LEHOTSKY KELLER

SUPREME COURT OF TEXAS

2021-2022 TERM BUSINESS ROUNDUP

JULY 2022

ABOUT LEHOTSKY KELLER LLP

Lehotsky Keller LLP is a national litigation boutique with offices in Austin, Washington DC, Oklahoma City, Denver, and Atlanta.

Lehotsky Keller's attorneys have broad experience in complex litigation across industries and deep experience litigating in state and federal appellate courts.

Founding Partner Scott A. Keller served as Solicitor General of Texas from 2015-2018. He has argued 12 cases in the Texas Supreme Court, 12 cases in the U.S. Supreme Court, and many others in courts throughout the nation.

Partner Kyle D. Hawkins served as Solicitor General of Texas from 2018-2021. He has argued six cases in the Texas Supreme Court, four cases in the U.S. Supreme Court, and many others in courts throughout the nation.

Partner Matthew H. Frederick is the former Deputy Solicitor General of Texas. He has argued more than 25 appeals in state and federal courts, including the Texas Supreme Court.

Partner Andrew B. Davis is a former Assistant Solicitor General of Texas. He has served as lead counsel in over 20 cases in state and federal courts, including the Texas Supreme Court.

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Discovery – "Apex" Depositions

***In re American Airlines, Inc.*, 634 S.W.3d 38 (Tex. 2021) (per curiam)**

- **Vote:** Per curiam.

Key Takeaways: Litigants do not have an automatic right to depose the other side's senior executives. To conduct an "apex" deposition, a litigant must establish "(1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient, or inadequate."

Background: Plaintiff sued American Airlines, claiming that one of American's gate agents had accessed his personal information and used that information to harass him by text, email, and phone. During discovery, the plaintiff sought to depose American's executive vice president. American eventually moved for a protective order, arguing that the apex deposition was both improper and unlikely to be useful. The trial court denied a protective order, and the court of appeals denied relief without reaching the merits. American then filed a mandamus proceeding in the Supreme Court.

Decision: The Supreme Court held that trial court erred by compelling deposition of a senior executive who lacked personal or unique knowledge of the underlying facts. The Court reasoned that American's executive vice president was a "high-level corporate official," and thus the Court's apex-deposition guidelines controlled. Under long-settled doctrine set out in a seminal case called *Crown Central*, a trial court cannot order the deposition of an apex official unless the official possesses unique or superior knowledge of the relevant facts in issue, and the party seeking to depose the official has made a good-faith attempt obtain discovery through a less intrusive means. Here, the Court held that the plaintiff met neither factor for two reasons. *First*, the executive vice president did not possess unique or superior knowledge of the relevant facts of this case; general knowledge of American's company policies is not enough. *Second*, the Court reasoned that the plaintiff had not attempted less intrusive means of discovery. The Court found it particularly relevant that American had offered to produce a different corporate representative who could provide deposition testimony on the topics of interest to the plaintiff.

Contracts – Consequential Damages

***Signature Industrial Services, LLC v. International Paper Co.*, 638 S.W.3d 179 (Tex. 2022)**

- **Vote:** 7-0. Justice Blacklock wrote for the Court. Justices Huddle and Young did not participate.

Key Takeaways: (1) "As a general rule, neither the counterparty's market value nor the impact of breach on that value will be reasonably foreseeable at the time of contracting." (2) Evidence of a decline in a company's "book value"—that is, the difference in value between a company's assets and liabilities—is not by itself enough to calculate consequential damages.

Background: A jury found that International Paper Co. ("IP") breached a contract and awarded Signature Industry Services ("SIS") $56.3 million in consequential damages. The consequential-damages award reflected the jury's finding that IP's breach resulted in the abandonment of a later deal in which SIS would have sold itself for $42 million—the company's entire book value at the time. The court of appeals reduced the consequential damages award but refused to eliminate the award entirely.

Decision: The Supreme Court held that SIS is entitled to none of the originally awarded $42 million in consequential damages, and the Court rejected both of SIS's arguments. *First*, the Court held that SIS failed to provide evidence that IP at the time of contracting foresaw the possibility of SIS's loss in market value—that is, the value of a property when offered for sale. The Court noted that lost business opportunities do often lead to a decline in market value, but plaintiffs must substantiate such claims with proper evidence. So "[t]he law does not charge contracting parties with a duty to understand how their actions will affect the counterparty's market valuation." *Second*, the Court held that "book value" by itself "is entitled to little, if any, weight in determining the value of corporate stock," and book value has long been rejected by Texas courts evaluating consequential damages.

