

I Can't Find This in the *!#%* PJC!

**Jury Questions and Instructions That The
Business Litigator Needs—But Aren't In The PJC.**

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Chapter 17**

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EDUCATION:

SMU 1963
Phi Gamma Delta Social Fraternity
SMU Law School 1966
Journal of Air Law and Commerce
Barristers
National Moot Court Team, Captain
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PROFESSIONAL ORGANIZATIONS:

Fellow, American College of Trial Lawyers
Committee on Federal Rules of Evidence, 1993-
Fellow, American Board of Trial Advocates
President of Dallas Chapter, 1996
Member of National Board of Directors, 1992-96
Fellow, International Society of Barristers
Fellow, International Academy of Trial Lawyers
Master, William Mac Taylor American Inns of Court (112th)
President of Inn of Court 1992-94
The Best Lawyers in America (Business Litigation) (Woodward White)

BOARDS AND COMMISSIONS:

Member, Texas Higher Education Coordinating Board of the Texas College and
University System of Texas 1983-91
Chairman of the Financial Planning and Legal Committees
Board of Trustees, Baylor College of Dentistry
Chair 1995-96
Vice-Chair 1994-96
Chair, Board of Trustees, Baylor Oral Health Foundation 1994-
Board of Trustees, Southwestern Medical Foundation 1997-
Board of Directors, Dallas Zoological Society 1996-99
University of Texas at Dallas 1994-
Board of Development
Executive Committee
Member, Supreme Court of Texas Task Force on the Charge to the Jury, 1991-92.
Board of Directors, Alliance for Higher Education; Chair 1999-2000

HONORS

SMU Law School Distinguished Alumni Award for Private Practice (2001)
Dallas Bar Association: ‘Trial Lawyer of the Year – 2001’
“Hall of Fame” – Baylor College of Dentistry – 2003
Fall Commencement Speaker, University of North Texas, December 17,
1994
Honorary Alumnus, University of North Texas, December 17, 1994
Alliance for Higher Education Award: “For Distinguished and Outstanding
Service in Support of Higher Education,” November 1994

BUSINESS AND SOCIAL CLUBS:

Salesmanship Club of Dallas
Member of Board of Directors B 2002-03
First Vice-President B 2002
Dallas Assembly
Dallas Citizens Council
Member of Board of Directors, 1990-93; 2000-2003
The Dallas Breakfast Group
President 1993-95
Board of Directors 1989-94

CIVIC AND CHURCH ACTIVITIES:

Member of Highland Park Presbyterian Church
President of Elliott Class at Highland Park Presbyterian Church
1989-90
Chairman of Area Campaign for DART Election 1983
Campaign Treasurer of Citizens for Regional Transportation in 1989 (Pro
DART Business Group)
Board of Directors of Camp Grady Spruce (YMCA)
Board of Directors and Vice-President of the Dallas County Mental Health Association
1984-88
Chairman of Lawyer Division of United Way 1988

AMERICAN BAR ASSOCIATION:

Fellow, American Bar Foundation
Member Litigation Section
Chairman of the Business Torts Committee of Litigation Section 1984-85
Chairman of the 1985 Fall Meeting of the Litigation Section
Chairman of Financial Resources Committee 1990-92
Chairman of the Video/Audio Tape Committee 1986-88
Editor of Business Torts Newsletter 1982
Participant in programs at Litigation Section meetings in Hawaii, New
York City and Washington, D.C.

SMU:

GTE-SMU Athletic Forum, Board of Directors
Class Representative ('63) for SMU Annual Fund 1992-93
President of the SMU Law School Alumni Association 1988-1989
Instructor in Trial Advocacy Course 1983
Class Representative for Law School Fund drive 1981-83

STATE BAR OF TEXAS:

Vice-Chair of Texas Pattern Jury Instructions, 1993- 95
Frequent speaker at Continuing Legal Education seminars, including
Advanced Civil Trial Seminar 1983, 1984, 1985 and 1986
Course Director for the Advanced Civil Trial Seminar in 1987
Member of Continuing Legal Education Committee, 1989

DALLAS BAR ASSOCIATION:

Board of Directors 1994-95
Chairman of the Admissions Committee 1988
Chairman of Courthouse Committee
Chairman New Laws and Legislation Committee
Special Counsel to the Dallas Bar Association 1982-83
Fellow, Dallas Bar Foundation 1994-

TEXAS ASSOCIATION OF DEFENSE COUNSEL:

Regional Director of TADC
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Haynes and Boone, LLP, Appellate Section, Fort Worth, Texas, 2001-Present.

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

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

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

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; Bar Association of the Fifth Federal Circuit; Tarrant County Bar Association, Appellate Section; College of the State Bar of Texas; Texas Bar Foundation (2004-Present); Eldon B. Mahon Inn of Court, Barrister (2003-2006), Associate (1994-1997); Tarrant County Bar Foundation (2002-Present).

Committees—State Bar Pattern Jury Charge Committee, PJC IV/Business, Consumer, and Employment (Vice Chair, June 2003-Present, Member, June 2001-Present); State Bar Pattern Jury Charge, Oversight Committee (June 2003-Present); Secretary, Tarrant County Bar Association Appellate Section (2004-2005); Judicial Evaluation Committee, Tarrant County Bar Association (2000-2001, 2004-2005); Chair, CLE/Brown Bag Seminar Committee, Tarrant County Bar Association (2004-2005, Member 2001-2004).

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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In re K.N.R.,
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119 S.W.3d 16 (Tex. App.—Tyler 2003, no pet.)..... 9

Lane v. Montgomery Elevator Co.,
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Laredo Medical Group Corp. v. Mireles,
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Martinez v. Abbott Laboratoriess,
146 S.W.3d 260 (Tex. App.—Fort Worth 2004, pet. denied)..... 14

McIlvain v. Jacobs,
794 S.W.2d 14 (Tex. 1990)..... 7

Milkovich v. Lorain Co.,
497 U.S. 1 (1990) 6

Minyard Food Stores, Inc. v. Goodman,
50 S.W.3d 131 (Tex. App.—Fort Worth 2001),
rev'd, 80 S.W.3d 573 (Tex. 2002)..... 28

Missouri Pacific R. Co. v. Lemon,
861 S.W.2d 501 (Tex. App.-Houston [14th Dist.] 1993, writ dism'd by agr.)..... 29

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760 S.W.2d 4 (Tex. App.—Dallas 1998, writ denied) 5

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968 S.W.2d 917 (Tex. 1998)..... 27

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2003 WL 22360942 (Tex. App.—El Paso, Oct. 16, 2003, pet. denied)..... 15

New Process Steel Corp., Inc. v. Steel Corp. of Texas, Inc.,
703 S.W.2d 209 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) 1

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146 S.W.3d 144 (Tex. 2004)..... 6, 7, 8

New York Times v. Sullivan,
376 U.S. 254 (1964)..... 7

Ordonez v. M.W. McCurdy & Co. Inc.,
984 S.W.2d 264 (Tex. App.—Houston [1st Dist.] 1998, no pet.)..... 14, 15, 16

Patel v. City Of Everman,
No. 12-02-00174-CV, 2004 WL 2158004 (Tex. App.—Tyler 2004, pet. denied). 10

Pecos Petroleum Co. v. McMillan,
2003 WL 1823389 (Tex. App.—San Antonio 2003, pet. denied) 21

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13 S.W.3d 421 (Tex. App.—Corpus Christi 2000, no pet.)..... 8

Philadelphia Newspapers, Inc. v. Hepps,
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724 S.W.2d 20 (Tex. 1987)..... 3

Plas-Tex, Inc. v. U.S. Steel Corp.,
772 S.W.2d 442 (Tex. 1989)..... 3

Prudential Insurance Co. of America v. Financial Review Services, Inc.,
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845 S.W.2d 918 (Tex. App.—San Antonio 1992, writ denied)..... 4

Randall's Food Markets, Inc. v. Johnson,
891 S.W.2d 640 (Tex. 1995)..... 7, 8

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 No 01-03-00351-CV, 2005 WL 90942,
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 539 S.W.2d 917 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.)..... 12

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 111 S.W.3d 113 (Tex. 2003)..... 24

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Jury Questions and Instructions that the Business Litigator Needs—But Aren't in the PJC

Pattern instructions do not and cannot contain all possible jury questions and instructions a court or practitioner may need in a case. Why not? Reasons vary, including (1) the law is still developing in an area, (2) the claim is new or uncommon, (3) a sub-issue for a particular claim is unresolved, (4) the law is in conflict on one or more points, or (5) the issue is a nuance not likely to repeat itself in many cases. Then why start from the patterns? Because committee patterns are the product of hundreds of hours of bi-partisan debate with a resulting product that represents the consensus as to questions and instructions for the most common claims and defenses based on well-settled law. The state bar patterns are not designed to flag unsettled issues or to predict where the law may arrive in the future. Nevertheless, you must craft proposed questions and instructions for your case – even if patterns are unavailable to aid you. This article is designed to help you in that quest by (1) listing potential sources, (2) discussing elements and issues for common claims and issues not in the patterns, and (3) identifying some potential issues related to the current patterns in business cases.

I. Potential Sources for Questions, Instructions, and Definitions.

Many sources of patterns, forms, and language for jury charge questions, instructions, and definitions exist. For example, the following represent sources for jury charge questions, instructions, and definitions, more than one of which may come into play in any given case:

◆**Texas/United States Supreme Court-Approved Language.** The Texas Supreme Court may approve submitted language or set out its own language based upon prior cases or synthesizing the law from several sources. *See, e.g., Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 772 (Tex. 2003) (approving *French v. Grigsby* instruction on uncertain, overlapping damages). Likewise, the United States Supreme Court may also expressly approve submitted instructions. *See, e.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (approving mixed motive instruction in

Title VII employment discrimination case based on circumstantial evidence).

◆**Court of Appeals-Approved Language.** While potentially subject to risk of eventual reversal if not supreme-court approved, court of appeals-approved language is another good source for charge language. Unlike cases that merely discuss substantive law, cases that actually approve particular language provide a trial court with a judicial “pattern.” *See, e.g., New Process Steel Corp., Inc. v. Steel Corp. of Texas, Inc.*, 703 S.W.2d 209, 214 (Tex. App.—Houston [1st Dist.] 1985, writ ref’d n.r.e.) (approving instructions on fraud as adequate); *Gage v. Langford*, 582 S.W.2d 203, 207 (Tex. Civ. App.—Eastland 1979, writ ref’d n.r.e.) (holding definition of waiver omitted word “intentional” and thus providing basis to draft proper instruction).

◆**Statutory Language.** “[W]hen a statutory cause of action is submitted, the charge should track the language of the provision as closely as possible.” *Borneman v. Steak & Ale of Texas, Inc.*, 22 S.W.3d 411, 413 (Tex. 2000); *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994) (same); *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931 (Tex. 1980) (same). Of course, exceptions exist to that proposition, some of which are discussed later in the paper.

