 (Tex. App.—Amarillo 2000, no pet.) (even if *Casteel* extended to require separate answers to elements of damage, party waived error by failing to object to the form).

After *Harris County* and *Romero*, courts of appeal may be less stringent in requiring an objection to form. See *Mo. Pac. RR Co. v. Limmer*, 180 S.W.3d 803, 822-23 (Tex. App.—Houston [14th Dist.] 2005, pet. granted) (objection to negligence question preserved complaint about single apportionment question); *Iron Mountain Bison Ranch, Inc. v. Easley Trailer Mfg., Inc.*, 42 S.W.3d 149, 156-57 (Tex. App.—Amarillo 2000, no pet.) (despite lack of objection on broad-form format, court found objection as to lack of evidentiary support sufficient to preserve *Casteel* error).

One error in form can arise from the predication or conditioning of questions in the charge. Failure to complain about the conditioning can waive error and result in losing the claim or defense. For example, in *Floating Bulk Terminal, LLC v. Coal Logistics Corp.*, 2002 WL 1733670 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (n.d.p.), the jury answered that the defendant had not complied with its fiduciary duty (i.e., “No”) but did not answer the damage issue because it was conditioned on an affirmative finding in the breach question (i.e., “Yes”). The plaintiff moved for a mistrial but did not object to an incomplete verdict. As a result, when the court of appeals reversed the breach of contract recovery, the court held that rendition or remand on the alternate theory of recovery was not possible and instead rendered a take-nothing judgment. *Id.* (citing *Osterberg v. Peca*, 12 S.W.3d 31, 56 (Tex. 2000); see also *Gerdes v. Kennamer*, 155 S.W.3d 523, 534-35 (Tex. App.—Corpus Christi 2005, pet. denied) (no complaint at trial that conspiracy finding not conditioned on affirmative fraud finding)).

On the other hand, the supreme court held that lack of predication of a conspiracy question on a recognized tort could support a judgment if the

evidence supported any of the torts. *Cf. Chu v. Hong*, 249 S.W.3d 441 (Tex. 2008). The court ultimately held, however, that none of the submitted torts were recognized in the context husband-wife division of property context.

D. The lingering object and/or request issue

1. Objection only

“A request by either party for any questions, definitions, or instructions shall be made separate and apart from such party’s objections to the court’s charge.” TEX. R. CIV. P. 273. “[O]bjections shall in every instance be presented to the court in writing, or be dictated to the court reporter in the presence of the court and opposing counsel, before the charge is read to the jury.” TEX. R. CIV. P. 272.

An objection “must point out distinctly the objectionable matter.” TEX. R. CIV. P. 274. That is, the objection must identify *what* part of the question, instruction, or definition is objectionable. See *Castleberry v. Branscum*, 721 S.W.2d 270, 276-77 (Tex. 1986); *Carlton v. Cobank, Inc.*, 2003 WL 1728493 (Tex. App.—Amarillo 2003, pet. denied) (memo opin.) (failing to explain how question was erroneous waived error).

An objection must point out “the grounds of the objection.” TEX. R. CIV. P. 274. That is, a party must give the reasons *why* the part of the a matter is objectionable. General objections do not suffice. See, e.g., *City of Brenham v. Honerkamp*, 950 S.W.2d 760, 766 (Tex. App.—Austin 1997, writ denied) (objection that definition “not the law in Texas” insufficient); *Ron Craft Chevrolet, Inc. v. Davis*, 836 S.W.2d 672, 675 (Tex. App.—El Paso 1992, writ denied) (objection that “no pleadings to support the submission” so broad as to be meaningless).

The objection at trial must also match the complaint on appeal. See, e.g., *Centurion Planning Corp. v. Seabrook Venture II*, ___ S.W.3d ___, 2004 WL 2823125 (Tex. App.—Houston [1st Dist.] 2004, no pet.) (no evidence complaint did not match complaint on appeal about defective instruction on fraudulent lien); *Delaney v. Scheer*, 2003 WL 247110 (Tex. App.—Austin 2003, no pet.) (memo opin.) (objection that does not match complaint on appeal waives any error); *Celanese Ltd. v. Chem. Waste Mgmt., Inc.*, 75 S.W.3d 593, 600-01 (Tex. App.—Texarkana 2002, pet. denied) (objection that the measure of damage is improper does not match complaint that some elements of damage are omitted and thus does not preserve complaint on omission); *El Paso Ref., Inc. v. Scurlock Permian Corp.*, 77 S.W.3d 374, 383 (Tex. App.—El Paso 2002, pet. denied) (“party confined to jury instruction objection made at trial; any variant complaint on appeal is waived”); *Lyondell Petrochemical Co. v. Kirkland*, 1999 WL 1208506 (Tex. App.—Houston [1st Dist.] 1999, pet.

denied) (n.d.p.) (objection at trial that instruction improperly commented on weight of evidence does not preserve error on whether instruction informed jury of the legal effect of its answer).