Contracts – Procuring-Cause Doctrine

***Perthuis v. Baylor Miraca Genetics Laboratories, LLC*, 2022 WL 1592587 (Tex. May 20, 2022)**

- **Vote:** 7-2. Justice Young wrote for the Court. Justice Huddle, joined by Justice Boyd, dissented.

Key Takeaway: The procuring-cause doctrine is a "settled and plain" default rule in which an employee who previously signed a commission agreement with his employer may be entitled to commission from sales occurring after the employer-employee relationship terminates.

Background: BMGL hired Perthuis as its Vice President of Sales and Marketing in 2015. Perthuis was a salaried, at-will employee with a sales commission of 3.5%. The contract was otherwise silent on the commission obligation. In 2015, Perthuis negotiated a contract between BMGL and a client, Netera. In 2017, he renegotiated the agreement, making it BMGL's largest contract. Four days later, BMGL fired Perthuis. BMGL then refused to pay Perthuis any commission for sales from Neteria that occurred after his termination. Perthuis filed suit for breach of contract claiming that he is entitled to a commission from Neteria sales that occurred after his termination. A jury found in favor for Perthuis but awarded him less than his full commission, and the court of appeals reversed.

Decision: The Supreme Court held that, because the employment contract was silent as to the status of Perthuis's commission after his termination, by default, the procuring-cause doctrine applies. The Court noted that the ability for a plaintiff to recover commissions under the procuring-cause doctrine is based upon the outcome of three questions: (1) whether the contract at issue is the type in which the procuring-cause doctrine applies; (2) whether the doctrine was displaced by the terms of the contract; and (3) "to what extent does the doctrine impose liability for the specific commission payments that the plaintiff demands." Here, the Court opined that BMGL-Perthuis contract was the type of contract in which the procuring-cause doctrine applies because (1) the employment contract promised commissions for sales; (2) nothing in the BMGL-Perthuis contract displaced the procuring-cause doctrine and the fact that the contract was an "at-will" contract did not, by itself, displace the procuring-cause doctrine; and (3) because the jury awarded less than the full amount of Perthuis's claimed commissions. The case was remanded down to the court of appeals to determine whether Perthuis was the procuring cause of the sales.

Contracts – Insurance Company Duty to Defend

***Monroe Guaranty Insurance Co. v. BITCO General Insurance Corp.*, 640 S.W.3d 195 (Tex. 2022)**

- **Vote:** 9-0. Justice Huddle wrote for the Court.

Key Takeaway: Evidence extrinsic to an insurance contract is admissible to prove that a defendant owes the plaintiff a duty to defend if "the evidence (1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved."

Background: BITCO insured 5D from 2013 to 2015, while Monroe insured 5D from 2015 to 2016. 5D was sued in 2016 for negligent drilling at a project in 2014, although the exact date of occurrence was not included in the pleadings. 5D demanded that both providers defend 5D. Monroe refused to defend 5D, asserting instead that the suit arose from conduct before Monroe's insurance policy began. BITCO then sued Monroe for a declaration that Monroe owed a duty to defend. A federal district court held that it could not consider extrinsic evidence as to the date of occurrence, but that Monroe still owed a duty to defend. The Fifth Circuit concluded that extrinsic evidence of the date of occurrence was "[k]ey to deciding the case" and certified two questions to the Supreme Court: (1) whether Texas law recognizes an exception to the "eight-corners rule," which is a doctrine of insurance law recognizing that an insurer's duty to defend is determined by looking strictly at the four corners of the plaintiff's complaint and the four corners of the insurance policy—*i.e.*, extrinsic evidence and/or facts outside of the pleadings are not considered; and (2) if Texas law recognizes an exception, whether the exception applies here.

