PERILS AND PITFALLS IN THE TEXAS CIVIL PRACTICE & REMEDIES CODE: HOW YOU CAN AVOID (OR EXPLOIT) THEM TO YOUR ADVANTAGE

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Perils and Pitfalls in the Texas Civil Practice & Remedies Code: How You Can Avoid (or Exploit) Them to Your Advantage

This paper does not pretend to be an exhaustive exploration of the Texas Civil Practice & Remedies Code—that project would be beyond the ken of mere mortals and certainly the dubious attention span of the author. Instead, it focuses on some of those provisions that can trip up even the most seasoned litigators or, even more critically, that have generated a split among the various Texas courts of appeal, thereby affecting the conduct and consequences of litigation depending on in which appellate district a case is being tried.

1. Chapter 18 – Evidence

There are two provisions in this chapter of the Code that have generated circuit splits as to their meaning and effect. The consequences of ignoring or simply being unfamiliar with the requirements of these evidentiary provisions can cost a litigator some—if not all—of his or her verdict.

A. Section 18.001 – Affidavit Concerning Cost & Necessity of Services

i. The joys of the section 18.001 affidavit

With the exception of an action on a sworn account, this section applies to all civil actions. See Tex. Civ. Prac. & Rem. Code Ann. § 18.001(a). It permits a party to offer an affidavit into evidence establishing that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary. Unless a controverting affidavit is served on the party offering the affidavit within the time period specified in the statute, the affidavit is deemed sufficient evidence to support a finding of fact by a judge or jury that the amount charged was reasonable or that the service was necessary. Id. § 18.001(b).

Section 18.001 is a convenient vehicle for overcoming two evidentiary hurdles: (1) it allows for the admissibility of evidence of the reasonableness and necessity of charges which would otherwise be deemed inadmissible hearsay, and (2) it expressly authorizes the use of what would otherwise be considered inadmissible hearsay to support findings of fact by a judge or jury. See Beauchamp v. Hambrick, 901 S.W.2d 747, 749 (Tex. App.—Eastland 1995, no writ). In effect, a § 18.001 affidavit allows a party to avoid the expense and logistical difficulties of calling a live expert to trial to prove up the reasonableness and necessity of charges incurred by the party. Hong v. Bennett, 209 S.W.3d 795, 801 (Tex. App.—Fort Worth 2006, no pet.).
To obtain the potential benefits of a § 18.001 affidavit, a party must satisfy two requirements. First, the party must ensure that the affidavit complies with the provisions of § 18.002 to the extent that it must be notarized and be made by either the person who provided the services or the person in charge of records showing the services provided and the charges made. It must also include an itemized statement of the services and charges for which compensation is being sought. Id. § 18.001(c). Second, the party seeking to offer the affidavit must serve a copy of the affidavit on each other party in the case at least 30 days before the day on which evidence is first presented at the trial of the case. Id. § 18.001(d).

ii. Paradise lost: the controverting or counteraffidavit

An opposing party can potentially deprive the party offering the § 18.001 affidavit of its benefits by serving a controverting affidavit. Id. § 18.001(b). Certain stringent requirements, however, govern the controverting affidavit. It must give reasonable notice of the basis upon which the opposing party intends to controvert the “claim reflected by the affidavit,” it must be sworn to, and it must be made by a person who is qualified by knowledge, skill, experience, training, education, or other expertise, to testify against any or all of the matters addressed in the § 18.001 affidavit. Id. § 18.001(f). Finally, a party who intends to controvert a § 18.001 affidavit must serve a copy of the counteraffidavit on each other party no later than 30 days after the day the controverting party receives a copy of the § 18.001 affidavit and at least 14 days before the day on which evidence is first presented at the trial of the case or with leave of court at any time before the commencement of evidence at trial. Id. § 18.001(e).

iii. But what does § 18.001 really accomplish?

a) Does failure to serve a controverting affidavit preclude consideration of controverting evidence at trial?

