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Proposed Amendments Require "Plain Language" in Jury Instructions

by MARY ALICE ROBBINS

Proposed amendments to the Texas Rules of Civil Procedure include a "plain language" revision of the instructions judges must give prospective jurors and jury members selected for a trial.

Misc. Docket No. 10-9210, posted Dec. 14 on the Texas Supreme Court's website and signed Dec. 13, would amend jury instructions required by court order under Rule 226a and would amend Rules 281 and 284.

Kennon Peterson, the Supreme Court's rules attorney, says the court rewrote the instructions prescribed under Rule 226a "in plain language that jurors are more likely to understand and therefore to follow."

Justice Nathan Hecht, the Supreme Court's liaison for rules, says there's a lot of "legalese" in the current jury instructions.

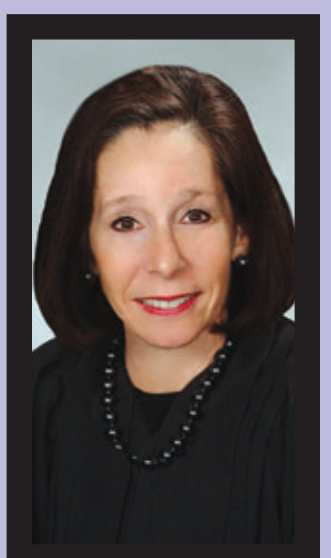
"We're just trying to put them in plainer English," Hecht says.

Supreme Court Advisory Committee (SCAC) member Tracy Christopher, a justice on Houston's 14th Court of Appeals, says rudimentary testing by the State Bar of Texas Jury Charge Oversight Committee found that jurors do not always understand the instructions they are given.

Christopher writes in an e-mail that the State Bar committee began working on revisions in the Rule 226a jury instructions in 2006 and presented its recommended draft to the SCAC in October 2007.

Among other things, the proposed revisions seek to clarify that if only 10 members of a jury agree on every answer in a jury charge, only those 10 members can sign the verdict certificate, Christopher says.

see **Proposed**, page 14



'10 year in review

Of E-Mail Addresses And Conduct Messes

The Tongue-in-Cheek Awards

by MARY ALICE ROBBINS

I have written the column on *Texas Lawyer's* annual Tongue-in-Cheek Awards for the past decade, and the lawyers and judges of Texas have provided more than enough material for the column each year. This year is no exception.

The 2010 winners are as follows:

The **Mislabeling Award** goes to Justice Leslie Brock Yates, who will be leaving Houston's 14th Court of Appeals at the end of the year. In a Feb. 11 letter to Republican voters, Yates alleged that her GOP primary opponent, 334th District Judge Sharon McCally of Houston, was the "handpicked candidate" of Democrat personal-injury trial lawyers. Yates also wrote in the letter that prior to winning the trial court bench, McCally had been a plaintiffs personal-injury trial lawyer who "sued small and large business, killing jobs and driving up the costs of doing business in Texas." Although McCally said she had done plaintiffs personal-injury cases, she said the allegation that she was the trial lawyers' handpicked candidate was untrue. McCally defeated Yates in the primary and went on to win

see **The Winners**, page 29

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Litigants in personal-injury cases can only hope that in the interim, CMS or Congress will provide desperately needed clarification of the new reporting requirements.

Quentin Brogdon is an associate with the Law Offices of Frank L. Branson in Dallas. He is board certified in personal-injury trial law by the Texas Board of Legal Specialization, and he is a member of the American Board of Trial Advocates. He was president of the Dallas Trial Lawyers Association in 2008. His e-mail address is qdbrogdon@flbranson.com.

REAL ESTATE LAW

Rethinking Receiverships

by STEVEN A. CAUFIELD

When defaults spiked for loans underwritten by commercial mortgage-backed securities (CMBS), many Texas attorneys sought state court-appointed receivers for commercial real estate assets.

Placing a struggling property in receivership has long been a remedy available for lenders, but Texas' relatively expedited and inexpensive nonjudicial foreclosure process limited the remedy's practical value for traditional lenders.

The bad economy is changing the value of receiverships, at least for special servicers of CMBS loans. A master servicer oversees the trusts that hold pools of performing CMBS loans; a special servicer takes over when the debt matures, goes into default, or requires some sort of extraordinary action on behalf of the lender. With the sharp increase in defaults under CMBS-backed loans and the resulting issues presented by the Real Estate Mortgage Investment Conduit (REMIC) regulations that govern CMBS loans, many Texas attorneys petitioned courts on behalf of special-servicer clients to appoint receivers. They also helped their clients navigate REMIC regulations, the intricacies of which are becoming more apparent in the loan default era than they were in the loan origination era.