Decision: The Supreme Court first held that if a plaintiff's petition states a claim that could trigger the duty to defend and the application of the eight-corners rule is not determinative of coverage due to a gap in the plaintiff's pleading, then Texas law permits consideration of extrinsic evidence when the evidence (1) does not concern the underlying merits issue, (2) does not contradict an alleged fact in the pleadings, and (3) conclusively establishes the coverage fact to be proved. The Court reasoned that, as a matter of policy, this rule effectuates the contracting parties' agreement as written and "protect[s] the insured's interests in defending against the third party's claims." As applied to the facts in this case, the Court refused to allow an exception to the eight-corners rule because the extrinsic evidence "would overlap with the merits of" the liability in the underlying case.

Contracts – Insurance Policies

***Dillon Gage Inc. of Dallas v. Certain Underwriters at Lloyds*, 636 S.W.3d 640 (Tex. 2021)**

- **Vote:** 9-0. Justice Bland wrote for the Court.

Key Takeaways: In interpreting insurance policies, when an insurance policy excludes losses "consequent upon" an action of the insured, the phrase "consequent upon" indicates but-for causation. Further, under Texas's concurrent-causation doctrine, if covered and uncovered events are inseparable and combine to cause the insured's loss, an "insurance policy's exclusion applies"; but if the covered and excluded event are independent causes of the loss, an "insurer must provide coverage despite [an] exclusion."

Background: A gold-coin dealer sued its insurer for breach of contract and violations of the Texas Insurance Code after the insurer denied a property-loss claim involving a scheme where a thief paid via a fraudulent check and then re-routed a UPS shipment. The dealer's insurance policy excluded losses "consequent upon" handing over property against payment by fraudulent check. The parties disagreed over the definition of "consequent upon" as used in their insurance contract. The dealer asserted that "consequent upon" requires stringent causal connection ("substantial-factor causation"), and it was UPS's negligence in changing the shipping destination without authorization, not the dealer's acceptance of a fraudulent check, that is the substantial factor. By contrast, the Underwriters asset that "consequent upon" does not require a direct causal connection. A federal district court granted the Underwriters' summary-judgment motion, and the Fifth Circuit certified two questions to the Supreme Court on appeal: (1) Did the dealer sustain its losses "consequent upon" handing over property against a fraudulent check; and (2) did the shipper's alleged negligence constitute an independent cause of the losses under Texas law?

Decision: On the first question, the Supreme Court held that the ordinary meaning of "consequent upon" is "following as a result or effect," placing it in the category of but-for causation. Here, the dealer sustained its losses consequent upon handing over property against fraudulent checks. On the second question, the Court held that, because the shipper's alleged negligence stemmed from the same criminal scheme, the shipper's alleged negligence was a concurrent, rather than independent, cause of the loss. Therefore, the exclusion applied under Texas's concurrent-causation doctrine.

Contracts–
Implied Revocation of Offer

***Angel v. Tauch*, 642 S.W.3d 481 (Tex. 2022)**

- **Vote:** 8-0. Justice Devine wrote for the Court. Justice Lehrman did not participate.

Key Takeaways: The Court revived the "rarely implicated" contract-law doctrine known as the implied-revocation doctrine—which was first adopted in *Antwine v. Reed*, 145 Tex. 521 (1947)—and expanded it beyond real-property transactions. Under the implied-revocation doctrine, the power of a contract offeree to accept an offer terminates "when [1] the offeree has knowledge that [2] the offeror has undertaken 'some act inconsistent' with the offer."

Background: South State Bank obtained a judgment against defendant Kyle Tauch. During settlement talks, Tauch offered to purchase the judgment, and the Bank made a counteroffer offer to Tauch stating that Tauch should "let [the Bank] know as quickly as possible as the bank will likely be look[ing] at other collection alternatives." Quickly thereafter, the Bank agreed to assign its judgment right against Tauch to Angel for a fee. Tauch then attempted to accept the Bank's counteroffer to purchase its judgment against him, but the Bank responded that its offer to buy Angel's judgment was revoked when Tauch received notice of the Bank's assignment agreement with Angel. At summary judgment, the trial court held that the Bank's offer was impliedly revoked, and the court of appeals reversed.