Texas courts of appeal appear to be divided over the effect of a § 18.001 affidavit and, more significantly, the consequences of serving a controverting affidavit. Some courts have held that a defendant who fails to serve a responsive controverting or counteraffidavit is precluded from presenting evidence contesting or otherwise challenging the reasonableness and necessity of the expenses incurred by the claimant. See, e.g., Hong v. Bennett, 209 S.W.3d 795, 804 (Tex. App.—Fort Worth 2006, no pet.) (finding that controverting affidavit that failed to establish

1 It is unclear what the effect of Texas Civil Practice & Remedies Code § 132.001, which permits the use of an unsworn declaration, has on the § 18.001 affidavit.

2 For actions commencing on or after September 1, 2013, the Texas legislature has clarified that the records attached to the § 18.001 affidavit are not required to be filed with the court before trial commences. Tex. Civ. Prac. & Rem. Code § 18.001(d). Only service of the affidavit, counter-affidavit and their respective supporting documents on the opposing parties is required by the statute. See id. at §18.001(d)-(e).
qualifications of affiant to challenge reasonableness and necessity of expenses meant such
evidence was insufficient and properly excluded by trial court); *Beauchamp v. Hambrick*, 901
S.W.2d 747, 749 (Tex. App.—Eastland 1995, no writ) (noting that §18.001 provides for
exclusion of evidence to the contrary, upon proper objection, in the absence of a properly-filed
Houston [14th Dist.] Nov. 25, 1992, writ denied) (not designated for publication) (“Failing to
[file counteraffidavit] prevents one from introducing any evidence controverting the initial
affidavit.”).

Other courts have looked the other way and opined that it was not error for a trial court to
permit controverting testimony and other argument challenging the reasonableness and necessity
of expenses incurred by the claimant despite the seemingly mandatory nature of §18.001(e) and
(noting, without disapproval, that, rather than file counteraffidavit, defendant relied on cross-
examination at trial to controvert §18.001 affidavit); *Grove v. Overby*, No. 03-03-00700-CV,
2004 WL 1686326, at *6 (Tex. App.—Austin July 29, 2004, no pet.) (mem. op.) (holding that it
was not error “to allow cross-examination and argument contesting [claimant’s] medical
costs” although defendant failed to file a controverting affidavit).

b) Does the filing of a proper controverting affidavit negate the effect of the §18.001
affidavit by requiring a claimant to tender expert testimony at trial?

In the absence of a compliant,controverting affidavit,a § 18.001 affidavit is deemed
sufficient to support a fact finding concerning the reasonableness and necessity of a claimant’s
espenses. § 18.001(b); see also *Owens*, 158 S.W.3d at 110. But, if a controverting affidavit
satisfying the requirements of § 18.001(e) and (f) is served, then it is apparently incumbent on
the claimant to offer live expert testimony to prove the reasonableness and necessity of his
costs. See *Hong*, 209 S.W.3d at 804. In fact, a trial court is deemed to have abused its
discretion if it simply admits both competing affidavits in lieu of shifting the burden back on to
the claimant and requiring her to elicit such live testimony at trial. See id.

c) Is an uncontroverted § 18.001 affidavit deemed conclusive as to the
reasonableness and necessity of costs incurred?

Surprisingly, a § 18.001 affidavit—even when it is not controverted—is not considered to
be conclusive as the reasonableness and necessity of costs incurred by a claimant, but merely
sufficient to base a finding of fact. See, e.g., *Hong*, 209 S.W.3d at 800 (“An uncontroverted
section 18.001(b) affidavit provides legally sufficient—but not conclusive—evidence to support

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3 Section 18.001 actually requires only that the affidavit and counteraffidavit be served—not filed. Tex. Civ.
a jury’s finding that the amount charged for a service was reasonable and necessary.”); Owens, 158 S.W.3d at 110 (observing that “evidence presented in accordance with the statute does not conclusively establish the amount of damages”); Grove, 2004 WL 1686326, at *6 (“Section 18.001 affidavits are not conclusive of the amount of damages; they are merely ‘sufficient evidence to support a finding of fact.’”); Beauchamp, 901 S.W.2d at 749 (“[Section 18.001] does not provide that the evidence is conclusive, nor does it address the issue of causation.”). Thus, a jury is free to disregard evidence submitted in the form of a § 18.001 affidavit in determining a damages award. See Grove, 2004 WL 1686326, at *6.

d) Does a § 18.001 affidavit serve to establish causation?