◆**Federal Pattern Jury Instructions.** When crafting charge submissions for federal law claims or state law claims that are patterned after federal claims (such as antitrust or employment claims), federal patterns can assist the practitioner and court. Indeed, the Texas Supreme Court approved the language as “in substantially correct form” from a federal pattern for a federal claim. *See Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 169-70 (Tex. 2002) (8th Circuit pattern on foreseeability in substantially correct form for FELA case). On the other hand, federal charges allow more expansive instructions and commenting; as such, some of the less concise language (at least of the older patterns) most likely will not make its way into a Texas state court

charge. Starting from the model language for the core elements and instructions, however, can be quite helpful.

Although several of the federal circuits have criminal and (or) civil patterns for federal claims, the extent of topic coverage and depth varies by circuit. The following civil patterns are available via links on the Fifth Circuit's web page:

PATTERN JURY CHARGES OF THE DISTRICT JUDGES ASS'N OF THE FIFTH CIRCUIT, CIVIL CASES (West 1999) (including General Instructions, FELA, Antitrust, Securities, RICO, Patent Infringement, Civil Rights, Labor, Tax Refunds, Miscellaneous Claims and Damages).

8TH CIR. CIVIL JURY INSTR. 4.51 (2001) (General Instructions, Civil Rights, Employment, Odometer Fraud, FELA).

MANUAL OF MODEL OF CIVIL JURY INSTRUCTIONS, NINTH CIRCUIT (2004) (General Instructions, FELA, Admiralty, Tax Refunds, Civil Rights, Employment, Antitrust [referring to ABA patterns], Trademark/Patent/Copyright, Securities, RICO).

ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) (1999) (General Instructions, Employment, Civil Rights, Employment, Alter Ego, Antitrust, Securities, RICO, Admiralty, FELA, Patent Infringement, Eminent Domain, Miscellaneous Claims).

WESTERN DISTRICT OF MICHIGAN, STANDARD CIVIL JURY INSTRUCTIONS. (<http://www.miwd.uscourts.gov/JURY/stdjry.html>)

Most of the federal patterns contain a caveat explaining that the model instructions are not "binding . . . but are merely helpful suggestions to assist the district courts." *See, e.g.*, 8TH CIR. CIVIL JURY INSTR. 4.51, INTRODUCTION. As a result, just like other committee patterns (unless expressly approved or from a supreme court opinion), using the model federal patterns to formulate requested questions, instructions and definitions is beneficial but not a guarantee against reversal.

ABA Section/Committee Pattern Instructions. Various sections of the American Bar Association

and other federal bar associations also publish patterns that represent the work of hundreds of hours by committee members. Some of the most commonly cited patterns currently available include the following:

MODEL JURY INSTRUCTIONS, BUSINESS TORTS LITIGATION, American Bar Association, Litigation Section (1996).

MODEL JURY INSTRUCTIONS, CONSTRUCTION LITIGATION, American Bar Association, Litigation Section (2001).

MODEL JURY INSTRUCTIONS, EMPLOYMENT LITIGATION, American Bar Association, Litigation Section (1994).

MODEL JURY INSTRUCTIONS FOR FIDELITY CASES, American Bar Association, Tort Trial & Insurance Practice Section (2002).

MODEL JURY INSTRUCTIONS, SECURITIES LITIGATION, American Bar Association, Litigation Section (1996).

MODEL JURY INSTRUCTIONS FOR SURETY CASES, American Bar Association, Tort Trial & Insurance Practice Section (2000).

PATENT JURY INSTRUCTIONS, Federal Circuit Bar Association (2001).

SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, American Bar Association, Antitrust Section (3d ed. 1999).

Like the federal circuit patterns, the committee patterns contain the inevitable caveat. For example, the antitrust samples include the following in the introduction:

These are 'sample,' not 'model' or 'pattern,' instructions. While the Committee believes that they accurately and fairly state the law, the language used has not been judicially approved in many instances. Moreover, because it is not possible to anticipate the large variety of factual contexts in which civil antitrust instructions may be given, in any given

case, the instructions must be tailored to the particular facts and issues involved.

SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, INTRODUCTION, xiii.

◆**State Bar Pattern Jury Charges.** Proposed submissions in the Texas State Bar Pattern Jury Charges (“PJC”) rely on Texas Supreme Court cases, statutory language, and other well-settled law and are thus a good source for questions, instructions, and definitions.

The Supreme Court (and courts of appeal) have explicitly approved the language in some of the patterns. *See, e.g., Placencio v. Allied Indus. Int’l, Inc.*, 724 S.W.2d 20, 22 (Tex. 1987) (approving PJC form of “misuse” applicable to products cases); *Wilson v. Kaufman & Broad Home Sys.*, 728 S.W.2d 874, 875 (Tex. App.—Beaumont 1987, writ ref’d n.r.e.) (approving PJC form of questions and instructions related to product liability suits involving design defects).

On the other hand, using PJCs not explicitly approved does not eliminate the risk of reversal. On occasion, the supreme court has reversed a charge relying on the patterns. *See, e.g., Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001) (tortious interference submission modeled after pattern “not entirely correct” statement of the law); *State v. Williams*, 940 S.W.2d 583, 584-85 (Tex. 1996) (holding PJC premises defect pattern erroneous); *City of San Antonio v. Rodriguez*, 931 S.W.2d 535, 536 (Tex. 1996) (remanding for a new trial based on a jury instruction that incorrectly stated the law); *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442 (Tex. 1989) (“The jury charge used in this cause on the implied warranty of merchantability claim was a pattern jury charge. . . . The holding in this cause will require a change in PJC 71.07. Question one of [now former] PJC 71.07 should be amended to read as follows . . .”).

Just as with the other patterns, the Texas State Bar PJCs warn:

The infinite combinations of possible facts in contract, consumer, employment, and other business cases make it impracticable for the Committee to offer questions suitable for every occasion. The Committee has tried to prepare charges to serve as guides for the usual

litigation encountered in these type of cases. However, a charge should conform to the pleadings and evidence of a case . . . [T]his Committee has avoided recommending changes in the law and has based this material on what it perceived the present law to be. It has . . . not [attempted] to express favor or disfavor for particular positions. In unsettled areas, the Committee generally has not taken a position on the exact form of a charge . . . [but] has provided guidelines in some areas in which there is no definitive authority.

TEXAS PATTERN JURY CHARGES—BUSINESS, CONSUMER, INSURANCE & EMPLOYMENT, STATE BAR OF TEXAS (2003) (quoting Introduction); *see also Styers v. Schindler Elevator Corp.*, 115 S.W.3d 321, 325 (Tex. App.—Texarkana 2003, pet. denied) (“Trial courts are not required to reproduce pattern jury charges with exactness, but are accorded broad discretion in submitting issues that are logical, simple, fair, legally correct, and complete.”).

◆**Other Organization-Sponsored and Commercial Treatises.** Various organizations and publishers also offer form guides. Some of the more commonly cited forms include the following:

MODEL PATENT JURY INSTRUCTIONS, AMERICAN INTELLECTUAL PROPERTY LAW ASSOCIATION (locate via link on 5th Circuit’s web page or address: http://www.aipla.org/Content/ContentGroups/Publications1/Publications_available_for_viewing1/juryinst.pdf).

Devitt & Blackmar, FEDERAL JURY PRACTICE AND INSTRUCTIONS, CIVIL AND CRIMINAL (4th ed., 1987-)

Kevin F. O’Malley, Jay E. Grenig, & William C. Lee, FEDERAL JURY PRACTICE & INSTRUCTIONS (5th ed. 2001).

Leonard B. Sand, MODERN FEDERAL JURY INSTRUCTIONS (Matthew Bender 2001).

TEXAS COURT CHARGES (Matthew Bender 2000) (printing actual charges submitted in various types

of case from 1973 through 1999, many of which not reviewed on appeal thus mandating caution in following without further investigation).

◆**Do-it-yourself.** In the absence of language expressly approved by (preferably the highest) court or at least committee developed patterns, an assessment of what questions, instructions, and definitions are necessary to resolve, and will aid the injury in resolving, the ultimate issues must be made from sources on the substantive law. *See, e.g., Louisiana-Pacific Corp. v. Knighten*, 976 S.W.2d 674, 676 (Tex. 1998) (instruction is proper if it will aid the jury in answering the issues presented to the jury); *Rampel v. Wascher*, 845 S.W.2d 918, 924 (Tex. App.—San Antonio 1992, writ denied) (“A proper broad form jury question asks an ultimate issue and instructs the jury about the elements of the ground of recovery or defense that the jury must find before giving a ‘yes’ answer to the issue.”).

II. Claims or Issues Not in the Patterns.

The law as to some claims has been developing over the last several years but the claims nevertheless do not as yet appear in the patterns. Insufficient development of the law or approved instructions explains the reason some claims do not appear in the patterns. For others, the long process of developing the patterns has begun but will take additional time to complete. This section discusses several areas where the law is developing to a point where patterns might evolve in the near future for these fairly common claims.

A. 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 (“Texas Free Enterprise and Antitrust Act”). The Texas Supreme Court, however, recently heard argument in a Texas Antitrust Act case. *Coca-Cola Co. v. Harmar Bottling Co.*, 111 S.W.3d 287, 301 (Tex. App.—Texarkana 2003, pet. granted). The opinion in that case may provide more definitive guidance on the substantive law but may not reach issues on charging the jury in a case.

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 Caller Times Publ’g Co. v. Triad Communications, Inc.*, 826 S.W.2d 576, 580 (Tex. 1991). The ABA Sample Jury Instructions, therefore, provide a good source of law and starting point for jury instructions. SAMPLE JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, American Bar Association, Antitrust Section (3d ed. 1999). As noted above, however, state patterns are more concise and streamlined than typical federal patterns such that modifications or distilling is often required.

The following cases reflect the state of Texas law on various aspects of antitrust cases but most do not address appropriate language for charging the jury. These cases along with the federal patterns, however, provide a good starting point for drafting requested questions, instructions and definitions. The uniquely fact specific aspects of antitrust cases require intense study of the law and interaction of elements, claims, and parties to craft a workable charge that inevitably raises interesting broadform issues.

1. Unreasonable restraint of trade.

“To establish a violation of Section 15.05(a) of the Act, a plaintiff must prove the challenged restraint of trade is unreasonable and has an ‘adverse effect on competition’ in the relevant market.” *Coca-Cola*, 111 S.W.3d at 301 (quoting *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 688, 670 (Tex. 1990) and *Winston v. Am. Med. Int’l, Inc.*, 930 S.W.2d 945, 952 (Tex.App.—Houston [1st Dist.] 1996, no writ)); *see* Tex. Bus. & Com. Code § 15.05(a).