Decision: The Supreme Court held that Tauch's knowledge that the Bank had assigned its judgment to Angel impliedly revoked the Bank's offer to Tauch. The Court observed that a legally enforceable contract requires offer, acceptance, and consideration—and if an offer is revoked before acceptance, no contract is formed. The Court held that the implied-revocation doctrine first adopted in *Antwine* controls, and under the implied-revocation doctrine, the power of an offeree to accept an offer terminates "when [1] the offeree has knowledge that [2] the offeror has undertaken 'some act inconsistent' with the offer." The Court held that these elements are satisfied when an offeree has "notice" of "[a]ny clear manifestation of unwillingness to enter into the proposed bargain." Here, the Court reasoned that the Bank impliedly revoked its offer when it agreed to assign its judgment against Tauch to Angel, as this action reflected the Bank's intention to do a different deal than what it had previously proposed to Tauch, and Tauch received notice of the Bank-Angel assignment.

Tax –
Taxable Activities in the State of Texas

Sirius XM Radio, Inc. v. Hegar*, 643 S.W.3d 402 (Tex. 2022)

- Vote: 9-0. Justice Blacklock wrote for the Court.

Key Takeaways: For purposes of calculating an entity's franchise tax, "service performed in the state" refers to where an entity's "useful labor" occurs—*i.e.*, "where the employees do their work." And when "technology rather than personnel performs the useful act," the Court looks "to the location of that equipment."

Background: Sirius XM produces radio programs out of state and transmits them from out-of-state platforms into Texas. The Comptroller audited Sirius XM and determined that Sirius XM owed additional franchise tax. Sirius XM paid the additional tax under protest and sued. By statute, a significant step in determining an entity's franchise tax is calculating its "apportioned margin," which requires a calculation of "the taxable entity's receipts from . . . each service performed in this state." Sirius XM argued that the location where its service is performed is where its programs are produced and transmitted. By contrast, the Comptroller argued that the decryption services used to access Sirius XM's content, which is located within a subscriber's radio, is the location where the service is performed. The trial court agreed with Sirius XM, but the court of appeals reversed.

Decision: The Supreme Court held that Sirius XM is entitled to a refund of over $2 million in franchise tax. The Court noted that one step in calculating an entity's franchise tax is determining the entity's "apportioned margin." In determining the apportioned margin, an entity must determine its taxable receipts from "each service performed in this state." The Court concluded that "the most natural reading of 'service performed in this state' supports locating the performance of the service at the place where the taxpayer's personal or equipment is physically doing useful work for the customer." Here, the Court reasoned that the location of Sirius XM's "useful work for the customer" is where Sirius XM produces and broadcasts its radio station, which occurs outside of Texas. The Court rejected the Comptroller's argument that the location of Sirius XM's "useful work for the customer" is where a subscriber's radio unscrambles Sirius XM's radio signal because, the Court reasoned, it is an "economic reality . . . that decryption is not a service" that Sirius XM "perform[s] for the benefit of the customer."

**Lehotsky Keller Partner Kyle Hawkins was counsel for Respondent in this case during his tenure as Solicitor General at the Texas Attorney General's Office.*

Antitrust – Unlawful Agreement

***AMC Entertainment Holdings, Inc. v. iPic-Gold Class Entertainment, LLC*, 638 S.W.3d 198 (Tex. 2022)**

- **Vote:** 8-0. Chief Justice Hecht wrote for the Court. Justice Young did not participate.

Key Takeaway: At the summary-judgment stage, a plaintiff alleging that a defendant conspired to restrain trade in violation of Section 15.05(a) of the Texas Antitrust Act must provide evidence that the defendant and another engaged in "an actual agreement" to restrain trade instead of acting in "unilateral, independent conduct" with each other.

Background: iPic sued AMC and Regal for conspiring to restrain trade in the movie-theater market by requesting exclusive licenses to show movies within given geographic areas where iPic wished to compete. iPic sued and, as relevant here, the trial court granted AMC's no-evidence summary-judgment motion. The court of appeals reversed and remanded the case for trial.