“No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only.” TEX. R. CIV. P. 274. Also, “[w]hen the complaining party’s objection . . . is, in the opinion of the appellate court, obscured or concealed by voluminous unfounded objections, . . . such objection . . . shall be untenable.” TEX. R. CIV. P. 274. A party should identify specifically by objection for each question, instruction, or definition what is objectionable and why.

The court should “endorse the rulings on the objections if written or dictate the same to the court reporter in the presence of counsel.” TEX. R. CIV. P. 272. Rule 272, though, presumes that “the party making the objections presented the same at the proper time and excepted to the ruling thereon.” TEX. R. CIV. P. 272. As a result, the supreme court held that “if an objection is articulated and the trial court makes no change in the charge, the objection is, of necessity, overruled.” *Accord v. Gen. Motors Corp.*, 669 S.W.2d 111, 114 (Tex. 1984).

Objections continue to suffice for defective submissions. *See, e.g., Holubec v. Brandenberger*, 111 S.W.3d 32 (Tex. 2003) (although request did not “precisely” track the statutory language, objection sufficient to preserve complaint about defect in nuisance question); *Miga v. Jensen*, 96 S.W.3d 207, 212-13 (Tex. 2002) (“Twice during the charge conference [the defendant] asserted that [the plaintiff’s] damages were limited to the value of the stock at the time of breach; the trial court interrupted [the defendant] the second time, saying, ‘you’ve got your objection on the record.’”); *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000) (objection to entire question that plaintiff did not have consumer standing to bring any DTPA-based Article 21.21 claims sufficiently specific to preserve error and objection to each sub-part of same question on identical grounds not necessary to preserve error).

2. Request only

“A request by either party for any questions, definitions, or instructions shall be made separate and apart from such party’s objections to the court’s charge,” and must be in writing in substantially correct form. TEX. R. CIV. P. 273; 278; *see Placencio v. Allied Indus. Int’l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987) (“[Substantially correct] means one that in substance and in the main is correct, and that is not affirmatively incorrect”); *Woods v. Crane Carrier Co.*, 693 S.W.2d 379-80 (Tex. 1985) (request dictated into record during objections did not preserve complaint);

Aransas County Navigation Dist. No. 1 v. Johnson, 2008 Tex. App. Lexias 3153 (Tex. App.—Corpus Christi 2008, no pet. h.) (memo opin.) (holding proffered definition of “seaward movement” in boundary dispute not substantially correct under *Placencio*). Relying on *Payne*, some courts (particularly if other parts of the record demonstrate the trial court understood the issue) may now give a slightly broader latitude as to how correct a request must be.

Although the court generally must endorse requests as “Refused” or “Modified as follows:” and sign the same officially, TEX. R. CIV. P. 276, the record sometimes may reflect a ruling without signature. *Dallas Market Ctr. Dev. Co. v. Liedeker*, 958 S.W.2d 382, 386-87 (Tex. 1997) (holding that trial court’s statement on the record that the court would note its refusal on the requests preserved error despite the fact that the court never endorsed and signed the requests). *But cf. Kennedy Ship & Repair, LP v. Pham*, 210 S.W.3d 11, 26-27 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (no record of discussing instruction on materiality not in final charge insufficient to preserve error in the absence of any express oral or written ruling on request).

Although requests may not be obscured or concealed by minute differentiations or numerous unnecessary requests, the supreme court held that a pre-trial submission of a complete charge did not necessarily “obscure” a request but could instead suffice to preserve error. *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 451 (Tex. 1995); *see* TEX. R. CIV. P. 274. The trial court, however, had submitted part of the proposed charge, which the supreme court found made it clear that the trial court was aware of the plaintiff’s request for a finding on future lost profits. The plaintiff also objected to the omission. *Id. But cf. Luensmann v. Zimmer-Zampese & Assocs., Inc.*, 103 S.W.3d 594, 599 (Tex. App.—San Antonio 2003, no pet.) (written objections with check marks and oral statement that no objections other than written insufficient to preserve error); *Riddick v. Quail Harbor Condominium Ass’n*, 7 S.W.3d 663, 673 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (submitting entire charge not sufficient to preserve error under *Alaniz* or *Liedeker* when record did not show court ruled, in writing or orally, or was otherwise aware of the proposed requests).