The notion that, in a personal injury case, a § 18.001 affidavit serves to establish a causal nexus between the incident complained of and medical expenses incurred appears to have been almost reflexively rejected by Texas courts. See, e.g., Hong, 209 S.W.3d at 804 n.4 (“Section 18.001 does not address the issue of causation.”); Owens, 158 S.W.3d at 110 (pointing out that a section 18.001 affidavit does not establish a “causal nexus between the accident and the medical expenses”); Grove, 2004 WL 1686326, at *6 (holding that 18.001 affidavits are not conclusive as to causation of claimant’s injuries).

iv. Is it substantive or procedural: what do federal courts say about § 18.001?

In 2006, the Northern District of Texas addressed the question of whether a § 18.001 affidavit is procedural or substantive in nature in a Federal Tort Claims Act case involving a collision with a postal worker. See Rahimi v. United States, 474 F. Supp. 2d 825 (N.D. Tex. 2006). If the court found the provision authorizing the use of a § 18.001 affidavit to be purely procedural, then the claimant would not be permitted to rely on such an affidavit and would instead be forced to use significantly more expensive and time-consuming alternatives to proving her damages. Id. at 829. Concluding that such an alternative was inappropriate, the Rahimi court determined that, because the state’s “evidentiary rule” was so bound up or intertwined with the claimant’s substantive rights, it would apply the rule concerning § 18.001 affidavit, subject to the deadlines imposed by the court’s own scheduling order and the timing requirements set forth in the Federal Rules of Civil Procedure. Id.

B. Section 18.091 – Proof of Certain Losses

Section 18.091(a) of the Texas Civil Practice & Remedies Code imposes an additional requirement on parties seeking recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value or loss of inheritance: it requires that evidence to prove such losses 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.” The statute is apparently intended to
prevent a claimant from receiving a windfall where the jury awards pretax income as damages that are not subject to taxation. *Big Bird Tree Serv. v. Gallegos*, 365 S.W.3d 173, 179 (Tex. App.—Dallas 2012, pet. denied).

Despite the seemingly mandatory nature of § 18.091(a), a claimant’s failure to comply is not necessarily fatal to a recovery for loss of earnings, earning capacity, contributions or inheritance where the defendant fails to object at trial. For example, in *Interconex, Inc. v. Ugarov*, the Houston First District Court of Appeals rejected the defendant’s argument to reverse and render where the plaintiff purportedly failed to comply with § 18.091(a) because the defendant failed to object to the trial court’s jury instruction not to consider taxes in answering the jury charge questions and did not specifically object to the damages question for failure to comply with § 18.091. *Interconex*, 224 S.W.3d 523, 533 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

Similarly, in *Big Bird*, although the Dallas court of appeals acknowledged that the plaintiff had apparently testified to his loss of earnings and earning capacity using “pretax wages,” it affirmed the jury’s award because the defendant had failed to object to this testimony at trial and there was some evidence in the record to support the jury’s finding on these elements of damages. *Big Bird*, 365 S.W.3d at 179.

Thus, the moral of the story for defendants in terms of enforcing § 18.091(a) is apparently to object at trial or risk waiving the issue on appeal. See *Big Bird*, 365 S.W.3d at 179; *Interconex*, 224 S.W.3d at 533. In the meantime, plaintiffs who have dodged the § 18.091 bullet thus far should remember that, when seeking recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value or loss of inheritance, they must present that evidence to the jury in a post-tax form.

2. **CHAPTER 27 – ACTIONS INVOLVING THE EXERCISE OF CERTAIN KINDS OF CONSTITUTIONAL RIGHTS**

Texas’ anti-SLAPP legislation is codified in chapter 27 of the Texas Civil Practice & Remedies Code. Tex. Civ. Prac. & Rem. Code Ann. § 27.001 et seq. (West 2013). The stated purpose of the chapter is to “encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law,” while simultaneously safeguarding “the rights of a person to file meritorious lawsuits for demonstrable injury. *Id.* § 27.002.
A. Scope of application, deadlines, and procedures.