2. Monopolization elements.

“[M]onopoly . . . is established if two elements are proven: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.” *Caller-Times*, 826 S.W.2d at 580; *Coca-Cola*, 111 S.W.3d at 303; *see* Tex. Bus. & Com. Code § 15.05(b).

3. Attempted monopolization elements.

“To prove attempted monopoly, a plaintiff must show (1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.” *Coca-Cola*, 111 S.W.3d at 303; *Chromalloy Gas Turbine Corp. v. United Tech. Corp.*, 9 S.W.3d 324, 327 (Tex. App.—San Antonio 1999, pet. denied); see Tex. Bus. & Com. Code § 15.05(a).

4. Adverse effect on competition.

“Without a showing of actual adverse effect on competition, [a plaintiff] cannot make out a case under the antitrust laws.” *Coca-Cola*, 111 S.W.3d at 303 (quoting *MJR Corp. v. B & B Vending Co.*, 760 S.W.2d 4, 22-23 (Tex.App.-Dallas 1988, writ denied)); *Scott v. Galusha*, 890 S.W.2d 945, 950 (Tex. App.—Fort Worth 1994, writ denied).

5. Relevant market.

Relevant market includes a relevant product market and a relevant geographic market. *Coca-Cola*, 111 S.W.3d at 303. In *Coca Cola*, the trial court defined the geographic market as “the area in which the defendants face competition from suppliers in the relevant product market and to which retailers can practicably turn for supplies.” *Id.* The appellate court evaluated the evidence under that definition.

The appellate court was less clear on the definition of the product market submitted but noted “it is the individuals who actually purchase the product who really define the scope of market—because they *are* the market.” *Id.* The appellate court also discussed interchangeability of products, the usual lynchpin under federal law. *Id.* A review of the charge submitted in the case reflects a definition derived from the ABA patterns.

The issue of how relevant market, a critical aspect of the various forms of antitrust claims, is submitted in state court is an interesting one. Given how relevant market controls the remainder of the findings and how the evidence can be reviewed on appeal, one should consider whether the relevant market issue should be granulated. Federal patterns granulate (but also do so in most contexts). Or consider whether another way exists to attain a sufficient implied finding through a broad-form submission. In short, relevant market

is frequently one of the most hotly contested issues in an antitrust case, making its form of submission an important one.

6. Predatory pricing.

“[T]he . . . test for predatory pricing [is] (1) the seller has an objectively reasonable expectation of recouping its losses due to the alleged predatory pricing by charging higher prices later, that is, the predatory pricing is economically feasible; and (2)(a) the price charged is below average variable cost; or (b)(i) there are substantial barriers to market entry; (ii) the seller is charging a price below its short-run profit-maximizing price and its average total cost; and (iii) the benefits of the seller’s price depended on its tendency to discipline or eliminate competition and thereby enhance the firm’s long-term ability to reap the benefits of monopoly power.” *Caller-Times*, 826 S.W.2d at 588.

7. Causation.

“Any person . . . whose business or property has been injured by reason any conduct declared unlawful” in the Antitrust Act may recover damages as specified by the Act. Tex. Bus. & Com. Code § 15.21. In *Coca Cola*, the court noted that “a plaintiff must establish that the monopolization was a proximate cause of injury to the plaintiff.” 111 S.W.3d at 307.

8. Willful or flagrant/treble damages.

“[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); see also *Coca-Cola*, 111 S.W.3d at 307. 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.).

B. Defamation.

The State Bar PJC’s do not as yet include patterns for defamation claims. The charge must

be crafted from various case and statutory authority (e.g., chapter 73 of the Civil Practice and Remedies Code (“CPRC”). Although the complete contours of slander and libel are well beyond the scope of this paper, this section sets out the basic elements of a defamation claim and some of the issues for which jury resolution may be necessary.

“To maintain a defamation cause of action, 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).

Several open questions remain. For that reason, and because resolution of some fact issues will determine how the jury completes the remainder of the charge, granulated submission of some of the issues may be necessary either to (1) preserve an unsettled issue or (2) secure the appropriate answers for the recovery sought.

1. Legal issues.

Many legal issues for the court will precede submission of a defamation claim to the jury. For example, whether a statement is of a public or private concern is a legal issue, *Connick v. Myers*, 461 U.S. 138, 148 (1983); as is whether a plaintiff is a private or public official or figure, *McLemore*, 978 S.W.2d at 571. For a list of potential legal issues, see Michol O’Connor, O’Connor’s Texas Causes of Action (Jones McClure 2004), at 336.

2. Published.

Published means “orally, in writing, or in print to [a] third person capable of understanding [the] defamatory import and in such a way that the third person did so understand the words.” *Accubanc Mortgage Corp. v. Drummonds*, 938 S.W.2d 135, 147 (Tex. App.—Fort Worth 1996, writ denied). A jury issue may be necessary to resolve any fact dispute on whether the allegedly defamatory words were published. *See id.* (discussing jury finding on publication and law of self-publication).

3. Defamatory.

Defamation means the statement “tends to injure a living person’s reputation and thereby

expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person’s honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.” Tex. Civ. Prac. & Rem. Code § 73.001; *see also Renfro Drug Co. v. Lawson*, 160 S.W.2d 246, 248-49 (Tex. 1942); *Colson v. Grohman*, 24 S.W.3d 414, 421 (Tex. App.—Houston [1 Dist.] 2000, pet. denied) (“A statement is defamatory if the words tend to injure a person’s reputation, exposing the person to public hatred, contempt, ridicule, or financial injury.”).

“It is well settled that ‘the meaning of a publication, and thus whether it is false and defamatory depends on a reasonable person’s perception of the entirety of a publication and not merely on individual statements.’” *Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex. 2002); *Turner v. KTRK, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000) (“A publication can be false and defamatory by omitting or juxtaposing facts, “even though all the story’s individual statements considered in isolation were literally true or non-defamatory.”).

The initial question of whether a statement is capable of defamatory meaning is for the Court. *Id.* “But when a publication is of ambiguous or doubtful import, the jury must determine its meaning.” *Id.*

4. Fact vs. opinion.

“[T]he Constitution protects ‘statements that cannot ‘reasonably [be] interpreted as stating actual facts’ . . . to ‘provide assurance that public debate will not suffer for lack of imaginative expression’ or the ‘rhetorical hyberbole’ which has traditionally added much to the discourse of our Nation.” *Bentley*, 94 S.W.3d at 579. Whether a statement is one of fact or one of opinion is a legal question for the court. *Id.* (citing *Milkovich v. Lorain Co.*, 497 U.S. 1, 19-21 (1990)).

In the context of parody or satire, the issue is more complicated because the statements made by the defendants may be admittedly false, but intended for satire and not a suggestion of fact. *See New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157 (Tex. 2004). Because satire usually utilizes actual names or events, in such cases the question is *not* whether the statements about the plaintiff were false, but rather the “test is whether the publication could be reasonably understood as

describing actual facts.” *Id.* *Isaacks* suggests the issue remains a legal one, but other cases treat the issue as one of fact.

5. “Concerning” the plaintiff.

A statement “concerns” a plaintiff if it is “directed at” the plaintiff. *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413, 429 (Tex. 2000). Whether a statement was “of and concerning” a plaintiff could raise a fact question.

6. Falsity.

Falsity is presumed for a private plaintiff in a nonmedia defendant case regarding a private issue. *See, e.g., Randall’s Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995) (“In suits brought by private individuals, truth is an affirmative defense to slander). When the matter involves (1) a private plaintiff and a nonmedia defendant on a public issue or a media defendant on a private issue or (2) a public official or figure plaintiff against a nonmedia defendant, who bears the burden to prove falsity apparently is unclear. *See Bentley*, 94 S.W.3d at 586-87 & nn.62-64.

A public official against a media defendant must prove that defamatory statements made about him were false. *Id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)). The United States and Texas Supreme Courts have not required more than a preponderance burden on the falsity element. *Id.*

In *Bentley*, although the court suggested that the refusal to submit “falsity” to the jury was error, the court ultimately found the issue resolved as a matter of law:

[T]he trial court refused [defendant’s] request to inquire of the jury whether statements about [plaintiff] were false. The [trial] court appears to have been of the view that the issue was subsumed in [the] motion for a partial directed verdict that [the] statements were defamatory per se, even though the falsity of those statements was not mentioned in the argument or ruling on the motion. That a statement is defamatory—that is, injurious to reputation—does not mean that it is false, and vice versa. After the verdict was returned, the defendants argued that the issue of falsity had not been raised by [the] motion. The court disagreed,

reciting in its judgment that by granting [the] motion it had ‘ruled as a matter of law that [defendant] had published false and defamatory statements about [plaintiff] by accusing him of being corrupt and a criminal.’ The defendants argue that because the trial court denied them a jury finding on falsity and the evidence on that issue was disputed, they are entitled to a new trial. . . . Strictly as a matter of logic, the jury’s finding that [defendants] acted with actual malice does not necessarily imply that the statements made were false, inasmuch as the jury could have believed, *as they were instructed*, that [defendants] acted ‘with reckless disregard as to [the] truth or falsity’ of the statements. As a practical matter, however, it is highly unlikely that the jury would have found that [defendants] made true statements with actual malice—that is, with reckless disregard for whether the statements were true. [Defendant’s] implied finding argument is therefore not without force. But we need not determine whether a finding of falsity can be implied from the verdict in this case because, as we explain below, Bentley proved conclusively that the statements that he was corrupt and criminal were false. Accordingly, we accept the trial court’s statement in its judgment that it determined the issue as a matter of law.

Id. (emphasis added). Thus, the falsity issue may sometimes be a legal determination.

“The test used in deciding whether the [statement] is substantially true involves consideration of whether the alleged defamatory statement was more damaging to [a person’s] reputation, in the mind of the average listener, than a truthful statement would have been. This evaluation involves looking to the gist of the [statement(s)].” *McIlvain v. Jacobs*, 794 S.W.2d 14, 16 (Tex. 1990). This test should be reviewed if a fact issue is raised and submitted on falsity.

7. Fault.

As to fault, proof of negligence or actual malice is generally required. The categories below are broad categorizations that should be verified

for any given case. *See, e.g.,* Michol O'Connor, O'Connor's Texas Causes of Action (Jones McClure 2004), at 335-68.

With regard to a private plaintiff and a nonmedia defendant on a private issue, the law is unclear whether strict liability still applies (given several United States Supreme Court constitutional holdings). *See, e.g., Philadelphia Newspapers, Inc. v. Hepps*, 476 U.S. 767, 775 (1986) ("When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape."). In that circumstance, neither negligence nor actual malice may apply. *See Peshak v. Greer*, 13 S.W.3d 421, 426 (Tex. App.—Corpus Christi 2000, no pet.) (private plaintiff without media defendant does not require fault determination).

