

Supreme Court of Texas
June 26, 2015

Beeman v. Livingston

No. 13-0867

Case Summary written by Allison Grayson, Online Edition Editor.

JUSTICE JOHNSON delivered the opinion of the Court.

Laura Beeman sued the executive director of TDCJ, Brad Livingston, claiming that Livingston violated Chapter 121 of the Texas Human Resources Code by failing to provide Beeman and another deaf inmate with proper ways of participating in inmate activities and telephone calls. More specifically, Beeman argued “Livingston failed to provide her with reasonable access to the telephone system used by inmates to make telephone calls to family and friends, and failed to provide sign language interpreters to allow her to meaningfully participate in educational, religious, and other programs at the prison.”

In making this allegation, Beeman alleged Livingston acted ultra vires in his failure to provide accommodations, creating an exception to any sovereign immunity Livingston might have as the executive director of TDCJ. In response, Livingston entered a plea to the jurisdiction, “arguing the Code does not clearly and unambiguously waive immunity.”

The trial court denied Livingston’s plea and instead granted a temporary injunction forcing Livingston to provide certain services to Beeman. Thereafter, the court of appeals reversed the claims for want of subject matter jurisdiction.

Issue: Are TDCJ prisons included in the definition of public facilities under Chapter 121 of the Texas Human Resources Code?

In this instance, the Court affirmed the decision by the court of appeals, stating that “[w]hile Chapter 121 is not a model of clarity, [the Court ultimately agreed] with the court of appeals that construing the term ‘public facility’ to include prisons does not reflect legislative intent as expressed in the term’s definition and the statute as a whole.”

Although the statute gives descriptions of what might fall under the definition of a public facility, including college dormitories or other educational facilities, the Court explained that nothing in the statute indicates “that the Legislature also intended to include prisons in the

definition.” Further, if the Legislature intended to include prisons, it would have included prisons in the statute, and could easily do so in the future through an amendment to the Code.

Taking all of this information into consideration, the Court determined that Livingston was subject to sovereign immunity and did not act ultra vires in failing to provide special accommodations to deaf inmates. Therefore, the Court affirmed the decision by the court of appeals.

Royston, Rayzor, Vickery & Williams, LLP v. Lopez

No. 13-1026 & 14-0109

Case Summary written by Allison Grayson, Online Edition Editor.

JUSTICE JOHNSON delivered the opinion of the Court.

Francisco Lopez sought the representation of Royston, Rayzor, Vickery, & Williams, LLP (the firm) in his divorce. The contract between the two parties included an arbitration provision.

After the firm filed for divorce on Lopez’s behalf, the parties were ordered to attend mediation. The parties ultimately settled. Thereafter, Lopez sued the firm “claiming the firm induced him to accept an inadequate settlement.” In response, the firm moved to compel arbitration.

After the trial court denied the firm’s motion, the firm “filed both an interlocutory appeal challenging the denial under the Arbitration Act, and an original proceeding seeking mandamus relief under common law.” The court of appeals affirmed the trial court’s decision and denied mandamus relief.

In its analysis, the court of appeals determined that Lopez’s claims fell within the scope of the agreement. Then, the court examined Lopez’s affirmative defenses to arbitration. Looking at whether the arbitration provision was unconscionable, the court determined that Lopez need only prove the provision was procedurally unconscionable or substantively unconscionable, not both. The court of appeals concluded the provision was unenforceable based on its substantive unconscionability.

“In cause number 13-1026, [the firm sought] relief from the court of appeals’ judgment denying its interlocutory appeal, and in cause number 14-0109, it [sought] mandamus relief directing the trial court to

order arbitration.” In response, Lopez urged the Court to affirm the previous decisions because “(1) the court of appeals correctly determined that an arbitration provision need not be both procedurally and substantively unconscionable to be unenforceable, and this provision [was] substantively unconscionable because it [was] excessively one-sided; (2) the arbitration provision was entered into in the context of Lopez’s agreeing to become a client of the law firm, and given that context it violates public policy; (3) Lopez’s status as a prospective client shifted the burden of proof to [the firm] to establish it met its ethical obligation to explain the effects of the arbitration provision to him and [the firm] did not do so; and (4) the arbitration provision [was] illusory because it [allowed the firm] to avoid arbitration as to its fee disputes while requiring Lopez to arbitrate all his disputes.”