Decision: The Supreme Court held that AMC and Regal had not violated state antitrust law because the "factual context" "renders [iPic's] claim implausible." The Court recognized that federal antitrust law guides construction of state law, and that under federal law there must be an agreement to restrain trade. This requires "a unity of purpose," "common design," or "meeting of minds in an unlawful arrangement." The Court observed that, under federal law, "(1) parallel business conduct, alone, is insufficient to raise a fact issue on the existence of a conspiracy; (2) when the conspiracy alleged is implausible, more persuasive evidence will be required to survive summary judgment; and (3) the plaintiff's evidence must tend to exclude the possibility that the defendants acted independently." The Court also observed that federal district courts have promulgated several factors that "serve as a prox[y] for direct evidence of an agreement," with "a plausible allegation that the parallel conduct was not in the alleged conspirators' independent self-interest absent an agreement" being "the most important 'plus factor.'" Here, the Court concluded on the facts of this case that the defendants' behaviors were better interpreted as independent actions instead of a conspiracy. The Court noted in particular that a conspiracy was "farfetched," the defendants lacked any motive to conspire, and even if they did, the conspiracy was a failure.

Torts – Premises Liability

***SandRidge Energy, Inc. v. Barfield*, 642 S.W.3d 560 (Tex. 2022)**

- **Vote:** 8-0. Justice Bland wrote for the Court. Justice Lehrmann did not participate.

Key Takeaway: Under Chapter 95 of the Civil Practices and Remedies Code, a premises owner has no duty to warn invitees of open-and-obvious conditions.

Background: Barfield sustained an electrical shock and resultant injuries while working on an energized overhead line at SandRidge. He sued SandRidge under Chapter 95 of the Civil Practices and Remedies Code, which provides contractors or their employees a cause of action for personal injury or property damage arising from the condition or use of a property. The trial court granted summary judgment to SandRidge. A divided court of appeals reversed the decision, declining to apply the open-and-obvious doctrine to claims arising under Chapter 95. The majority asserted that the Supreme Court had abrogated the open-and-obvious doctrine in *Parker v. Highland Park*, 565 S.W.2d 512 (Tex. 1978), by the time Chapter 95 was enacted.

Decision: The Supreme Court held that the trial court properly applied the open-and-obvious doctrine. The Court noted that a property owner is liable under Chapter 95 only if (1) "the property owner exercises or retains some control over the manner in which the work is performed" and (2) the property owner had actual knowledge of the dangerous condition and failed to adequately warn the invitee. The Court observed that it had recently applied the open-and-obvious doctrine to Chapter 95 premises-liability claims in *Los Compadres*. The Court then stated that the court of appeals misunderstood a pervious precedent, *Parker*, stating that *Parker* did not abrogate the open-and-obvious doctrine but only "eliminated the plaintiff's affirmative burden to disprove that a condition was open and obvious." Here, the Court held that SandRidge was not liable for Barfield's injuries. Specifically, the Court reasoned that, because Barfield admitted that he knew the supply line was energized and dangerous, SandRidge had no duty to warn Barfield that the supply line was energized since he had already "understood and appreciated" the danger. Additionally, the Court did not address whether the necessary-use exception broadly applies to contractors.

Real Property – Eminent Domain

***Hlavinka v. HSC Pipeline Partnership, LLC*, 2022 WL 1696443 (Tex. May 27, 2022)**

- **Vote:** 9-0. Justice Bland wrote for the Court.

Key Takeaways: (1) Section 2.105 of the Texas Business Organizations Code grants condemnation authority to pipelines carrying polymer-grade propylene as common carriers; (2) the question of whether the pipeline serves a public use is a question of law, not fact; and (3) as an evidentiary matter, to determine the market value of the taken property, a landowner may testify to sales of other pipeline easements.

Background: After Hlavinka rejected HSC's offer to purchase a pipeline easement, HSC initiated condemnation proceedings as a common carrier with eminent-domain authority. Hlavinka challenged HSC's condemnation authority on the grounds that (1) transport of polymer-grade propylene does not qualify HSC for common-carrier status and condemnation authority, and (2) transport to an unaffiliated customer is insufficient to demonstrate public use. HSC moved for partial summary judgment on its common-carrier status and moved to exclude Hlavinka's sales of other easements from testimony related to the value of the property taken. The trial court granted both of HSC's motions. The court of appeals affirmed the trial court's holding that Section 2.105 of the Texas Business Organizations Code grants condemnation authority to HSC. But the court of appeals reversed the trial court on two other matters, holding that: (1) a jury must resolve whether the pipeline serves a public use, and (2) testimony about sales of other easements is admissible for valuations of taken property.