In other words, an appellate court might find preservation if the record is clear as to party’s complaint but no modification to eliminate the complaint was made to the charge (which is another reason a party may choose to both object and request). This potential fall-back explains why a party may still choose to object with a request—even if the requests

somehow end up unsigned, the party may still have the error preserved by also objecting on the record.

A request in substantially correct form applies to omitted definitions and instructions or questions on which a party holds the burden. *See, e.g., Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473 (Tex. 2000) (defendant has burden to request instructions on affirmative defense).

In a concurring opinion, Justice Wainwright discussed a potential conflict between *Payne* (which allowed a request to preserve error in place of an objection if the trial court was plainly aware of the complaint) and *Hernandez v. Montgomery Ward*, 652 S.W.2d 923, 925 (Tex. 1983) (“A request for another charge is not a substitute for an objection.”). After noting the case at bar involved a defective instruction, Justice Wainwright concluded that he would “overrule *Hernandez* to the extent that any vestige of its statement that ‘[a] request for another charge is not a substitute for an objection’ still casts a shadow over this issue.” *First Valley Bank of Los Fresnos v. Martin*, 144 S.W.2d 466, 473-75 (Tex. 2004) (Wainwright, J., concurring). In short, *Payne* supports a request in place of an objection – if the trial court was made aware of the issue through signature, discussion, objection, or other means.

Recently, the supreme court again affirmed preserving an “objection” by a request. *See Diamond Offshore Management Co. v. Guidry*, 2005). The court held, “While the trial court could certainly have inquired about the separate issues of negligence, causation, and course of employment in a single question with proper instructions, Diamond was not obligated to request such a question. It was required only to object to the absence of any inquiry, which the trial court acknowledged Diamond had done with its requested questions.” *Id.* (citing *Payne* and concurrence in *Martin*).

3. Request and object

When a party chooses to object *and* request (as when request clarifies an objection or an objection clarifies a request) – even if neither is perfect – courts of appeal are more likely to find preservation under *Payne*. *See, e.g., Holubec v. Brandenberger*, 111 S.W.3d 32 (Tex. 2003) (although request did not “precisely” track the statutory language, objection sufficient to preserve complaint about defect in nuisance question); *Primrose Op. Co. v. Jones*, 102 S.W.3d 188, 198 (Tex. App.—Amarillo 2003, pet. denied) (filed list of questions, instructions and definitions discussed at charge conference sufficient to preserve error); *Samedan Oil Corp. v. Intrastate Gas Gathering, Inc.*, 78 S.W.3d 425, 452-53 (Tex. App.—Tyler 2001, pet. dismissed by agr.) (written objection to proposed charge, oral reference of court

to same written objections with final charge, and written request on same all combined to preserve error); *Doe v. Mobile Video Tapes, Inc.*, 43 S.W.3d 40, 50 (Tex. App.—Corpus Christi 2001, no pet.) (citing *Payne* [and pre-*Payne* cases] and finding error preserved by objection, argument to court, and request); *Park Funeral Chapel, Inc. v. Gallegos*, 2001 WL 488007 (Tex. App.—San Antonio 2001, no pet.) (n.d.p.) (objection to omission of word “reasonable” from fees question and referring court to applicable PJC made court aware of complaint); *M.D. Mark, Inc. v. PIHI P’ship*, 2001 WL 619604 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (n.d.p.) (tendered instruction that included essential fiduciary concepts in form that did not assume a duty or controverted facts preserved error even though ultimately found harmless); *Gen. Agents Ins. Co. of Am., Inc. v. Home Ins. Co. of Am.*, 21 S.W.3d 419, 425 (Tex. App.—San Antonio 2000, pet. dismissed by agr.) (objection that did not clearly state the grounds sufficient to preserve error when request clarified grounds for complaint); *Smith-Hamm, Inc. v. Equip. Connection*, 946 S.W.2d 458 (Tex. App.—Houston [14th Dist.] 1997, no writ) (objections and simple request “made the trial judge aware of its complaint, timely and plainly” when neither the case nor the complaint was difficult).

The open question may be whether a party is still required to request and object under certain circumstances. Prior to *Payne*, some courts held that the Rules require that a party request *and* object, at least in certain situations. *See, e.g., Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901, 903 (Tex. App.—Austin 1991, no writ) (party who would benefit from addition of limiting instruction to damage question must object to deficiency as submitted and request limiting instruction); *Wright Way Constr. Co. v. Harlingen Mall Co.*, 799 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1990, writ denied) (party who requests question, definition or instruction on which that party relies must also object).