Unlike traditional lenders, special servicers for CMBS trusts must satisfy certain REMIC requirements prior to foreclosing on a property or taking it back in the name of the trust. Typically, to foreclose on commercial real estate assets, the servicer must obtain updated appraisals, environmental reports, surveys and other third-party reports. These obligations can stretch the abbreviated Texas foreclosure time period by several months. That extended time could slash the value of a troubled asset. As a result, attorneys helped special servicers seek judicial appointment of receivers over commercial real estate collateral to protect the value of their assets while they performed the REMIC-required due diligence.

In 2010, Texas attorneys also navigated uncharted waters in representing special servicers and CMBS lenders selling real property directly out of receivership without first conducting a traditional foreclosure.

REMIC rules restrict a servicer's ability to modify existing debt or extend new debt to its borrowers. Therefore, when a special servicer forecloses on a CMBS loan, the secured debt is extinguished and the servicer has no ability to offer seller financing to a new buyer.

However, if the special servicer can sell the property out of receivership without foreclosing, in many circumstances the lender and the new borrower can modify the underlying debt, and the new buyer can assume it. This unlocks the value of an asset; it allows the special servicer to make loans to potential purchasers that otherwise may not be available in the still-thawing credit markets. Further, this allows the servicer to bring in new capital and solvent borrowers without ever assuming the obligations or potential liabilities of owning the property after a foreclosure sale.

Because of these benefits, in 2010 many special servicers employed Texas counsel to complete receivership sales of commercial real estate assets within the complicated and largely untested framework of REMIC regulations. As billions of dollars of CMBS loans mature in the coming years, it is likely that many more Texas attorneys will use the old remedy of receivership in 2011 and beyond.

Steven A. Caufield is an associate with Munsch Hardt Kopf & Harr in Dallas. His practice focuses on the acquisition, development and management of commercial real estate properties including hotel, office, mixed-use and industrial properties. He earned a bachelor of arts degree from Rice University and his J.D. from Tulane University Law School.

SECURITIES LAW

The Dodd-Frank Earthquake

by BRAD FOSTER and MATTHEW NIELSEN

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) is the most sweeping financial legislation since the Great Depression. The 2,300-page law contains a number of provisions that impact securities litigation and enforcement, including significant new whistle-blower protections and expanded Securities and Exchange Commission enforcement tools. These changes will affect Texas lawyers for years to come. Here are four key portions of the act.

Whistleblower provisions: Dodd-Frank §922 contains powerful new whistle-blower provisions. If an individual voluntarily contacts the SEC and provides "original information" about a violation of the securities laws and the information leads to a successful enforcement action with a monetary sanction of more than $1 million, the whistleblower is entitled to a bounty of between 10 percent and 30 percent of the total sanction. The act also creates a new private right of action for whistle-blowers against retaliating employers. Remedies include reinstatement, double back-pay with interest and attorneys' fees.

Expanded secondary liability: Dodd-Frank relaxes the culpability standard for aiding-and-abetting claims brought by the SEC. Previously, the SEC was required to show that a defendant "knowingly" provided substantial assistance to a violator of the federal securities laws. Dodd-Frank §929-O has expanded liability to those who have acted "recklessly." Also, for the first time, the SEC may pursue aiding-and-abetting claims under the Securities Act of 1933, the Investment Company Act and the Investment Advisers Act. Finally, Congress has ordered the comptroller general to conduct a study on the impact of authorizing a private right of action against aiders and abettors. The U.S. Supreme Court eliminated private aiding-and-abetting claims in 1994, and any reinstatement of such claims would have monumental consequences for law firms, accounting firms and underwriters.

Enhanced SEC enforcement power: Dodd-Frank authorizes a doubling of the SEC's budget over the next five years. It gives the SEC nationwide subpoena power for trial witnesses, expanded jurisdiction over foreign securities transactions and broader authority to bar individuals from the securities industry. It also provides the SEC with the ability to seek financial penalties in administrative proceedings and to bring such proceedings against anyone who allegedly violates the securities laws, regardless of whether he or she is registered with or practices before the SEC. As a result, the SEC may choose to bring more cases as administrative proceedings, which are expedited, involve limited discovery and do not permit jury trials.