Decision: The Supreme Court held that transporters of polymer-grade propylene may qualify for common-carrier status, reasoning that the product is a derivative of crude petroleum and thus an "oil product" under Section 2.105. The Court reversed the court of appeals's holding that a jury must determine whether HSC had met the public use standard, reiterating its decades-long precedent that "the ultimate question of whether a particular use is a public use is a judicial question to be decided by the courts." Finally, the Court affirmed the court of appeals's holding that Hlavinka's testimony about other easement sales should be admitted as some evidence of the current highest and best use of the property taken. It remanded to the trial court for a new trial to determine the taken property's market value.

Real Property – Eminent Domain

Miles v. Texas Central Railroad & Infrastructure, Inc.*, 2022 WL 2282641 (Tex. June 24, 2022)

- **Vote:** 5-3. Justice Lehrmann wrote for the Court. Chief Justice Hecht, joined by Justice Young, concurred. Justice Young also concurred individually. Justice Devine dissented. Justice Huddle, joined by Justice Devine and Blacklock, dissented. Justice Bland did not participate.

Key Takeaways: High-speed railways enjoy eminent-domain authority under Chapter 131 of the Texas Transportation Code, and a high-speed railway need not show a "reasonable probability of completion" to justify public use.

Background: Texas Central Railroad and Texas Logistics are a joint venture formed for the purpose of building a railway for a high-speed passenger train between Houston and Dallas. In 2015, a real-property owner refused to consent to a survey of his property, which was the "preferred" route of the railway. The property owner sued, seeking a declaratory judgment that the joint venture lacked eminent-domain authority. At summary judgment, the trial court held that neither of the Texas Central nor Texas Logistics had eminent-domain authority. The court of appeals reversed.

Decision: The Supreme Court sided with the railroad, holding that Chapter 131 grants it eminent-domain authority. The Court observed that, under Texas law, a claimant asserting a claim for eminent-domain must show (1) the power of eminent-domain authority granted by the Legislature and (2) public use of the property. The Court noted that Chapter 131 of the Texas Transportation Code grants eminent-domain authority to "corporation[s] chartered for the purpose of constructing, acquiring, maintaining, or operating lines of electric railway between municipalities in this state for the transportation of . . . passengers." The Court concluded that this language covered rail projects because the joint venture was formed for the purpose of establishing a high-speed passenger train between Houston and Dallas. The Court also rejected the property-owner's argument that for Texas Central and Texas Logistics to prove public use, they must show a reasonable probability of completion of the Houston-Dallas railway. The Court reasoned that neither case law nor the Texas Constitution imposes a reasonable-probability-of-completion test.

**Lehotsky Keller submitted an amicus brief in this case on behalf of the Dallas Regional Chamber, Dallas Citizens Council, and Texas Rail Advocates in support of Respondents.*

Constitutional Law – Due-Course-of-Law Claim

***Texas Department of State Health Services v. Crown Distributing LLC*, 2022 WL 2283170 (Tex. June 24, 2022)**

- Vote: 9-0. Justice Boyd wrote for the Court. Justice Young, joined by Chief Justice Hecht and Justices Devine and Blacklock, concurred.

Key Takeaway: The due-course-of-law clause does not protect a right to manufacture, process, and sell hemp for smoking.

Background: Various portions of the Texas Agricultural Code generally permit and regulate the manufacture, sale, handling, transportation, and distribution of consumable hemp products within Texas. But Chapters 122 and 443 prohibit the manufacturing or processing of hemp products for smoking. Various Hemp Companies sued, seeking a declaratory judgment that Texas's prohibition on the manufacture, processing, and sale of smokable hemp violates the Texas Constitution's due-course-of-law clause. The trial court agreed.

Decision: The Supreme Court reversed and held that Texas's regulatory scheme regarding hemp does not violate the Texas Constitution's due-course-of-law clause. The Court noted that, before reaching the merits of a due-course-of-law claim, a plaintiff must allege the deprivation of a constitutionally protected interest. The Court rejected the Hemp Companies' argument that they enjoy a constitutionally protected interest "to engage in [their] 'chosen profession'" of manufacturing, processing, and selling smokable hemp. Specifically, the Court opined that the due-course-of-law clause protects a right to work in "common occupations," but "some work-related interests" such as "a right to work in fields our society has long deemed 'inherently vicious and harmful' . . . do not enjoy constitutional protection at all." Here, the Court reasoned that Section 443.204(4) and Rule 300.104's prohibition on the sale of smokable hemp does not violate the Texas Constitution's due-course-of-law clause because "the long history of the state's extensive efforts to prohibit and regulate the production, possession, and use of" hemp renders the Hemp Companies' interest in selling hemp in an unprotected "purely [] personal privilege" that the Legislature can restrict.