The statute authorizes a party to file a motion to dismiss a legal action that is based on, related to, or in response to that party’s exercise of free speech, the right to petition, or right of association. *Id.* § 27.003(a). Upon the filing of a motion to dismiss under chapter 27, discovery in the litigation will be suspended until the court rules upon the motion (except as provided by § 27.006(b), which authorizes a court to permit specific limited discovery that is relevant to the motion). *Id.* §§ 27.003(b), 27.003(c). A party filing a motion under § 27.003 may request that the court issue findings regarding whether the lawsuit was brought for the purpose of deterring, preventing, or retaliating against a party for exercising its constitutional rights. *Id.* § 27.007(a). Findings made under § 27.007(a) must be issued by the court no later than the 30th day after the request is made. *Id.* § 27.007(b).

A party must file a motion to dismiss under this section no later than the 60th day following the date of service of the legal action. *Id.* § 27.003(b). Section 27.004(a) requires that a hearing on the motion to dismiss take place no later than the 60th day after the date of service of the motion. *Id.* § 27.004(a). This deadline for the hearing may be extended if necessary, but must occur no more than 90 days after the date of service of the motion, unless the court permits further discovery, in which case the hearing date must take place no later than 120 days after the date of service of the initial motion to dismiss. *Id.* § 27.004.

The court is required to rule on a motion brought under § 27.003 within 30 days following the date of the hearing. *Id.* § 27.005(a). In order to prevail on its motion to dismiss, the moving party must show by a preponderance of the evidence that the lawsuit is based on, related to, or in response to: (1) the right to free speech; (2) the right to petition; or (3) the right of association. *Id.* § 27.005(b). However, under § 27.005(c), if the party bringing the legal action is able to establish by “clear and specific” evidence a prima facie case for each element of its claim, the court may not dismiss the action. *Id.* § 27.005(c). Notwithstanding § 27.005(c), if the moving party establishes by a preponderance of the evidence all of the elements of a valid defense to the claim, the court must dismiss the legal action. *Id.* § 27.005(d). The court may consider affidavits from the parties, the pleadings, and any such limited and relevant discovery as the court has permitted when ruling on the motion to dismiss. *Id.* § 27.006.

If the court fails to rule on the motion to dismiss within the 30-day period after the hearing, as prescribed by § 27.005, then the motion is considered to be denied by the operation of law. *Id.* § 27.008. The moving party may appeal this ruling. *Id.* Appellate courts are required to expedite appeals from trial court orders on motions filed under this chapter, whether interlocutory or not. *Id.*

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4 For an example of judicial findings made pursuant to Section 27.002, see *Pena v. Perel*, No. 08-12-00275-CV, 2013 WL 4604261, at **1–2 (Tex. App.—El Paso Aug. 28, 2013, no pet. h.).
B. Certain Legal Actions Are Exempt from Chapter 27.

Section 27.010 identifies certain types of legal actions that are specifically exempted from application of the chapter. The chapter does not apply to enforcement actions brought in the name of the state or any political subdivision thereof, including actions brought by the attorney general or a district attorney. Id. § 27.010(a). Section 27.010(c) exempts legal actions seeking “recovery for bodily injury, wrongful death, or survival or to statements made regarding that legal action.” Id. § 27.010(c). Section 27.010(d) exempts actions brought under the Texas Insurance Code or otherwise arising from insurance contracts. Id. § 27.010(d).

Perhaps the biggest exemption to the chapter is created by § 27.010(b), which exempts lawsuits brought against:

[A] person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct arises out of the sale or lease of goods, services, or an insurance product, insurance services, or a commercial transaction in which the intended audience is an actual or potential buyer or customer.

Id. § 27.010(b).

This provision was the subject of discussion in BBB of Metro. Dallas, Inc. v. BH DFW, INC., 402 S.W.3d 299 (Tex. App.—Dallas 2013, pet. filed). The court in that case referred to § 27.010(b) as exempting commercial speech from the chapter. BBB of Metro. Dallas, 402 S.W.3d at 309. However, all commercial speech is not exempted from the chapter; each element of the section must be met.