In explaining its reversal of the court of appeals’ decision, the Court stated that arbitration provisions in an attorney-client contract are not “presumptively unconscionable.” Further, the Court argued that parties asserting defenses to arbitration clauses have the burden of proving unconscionability.

Because the provisions in question related to the contract as a whole, the Court refrained from deciding whether the provisions were unconscionable. The Court explained that “challenges relating to an entire contract will not invalidate an arbitration provision in the contract; rather, challenges to an arbitration provision in a contract must be directed specifically to that provision.”

While Lopez argued that the arbitration provision was one-sided because it forced him to arbitrate, but allowed the firm to choose whether to arbitrate or litigate, the Court argued that this was not true. In fact, the Court determined that the “provision equally [bound] both parties to arbitrate claims within its scope and [ensured] that the same rules [applied] to both parties[.]” Therefore, Lopez failed to show the arbitration provision was substantively unconscionable.

Furthermore, in response to Lopez’s urging that the firm failed to fully explain the agreement, the Court declined to require that attorneys explain arbitration provisions in attorney-client employment contracts to prospective clients. The Court explained that prospective clients who sign contracts containing arbitration provisions “are deemed

to know and understand the contracts' content and are bound by their terms on the same basis as are other contracting parties."

Discussing the idea of illusory promises, the Court stated that "the fact that the scope of an arbitration provision binds parties to arbitrate only certain disagreements does not make it illusory." Moreover, an arbitration clause is not illusory just because it is one-sided.

Based on the above-mentioned considerations, the Court reversed the court of appeals' decision in cause number 13-1026 and remanded the cause to the trial court. The Court also denied the writ of mandamus in cause number 14-0109.

JUSTICE GUZMAN, joined by JUSTICE LEHRMANN and JUSTICE DEVINE, concurring.

Justice Guzman wrote to "emphasize the need for rules more specifically delineating the means and methods by which attorneys can discharge their ethical responsibilities in this context." While the Disciplinary Rules do not specifically speak to arbitration agreements, attorneys must generally provide enough information to allow the client to make an informed decision. In her concurrence, Justice Guzman argued that the rulemaking process would be the best forum for achieving more clarity in how best to discharge such responsibilities.

Cantey Hanger, LLP v. Byrd

No. 13-0861

Case Summary written by Allison Grayson, Online Edition Editor.

JUSTICE LEHRMANN delivered the opinion of the Court, in which JUSTICE GUZMAN, JUSTICE BOYD, JUSTICE DEVINE, and JUSTICE BROWN joined.

In 2006, Philip Byrd and Nancy Simenstad filed for divorce. Simenstad was represented in the divorce proceedings by Cantey Hanger. The divorcing couple ultimately settled in 2008 and the trial court entered an agreed divorce decree. "The decree awarded Simenstad three aircraft as her separate property, including a Piper Seminole that had been owned by Lucy Leasing Co., LLC, a company the decree awarded to Byrd." In addition, the decree "made Simenstad responsible for all ad valorem taxes, liens, and assessments on the aircraft." The

decree also required the parties to execute any documents necessary for transfer of ownership within ten days.

Byrd, Lucy Leasing, and PGB Air, Inc. (the Respondents) sued Simenstad and Cantey Hanger, alleging that Simenstad and Hanger falsified a bill of sale, which transferred the Piper Seminole to a third party. The Respondents argued that Cantey Hanger “falsified the bill of sale in order to shift tax liability for the Piper Seminole from Simenstad to Byrd in contravention of the decree.”

In response, Cantey Hanger “moved for summary judgment on attorney-immunity grounds, arguing that it owed no duty to Byrd or the other plaintiffs and that as a matter of law it was not liable to the plaintiffs for actions taken in the course and scope of its representation of Simenstad in the divorce proceeding.” The Respondents argued that Cantey Hanger failed to discharge its duties, and therefore, was not protected on attorney-immunity grounds.

The trial court granted the motion for summary judgment and dismissed all claims against Cantey Hanger with prejudice. “The court of appeals reversed as to the fraud, aiding-and-abetting, and conspiracy claims relating to the sale of the plane.” The court of appeals explained its decision stating that the sale of the plane had nothing to do with the divorce decree, and therefore, was outside the scope of Cantey Hanger’s representation of its client.