Appellate Procedure – Permissive Interlocutory Appeals

Industrial Specialists, LLC v. Blanchard Refining Co. LLC*, 2022 WL 2082236 (Tex. June 10, 2022)

- **Vote:** 5-3 in the judgment. Justice Boyd, joined by Justices Devine and Huddle, authored a plurality opinion. Justice Blacklock, joined by Justice Bland, concurred in part and concurred in the judgment. Justice Busby, joined by Chief Justice Hecht and Justice Young, dissented. Justice Lehrmann did not participate.

Key Takeaway: Courts of appeals have discretion to reject a permissive interlocutory appeal even when the two requirements of Texas Civil Practice and Remedies Code Section 51.014(f) are met.

Background: In an indemnity dispute, the two parties moved for summary judgment, and the trial court denied both motions. But the trial court granted Industrial Specialist's subsequent motion for permissive interlocutory appeal. The court of appeals denied the permissive appeal in a one-page memorandum opinion.

Decision: The Supreme Court held that courts of appeals have discretion to reject a permissive interlocutory appeal even when the two requirements of Section 51.014(f) are met. But the Court failed to garner a majority opinion regarding the requirements courts of appeals must follow in denying a permissive interlocutory appeal. A three-justice plurality would interpret Rule 47 of the Texas Rules of Appellate Procedure to require courts of appeals to issue a written opinion that explains the court's "basic reasons for it." The plurality concluded that the court of appeals here satisfied this requirement, even if its one-page memorandum opinion was conclusory. Two justices concurring in part and concurring in the judgment would hold that courts of appeals have "absolute" discretion in denying a permissive interlocutory appeal and need not issue a written opinion setting out their reasoning. The three dissenting justices agreed with the plurality that courts of appeals denying a permissive interlocutory appeal must issue a written opinion, but the dissenting justices would have held that the court of appeals written opinion in this case was inadequate.

**Lehotsky Keller submitted an amicus brief in this case on behalf of the American Fuel & Petrochemical Manufacturers, American Petroleum Institute, National Association of Manufacturers, and Texas Oil & Gas Association in support of Respondents.*

A LOOK AHEAD TO THE 2022-2023 TERM

The Supreme Court of Texas already has agreed to hear several cases in the 2022-2023 term that carry significant consequences for the business community.

In *Harold Franklin Overstreet v. Allstate Vehicle & Property Ins. Co.*, No. 22-0414, the Court will consider three certified questions from the Fifth Circuit regarding Texas's doctrine of "concurrent causation." The case concerns an insurer's duty to cover losses resulting in part from damage that predates the term of insurance. This case is set for oral argument on September 21, 2022.

In *Wal-Mart Stores, Inc. v. Xerox State & Local Solutions, Inc.*, No. 20-0980, the Court will address whether a plaintiff can recover tort and breach-of-contract damages for losses incurred during a system outage. Lehotsky Keller submitted an amicus brief on behalf of FMI – The Food Industry Association and the Merchant Advisory Group supporting Petitioner. This case is set for oral argument on September 21, 2022.

In *Mosaic Baybrooke One, L.P. v. Simien*, No. 21-0159, the Court will address an issue concerning class certification, namely, a lower court's duty to conduct a "rigorous analysis" of the appropriateness of class certification, including an assessment of all class-certification barriers. This case is set for oral argument on September 21, 2022.

In *American Campus Communities, Inc. v. Berry*, No. 21-0874, the Court will address, among other things, whether a class may be certified based solely on an alleged *per se* statutory violation, where the petition does not allege that absent class members have otherwise suffered damages. This case is set for oral argument on October 5, 2022.

In *State v. Volkswagen Aktiengesellschaft*, No. 21-0130, the Court will consider whether a company is subject to the personal jurisdiction of a Texas court for activities directed at the United States as a whole but not specifically Texas. The Court has not yet set the case for oral argument.