Future SEC rule-making: Dodd-Frank has empowered the SEC to make significant changes to existing law through rule-making. Under the act, the SEC may impose fiduciary standards on stockbrokers, and it may restrict or eliminate the mandatory arbitration of broker-customer disputes. Together, these changes would alter the current landscape significantly and would be likely to generate a flood of securities cases in Texas state courts.

Dodd-Frank is a complex statute that has triggered a dynamic and controversial rule-making process. Its ultimate effects likely will be far-reaching, although it may be several years before the strengths and weaknesses of the legislation are fully revealed.

Brad Foster is a partner in Andrews Kurth in Dallas. He represents clients in securities class actions, shareholder derivative suits, SEC and Financial Industry Regulatory Authority Inc. investigations, and other complex business disputes. Matthew Nielsen is a partner-elect in the firm's corporate compliance, investigations and defense practice group. His practice focuses on internal investigations, SEC and other regulatory investigations and enforcement proceedings, and private securities litigation.

TAX LAW

An Untaxing Year

by ALAN K. DAVIS and JOSH UNGERMAN

On Jan. 1, Americans woke up to discover that the federal estate tax and the federal generation-skipping transfer tax (GST tax) no longer applied to people who died in 2010 and transfers during 2010. While it is true that only a small portion of the Texas population is wealthy enough to be subject to the federal estate or GST tax, this development had far-reaching consequences for Texas lawyers.

Speaking strictly to the tax consequences, no estate tax would mean a virtual free pass for millionaires dying and passing their accumulated estates to their heirs. A perfect example is billionaire Texas oilman Dan Duncan. His death in March 2010 — as opposed to March 2009 — potentially has reduced federal tax revenues by several billion dollars, as noted in a June 8 article in *The New York Times*. To a lesser extent, hundreds of Texans have passed away this year with otherwise taxable estates, providing their heirs with a windfall due to this no-estate-tax environment.

Aside from the loss of federal tax revenue, millions of Texans were affected, because lawyers draft most wills and other estate planning documents by taking into consideration exemptions and exclusions provided under the federal estate tax regime. As a result of the no-estate-tax environment, many estate plans drafted to save federal estate tax no longer were operative, and in many cases resulted in skewed or ambiguous distributions among beneficiaries.

For example, an individual desiring to benefit children from a prior marriage but not pay unnecessary estate tax could have a formula in his will providing "an amount of my estate, which can pass without tax by reason of the unified credit for estate taxes, passes to my children." The residuary estate would then pass to his spouse, qualifying for the unlimited marital deduction. In 2009, applying this formula would have given children approximately $3.5 million and the spouse the balance of the estate. But when applying that language in 2010, when there is no estate tax, do the children get it all, because the entire estate can pass without tax, or do they get nothing, because there is no applicable "unified credit" during 2010?

Virtually all Texas lawyers who draft wills and estate plans had to review their forms, contact clients and redo estate plans for the sole possibility of a client dying during 2010 with documents whose operation depended on the application of the federal estate tax. If lawyers didn't revise documents, then, after the person dies, the recipient of the estate may have been unclear, due to formula clauses based on references to federal estate tax exemptions and other concepts. As a result, there likely will be many construction suits to determine the proper recipient of assets.

Attorneys and clients have spent untold time during 2010 dealing with the issues resulting from the temporary lapse in the estate tax and GST tax during 2010. Unquestionably, the one-year hiatus of the federal estate and GST tax is the most significant tax development affecting Texans this year.

Alan K. Davis and Josh Ungerman are partners in Meadows, Collier, Reed, Cousins, Crouch & Ungerman, where they assist high net worth families with estate and tax planning, intergenerational wealth transfers and charitable solutions. They also handle Internal Revenue Service audits and litigation.

In Their Own Words: Memorable Quotes From the Year Gone By

Editor's note: The following quotes appeared in Texas Lawyer *articles in 2010.*


JOEL SALCIDO
WILLING

"I'm not criticizing the commission for what they did, but I don't understand why they did what they did."

— State Commission on Judicial Conduct executive director Seana Willing commenting on the commission's order of public warning against Texas Court of Criminal Appeals Presiding Judge Sharon Keller.


JOHN COUNCIL
FURGESON

"Boy, I was really rocking and rolling, wasn't I?"