Issue: Whether “Cantey Hanger [conclusively proved] that its alleged conduct with respect to the sale of the plane was part of the discharge of its duties in representing Simenstad in the divorce proceedings or, instead, was independent of the divorce and foreign to the duties of an attorney.”

In its explanation of the attorney-immunity defense, the Court argued that a general fraud exception to the defense would significantly undercut its purpose. Further it stated that “merely labeling an attorney’s conduct ‘fraudulent’ does not and should not remove it from the scope of client representation or render it ‘foreign to the duties of an attorney.’”

Additionally, the Court explained that an attorney pleading the attorney-immunity defense has the burden to prove the conduct in question fell under the scope of discharging its duties to its client. The defense does not depend on whether or not the wrongful conduct was fraudulent. Here, the Court determined that the alleged conduct fell

under the scope of Cantey Hanger's legal representation of Siminestad. Therefore, the Court reversed the portion of the court of appeals' judgment relating to the fraud claims and reinstated the trial court's judgment.

JUSTICE GREEN joined by CHIEF JUSTICE HECHT, JUSTICE JOHNSON, and JUSTICE WILLETT, dissenting.

Justice Green dissented to explain his position that the attorney-immunity defense must be used to except conduct occurring during litigation. Justice Green argued that the Court's interpretation of the doctrine resulted in "a much broader, more expansive liability protection." Justice Green therefore stated that he would affirm the court of appeals' judgment because Cantey Hanger failed to "establish that its alleged conduct occurred in litigation."

In re David Dow

No. 15-025

Case Summary written by Catharine Hansard, Lead Articles Editor.

PER CURIUM.

Miguel Paredes was convicted of capital murder in 2001 for killing three members of a rival gang. Paredes was sentenced to death, and after raising twenty-nine points of error, the Court of Criminal Appeals confirmed Paredes's conviction.

In 2003, Paredes sought habeas relief in state court, and beginning in 2006, Paredes sought habeas relief in federal court. At each hearing, Paredes instructed his lawyer at the time, Michael Gross, to waive claims for ineffective assistance of counsel and counsel's failure to present mitigating evidence at the punishment phase of his trial. The state court and federal district court in which Paredes applied denied habeas relief, as did the Court of Criminal Appeals and the Court of Appeals for the Fifth Circuit.

In May 2014, Gross notified Paredes that the state set his execution for October 28, 2014. Paredes acknowledged receipt of Gross's notification and informed Gross that, at the time he waived the ineffective counsel claims during his habeas hearings, Paredes had been suicidal and on medication. Around the same time, Paredes contacted David Dow, an experienced capital defense attorney, for last minute

help. Dow received Paredes's letter for help on June 9, and from September 12 to October 14, Dow investigated Paredes's case. On October 21, Dow filed a motion to reconsider denial of habeas relief, a new application for habeas relief, an application to stay Paredes's execution, and statements to explain the untimely filing pursuant to Court of Criminal Appeals Miscellaneous Rule 11-003, a rule that operates to ensure timely filings and deadlines in cases involving execution. The Court of Criminal Appeals denied Dow's motions on October 23, and the Fifth Circuit subsequently denied Dow's motions on October 25. After the United State Supreme Court denied a stay of Paredes's execution, he was executed on October 28.

After appearing before the Court of Criminal Appeals to show cause for why he should not be sanctioned for violating Court of Criminal Appeals Miscellaneous Rule 11-003, the Court of Criminal Appeals held Dow in contempt and, because of his prior violation to the predecessor to Miscellaneous Rule 11-003 in 2010, Dow was also suspended from practicing before the Court of Criminal Appeals for one year. Dow sought mandamus and declaratory relief in the Supreme Court of Texas, claiming that the Court of Criminal Appeals exceeded the scope of its authority. The issue before the Supreme Court of Texas was whether the Court had jurisdiction to grant Mr. Dow such mandamus and declaratory relief.