Those courts generally relied on two rules to require an objection and a request: (1) Rule 274 provides that “[a]ny complaint . . . on account of an omission . . . is waived unless specifically included in the objections,” and (2) Rule 278 requires a party relying on a question to submit a request. *See, e.g., Wright Way*, 799 S.W.2d at 418. Moreover, when a party will benefit from a question, instruction or definition, courts have generally required the relying or benefiting party to make the trial court aware of the complaint by an articulated objection to avoid building error in the record with unexplained requests. *See id.*

Some courts of appeals, particularly the First District, construe *Payne* as consistent with Rule 278 only by allowing a written request to replace a written

or oral objection, but *not by allowing an objection alone to preserve error when an obligation to request existed.* *Mason v. Southern Pac. Transp. Co.*, 892 S.W.2d 115, 117 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *see also Elliott v. Whitten*, 2004 WL 2115420 (Tex. App.—Houston 1st Dist.] 2004, pet. denied) (memo opin.) (error on omitted instruction on measure of damage not preserved by oral request in the absence of written submission); *Fraser v. Baybrook Bldg. Co.*, 2003 WL 21357316 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (memo opin.) (citing *Mason* to require request but holding waiver when no objection or request); *Gragson v. ME&E Welding & Fabrication, Inc.*, 2001 WL 1190087 (Tex. App.—Texarkana 2001, pet. denied) (n.d.p.) (“If a party does not submit that written request, he waives any error by the trial court in not submitting it. Dictating a requested instruction to the court reporter is not sufficient to support an appeal based on the trial court’s refusal to submit requested material.”); *Shamrock Communications, Inc. v. Wilie*, 2000 WL 1825501 (Tex. App.—Austin 2000, pet. denied) (n.d.p.) (citing *Payne* but requiring tender for omitted instruction and finding tendered instruction too narrow to constitute substantially correct wording); *Johns v. Ram-Forwarding, Inc.*, 29 S.W.3d 635, 638 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (finding complaint one of an omitted issue, relying on *Mason* but not *Payne*, and holding waiver occurred when no tender made); *Lewis v. Lewis*, 1999 WL 442176 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (n.d.p.) (finding any error on omitted question waived by failure to tender written request); *Jarrin v. Sam White Oldsmobile Co.*, 929 S.W.2d 21, 24 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (finding complaint one of omitted instruction, relying on *Mason*, and holding waiver occurred in absence of tendered instruction).

Another court recently described the three-step process to require a party to object and request. *See, e.g., Sears, Roebuck & Co. v. Abell*, 157 S.W.3d 886, 891-92 (Tex. App.—El Paso 2005, pet. denied) (holding waiver in the absence of objection or request by noting when error is “omission of an instruction relied on by the requesting party, three steps are required by the Rules to preserve error: a proper instruction must be tendered in writing and requested prior to submission; a specific objection must be made to the omission of the instruction; and the court must make a ruling”). *But cf. Conquest Drilling Fluids, Inc. v. Tri-Flo Int’l, Inc.*, 137 S.W.3d 299, 307 (Tex. App.—Beaumont 2004, no pet.) (request refused as signed sufficient to preserve limitations instruction even in the absence of objection). Because most cases involve an objection and courts construe *Payne* as

allowing a request to replace an objection, the issue is generally one of an absent written request.

Tichacek (and other cases) may suggest the supreme court is less restrictive in its application of *Payne*. *See, e.g., Moritz v. Preiss*, 121 S.W.3d 715 (Tex. 2003) (failure to request submission of claims against a party or to object to the charge as submitted supported application of presumed finality rule after trial on the merits). Nevertheless, a party should give careful thought to tendering written requests in any circumstances in which it might apply.

E. Summary of preservation.

Although not directly addressed in the most recent cases, the progression of holdings appears to find preservation if the trial court’s granting of the objection (or request) would cure the error. In other words, a *Payne*-type analysis appears to apply to “form” errors where granting the substance of the objection would cure the error. Of course, as always, the more detailed the objection explaining (even no-evidence grounds) is more likely to serve as proper preservation, and if it is a potential form issue, objection to form (as expected by many courts of appeals) would likewise be advisable.