With regard to a private plaintiff on other issues against media or nonmedia defendants or public officials of figures on private issues, the standard is negligence. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974). On the other hand, when a defendant raises a qualified or conditional privilege, a private plaintiff may face an actual malice burden to overcome the privilege, but apparently with a preponderance of the evidence burden. *See Randall's Food Markets*, 891 S.W.2d at 646.

With regard to public figures or officials plaintiffs on public matters, the standard is actual malice. *See, e.g., Isaacks*, 146 S.W.3d at 161; *Bentley*, 94 S.W.3d at 596-97. Actual malice means with knowledge of its falsity or with reckless disregard for truth or falsity, although the exact definition of reckless disregard may be unclear. *See Bentley*, 94 S.W.3d at 591; *see also St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) ("There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.").

The burden for actual malice is "clear and convincing," which is "a firm conviction that the fact to be proved is true." *See Bentley*, 94 S.W.3d at 596-97; *see also* Tex. Civ. Prac. & Rem. Code § 41.001(2).

8. Nonexemplary Damages.

Other issues can exist in regard to damage. For example, if a matter is defamatory per se (i.e., injurious to business or profession or imputes criminal conduct), are damages presumed in certain cases? *See, e.g., Peshak*, 13 S.W.3d at 425-26. If a statement is defamatory per quod, must special damages be pleaded and proven to recover general damages? *See, e.g., Kelly v. Diocese of Corpus Christi*, 832 S.W.2d 88, 91, 94 (Tex. App.—Corpus Christi 1992, writ dismissed w.o.j.). Are these questions legal or factual?

9. Jury issues.

Thus, each case may have one or more fact issues that may need to be submitted in granulated form or some may be combined in broadform. The following are a nonexhaustive list of potential fact issues:

1. Did D publish the statement?
2. Was the statement of and concerning P?
3. Was the statement defamatory?
4. Was it false?
5. Was it published negligently? (or clear and convincing evidence with actual malice)?
6. Was the statement substantially true?
7. Was statement injurious to profession or impugn a crime?
8. Amount of general and/or special damages?

Along with these questions, definitions and instructions on publication, of and concerning, substantial truth, ordinary care, actual malice, and perhaps defamatory per se are also required (using the principles briefly outlined above). Moreover, if more than one defamatory statement is at issue, thought should be given to whether constitutional principles require further granulation or linking of conduct through the series of questions.

C. Business Disparagement.

Business disparagement also does not yet appear in the State Bar Patterns. "To prevail on a business disparagement claim, a plaintiff must establish that (1) the defendant published false and disparaging information about it, (2) with malice, (3) without privilege, (4) that resulted in special damages to the plaintiff. A business disparagement claim is similar in many respects to a defamation action. The two torts differ in that defamation actions chiefly serve to protect the personal reputation of an injured party, while a business

disparagement claim protects economic interests.” *Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 170 (Tex. 2003) (citing *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987)). As a result, many of the same issues discussed above should be considered in the context of business disparagement.

D. E-Torts and Anti-Spam.

1. Texas Anti-Spam Act.

Chapter 46 of the Texas Business and Commerce Code provides a civil action for transmitting certain commercial electronic messages (1) containing certain content (e.g., false or deceptive information in the subject line), (2) without a certain format reflecting the content (e.g., does not contain ADV in the subject line if contains obscene material), and (3) to certain recipients (e.g., who have been asked to be removed from a list). Tex. Bus. & Com. Code §§46.002-.004. In addition to criminal and civil penalties, the Act provides for civil liability under the Act as well as under the Deceptive Trade Practices Act (“DTPA”). *Id.* §§ 46.005-.008. But the federal CAN-SPAM Act (Controlling the Assault of Non-Solicited Pornography and Marketing Act, effective January 1, 2004) “supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto. [The Act does not] preempt the applicability of (A) State laws that are not specific to electronic mail, including State trespass, contract, or tort law; or (B) other State laws to the extent that those laws relate to acts of fraud or computer crime.” Section 8, CAN-SPAM Act.

The Federal Trade Commission (“FTC”) continues to determine how to interpret and enforce the CAN-SPAM Act, although the FTC recently relied on the act in a Nevada suit to target a network of emailers sending pornographic materials. See <http://www.ftc.gov/opa/2005/01/globalnetsolutions.htm>. The Texas Attorney General is also determining the contours of the Texas Act and how it interacts with the CAN-SPAM Act. See <http://www.oag.state.tx.us/consumer/spam.shtml>. Private enforcement actions likewise are in their

infancy. As a result, the statutory provisions are the best source of authority in the event of a jury trial on any of these statutory issues.

2. E-torts: trespass, conversion, tortious interference, defamation, etc.

An emerging area of tort actions revolves around the use (and abuse) of technology. See, e.g., *Lambrecht & Associates, Inc. v. State Farm Lloyds*, 119 S.W.3d 16 (Tex. App.—Tyler 2003, no pet.) (action by insured against its insurer after insurer denied coverage for loss of business personal property and loss of income resulting from failure of computer system allegedly due to injection of computer virus). For example, the spreading of a computer virus could result in a *trespass* action, the posting of certain content to a website could result in a *defamation* action, the sending of an email to another party’s customers could result in a *tortious interference with contract* action, or the use of certain names, words or logos could result in a *trademark infringement* action. For a general discussion of cases addressing these issues, see Ralph Duggins and Jerry Selinger, *Recent Developments in Internet Law*, 26th Annual Advanced Civil Trial Course (2003). Claimants may also consider whether unauthorized access to information systems gives rise to a claim for *conversion*.

Patterns for tortious interference and trademark infringement can be located in the Texas and American Bar Association patterns listed above. Defamation is discussed generally above. This section briefly outlines trespass and conversion elements for submission.

a. Trespass.

The e-trespass claims for viruses apparently face difficulty absent damage to the computer system or its data or other interference with its functioning or use. See, e.g., *Intel Corp. v. Hamidi*, No. 5103781, 2003 LEXIS 4205 (Cal. June 30, 2003). As such, because of the injury requirement, in contexts other than viruses or other access that damages a system or data, one of the other torts listed above is more likely to apply—defamation, trademark infringement, or perhaps (if a civil action is available) Texas Penal Code § 33.002.¹

¹ The Penal Code provides as follows on “Breach of Computer Security”:

Under Texas law,

A trespass to personalty is an unlawful injury to, or interference with, possession, with or without the exercise of physical force. Destruction of, or injury to, personal property, regardless of negligence, may be a trespass. A trespass is usually regarded as an intentional tort in the sense that it involves an intent to commit an act that violates a property right, or would be practically certain to

have that effect, although the actor may not know that the act he intends to commit is such a violation.

Jamison v. National Loan Investors, L.P., 4 S.W.3d 465, 469 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (citations omitted).

As a result, the basic trespass charge question would inquire, Did D intentionally injure or interfere with P's possession or use of its personal property?² In the e-tort area, thought must be given to whether any additional questions or instructions could or should apply for an e-trespass claim.

(a) A person commits an offense if the person knowingly accesses a computer, computer network, or computer system without the effective consent of the owner.

(b) An offense under this section is a Class B misdemeanor unless in committing the offense the actor knowingly obtains a benefit, defrauds or harms another, or alters, damages, or deletes property, in which event the offense is:

(1) a Class A misdemeanor if the aggregate amount involved is less than \$1,500;

(2) a state jail felony if:

(A) the aggregate amount involved is \$1,500 or more but less than \$20,000; or

(B) the aggregate amount involved is less than \$1,500 and the defendant has been previously convicted two or more times of an offense under this chapter;

(3) a felony of the third degree if the aggregate amount involved is \$20,000 or more but less than \$100,000;

(4) a felony of the second degree if the aggregate amount involved is \$100,000 or more but less than \$200,000; or

(5) a felony of the first degree if the aggregate amount involved is \$200,000 or more.

(c) When benefits are obtained, a victim is defrauded or harmed, or property is altered, damaged, or deleted in violation of this section, whether or not in a single incident, the conduct may be considered as one offense and the value of the benefits obtained and of the losses incurred because of the fraud, harm, or alteration, damage, or deletion of property may be aggregated in determining the grade of the offense.

(d) A person who his [sic] subject to prosecution under this section and any other section of this code may be prosecuted under either or both sections.

TEX. PENAL CODE § 33.02.

b. Conversion.

Another e-tort area is conversion of data or information. Conversion is the unauthorized and wrongful assumption and exercise of dominion and control over the personal property of another to the exclusion of, or inconsistent with, the owner's rights. *Waisath v. Lack's Stores, Inc.*, 474 S.W.2d 444, 447 (Tex. 1971); *Smith v. Maximum Racing, Inc.*, 136 S.W.3d 337, 341 (Tex. App.—Austin 2004, no pet.); *Whitaker v. Bank of El Paso*, 850 S.W.2d 757, 760 (Tex. App.—El Paso 1993, no writ).

² To recover for trespass to real property, a plaintiff must prove that (1) the plaintiff owns or has a lawful right to possess real property, (2) the defendant entered the plaintiff's land and the entry was (a) physical, (b) intentional, and (c) voluntary, and (3) the defendant's trespass caused injury to the plaintiff. *Patel v. City Of Everman*, No. 12-02-00174-CV, 2004 WL 2158004, at *11 (Tex. App.—Tyler 2004, pet. denied). One court approved of the following question and instruction in a trespass on realty case:

"Trespasser" means one who enters on the property of another without having consent of the owner. To constitute a trespass, entry upon another's property need not be in person but may be made by causing or permitting a thing to cross the boundary of the premises. Every unauthorized entry upon land of another is a trespass and the intent or motive prompting the trespass is immaterial.

Did [the defendant] trespass causing damage to [the plaintiff's] property on the date of the fire that is the basis of this suit?

Watson v. Brazos Elec. Power Co-op., Inc., 918 S.W.2d 639, 646 (Tex. App.—Waco 1996, writ denied).

“To establish a claim for conversion of personal property, a plaintiff must prove that: (1) the plaintiff owned or had legal possession of the property or entitlement to possession; (2) the defendant unlawfully and without authorization assumed and exercised dominion and control over the property to the exclusion of, or inconsistent with, the plaintiff’s rights as an owner; (3) the plaintiff demanded return of the property; and (4) the defendant refused to return the property.” *Smith*, 136 S.W.3d at 341. One court approved a jury question/instruction that omitted wrongful intent, holding such intent was not an element of the claim. *Winkle Chevy-Olds-Pontiac, Inc. v. Condon*, 830 S.W.2d 740, 746 (Tex. App.—Corpus Christi 1992, writ dismissed). Additionally, some of those elements may not constitute fact questions. See *Smith*, 136 S.W.3d at 341 (submitting only form of “unlawful possession” element and holding other elements found as a matter of law).