The case involved a party suing the Better Business Bureau of Metropolitan Dallas (“BBB”) in response to a negative review issued by the BBB. See id. at 303–04. Generally, the burden of proving that an exemption applies lies with the party seeking to benefit from the exemption. City of Houston v. Jones, 679 S.W.2d 557, 559 (Tex. App—Houston 1984, no writ) (citing Franklin v. Pietzsch, 334 S.W.2d 214, 219–20 (Tex. Civ. App.—Dallas 1960, writ ref’d n.r.e.)). Therefore, once the BBB established by a preponderance of the evidence that its negative review was considered an exercise of its constitutional right to free speech, the burden shifted to BH DFW to show that an exemption applied. BBB of Metro. Dallas, 402 S.W.2d at 309. BH DFW argued that § 27.010(b) applied because: 1) the BBB was in the business of selling accreditation services, which BH DFW had purchased; 2) the legal action arose out of a commercial transaction between BH DFW and the BBB—the fee paid by BH DFW in order to obtain accreditation; and 3) the intended audience of the BBB’s negative review was actual or potential customers. Id.
The court rejected BH DFW’s argument, holding that BH DFW had failed to establish that the exemption applied. *Id.* The court cited the following reasons for its ruling: 1) BH DFW had presented no evidence that the negative review arose out of a commercial transaction between the parties, while the BBB presented evidence that it published reviews of companies regardless of whether they had sought accreditation or not—that is, the BBB reviewed businesses regardless of whether the business had a commercial relationship with the BBB; and 2) the intended audience of the BBB review was the general public, not any particular entity. *Id.* At the end of the day, it was not sufficient to establish an exemption under § 27.010(b) to merely allege a general commercial relationship between the parties. The legal action must arise out of a specific transaction, and the behavior complained about must be directed towards actual or potential buyers or customers—that a statement is directed towards the public, generally, is not enough for this subsection to apply. *See id.*

**C. Court costs, damages, and sanctions.**

The primary relief available under chapter 27 is, of course, the dismissal of a frivolous suit. However, § 27.009 also provides for the award of damages, costs, and sanctions, when appropriate. *See* § 27.009. Under § 27.009(a), if the party moving for dismissal under chapter 27 is successful, court costs, reasonable attorney’s fees, and such other expenses as justice and equity may require are to be awarded. *Id.* § 27.009(a). Sanctions against the party bringing the legal action are also available. *Id.* However, if the court determines that a motion to dismiss under this chapter was filed frivolously or with the intent to delay, then court costs and attorney’s fees may be awarded to the non-moving party. *Id.* § 27.009(b).

3. **CHAPTER 51 – APPEALS**

**A. Section 51.014 – Appeals from Interlocutory Order**

The appellate review of a trial court’s interlocutory orders has historically been disfavored because, in addition to being time-consuming and expensive, such appeals are highly disruptive to the litigation process and interfere with a trial court’s ability and authority to manage its docket. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 138 (Tex. 2004); *see also Hernandez v. Ebrom*, 289 S.W.3d 316, 322–23 (Tex. 2009) (Jefferson, C.J., dissenting). Section 51.014 of the Texas Civil Practice & Remedies Code provides for the appeal of certain interlocutory orders that would ordinarily otherwise be unappealable until after conclusion of the litigation. *Hernandez*, 289 S.W.3d at 323. In these limited instances, the rights at stake were considered to be so important that Texas lawmakers provided for exceptions to what is otherwise known as the final judgment rule. *Id.*
B. Section 51.014(a)(12) – Appeals from Denial of Motion to Dismiss under § 27.003

Section 27.008 of the Civil Practice and Remedies Code deals with appeals from rulings on motions to dismiss made under chapter 27. Subsection 27.008(a) permits the moving party to appeal if the court does not rule on the motion to dismiss within the time prescribed by § 27.005. If the court fails to rule on the motion, it is to be treated as having been denied by operation of law, whereupon the moving party may then appeal. Id. Subsection 27.008(b) provides for expedited appellate review, whether interlocutory or not, from a trial court ruling on a motion to dismiss filed pursuant to § 27.003 or from the court’s failure to rule on that motion within the required time. Id. at § 27.008(b).

i. A circuit split

Texas courts of appeals have had differing interpretations regarding the meaning of § 27.008. Specifically at issue is whether § 27.008 authorizes an interlocutory appeal from a trial court’s ruling on a motion to dismiss. Section 27.008 was examined in detail in Jennings v. Wallbuilder Presentations, Inc., 378 S.W.3d 519 (Tex. App.—Fort Worth 2012, pet. filed). The court in Jennings construed § 27.008(a) as conferring appellate jurisdiction on the court only where a trial court failed to rule on a motion to dismiss brought under chapter 27. Jennings, 378 S.W.3d at 524. Likewise, the court held that § 27.008(b), requiring expedited appellate review, did not contain language expressly creating a right of interlocutory appeal. Id. at 524–25. The court compared the language in § 27.008(b) with that of statutes which did expressly create a right of interlocutory appeal. See id. The Jennings court concluded that interlocutory appeals under § 27.008 are limited to situations in which the trial court fails to rule on a motion to dismiss and the motion is therefore considered denied by operation of law. See id. at 524.