V. ISSUES IN DEMONSTRATING HARM

A. Harmless error analysis: Probably caused the rendition of an improper judgment

Rules 44.1(a) and 61.1 provide that reversal is appropriate if the error: “(1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant [or petitioner] from properly presenting the case to the court of appeals.” TEX. R. APP. P. 44.1(a); 61.1.

Charge error traditionally has been reversible only upon a showing of harm under Rule 44.1(a). *See, e.g., Holubec v. Brandenberger*, 111 S.W.3d 32 (Tex. 2003); *Union Pacific R. Co. v. Williams*, 85 S.W.3d 162, 170-71 (Tex. 2002); *Galveston County*, 940 S.W.2d at 586; *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995). And harm continues to be the question in most charge cases. *See, e.g., Bed, Bath & Beyond, Inc. v. Urista*, 211 S.W.3d 753, 757 (Tex. 2006) (conducting harm analysis regarding inferential rebuttal instruction); *Willis v. Donnelly*, 199 S.W.3d 262 (Tex. 2006) (instructing on wrong measure of damage “probably caused the rendition of an improper judgment”); *Longfellow v. Racetrac Petroleum, Inc.*, 2008 Tex. App. Lexis 4475 (Tex. App.—Fort Worth 2008, no pet. h.) (memo opin.); *Orion Mktg. Group, Inc. v. Morris*, 2008 Tex. App. Lexis 1192 (Tex. App.—San Antonio 2008, no pet. h.) (memo opin.) (holding no harm from any error in form of instructions in workers’ comp retaliation case).

As discussed below, however, the standard may be different with regard to certain broad-form errors

that preclude a court from determining whether the jury based its finding(s) on a valid theory.

B. “Presumed harm” that denies right of appellate review

1. *Casteel, Harris County: Cannot determine if jury based verdict on improper theory*

The progression of harm analysis for “form” errors began with *Casteel*. In *Casteel*, the court noted that “[i]t is fundamental to our system of justice that parties have the right to be heard by a jury properly instructed on the law. Yet, when a jury bases a finding of liability on a single broad-form question that commingles invalid theories of liability with valid theories, *the appellate court is often unable to determine the effect of this error*. The best the court can do is determine that some evidence could have supported the jury’s conclusion on a legally valid theory. To hold this error harmless would allow a defendant to be held liable without a judicial determination that a factfinder actually found that the defendant should be held liable on proper, legal grounds.” 22 S.W.3d at 389 (emphasis added). As a result, “[w]hen a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful *and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory.*” *Id.* at 387-88 (emphasis added). *Cf. Rocor Int’l, Inc. v. National Union Fire Ins. Co.*, 77 S.W.3d 253, 273 (Tex. 2002) (Baker, J., dissenting) (using traditional harmless error analysis to assess objection to charge that one of several theories submitted did not have support in the evidence).

The court similarly held in *Harris County*: “[T]he trial court erred in overruling [the defendant’s] timely and specific objection to the charge, which mixed valid and invalid elements of damage in a single broad-form submission, and that such error was harmful *because it prevented the appellate court from determining ‘whether the jury based its verdict on an improperly submitted invalid’ element of damage.*” 96 S.W.3d at 234.

In a peremptory strike case, the supreme court summarized its holding in *Casteel* as follows: “[W]e do not hold the error harmless because the most that a reviewing court can say is that the verdict might have been reached on a valid theory [and] we cannot know for certain that [] inclusion did not affect the verdict, so *we presume harm.*” *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 91 (Tex. 2005) (emphasis added).

2. *SBC (2004): No reasonable basis for concluding jury confused*

A broad-form commingling error was urged in *S.W. Bell Tel. Co. v. Garza*, 164 S.W.3d 607 (Tex. 2004). The jury question had asked if the plaintiff was disqualified or discharged, but the Labor Code does not include “disqualify” in its language. The question thus arguably submitted an invalid theory of recovery. The Texas Supreme Court, however, did not address the *Casteel* issue. The court did consider whether the trial court’s substitution of the word “disqualify” for the term “discriminate” was reversible error. The court found no reversible error in the question as submitted because “there was no difference between asking the jury whether he was disqualified for filing a compensation claim and asking whether he was discriminated against by being disqualified for filing a compensation claim.”

The court noted that the charge would have been “more accurate” if it had asked whether the defendant “discriminated” against the plaintiff “for filing a compensation claim by disqualifying him from his position.” *Id.* The court found *no reasonable basis for concluding that the jury was confused by the question*, and thus affirmed. *Id.* To the extent that *SBC* raised a *Casteel* issue, the standard applied appears to be more in the realm of a traditional harm analysis (in which juror confusion is part of assessing harm).