— Senior U.S. District Judge W. Royal Furgeson Jr. of the Western District of Texas in Dallas when asked about the 16 trips he reported on his 2008 financial disclosure report.

"If it's consensual, what's wrong with it?"

— Houston lawyer Rich Robins commenting at a hearing on proposed amendments to the Texas Disciplinary Rules of Professional Conduct that would prohibit lawyers from having sex with their clients.


BOSQUEZ

"It's a memory trigger. You look at it when you have a rough day here at the office, when deadlines are stacking up and there are documents you need to address. You look up at something like that, and you remember that you can make a difference. That's enough to perk you up every day. That's better than a cup of coffee."

— Vinson & Elkins associate Teodoro B. "Ted" Bosquez of Houston commenting on a handmade gift from a pro bono client.

"When I saw my colleagues who also made partner assembled in the office, I felt I was either going to get good news, or I had the nucleus of a really good boutique."

— Danny David, a partner in Baker Botts in Houston, discussing how he was called into managing partner Walt Smith's office to find out if he had made partner.

"It was all a mirage."

— McKool Smith principal Gary Cruciani discussing his time at Baron & Budd.

"Gary Cruciani did not get a lobotomy at Baron & Budd. He's able-bodied and of sound mind, and he will be paid exactly what he's worth. He left Baron & Budd the wrong way, and he ought to be ashamed of it."

— Baker Botts partner Rod Phelan, who represents Russell Budd in Gary Cruciani's negligent misrepresentation suit against Budd and his firm Baron & Budd.

'10 year in review

"We're not so large that I can't take the time to evaluate lawyers individually."

— Kelly Hart & Hallman managing partner Dee Kelly Jr. discussing how he determines associate bonuses.

"In Texas today, odds of a $58 million judgment, including $44 million in punitives, being upheld by our Supreme Court are pretty much slim and none."

— Richard Alderman, associate dean and director of the Consumer Law Center at the University of Texas Law Center, predicting the verdict in Cull and Cull v. Perry Homes, et al. *will not stand.*


JOHN EVERETT
MENDOZA

"We are a total of 27 [summer associates in Houston] this year. Obviously, no one has a crystal ball about how things will end up, but you feel a lot better as a student coming in with that number than being one of 80."

— Rocio Mendoza, a summer associate with Baker Botts, commenting on the smaller size of the firm's 2010 summer associate class when compared with the 2009 summer associate class.


MARK GRAHAM
JOHNSTON

"I don't know how firms can get away with not discounting."

— James M. "Duke" Johnston, vice president and general counsel of Waco's The Dwyer Group Inc., on asking outside counsel to reduce their billing rates.

"I turned 42. And I obviously can buy whatever I want. And I decided, how long am I really going to ride around in a Lamborghini? You can only own so many cars, and you can only drive one at a time, unless you're really talented. And I'm not that talented."

— Houston plaintiffs attorney Tony Buzbee discussing his thoughts behind donating 13 of his cars, worth an estimated $3.5 million, to The Jesse Tree, a Galveston nonprofit that assists underprivileged people in receiving health care and social services.


JOHN EVERETT
MARTIN

"What this decision does is put the world back in the right order."

— Brian S. Martin, a partner in Thompson, Coe, Cousins & Irons in Houston, commenting on Trinity Universal Insurance Co., et al. v. Employers Casualty Co., *in which the 5th U.S. Circuit Court of Appeals reversed a district court holding limiting an insurer's duty to defend an insured.*

"The majority's opposition to the governing law is palpable, its errors are profound, and its action in taking control of this case is simply breath-taking."

—1st Court of Appeals Justice Terry Jennings in his dissenting opinion in In Re V.V., a Minor Child, *a parental-rights termination case.*


JENNINGS

"The courts appear to have created a lucrative cause of action here; the market is responding to it."

— Michael C. Smith, a partner in Siebman, Burg, Phillips & Smith in Marshall, discussing the proliferation of patent false marking suits.


SMITH

"It's sort of like a gold rush for clients."

— Brian O'Neill, a partner in Faegre & Benson in Minneapolis, commenting on the litigation rush stemming from the Deepwater Horizon oil rig explosion and leak.

"Were any of our people on it?"

— Brian Baird, vice president, general counsel and secretary of Houston-based Frank's International Inc., discussing his first thoughts when he heard on April 20 that a BP PLC-leased drilling platform had exploded in the Gulf of Mexico.


JOHN EVERETT
BAIRD

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