In Direct Commercial Funding, Inc. v. Beacon Hill Estates, LLC, No. 14-12-00896-CV, 2013 WL 407029 (Tex. App—Houston [14th Dist.] Jan. 24, 2013, no pet. h.), the Houston court of appeals declined to follow Jennings. The Beacon Hill Estates court rejected the analysis in Jennings because, “the result they advocate impermissibly renders portions of subsections (b) and (c) meaningless in contravention of statutory construction precepts.” Beacon Hill Estates, 2013 WL 407029 at *3. The Beacon Hill Estates court noted that subsection (b) states that “an appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss … or from a trial court’s failure to rule…. “ Id. The court then reasoned, “[i]f no interlocutory appeal is available when the trial court expressly rules on a motion to dismiss by signing an order, then the phrase ‘from a trial court order on a motion to dismiss’ appearing after the phrase ‘whether interlocutory or not’ is rendered meaningless.” Id. The court further concluded that the most natural reading of the subsection was that the phrase “whether interlocutory or not” modifies the following references to a “trial court order” and “a
trial court’s failure to rule. See id. The Dallas court of appeals agreed with the Beacon Hill Estates court’s analysis in BBB of Metro. Dallas, Inc. v. BH DFW, INC., 402 S.W.3d 299, 307 (Tex. App.—Dallas 2013, pet. filed). The court adopted that analysis and held that chapter 27 did permit interlocutory appeals of trial court orders. See BBB of Metro. Dallas, 402 S.W.3d at 307 (“We find the reasoning of the Fourteenth Court of Appeals in Beacon Hill Estates to be persuasive. Accordingly, we conclude this Court has jurisdiction under chapter 27 of the civil practice and remedies code over this interlocutory appeal of the trial court’s order denying the BBB’s motion to dismiss.”).

ii. Legislative resolution of the circuit split

The Texas supreme court did not resolve the split between the circuits. Instead, the Texas legislature addressed this disagreement legislatively in 2013. See Kinney v. BCG Attorney Search, Inc., No. 03-12-00579-CV, 2013 WL 4516106 (Tex. App.—Austin Aug. 21, 2013, no pet. h.). The legislature made a revision to chapter 51 of the Texas Civil Practices and Remedies Code in order to resolve the ambiguity in chapter 27. Id. at *3. The amendment, codified at § 51.014(a)(12), expressly authorizes interlocutory appeal of a trial court’s ruling denying a motion to dismiss filed under chapter 27. Id.

C. Section 51.014(a)(7) – Appeals from Grant/Denial of a Special Appearance

Section 51.014(a)(7) authorizes the interlocutory appeal of a trial court’s order denying or granting the special appearance of a defendant under Texas Rule of Civil Procedure 120a except in a suit brought under the Texas Family Code.

i. Circuit split as to whether 51.014(a)(7) is mandatory or permissive.

In 2007, the Waco court of appeals determined that a defendant had waived its right to appeal the trial court’s denial of its special appearance because the defendant waited over two years from the denial—and following a trial on the merits—to file an appeal of the trial court’s interlocutory ruling. See Matis v. Golden, 228 S.W.3d 301, 305 (Tex. App.—Waco 2007, no pet.). Relying upon § 51.014(a)(7) and Texas Rule of Appellate Procedure 26.1(b), the Matis court opined that “an appeal of an order granting or denying a special appearance is in an interlocutory appeal which must be perfected by filing a notice of appeal within twenty days after the ruling.” Id. Because it deemed the defendant’s appeal untimely, the Matis court concluded that it did not have jurisdiction to hear the appeal and dismissed it for want of jurisdiction. Id.; see also id at 312 (Gray, C.J., concurring) (“[A] losing party cannot wait until the end of the proceeding and then appeal the denial of the special appearance, but must instead comply with the requisites of timely filing a notice of appeal for the accelerated appeal.”). Thus,
in the Waco court of appeals’ view, the interlocutory appeal afforded under § 51.014(a)(7) is mandatory—that is, a litigant must use it or lose it.