Dow argued that the Texas Supreme Court had exclusive authority to regulate the practice of law and thus, jurisdiction to grant him mandamus and declaratory relief. The Texas Supreme Court considered the specific situations, according to Article V, § 3(a) of the Texas Constitution, in which it may issue writs of mandamus: (1) when it is "necessary to enforce its jurisdiction" and (2) in cases that the Texas Legislature specifies. TEX. CONST. art. V, § 3(a). The Texas Supreme Court determined that it may only issue a writ of mandamus to a lower court to enforce the Texas Supreme Court's jurisdiction—and the Court of Criminal Appeals is not a lower court. Furthermore, the Texas Supreme Court determined that the Texas Legislature has authorized the Texas Supreme Court to issue writs of mandamus only in circumstances specified under § 22.002(a) of the Texas Government Code, and the statute expressly prohibits the Texas Supreme Court from issuing writs of mandamus to the Court of Criminal Appeals.

The Texas Supreme Court also considered its authority to regulate the practice of law. The Texas Supreme Court determined that its duty to regulate the practice of law is administrative in nature, and under § 22.002(a) of the Texas Government Code, the Texas Supreme Court has the ability to issue writs of mandamus to lower courts that interfere with the disciplinary process. This provision, however, also prevents the Texas Supreme Court from issuing writs of mandamus to the Court of Criminal Appeals. Furthermore, the Texas Supreme Court noted that the Court of Criminal Appeals issued a valid sanction against Dow for his failure to comply with Miscellaneous Rule 11-003, which exists to ensure that pleadings are filed timely in death penalty cases.

Finally, the Texas Supreme Court decided that because declaratory relief only operates to make mandamus relief effective and the Court did not have mandamus jurisdiction, the Texas Supreme Court did not have jurisdiction to grant Dow the declaratory relief he requested.

Greater Hous. P'ship v. Paxton

No. 13-0745

Case Summary written by Jenée Duran, Staff Member.

JUSTICE GUZMAN delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE LEHRMANN, JUSTICE DEVINE, and JUSTICE BROWN joined.

In May 2008, Houston-area resident Jim Jenkins submitted a request to Greater Houston Partnership (GHP) for “a copy of the check register for all checks issued for the year 2007,” basing his request on the Texas Public Information Act (TPIA). Jenkins claimed that GHP was “an organization that spen[t] or [was] supported in whole or in part by public funds,” and as such was “subject to the Public Information Act in the same manner as a governmental body.” GHP functioned much like a chamber of commerce, contracting to help promote the economy of the City of Houston by providing consulting, event planning, and marketing services in line with an “Agreement for Professional Services.”

GHP objected to the request from Jenkins and did not disclose the information he requested, acknowledging that it received public funds from the city, but did not agree that it qualified as a “governmental

body” under the TPIA because the funds were compensation for services provided through an arm’s-length contract with the city. GHP referred the matter to the Texas Attorney General as provided in the TPIA. The Attorney General’s Open Records Division concluded that the GHP was a “governmental body” subject to the TPIA’s disclosure requirements in an informal letter ruling. GHP filed a declaratory-judgment action against the Attorney General in response to its informal ruling, seeking a “declaration that: (1) the Attorney General lacked jurisdiction over the dispute and (2) even if jurisdiction was proper, GHP was not a ‘governmental body’ under the TPIA.” Jenkins also filed an additional request for a copy of GHP’s 2008 “disbursement registers and/or check registers.” The Attorney General closed this second request without a finding and directed a trial court to resolve the suit, in which Jenkins intervened a short time after.

The trial court found that “GHP was a ‘governmental body’ supported by public funds and ordered disclosure of the 2007 and 2008 check registers.” The court of appeals agreed with the trial court and affirmed its judgment, using the *Kneeland* test to conclude GHP qualified as a governmental body under the TPIA, finding that the phrase “supported in whole or in part by public funds” was ambiguous. GHP appealed, and the Supreme Court granted its petition for review to “determine the proper scope of the funding source element of the TPIA’s governmental body definition.”

Issue: Whether “a private entity operating like a chamber of commerce is a ‘governmental body’ subject to public disclosure of its private business affairs under the Texas Public Information Act.”