Because cases often discuss the definition or elements of conversion without regard to proper jury instruction, reliance on these substantive elements should form the beginning point for analyzing what questions and instructions might need to be requested from the jury. See, e.g., *Apple Imports, Inc. v. Koole*, 945 S.W.2d 895, 899 (Tex. App.—Austin 1997, writ denied) (jury charge “asked whether Apple converted appellees’ automobile and whether such conduct was a proximate cause of damages”). In the context of an e-conversion, additional thought must be given to how dominion and control exists “to the exclusion of or inconsistent with” an owner’s rights. As e-torts develop, construction of appropriate charge language to request may become easier.

E. 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 (again a topic whose full treatment is beyond the scope of this article).

1. 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 2004, no pet.) (not designated for publication) (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 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.

2. Seller, Buyer, Issuer.

“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).

“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.

3. 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 factfindings 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.

4. 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. 581-33F(2). The elements and scope of aider liability is the subject of one recent case argued before the supreme court. *Sterling Trust Co. v. Adderley*, 119 S.W.3d 312, 317-18 (Tex. App.—Fort Worth 2003, pet. granted).

Two cases define 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.

On the other hand, 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 court of appeals refused to read a “general awareness” requirement drawn from federal securities law into the TSA when it did not contain parallel language or liability. *Id.* The court thus held:

The language of the TSA does not require proof that an aider is generally aware of its role in the securities violation to be liable as an aider. . . . [T]he trial court [thus] did not abuse its discretion by failing to give [the defendant’s] requested jury instruction on general awareness.

Id. The trustee’s petition in the supreme court raises, among other things, the submission of the “general awareness” issue.

The defendant in *Adderly* also argued that aider liability as to a third-party trustee was precluded by a finding that the trustee did not know nor could it have known of the broker’s

fraudulent representations or omissions. *Id.* The court held as follows:

Under [Tex. Rev. Civ. Stat. Ann. art. 581-33(A)(2), (B) of the Texas Securities Act (“TSA”)], sellers are strictly liable if they sell or buy a security ‘by means of an untrue statement of a material fact or an omission to state a material fact.’ Sellers have a defense [under art. 581-33(B), (F)(1)] to the strict liability provisions of the TSA if they establish that they ‘did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.’ Persons who materially aid a seller are not held strictly liable under the TSA. To recover against an aider, the plaintiff must establish [under art. 581-33(F)(2)] that the aider acted ‘with intent to deceive or defraud or with reckless disregard for the truth or the law.’ An aider who acts with such intent or recklessness is liable ‘to the same extent as if he were the seller.’ *The express provisions of the TSA provide no defense to aiders who do not know or could not have known of a seller’s untruth or omission.*

Id. (emphasis added). In short, the court held lack of knowledge is not a defense in the face of an elevated scienter burden (i.e., “intent to deceive”).

Like the other species of liability, aider liability raises various fact issues. Until the contours of liability are more definitively determined, however, a drafter might want to seek some granulation to guard against findings that do not apply or against omitted findings that might apply.

F. Spoliation.

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*, No. 01-03-00351-CV, 2005 WL 90942, at *5 (Tex. App.—Houston [1st Dist.] Jan. 13, 2005, no pet. h.). 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)).³

³ 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 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 fact finder 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).

In shifting the burden of proof to the spoliating party, trial courts are choosing a middle ground that neither “condones the ... spoliation of evidence at the [nonspoliating party’s] expense nor imposes an unduly harsh and absolute liability” upon the spoliating party. *Welsh*, 844 F.2d at 1249. Moreover, by shifting the burden of proof, the presumption will support the nonspoliating party’s assertions and is some evidence of the particular issue or issues that the destroyed evidence might have supported. The rebuttable presumption will enable the nonspoliating party to survive summary judgment, directed verdict, judgment notwithstanding the verdict, and factual and legal sufficiency review on

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 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

appeal. See *Lane*, 484 S.E.2d at 251.

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).

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., *Hopper v. Swann*, No. 12-02-00269-CV, 2004 WL 948526, (Tex. App.—Tyler 2004, no pet.) (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);⁴ *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

⁴ The court held the evidence did not match the instruction requested in *Dunn*:

You are instructed that *intentional spoliation or destruction* of evidence by City National Bank ... and relevant to this case raises a presumption that the evidence would have been unfavorable to City National Bank

134 S.W.3d at 326-27.

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*, No. 04-03-00697-CV, 2004 WL 2045389 (Tex. App.—San Antonio Sept. 15, 2004, no pet.) (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. *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).

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;⁵ *Roytberg v. Wal-Mart Stores, Inc.*, 111

S.W.3d 843 (Tex. App.—Dallas 2003, no pet.);⁶ *Albertson’s*, 2004 WL 2045389;⁷ *Cresthaven*, 2003 WL 253283;⁸ *Morgan*, 2003 WL 22360942;⁹

Id. (emphasis added).

⁶ In *Roytberg*, the issue was whether a jury could answer a liability question negatively in the face of a spoliation instruction; the court had instructed as follows:

You are instructed that Sam’s has **negligently** destroyed evidence that is relevant to this case. Therefore, you are instructed that the destroyed evidence, the Lawn Chair, was unfavorable to Sam’s on the issue of Sam’s liability in this case. Therefore, Sam’s has the burden to disprove the presumption of liability by a preponderance of the evidence.

111 S.W.3d at 845 (emphasis added) (upholding jury finding).

⁷ The *Albertsons* instruction was as follows:

You are instructed that, when a party has possession of a piece of evidence at a time he or she **knows or should have known** it will be evidence in a controversy, and thereafter disposes of it, makes it unavailable, or fails to produce it, there is a presumption in law that the piece of evidence, had it been produced, would have been unfavorable to the party who did not produce it.”

2004 WL 2045389 (emphasis added).

⁸ The *Cresthaven* instruction:

You are instructed that, when a party has possession of a piece of evidence at a time he **knows or should have known** it will be evidence in a controversy, and thereafter he disposes of it, alters it, makes it unavailable, or fails to produce it, there is a presumption in law that the piece of evidence, had it been produced, would have been unfavorable to the party who did not produce it. If you find by a preponderance of the evidence that Cresthaven Nursing Residence had possession of original, unaltered nurses notes pertaining to Wanda Granger at a time it **knew or should have known** they would be evidence in this controversy, then there is a presumption that the original, unaltered nurses notes pertaining to Wanda Granger, if produced, would be

⁵The *Wal-Mart* instruction:

You are instructed that, when a party has a piece of evidence at a time he knows or should have known it will be evidence in a controversy, and thereafter he disposes of it, makes it unavailable, or fails to produce it, there is a presumption in law that the piece of evidence, had it been produced, would have been unfavorable to the party who did not produce it. If you find by a preponderance of the evidence that Wal-Mart had possession of the reindeer at time it **knew or should have known** they would be evidence in this controversy, then there is a presumption that the reindeer, if produced would be unfavorable to Wal-Mart.

Ordonez, 984 S.W.2d at 273;¹⁰ see also *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155 (4th Cir. 1995).¹¹ The instructions should be reviewed both

unfavorable to Cresthaven Nursing Residence. This presumption may be rebutted by Cresthaven Nursing Residence with the evidence of a reasonable explanation for the non-production of the evidence.

2003 WL 253283 (emphasis added).

⁹The *Morgan* instruction:

You are instructed 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.

2003 WL 22360942.

¹⁰The proposed instruction in *Ordonez* read as follows:

You are instructed that if there is evidence that is pertinent to the issues in this cause, which was in the exclusive possession and control of a party and which cannot be produced, and its disappearance or non-production has not been satisfactorily explained, then you may consider that such evidence contained information adverse to the position taken by the party who was in possession.

984 S.W.2d at 273.

¹¹ Other federal examples exist, but the often-cited *Vodusek* instruction was as follows:

The defendants contend that their access to relevant and potentially relevant evidence was substantially hindered by the actions of plaintiff's counsel and agents, including Mr. Halsey.... [I]t is the duty of a party, a party's counsel and any expert witness, not to take action that will cause the destruction or loss of relevant evidence where that will hinder the other side from making its own examination and investigation of all potentially relevant evidence.

If you find in this case the plaintiff's counsel and agents, including Mr. Halsey, failed to fulfill this duty, then you may take this into account when considering the credibility of Mr. Halsey and his opinions and also you are permitted to, if you feel justified in doing so, assume that evidence made unavailable to the

for the standard and for the result of the presumption.

III. Potential Issues Related to Patterns.

A. Employment discrimination.

1. Discrimination or discharge.

PJC 107.5 recommends submitting discharge and discrimination on the basis of disability as follows:

Did *Don Davis* [discharge or (describe other discriminatory action)] *Paul Payne* because he [filed a workers compensation claim in good faith ...]?

Texas Pattern Jury Charge 107.5 (2003).¹² The Texas Supreme Court recently addressed a wrongful discharge claim in *S.W. Bell Tel. Co. v. Garza*, No. 01-1142, 2004 WL 3019205 (Tex. Dec. 31, 2004). In *Garza*, the trial court submitted the following:

Did D disqualify or discharge P from his position because he instituted or caused to be instituted a worker's compensation claim in good faith?

Id. The statute does not include "disqualify" in its language, and the form of the question arguably submits an invalid theory of recovery. The case thus arguably raised a multi-theory broad-form submission issue for the supreme court. See *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000).

The Corpus Christi court had upheld the question, finding that there was no broadform error in submitting disqualification and discharge in a single question. *S.W. Bell Tel. Co. v. Garza*, 58 S.W.3d 214 (Tex. App.—Corpus Christi 2001),

defendants by acts of plaintiff's counsel or agents, including Mr. Halsey, would have been unfavorable to the plaintiff's theory in the case.

71 F.3d at 155.

¹² PJC 107.5 tracks section 451.001 of the Texas Labor Code, which provides in relevant part: "A person may not discharge or in any other manner discriminate against an employee because the employee has . . . filed a workers' compensation claim in good faith. . . ."

aff'd in part and rev'd in part on other grounds, No. 01-1142, 2004 WL 3019205 (Tex. Dec. 31, 2004).

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." 2004 WL 3019205, at *8. The court found no reasonable basis for concluding that the jury was confused by the question, and thus affirmed. *Id.* Thus, the question of whether employment cases that mix several grounds or theories raise a *Casteel* problem remains unsettled. See *Laredo Medical Group Corp. v. Mireles*, No. 04-03-00729-CV, 2004 WL 2346252, at *7 (Tex. App.—San Antonio 2004, no pet. h.) (raising *Casteel* in employment case).