The El Paso court of appeals, on the other hand, argued in an unpublished 2002 opinion that, because section 51.014(a) states that “a person may appeal from an interlocutory order,” the statute is permissive and, therefore, failure to exercise the right to interlocutory appeal does not waive the right to appeal the denial of a special appearance at the conclusion of the litigation. *Canyon (Australia) Pty., Ltd. v. Maersk Contractors, Pty., Ltd.*, No. 08-00-00248-CV, 2002 WL 997738, at *4 (Tex. App.—El Paso May 16, 2002, pet. denied) (“The word ‘may’ in a statute is permissive rather than mandatory.”) (citing *Texas Workers’ Comp. Com’n v. Texas Builders Ins. Co.*, 994 S.W.2d 902, 908 (Tex. App.—Austin 1999, pet. denied)). The *Canyon* court, therefore, concluded that it did have jurisdiction to hear the appeal of the trial court’s ruling granting the defendant’s special appearance. *Id.*

In 2008, although the appellee never challenged the court’s appellate jurisdiction to consider the defendant’s appeal of the denial of its special appearance in its appeal from a final judgment following trial, the Austin court of appeals addressed the question anyway, taking the opportunity to expressly (albeit respectfully) disagree with its sister court of appeals in Waco. See *GJP, Inc. v. Ghosh*, 251 S.W.3d 854, 866 (Tex. App.—Austin 2008, no pet.). The *GJP* court declined to undertake the statutory analysis conducted by the El Paso court of appeals and, instead, simply rejected the proposition that appellate review of special appearance rulings “is limited to solely to that which the legislature has conferred in section 51.014(a)(7)” and, therefore, subject to the deadlines governing interlocutory appeals. *Id.* Thus, the court concluded that appellate review of the trial court’s special appearance ruling was not barred. See *id.*

Although the Texas supreme court has not yet formally resolved this split of authority specifically with respect to § 51.014(a)(7), it did examine the language of § 51.014(a) in the context of an interlocutory appeal that, it was argued, should have been brought pursuant to § 51.014(a)(9) and its conclusion in that context suggests the answer to the dispute over § 51.014(a). See generally *Hernandez v. Ebrom*, 289 S.W.3d 316 (Tex. 2009). The issue before the *Hernandez* court was whether the defendant in a medical malpractice case could appeal the trial court’s denial of his motion to dismiss based upon the inadequacy of the claimant’s expert report after the claimant non-suited the case and final judgment of dismissal had been entered. *Id.* at 317. A successful motion to dismiss based upon an inadequate expert report would have entitled the defendant to his attorney’s fees and costs incurred in the suit. *Id.* at 319–20.

Similar to the El Paso court of appeals in *Matis*, the *Hernandez* majority focused on the statutory language of § 51.014(a), noting that it only states that “[a] person may appeal from” certain specified interlocutory orders. *Id.* at 319. Then, citing to the Code Construction Act, the
court pointed out that the term “may” is deemed to create “discretionary authority or grants permission or a power.” *Id.* at 318. The court went on further to observe that it failed to see either express language or context in the statute that would necessitate interpreting “may” as “imposing a duty as opposed to creating authority or granting permission or a power.” *Id.* Concluding that an interlocutory appeal under § 51.014(a)(9) was not mandatory based on its statutory language, the court held that an appeal could be taken following a final judgment.