The Court held that the TPIA could not be interpreted to apply to privately controlled corporations performing services under quid pro quo government contracts, finding that the Act only applied to private entities acting as the functional equivalent of the government. The Court “define[d] ‘supported in whole or in part by public funds’ to include only those private entities or their sub-parts sustained, at least in part, by public funds, meaning they could not perform the same or similar services without public funds.” They reasoned that because GHP did not depend on a public revenue source to survive, it was not sustained even in part by government funds. They reinforced this reasoning by analyzing the construction of the term “supported,” finding that the term was “consistent with the scope and nature of the eleven

other types of entities more clearly described as a ‘governmental body’” in the same provision of the statute. Finally, they reasoned that their narrowly-constructed definition of “supported in whole or in part by public funds” was in-line with the federal act on which the TPIA was based—the Freedom of Information Act. The Court held that because they did not find the TPIA’s language ambiguous, the GHP was not a “governmental body” under the Act, and reversed the court of appeals’ judgment.

JUSTICE BOYD, joined by JUSTICE JOHNSON and JUSTICE WILLETT, dissenting.

Justice Boyd dissented to express his position that the Greater Houston Partnership was supported in whole or in part by public funds, thereby making it a governmental body required to disclose information requested by public information requests. He argued that the words “supported by” were ambiguous, and that he would consider the Attorney Generals constructions of the TPIA’s definition of “governmental body” to be persuasive. Finally, he also argued that he would clarify the *Kneeland* test, which the majority found did not apply to this case, to provide guidance when determining “whether a private entity that provides services to or for the government and is paid with public funds is ‘supported in whole or in part by public funds’” and therefore a governmental body under the Act.

Patel v. Tex. Dep’t of Licensing and Regulation

No. 12-0657

Case Summary written by Eric Matthews, Staff Member.

JUSTICE JOHNSON delivered the opinion of the Court, in which JUSTICE GREEN, JUSTICE WILLETT, and JUSTICE DEVINE joined.

Eyebrow threading is a method of shaping eyebrows using only a tightly wound strand of cotton thread. By brushing a loop of the thread over the skin, the “threader” traps and removes unwanted eyebrow hair. In 2011, the Texas legislature categorized eyebrow threading as a “cosmetology” practice, which would require threaders to hold an esthetician license. To obtain a license, a person must complete “a minimum of 750 hours of instruction in an approved training program”

and pass a licensing test. The Texas Department of Licensing and Regulation (TDLR), which is governed by the Texas Commission of Licensing and Regulation (TCLR), enforces these regulations.

Minaz Chamadia, Nazira Momin, and Vijay Yogi were threaders at one of many threading mall kiosks operated by Justringz. TDLR inspected Justringz and issued Notices of Alleged Violations to Momin and Yogi for the unlicensed practice of cosmetology. Ashish Patel and Anverali Satani own a chain of threading salons named Perfect Browz. Satani also owns another threading business named Browz and Henna, which was inspected and given two warnings of violation by the TDLR. In December 2009, Chamadia, Momin, Yogi, Patel, and Satani (the Threaders) sued the TDLR, its director, and the TCLR (collectively, the State) seeking declaratory and injunctive relief under the Uniform Declaratory Judgments Act (UDJA). The Threaders sought declaratory judgment that the regulations, as applied to eyebrow threading, were unreasonable and violated their privileges and immunities and due process rights under Article 1 § 19 of the Texas Constitution. They also sought a permanent injunction barring enforcement of the regulations against them.

In their motion for summary judgment, the Threaders argued that under the constitutional challenge, the State must establish a real and substantial relationship between the regulations and the public's health and safety, which it could not do. In its plea to the jurisdiction, the State challenged the Threaders' standing, asserting that their claims were barred by sovereign immunity and the redundant remedies doctrine. The State also submitted a motion for summary judgment, arguing that the Threaders failed to show a deprivation of any substantive due process rights or "to plead a privileges and immunities claim different from their substantive due process claim." The trial court granted the State's motion for summary judgment, but dismissed its plea to the jurisdiction along with the Threaders' motion. The court of appeals affirmed, holding that the regulations, as applied to the Threaders, did not violate Article 1 § 19.

The issues before the Supreme Court of Texas were (1) whether the real and substantial test or a rational basis test applied to a substantive due process challenge of a regulation affecting economic interests brought under Article 1 § 19; and (2) under the appropriate test, whether the cosmetology regulations, as applied to the Threaders,

were unconstitutional. The State also challenged the Court's jurisdiction, alleging that (1) the State was immune from declaratory judgment claims raising constitutional challenges to statutes; (2) the Threaders' claims lacked justiciability and ripeness; (3) the claims were barred by the redundant remedies doctrine; and (4) Patel and Satani lacked standing. The Court addressed all of the State's jurisdictional challenges in turn, dismissing them to reach the merits of the case.