2. Causation in discrimination case.

PJC 107.6 suggests a "motivating factor" standard in discrimination cases. TEXAS PATTERN JURY CHARGES 107.6. But one court recently approved "age was one of the reasons" in a federal age discrimination case. *Dallas County Sheriff's Dept. v. Gilley*, 114 S.W.3d 689 (Tex. App.—Dallas 2003, no pet.). The court looked to the federal statute and pattern¹³ but also held "one of

¹³ The court noted as follows: "Gilley's sole claim is under the federal Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621 *et seq.* (West 1999 and Supp.2003) ("ADEA"). Under the ADEA, it is 'unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.' 29 U.S.C. § 623(a)(1). In an ADEA case, the ultimate burden of proof is on the plaintiff to prove the defendant intentionally discriminated against him. For Gilley's sole claim under federal law, the trial judge used language in the charge that tracks the language of the federal pattern jury charge for age discrimination claims. See

the reasons" resulted in the same finding as "motivating factor" under PJC 107.6. *Id.* ("[T]he Texas pattern jury charge requested by the Department asks whether age was 'a motivating factor' in the decision at issue and then defines the term 'motivating factor' to be 'a reason for making the decision at the time it was made.'"). Cf. *Quantum Chemical Corp. v. Toennies*, 47 S.W.3d 473 (Tex. 2001) (charge inquired whether plaintiff discharged 'because of age' rather than 'motivating factor' inherently ambiguous and could reasonably be interpreted to require that the improper motivation be either sole factor or one of several factors). Some uncertainty on what causation language may be used in employment claims thus *may* exist.

3. Mixed motive defense.

A question existed in the past as to whether a mixed motive discrimination case (under 42 U.S.C. § 2000e—2(m)) required direct of evidence to support the recovery of actual damages. The United States Supreme Court recently confirmed that circumstantial evidence suffices in a mixed motive case. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).¹⁴ The employer still retains a

PATTERN JURY CHARGES OF THE DISTRICT JUDGES ASS'N OF THE FIFTH CIRCUIT, CIVIL CASES ¶ 11.2 at 146 (Age Discrimination in Employment Act, 29 U.S.C. §§ 621- 634) (West 1999) ('FIFTH CIRCUIT PJI') (requiring plaintiff to prove '[t]hat his age was one of the reasons the defendant discharged [discriminated against] him').” *Gilley*, 114 S.W.3d 692 (case citations omitted).

¹⁴ “[T]he District Court . . . submitted the case to the jury with instructions, two of which are relevant here. First, without objection from petitioner, the District Court instructed the jury that '[t]he plaintiff has the burden of proving ... by a preponderance of the evidence that she 'suffered adverse work conditions' and that her sex was a motivating factor in any such work conditions imposed upon her.' Second, the District Court gave the jury the following mixed-motive instruction: 'You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason. However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the

limited affirmative defense (as set out in 42 U.S.C. § 2000e—5(g)(2)(B)) that precludes actual damages if the employer establishes that it “would have taken the same action in the absence of the impermissible motivating factor.” *Id.* Fifth Circuit employment patterns are undergoing review and modification, including review for the effect of *Desert Palace*. Drafters should therefore also consider whether *Desert Palace* influences the manner or frequency of a submission under PJC 107.18, the Texas pattern for the mixed motive defense under the Texas Labor Code. TEXAS PATTERN JURY CHARGES 107.18.

B. Fraud.

1. Reliance: Reasonable or Justified?

“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).¹⁵

The Supreme Court disapproved of a fraud submission that asked whether the plaintiff “was

plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff’s gender had played no role in the employment decision.” *Desert Palace*, 539 U.S. at 96-97.

¹⁵ The Texas Supreme Court approved the following broad-form submission in *Trenholm v. Ratcliff*, 646 S.W.2d 927 (Tex. 1983):

ISSUE: “Do you find from a preponderance of the evidence that prior to the purchase of Greenhollow lots by Plaintiff Oxford (Trenholm), Raymond F. Ratcliff, Jr. made false representations, either one or more, to representatives of the Plaintiff as to material facts, with the intent of inducing the Plaintiff to purchase Greenhollow lots, which were relied upon by Plaintiff.”

ANSWER: “We do.”

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).

Relying upon *Trenholm* and *Koral*, the comment to PJC 105.2 notes “the jury should be asked only to consider the plaintiff’s reliance and not asked to find whether that reliance was justified.” TEXAS PATTERN JURY CHARGES 105.2. Some cases, however, do discuss reasonable or justified reliance.

Although the court has listed the fraud elements as quoted above in a number of cases, in *Ernst & Young*, the court (with O’Neill writing) states: “To prevail on its fraud claim, Pacific must prove that: (1) Ernst & Young made a material representation that was false; (2) it knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth; (3) it intended to induce Pacific to act upon the representation; and (4) Pacific *actually and justifiably relied* upon the representation and thereby suffered injury.” *See Ernst & Young, L.L.P. v. Pac. Mut. Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001) (citing *Trenholm*) (emphasis added). But 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. Perhaps “justifiable” reliance is limited to the third party context.

Other cases not involving the third party context, however, 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.

If the issue is not one that is only evidentiary in nature or limited only to certain types of fraud (as in *Ernst & Young*), the issue becomes one of submission of the fraud claim: Should the jury find whether reliance was reasonable or justifiable?

2. Fraud by nondisclosure.

a. Duty.

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. 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 in whole or in part. 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 which 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 *Casteel*, 22 S.W.3d at 389. Thus, when seeking a submission (or defending against a submission) of both fraud by nondisclosure and fraud by affirmative representation, consider whether the two can or should be combined in a single broad-form question—if the duty to disclose is unclear or otherwise disputed.

b. Recklessness.

“[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 only 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 damage thereby.” *Wolf v. Fernandez*, 733 S.W.2d 695, 697 (Tex. App.—San Antonio 1987, writ ref’d n.r.e.).

One court held using a reckless standard did not suffice to meet the intentional requirement for promises of future performance. See *Taylor v. Johnson*, 677 S.W.2d 680, 683 (Tex. App.—Eastland 1984, writ ref’d n.r.e.). The trial court submitted the following question:

Do you find that Leta Taylor *represented* to David Johnson that *she would transfer* to him controlling ownership of J.Y. Taylor Manufacturing Company upon her death, that it was made with the intent to induce him to accept employment, was

material to his decision to accept employment, was relied upon by him, and that the representation was *false at the time it was made or was made recklessly?*

The jury answered “yes.” *Id.* In a different question, the trial court submitted the following:

Do you find that Leta Taylor *promised* David Johnson that *she would transfer* to him controlling ownership of J.Y. Taylor Manufacturing Company upon her death, that it was made with the intent to induce him to accept employment, was material to his decision to accept employment, was relied upon by him, *and was made with the intention at the time made of not fulfilling it?*

The jury answered “no.” *Id.* The court held that the jury’s answer based on an affirmative finding under a reckless standard would not support a fraud recovery based on the promise of future performance, particularly with a negative (“no”) finding under an intentional standard.

On the other hand, an affirmative answer to the following question was found sufficient to support a fraud recovery:

Do you find that the defendant, C.D. Payne, a) made *representations* to the plaintiff, Magdalene Campbell, that were material and false, b) with the *intention* that the representations should be acted upon by the plaintiff, c) that the plaintiff acted in reliance upon the representations and d) that such conduct, if any, was a proximate cause of damage to the plaintiff?

Campbell v. C.D. Payne & Geldermann Securities, Inc., 894 S.W.2d 411, 425-26 (Tex. App.—Amarillo 1995, writ denied); *see also Wolf*, 733 S.W.2d at 697 (“A jury finding of recklessness will not support an action for fraud based on unfulfilled promises to do something in the future.”). Although the trial court in *Campbell* did not include “no intent to perform future promise,” the court of appeals held “if the representations were false and made with the intention that they be relied upon by [plaintiff], [defendant] necessarily must not have intended to carry out those

representations in the future or they would not have been false.” *Campbell*, 894 S.W.2d at 425-26. The submission, however, did not include a reckless element.

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.”). Thus, the question would be whether “recklessly” conflicts in any way with (1) “intent not to perform” or (2) “knows to be false.”

C. 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:

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 relations from occurring for purpose of harming P.	Wrongful interference occurred if: (a) there was a reasonable probability the Ps would have entered K relation, and (b) W intentionally prevented the contractual relationship from occurring with the purpose of harming Ps.

TEXAS PATTERN JURY CHARGES 106.2 (2000).

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 defendant¹⁶ that prevented the relationship from occurring;¹⁷
- (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

¹⁶ In *Community Initiatives, Inc. v. Chase Bank of Texas*, No. 08-02-00527-CV, 2004 WL 2965861 (Tex. App.—El Paso Dec. 23, 2004, no pet. h.), 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.*

¹⁷ 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, no pet. h.).

Antonio 2003, pet. denied); *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 conduct complained of.

D. Insurance Code’s 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.

E. Vicarious Liability.

1. 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’).¹⁸ “While the broader

¹⁸ 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).

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 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. A drafter should review *Wolff* when seeking a joint enterprise submission.

2. Single Business Enterprise.

Last year, the court found it unnecessary to decide whether a theory of “single business enterprise” is a necessary addition to Texas law regarding the theory of alter ego for disregarding the corporate structure where article 2.21 of the Texas Business Corporation Act controls. *Southern Union Co. v. City of Edinburg*, 129 S.W.3d 74, 85-86 (Tex. 2003). The court noted that any veil-piercing theory under article 2.21 should track the language of the statute. *Id.*¹⁹ The trial court submitted the following instruction:

¹⁹ Article 2.21(A) provides as follows:

A holder of shares, an owner of any beneficial interest in shares, or a subscriber for shares whose subscription has been accepted, or any affiliate thereof or of the corporation, shall be under no obligation to the corporation or to its obligees with respect to:

- (1) such shares other than the obligation, if any, of such person to pay to the corporation the full amount of the consideration, fixed in compliance with Article 2.15 of this Act, for which such shares were or are to be issued;

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

(2) any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, owner, subscriber, or affiliate is or was the alter ego of the corporation, or on the basis of actual fraud or constructive fraud, a sham to perpetrate a fraud, or other similar theory, unless the obligee demonstrates that the holder, owner, subscriber, or affiliate caused the corporation to be used for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, owner, subscriber, or affiliate; or

(3) any obligation of the corporation on the basis of the failure of the corporation to observe any corporate formality, including without limitation: (a) the failure to comply with any requirement of this Act or of the articles of incorporation or bylaws of the corporation; or (b) the failure to observe any requirement prescribed by this Act or by the articles of incorporation or bylaws for acts to be taken by the corporation, its board of directors, or its shareholders.

TEX. BUS. & COM. CODE § 2.21.

appropriate, but leaves other questions, such as the following, unanswered: (1) Is single business enterprise a valid theory by which to pierce the corporate veil? (2) How do you submit single business enterprise theory of veil piercing? (3) How do you submit article 2.21?

3. Common law indemnity from agent.

One court recently 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.*

F. Inferential Rebuttal Instructions (Sole Proximate Cause/Unavoidable Accident).

Sole proximate cause and unavoidable accident instructions may apply to DTPA actions but infrequently apply in pure business cases. But, because the omission of a defense that finds support in the evidence generally results in reversible error, a request for such defenses requires analysis of any applicability.