3. *Romero (2005): Erroneous inclusion of claim (or defense) is harmful unless court reasonably certain jury not significantly influenced by it.*

The following quote from *Romero* summarizes the supreme court’s most recent analysis of harm under Texas Rules of Appellate Procedure 41.1(a)(2) and 61.1(b):

The argument was made in *Harris County* that even if it is reversible error to include legally invalid claims with legally valid ones in a single jury question, the same rule should not apply when all the claims are valid but some lack support in the evidence. While the jury might well be misled by legally erroneous instructions or questions, since they are not expected to know the law and are instead obliged to follow the law given them in the charge, they are certainly expected to know and weigh the evidence and C the argument goes C are therefore not likely to be influenced in making their findings by being allowed to consider factors without evidentiary support. We specifically rejected this argument, and this

case illustrates why. Having found malicious credentialing, the jury could not conceivably have ignored that finding in apportioning responsibility. ***While in other instances a jury may simply ignore a factor in the charge that lacks evidentiary support, there are other instances -- and this case is one -- where the jury is as misled by the inclusion of a claim without evidentiary support as by a legally erroneous instruction. In all circumstances in which “[a] trial court’s error in instructing a jury to consider erroneous matters, whether an invalid liability theory or an unsupported element of damage, prevents the appellant from demonstrating the consequences of the error on appeal”, the same analysis must be applied.***

We do not hold that the error of including a factually unsupported claim in a broad-form jury question is always reversible. Rule 44.1(a)(2) requires that the error, to be reversible, “probably prevented the appellant from properly presenting the case to the court of appeals.” But ***unless the appellate court is “reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it”, the error is reversible.*** We have no such reasonable certainty here; on the contrary, we are reasonably certain that the jury was significantly influenced by the erroneous inclusion of the factually-unsupported malicious credentialing claim in the apportionment question.

Romero, 166 S.W.3d at 227-28 (emphasis added).

A. Summary of harm analysis

Under a traditional harm analysis (*see* Rules 44.1(a)(1) and 61.1(a)), omission of a properly pleaded theory of recovery or defense supported by the evidence, juror confusion, jury notes, hotly contested issues, jury deadlocks and the like are used to assess harm based on the entire record. *See, e.g., Quantum Chemical Corp. v. Toennies*, 47 S.W.3d 473, 480 (Tex. 2001) (deadlock of jury and juror notes

indicated confusion); *Holubec*, 111 S.W.3d 32 (“did not fairly submit the factual issue that could have established [the] defense”); *Wal-Mart Stores, Inc. v. Johnson*, 106 S.W.3d 718, 723-24 (Tex. 2003) (inclusion of spoliation instruction improperly nudged or tilted jury); *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 387-88 (Tex. 1998) (closely contested, less than unanimous verdict, slim evidence indicated harm).

Under the “presumed harm” analysis of *Casteel* and *Romero* (*see* Rules 44.1(a)(2) and 61.1(b)), if [1] the jury *must* consider an (a) invalid or unsupported liability theory or (b) an unsupported element of damage, such errors represent error if [2] the appellate court is not reasonably certain that the jury was not significantly influenced by the issues erroneously submitted to it. *Romero* 166 S.W.3d at 227-28.

Other parts of the record as a whole, however, may play a role in that “reasonably certain” analysis (just as they do in the harm analysis). For example, in *Romero*, plaintiffs’ counsel “asked the jury to attribute 80% of the cause of injuries to the malicious credentialing claim and 20% to the negligence claim.” *KPH Consol., Inc. v. Romero*, 102 S.W.3d 135, 159-60 (Tex. App.—Houston [14th Dist.] 2003), *aff’d*, 166 S.W.3d 212 (Tex. 2005). That, among other things, convinced the appellate courts that the jury was significantly influenced by the issues erroneously submitted to it.

As a practical matter on appeal, a practitioner may be wise to demonstrate both burdens. The two concepts overlap to some extent, and as in *SBC*, the ultimate result may not be one of broad-form.

VI. CONCLUSION

All cases raise their own unique charge issues. Moreover, at any given time, various uncertainties exist in the law. While available patterns provide a good foundation, some modifications or additions are almost always necessary to account for the intricacies of the case and the state of flux in the law. Additionally, the charge must balance broad-form goals of consistency without confusion with the need for accurate findings that allow adequate appellate review. Finally, some granulation as well as unanimity requirements make jury polling before excusing the jury an important step in many cases.