First, the Court looked to establish the correct standard of review to apply to substantive due process challenges of economic regulations under § 19. It acknowledged the previous inconsistency of Texas courts, which the Threaders claimed applied a real and substantial test, a rational basis test involving consideration of evidence, or a rational basis test without consideration of evidence. The Court then reviewed the historical language of the Texas Constitution and its due course of law clause to determine that an accompanying consideration was required: "whether the statute's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest." The Court retained the presumption that statutes are constitutional, but laid out a new standard:

"To overcome that presumption, the proponent of an as-applied challenge to an economic regulation statute under Section 19's substantive due course of law requirement must demonstrate that either (1) the statute's purpose could not arguably be rationally related to a legitimate governmental interest; or (2) when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest."

Then, the Court applied this test to the cosmetology regulations as applied to the Threaders. The Court noted that the Threaders challenged the excessive amount of training, not cosmetology licensing in general, as not rationally related to the interest of public health and safety. Even the State acknowledged that up to 320 of the 750 training hours were not related to hygiene and sanitation practices relevant to eyebrow threading. The Court considered the actual cost of those 320 training hours and the approximate eight-week delay in employment to find that the cosmetology regulations, as applied to the Threaders, were

so oppressive that they violated the Texas Constitution. Therefore, the Court reversed the court of appeals and remanded the matter to the trial court.

JUSTICE WILLETT, joined by JUSTICE LEHRMANN and JUSTICE DEVINE, concurring.

Although a picture of the Texas Revolution's "Come and Take It" flag would have undoubtedly been worth a thousand words, Justice Willet's concurrence paints an equally effective picture of the historic importance of individual freedom in Texas. The concurrence agreed with the majority's outcome, but urged for greater protection of individual economic rights. Justice Willett illustrated the often-difficult balance of individual liberty and governmental power by describing democracy as "two wolves and a lamb voting on what to have for lunch," and liberty as "a well-armed lamb contesting the vote." The concurrence also pointed out that unlicensed eyebrow threaders pose far less risk to public wellbeing than a government with unlimited license.

JUSTICE BOYD, concurring in the judgment.

Justice Boyd also agreed with the majority's outcome, but not with the "unreasonably burdensome" standard. The concurrence explained that the cosmetology regulations are "arbitrary and unreasonable" and would have failed under the more traditional rational basis test, which would have been the more appropriate standard.

CHIEF JUSTICE HECHT, joined by JUSTICE GUZMAN and JUSTICE BROWN, dissenting.

Like Justice Boyd's concurrence, Chief Justice Hecht's dissent asserts that a more traditional rational basis test should be used. The dissent warned that the judiciary should be extremely cautious in striking economic regulations as unconstitutional and should leave such policy determinations to the legislature. Even if they are excessive, the cosmetology regulations are rationally related to the legitimate interest of public health and safety; therefore, the regulations should be upheld as constitutional.

JUSTICE GUZMAN, dissenting.

Justice Guzman expressed serious doubt that the majority's standard is feasible in practice. The dissent agreed that the regulations may be excessive, but that excessiveness is an issue better left to the legislature.

McGinnes Indus. Maint. Co. v. Phx. Ins. Co.

No. 14-0465

Case Summary written by Abigail Drake, Staff Member.

CHIEF JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE GREEN, JUSTICE WILLETT, JUSTICE DEVINE, and JUSTICE BROWN joined.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) changed the landscape of nuisance suits based on pollution, and gave the EPA the authority to mandate both the government and private parties to clean up hazardous waste sites. Under CERCLA, the EPA has two avenues to seek site cleanup: it may cleanup the site itself and recover the costs from the potentially responsible parties afterwards in a lawsuit or it may compel the potentially responsible parties “to perform the cleanup either voluntarily or involuntarily through administrative or judicial proceedings”.

In the 1960s, petitioner McGinnes Industrial Waste Corporation disposed of pulp and paper mill waste sludge in ditches near the San Jacinto River in Pasadena, Texas. In 2005, the EPA began investigating the possible environmental contamination at the site. In November 2008, McGinnes' parent company was notified of its potential liability and invited to enter into negotiations with the EPA regarding cleanup and the associated costs for repairing the site, while McGinnes was similarly notified in December 2008.