The supreme court recently ruled on a case raising the issue of whether an “unavoidable accident” instruction applies only to non-human conduct and whether a sole proximate cause

instruction should have been given under the circumstances of that case. *Texas Elec. Coop. v. Dillard*, No. 12-01-00258-CV, 2003 WL 1884296 (Tex. App.—Tyler Apr. 16, 2003) (jury not allowed to consider potential ramifications of unidentified rancher’s conduct in allowing cows to wander on highway when sole proximate cause instruction omitted), *rev’d*, *Dillard v. Texas Elec. Coop.*, No. 03-0655, 2005 WL 323726 (Tex. Feb. 11, 2005).

The supreme court ruled (1) unavoidable accident is not so limited as to apply only to nonhuman conduct, (2) the PJC’s multiple inferential rebuttal instructions are overlapping, (3) an inferential rebuttal instruction to explain to the jury that an occurrence could be caused by something/someone other than those submitted in the question is not harmful, but (4) multiple inferential rebuttal instructions would allow repeated emphasis by counsel in argument. *Dillard v. Texas Elec. Coop.*, 2005 WL 323726 (Tex. Feb. 11, 2005).

Justice O’Neill concluded “[u]nder 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.” *Id.*

In the context of a business case, an intervening cause—submitted with proximate cause in PJC 3.1—*may* arise in a business case if third party criminal conduct is at issue. Other circumstances also arguably exist. Indeed, *Dillard* makes the concept a broader one, with less restrictive pigeonholes. If so, a drafter should give thought to the best language that would apply for a global inferential rebuttal in a business case.

G. Segregated Damages.

In *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), the supreme court held that a no evidence objection to an element of damage preserved error as to the broad-form submission of valid and invalid elements of damage. *Id.* “[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.” *Id.* at 234; *see 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 [“physical impairment of loss of vision” and “physical impairment other than loss of vision”] violated the broad-form mandate of Rule 277 and stating “[a]lthough the trial court granulated physical impairment into two separate categories, [defendant] did not explain how it was harmed by the submission, particularly in light of the jury’s award of ‘\$0’ for physical impairment other than loss of vision”); *Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003) (holding long after trial that Texas does not recognize action for parent’s loss of consortium for non-fatal injury to child).

In addition to the failure of evidence, refusal to segregate damages over objection could cause error in the context of legal theories as well. *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). Thus, segregated rather than broad-form (i.e., lump sum) damages are now the general rule rather than the exception.

H. Overlapping, undefined damages.

The Texas Supreme Court recently held that in defining physical impairment, the jury should be instructed that (1) loss of enjoyment of life is a factor to be considered in assessing damages for physical impairment; (2) the effect of any physical impairment must be substantial and extend beyond pain, suffering, mental anguish, lost wages, or diminished earning capacity; and (3) plaintiff should not be compensated more than once for the same elements of loss or injury. *Golden Eagle Archery, Inc.*, 116 S.W.3d at 772. Physical impairment damages might apply in an employment or DTPA case, although the “undefinable” aspect of *Golden Eagle* may otherwise have little application in business cases with well-defined damages.

The supreme court noted that courts of appeal have not agreed on the definition of physical impairment or whether it applies solely to permanent (or can also include temporary) injuries. *Id.* at 765-67. The supreme court also noted that the court of appeals, in reviewing the

sufficiency of the evidence, should not have used the following definition of physical impairment “so frequently quoted by Texas courts”:

To recover damages for physical impairment, a plaintiff must prove that the effect of his physical impairment extends beyond any impediment to his earning capacity and beyond any pain and suffering to the extent that it produces a separate and distinct loss that is substantial and for which he should be compensated.

Id. (quotations omitted). The court so held because the jury had not been given that definition *and* the definition did not eliminate the overlap between soft damages. *Id.* The court then held:

[I]f ‘physical impairment’ is defined for a jury, it would be appropriate to advise the jury that it may consider as a factor loss of enjoyment of life. But the jury should be instructed [1] that the effect of any physical impairment must be substantial and extend beyond any pain, suffering, mental anguish, lost wages or diminished earning capacity and [2] that a claimant should not be compensated more than once for the same elements of loss or injury.

Id. at 772 (emphasis added).

While clearly defining physical impairment may still be difficult with that guidance, the court gave guidance on the preferred “overlapping” damage instruction. That is, when it is not feasible to define damage categories of damage, like physical impairment, in such a way that they do not overlap, a limiting instruction such as PJC 8.2 and PJC 110.27 should be submitted to avoid double awards of damages. *Id.* at 770.²⁰ However, PJC 8.2 and PJC 110.27 will probably be modified to comport with the following

²⁰ The trial court followed PJC 8.2 and instructed the jury: “Consider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element.” *Id.*; see also TEXAS PATTERN JURY CHARGES 7.14B.

instruction from *French v. Grigsby* that the court suggested is “clearer”:

In answering this special issue you shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss, that is do not compensate twice for the same loss, if any.

Id. (citing *French v. Grigsby*, 567 S.W.2d 604, 608 (Tex. Civ. App.—Beaumont 1978, writ ref’d n.r.e., approved, 571 S.W.2d 867 (Tex. 1978)). The PJC’s have now been modified to adopt *Grigsby*, but definitions of damages (including physical impairment, mental anguish, and other “overlapping” categories) is still an issue for determination in each case.

I. Subscriber/Exemplary Damages Cap.

The following issue is one moving through the courts:

Which, if either, cap (i.e., \$200,000 or a multiple of actual damages) from section 41.008 of the CPRC applies to a claim to recover exemplary damages (preserved in Labor Code § 408.001(b)) against a subscribing employer for the death of an employee caused intentionally or by the gross neglect of the employer?

That exemplary damage cap issue was involved in a case before the Texas Supreme Court but the court decided it on other grounds. See *Diamond Shamrock Ref. Co. v. Hall*, No. 02-0566, 2005 WL 119950 (Tex. Jan. 21, 2005).

Because the Labor Code’s exclusive remedy provision precludes an actual but not exemplary damage recovery in a workers’ compensation case, in 1987, the supreme court held that it is “not necessary” to determine the “exact amount” of actual damages “to determine whether the exemplary damages are reasonable.” *Wright v. Gifford-Hill*, 725 S.W.2d 712, 714 (Tex. 1987) (emphasis added).²¹ As a result, actual damages

²¹ The Texas Constitution authorizes and protects exemplary damages to the following individuals in the following circumstances:

Every person, corporation, or company, that may commit a homicide, through willful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide.

Tex. Const. art. XVI, §26. The Labor Code’s “exclusive remedy” provision acknowledges the constitutional provision by “not prohibiting” a claim for exemplary damages when an employee’s death arises from intentional or grossly negligent conduct of the employer.

Section 408.001. Exclusive Remedy; Exemplary Damages

(a) Recovery of workers’ compensation benefits is the exclusive remedy of an employee covered by workers’ compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.

(b) This section does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer’s gross negligence.

(c) In this section, “gross negligence” has the meaning assigned by Section 41.001, Civil Practice and Remedies Code.

Tex. Labor Code § 408.001 (Vernon 1993). Finally, the capping provision that raises the “which cap” issue contains, in pertinent part, the following language:

Limitation on Amount of Recovery

(a) In an action in which a claimant seeks recovery of exemplary damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.

(b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

- (1) (A) two times the amount of economic damages; plus
- (B) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or

have not typically been submitted in these types of cases. TEXAS PATTERN JURY CHARGES 9.6 cmt. Moreover, when adopted, chapter 41 (the cap chapter) initially excluded subscriber cases from its scope. With the 1995 amendments to the CPRC, however, workers’ compensation cases are no longer excluded from Chapter 41’s exemplary damage caps. TEX. CIV. PRAC. & REM. CODE § 41.002 (excluding antitrust, DTPA, and Insurance Code claims); see *R&R Contractors v. Torres*, 88 S.W.3d 685, 701-05 (Tex. App.—Corpus Christi 2002, no pet.).²² The chapter applies to all claims not excluded (presumably including all statutory, constitutional, or common law bases for exemplary damages). Thus, the cap applies; the question is, how?

In *Hall*, the defendants moved (in limine) to exclude evidence of economic and noneconomic damages based on “no recovery” and immateriality arguments. *Hall v. Diamond Shamrock Ref. Co.*, 82 S.W.3d 5, 23 (Tex. App.—San Antonio 2002), *rev’d*, 2005 WL 119950 Tex. Jan. 21, 2005). The defendants argued the \$200,000.00 cap of Chapter 41 automatically applied. The defendants convinced the trial court not to submit issues on the amounts of actual damages, and the trial court only allowed in evidence “relevant to the charge.” *Id.* at 24. The plaintiff made an offer of proof with a summary of the evidence outside the presence of the jury. *Id.* The trial court’s judgment awarded exemplary damages of \$200,000. *Id.*

The court of appeals held that “the jury needs the evidence [of compensatory damages] to calculate the punitive damages using the formula pursuant to section 41.008(b)(1).” *Id.* (emphasis added). The court therefore held that the “evidence of compensatory damages was relevant

(2) \$200,000.

(c) Section (b) does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally

Tex. Civ. Prac. & Rem. Code § 41.008.(a), (b), (c).

²² In 2001, the legislature refused to add the Labor Code back into the “exception” list in chapter 41. See *Torres*, 88 S.W.2d at 700.

to Hall's cause of action, the trial court committed error that resulted in an improper judgment. As a result of this error, there was a substantial discrepancy between the amount [the plaintiff] was actually awarded and the amount she could have been awarded if the evidence of compensatory damages had been included in calculating her damages under the formula" *Id.* (citation omitted and emphasis added). Although the trial court (not the jury) would calculate the cap, the issue is whether evidence of and findings on actual damages are necessary to properly apply the exemplary damage cap in a subscriber case.

The supreme court reversed and rendered because it found no clear and convincing evidence of gross negligence. 2005 WL 119950. The following cap issues thus remain open: (1) Is the \$200,000.00 cap automatic in a subscriber case such that it renders the admission of evidence on and the need for jury findings as to the amount of compensatory damages immaterial? Put another way, should a claimant for exemplary damages arising from a worker's death based on gross negligence or intentional conduct be allowed to offer evidence of and obtain jury findings on the amount of actual damages suffered? (2) If so, what damages would be relevant, and how procedurally should the evidence be offered and findings be obtained?

J. 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 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) 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.

Not all theories necessarily apply to all cases. PJC 7.14 suggests the following question to determine whether to impute exemplary damage liability to the corporation when the actor is a managerial employee:

If you have answered "Yes" to Question _____ [4.1 or other applicable liability question], and you have inserted a sum of money in answer to Question _____ [8.2 or other applicable damages question], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Do you find by clear and convincing evidence that the harm to *Paul Payne* resulted from malice attributable to *ABC Corporation*?