In July 2009, the EPA notified McGinnes that it had determined McGinnes was responsible for cleaning up the site and demanded that McGinnes pay over \$378,000 in costs. The letter required McGinnes to make a good faith offer within 60 days, but McGinnes did not make an offer, which prompted the EPA to issue a unilateral administrative order requiring McGinnes to conduct a “remedial investigation and feasibility study.”

While McGinnes was disposing of its waste at the site, it was covered by standard-form commercial general liability (CGL) insurance policies through Phoenix Insurance Company and Travelers Indemnity Company (the Insurers). Standard-form CGL insurance policies give the insurer “the right and duty to defend any suit against the insured seeking damages.” Each of McGinnes’ policies contained similar language, giving McGinnes these rights in conjunction with property damages caused by an occurrence.

In May 2008, in the time period between the EPA’s two notice letters, McGinnes requested a defense in the EPA proceedings from the Insurers. The Insurers refused on the ground that the proceedings were not a “suit” under the policy.

McGinnes sued the Insurers in federal district court for a declaration that the policies covered the EPA proceedings, but the federal district court granted partial summary judgment on that issue. McGinnes certified its order for interlocutory appeal, and the United States Court of Appeals for the Fifth Circuit certified this issue to the Texas Supreme Court.

Issue: Does “suit” include superfund cleanup proceedings conducted by the EPA under CERCLA?

When the policies at issue were first written, the only recourse for pollution was suing in court on common law or statutory claims. One effect of CERCLA was that the EPA was able to conduct what amounted to its own pretrial proceedings without having to initiate actual court proceedings. The notice letters to potentially responsible parties serve as pleadings. The EPA obtains discovery through requests for information. Its invitations for negotiations serve as attempts at mediation. The fines and penalties for non-cooperation are similar to court-ordered sanctions. Finally, the potentially responsible party’s opportunity for review is limited to the end of the process and judicial review is based on an abuse of discretion standard. Given this procedure, the EPA proceedings are a suit in and of themselves, only conducted outside a courtroom. CERCLA effectively redefined “suit” to include these proceedings, given that before the act, the same process would have been conducted through a court.

While the Insurers argued that this would amount to every demand letter having to be treated as a suit, this fear was unnecessary. Ordinary, run-of-the-mill demand letters are nothing like the notice

letters and unilateral administrative orders issued by the EPA under CERCLA, which command compliance.

Additionally, the Insurers claimed that the damages at issue for the cleanup costs were not the result of an “occurrence” under the policies, which they take to mean an accident. However, the Fifth Circuit already determined that cleanup costs are damages that are covered under the CGL policies at issue here. This further supported the Insurers’ duty to defend, for if the Insurer were required to indemnify but not to defend, it could have created a situation where the insured made no defense and the Insurer would have been liable for a large amount of damages.

Finally, thirteen other state high courts have found that “suit” in these standard-form CGL policies covers these proceedings, while only three have sided with the Insurers’ interpretation of the word. Of those three states, the most recent decision was in 1998, and seven other state high courts have sided with the insureds since that time.

JUSTICE BOYD, joined by JUSTICE JOHNSON, JUSTICE GUZMAN, and JUSTICE LEHRMANN, dissenting.

The ordinary meaning of “suit” is one of court proceedings. In allowing the EPA proceedings to be termed a “suit,” the Court moved outside what the parties actually contemplated and imposed a meaning that was unsupported by the context. When the policy was written, the meaning of “suit” was defined to mean a court proceeding or tribunal. Furthermore, the fact that the policies distinguished between a “claim” and a “suit” gave further emphasis to the assertion that “suit” should be limited to court proceedings. The fact that the EPA proceedings are a “functional equivalent” of a suit is irrelevant to contract interpretation. The Court has stated that this ruling will not mean that insurance companies have to defend against every administrative proceeding or demand letter, but it did not specify which ones insurers have to defend against and which ones insurers can ignore.

Additionally, not all courts have agreed that CERCLA cleanup costs are “damages” under a CGL policy. Because of the split, the argument that Insurers must defend because it must cover the damages falls flat.