"Clear and convincing evidence" means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

"Malice" means:

(a) a specific intent by *Don Davis* to cause substantial injury to *Paul Payne*; or

(b) an act or omission by *Don Davis*,

(i) which, when viewed objectively from the standpoint of *Don Davis* at the time of its occurrence, involved an extreme degree of risk, considering the

probability and magnitude of the potential harm to others; and

(ii) of which *Don Davis* had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

You are further instructed that in order for malice to be attributable to *ABC Corporation*, you must find that *Don Davis* was employed by *ABC Corporation* in a managerial capacity and was acting in the scope of that managerial capacity.

Answer “Yes” or “No.”

Answer: _____

TEXAS PATTERN JURY CHARGES 7.14B. Other *McGuff* actors can be substituted for the italicized phrase in the instruction. *Id.*

PJC 7.15 suggests an alternate submission if the actor is a vice principal:

If you have answered “Yes” to Question ____ [4.2A/4.2B], then answer the following question. Otherwise, do not answer the following question.

Was *Don Davis* acting in *his* capacity as a vice-principal of *ABC Corporation*?

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.

Answer “Yes” or “No.”

Answer: _____

TEXAS PATTERN JURY CHARGES 7.15. A vice principal’s status, such as corporate officer, could be undisputed, but absent submitting identified agents in the liability question, an issue could exist as to whether the jury found that (or another) person committed the tortious conduct found in the liability question. (In the above pattern, the liability and vice principal question submit *Don Davis*, an identified actor.)

PJC 110.35 suggests that the following instruction be given in the amount of exemplary damage question [PJC 110.34] to hold corporations liable for the acts of their servants:

Exemplary damages can be assessed against [Don Davis] [ABC Corporation] as principal because of an act by an agent, but only if,

- a. the principal authorized the doing and the manner of the act, or
- b. the agent was unfit and the principal was reckless in employing him, or
- c. the agent was employed in a managerial capacity and was acting in the scope of employment, or
- d. the employer or a manager of the employer’s ratified or approved the act.

TEXAS PATTERN JURY CHARGES 110.35.

Thus, whichever set of questions and instructions are used a set of findings are necessary: a specific liability finding generally as to a specific agent, a malice finding generally as to a specific agent, an exemplary liability finding for the corporation either through an instruction in the malice question or the amount question, and an assessment of exemplary damages against the corporation.

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.²³ 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 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 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.

In short, corporate liability for exemplary damages can raise various charge issues, including (1) With what question or in what phase is the vicarious liability instruction(s) or question submitted? (2) Which grounds should be submitted? (3) How is nondelegable duty submitted?

K. Out-of-State Conduct/Punitive 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

²³ 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”).

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*, 125 S.W.3d 672 (Tex. App.—Houston [1st Dist.] 2003, *dism’d*) (“[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.”). If it should be submitted to the jury, how to submit the instruction may present thorny issues.

A *State Farm* pattern is difficult because of the variations of evidence and defendants in cases. Moreover, other questions exist, e.g., does the 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. Although not necessarily addressing all of the issues, the following is one possible *State Farm* jury instruction(s) for use with PJC 110.34:

Do not assess any amount of exemplary damages against *Don Davis* for conduct that was lawful in the jurisdiction where it occurred.

In considering these factors, do not consider *Don Davis’s* lawful out-of-state conduct unless such conduct is connected to the harm resulting to *Paul Payne* found by you in Question ____.

L. House Bill 4.

1. Taxes.

House Bill 4 added section 18.091 to the CPRC:

(a) Notwithstanding any other law, if any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, evidence to prove the loss

must be presented in the form of a *net loss after reduction* for income tax payments or unpaid tax liability pursuant to any federal income tax law.

b) If any claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, **the court shall instruct the jury** as to *whether any recovery for compensatory damages sought by the claimant is subject to federal or state income taxes.*

Tex. Civ. Prac. & Rem. Code § 18.091 (2004) (emphasis added).

The provision may have broader application than intended (i.e., personal injury cases) to employment cases as well. Applying the provision to employment cases could result in “double taxation” through a reduction in judgment and a payment of taxes on the reduced recovery. Nevertheless, for now, the provision applies generically to types of recovery, not types of claim—requiring additional proof and additional jury instructions.

Ignoring the proof issues, the statute mandates an instruction. A list of “taxation” instructions used in other forums can be found in the following article: Claudia Wilson Frost and J. Brett Busby, *Charging the Jury in the Wake of HB4*, 67 Tex. B.J. 276, 279-80 (2004). The Texas statute appears slightly different in wording and perhaps intent than the instructions used in other forums. PJC 110.1.5 now contains a suggested pattern instruction on the taxation issue.

2. Unanimity—instruction and certificate.

House Bill 4 also imposed a unanimity requirement in exemplary damage cases in amending section 41.003:

(d) Exemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.

(e) In all cases where the issue of exemplary damages is submitted to the jury, the following instruction

shall be included in the charge of the court:

You are instructed that, in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous.

Tex. Civ. Prac. & Rem. Code § 41.003 (2004).

As has been pointed out in various legislative update seminars, section (e) only requires the instruction in the “amount” question, although section (d) requires unanimity in regard to “liability for and the amount of exemplary damages.” Despite that contradiction, the consensus appears to be unanimity applies to the state-of-mind and amount findings. Moreover, including the instruction only in the amount question appears to leave a gap for the jury; thus, a modified instruction in the state-of-mind question might also be prudent. A more extensive treatment of these issues is 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).

The supreme court recently promulgated a new jury certificate pursuant to Texas Rule of Civil Procedure 226a. That certificate recognizes that there is no one-size-fits all jury certificate anymore and allows trial court discretion in fashioning appropriate certification. Because the certificate is a “fill-in-the-blank,” however, practitioners should use care 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.

M. Broad-form issues.

Although the supreme court states that it has not retreated from its broad-form mandate, as discussed above with *Casteel* and *Harris County*, certain contexts are now recognized as infeasible for broad-form under the law. Moreover, several areas of potential infeasible broad-form areas remain open:

1. Evidentiary grounds of broad-form liability question.

The supreme court has yet to agree if the holding of *Casteel* applies to the failure of part of

a broad-form question on evidentiary grounds. See *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 69 n.1 (Tex. 2000) (“The City has not argued that it would be entitled to a new trial if the evidence was legally insufficient to support one or more of these theories of liability. Therefore, whether our decision in *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 389 (Tex. 2000), should be extended to cases in which there is no evidence to support one or more theories of liability within a broad form submission is not a question before us.”). But see *In re A.V.*, 113 S.W.3d 355, 358 (Tex. 2003) (refusing to review complaint on broad-form submission without objection to form or to evidentiary support of any theory submitted); *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). But, because *Harris County* involved failure of sub-parts of a damage question on legal sufficiency of the evidence grounds, that case may foretell the result when the supreme court reaches the issue, which it may have the opportunity to do so in the near future.²⁴ See *Laredo Medical Group Corp. v. Mireles*, No. 04-03-00729-CV, 2004 WL 2346252, *7 (Tex. App.—San Antonio) (Tex. App.—San Antonio 2004, no pet. h.) (relying on *Casteel* in *Sabine Pilot* employment discharge case and holding

²⁴ For example, numerous parties in family law cases have asserted a *Casteel* argument arising from an “E.B.” submission of two or more statutory grounds in the disjunctive in termination of parental rights cases. Although holding such an error was not preserved in *B.L.D.*, the supreme court noted: “While the court of appeals in this case states that *E.B.* does not control the resolution of this case, see 56 S.W.3d at 216 n. 15 (referring to the relevant discussion in *E.B.* as “dictum”), we observe that our courts of appeals are now divided on this issue.” *In re B.L.D.*, 113 S.W.3d 340, 349 n.8 (Tex. 2003). The supreme court also reviewed several other cases on the same or similar issue but found the error unpreserved in those cases as well. See *In re A.V.*, 113 S.W.3d 355, 358 (Tex. 2003); *In re K.N.R.*, 113 S.W.3d 365 (Tex. 2003); *In re A.F.*, 113 S.W.3d 363 (Tex. 2003). As a result, that issue remains open for resolution. Other areas may exist as well. *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).

reversal and remand required after holding subparts (a)-(c) supported by insufficient evidence even though subpart (d) supported by legally sufficient evidence).

2. 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 *Durban v. Guajardo*, 79 S.W.3d 198 (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. dismissed 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 *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); *KPH Consol., Inc. v. Romero*, 102 S.W.3d 135, 159-60 (Tex. App.—Houston [14th Dist.] 2003, pet. granted) (not relying on *Casteel* but holding that linking of erroneously submitted malicious credentialing question along with negligence question to single actual damage question left court unable to tell which damages caused by what conduct); *Custom Residential Paint Contracting, Inc. v. Klein*, No. 05-98-01858-CV, 2001 WL

1318420/2002 WL 660200 (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 intact but later accepting remittitur rather than remand), *judgment vacated based on finding of no harm in light of voluntary remittitur*, No. 05-98-01858-CV, 2002 WL 660200 (Tex. App.—Dallas Apr. 23, 2002). *Romero* could provide the supreme court an opportunity to reach this issue.

3. Multiple liability questions tied to single apportionment question.

Similar to the actual damage context, at least one court has determined that linking a flawed theory of liability to an apportionment question results in error. See *KPH Consol., Inc. v. Romero*, 102 S.W.3d 135, 159-60 (Tex. App.—Houston [14th Dist.] 2003, pet. granted) (not relying on *Casteel* but holding that linking of erroneously submitted malicious credentialing question along with negligence question to single apportionment question left court unable to tell how jury apportioned responsibility on what conduct). The problem would be whether the relative percentages should remain in tact after removing one of the defendants from the mix.

4. 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. See *San Antonio Credit Union v. O'Connor*, 115 S.W.3d 82, 102 (Tex. App.—San Antonio 2003, pet. filed) (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). The issue is whether any penalty was assessed for conduct that does not create any liability.

5. A “general” charge.

Rule 290 defines a jury verdict as “general or special.” Tex. R. Civ. P. 290. At least one court, however, has held that a jury charge that asks a jury whether it finds in favor of the plaintiff or the

defendant cannot meet the requirements of *Casteel*. *Commercial Bank of Texas v. Luce*, 92 S.W.3d 636, 639-40 (Tex. App.—Beaumont 2002, no pet.) (breach of employment contract action). Noting that both parties objected to the form of the charge, the court of appeals held that the jury question did not instruct the jury on the law or submit the controlling fact issues for the jury's determination. *Id.* The holding probably presents little controversy when viewed in light of *Casteel* and *Smith*.

IV. Conclusion.

All cases raise their own unique charge issues. Moreover, at any given time, various uncertainties exist in the law. Some of those issues are discussed above, although no list of charge issues can be exhaustive. Thus, while available patterns provides a good foundation for the Court's Charge, some modifications or additions are almost always necessary to account for the intricacies of the case and the state of flux in the law—particularly at present with House Bill 4 changes not yet solidified and some broad-form issues remaining.