4. **CHAPTER 71 – LIABILITY IN TORT**

   A. **Section 71.051 – Forum Non Conveniens**

   i. **How it works**

   Chapter 71 of the Texas Civil Practice & Remedies Code codifies the equitable doctrine of forum non conveniens in § 71.051, but limits application of the statute solely to actions for personal injury and wrongful death. *See* Tex. Civ. Prac. & Rem. Code § 71.051(i). Statutory forum non conveniens authorizes a court to stay or dismiss a claim or even an entire action if it finds that, “in the interest of justice and for the convenience of the parties, the claim or action would be more properly heard in a forum outside of Texas.” *Id.* at § 71.051(b). When deciding whether to grant a motion to stay or dismiss under the doctrine of forum non conveniens, a court is expected to consider whether:

   1. an alternate forum exists in which the claim or action may be tried;

   2. the alternate forum provides an adequate remedy;

   3. maintenance of the claim or action in Texas courts would work “a substantial injustice to the moving party;”

   4. the alternate forum can exercise jurisdiction over all of the defendants properly joined to the plaintiff’s claim;

   5. the balance of the private interests of the parties and the public interest of the state favors an alternate forum where such interest includes the extent to which an injury or death resulted from acts or omissions occurring in Texas; and

   6. the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.

   *Id.*
ii. Limitations on statutory forum non conveniens

A court is authorized to set terms and conditions for staying or dismissing an action as justice requires. *Id.* at § 71.051(c). If the moving party violates any of these terms or conditions, the court must withdraw the order staying or dismissing the claim or action as though the order had never been issued. *Id.* Further, the court is deemed to retain continuing jurisdiction for purposes of enforcing the terms and conditions of the stay or dismissal pursuant to the forum non conveniens statute. *Id.*

A motion for stay or dismissal under the statute must be made no later than 180 days after the time required for filing a motion to transfer venue of the claim or action. *Id.* at § 71.051(d). A motion to transfer venue must be filed prior to or concurrently with the filing of the movant’s first responsive pleading or may be combined with other objections and defenses and included in the movant’s first responsive pleading. Tex. R. Civ. P. 86(2).

Finally, a court may not stay or dismiss a plaintiff’s claim under the statute if the plaintiff is a legal resident of Texas. Tex. Civ. Prac. & Rem. Code § 71.015(e). If an action involves plaintiffs who are legal residents of Texas and plaintiffs who are not, a court is still prohibited from dismissing or staying the action if the Texas plaintiff is properly joined and the action arose out of a single occurrence. *Id.*

iii. A potential sea-change in forum non conveniens jurisprudence?

Recently, the Texas supreme court granted oral argument in a mandamus proceeding filed by Ford Motor Company in which Ford argued that the trial court abused its discretion in denying Ford’s motion to dismiss a wrongful death action based upon forum non conveniens. Ford contends that the trial court should have granted its motion to dismiss because both occupants of the vehicle involved in the fatal crash were citizens and residents of Mexico and no “true” plaintiff is a Texas resident. *In re Ford Motor Co.*, No. 13–12–00624–CV. 2012 WL 5949026, at *4 (Tex. App.—Corpus Christi Nov. 20, 2012, orig. proceeding [mand. pending]) (mem. op.). The Corpus Christi court of appeals denied Ford’s mandamus petition because one of the intervening plaintiffs was a Texas resident and, therefore, the Texas resident exception under § 71.015(e) precluded the trial court from dismissing the action based upon forum non conveniens. *Id.* at *5. Ford then filed a petition for writ of mandamus, seeking relief from the supreme court.

5 “Legal resident” is defined in the statute to include an individual who intends the specified political subdivision to be his permanent residence without regard for the individual’s country of citizenship or national origin. *Id.* at § 71.015(h)(1).
The underlying case arose from a rollover incident in Mexico that occurred after one of the tires on a Ford Explorer failed, causing the vehicle to crash. *Id.* at *1. The crash seriously injured Juan Tueme Mendez ("Juan") and killed his brother, Cesar Mendez Tueme ("Cesar"), who was owner of the Explorer. *Id.* Cesar’s daughter, who was a Texas resident, subsequently probated his estate in Texas in her capacity as personal representative of the estate. *Id.* Following the opening of Cesar’s estate, Juan filed suit against it, alleging that Cesar had failed to maintain the Explorer and such failure proximately caused the crash and his injuries. *Id.* On behalf of Cesar’s estate, Cesar’s daughter then filed a third-party petition against Ford and Michelin North America, Inc. (“Michelin”). *Id.* Once Ford and Michelin became third-party defendants, Cesar’s daughter filed an “original petition in intervention” in her individual capacity as a wrongful death beneficiary against Ford and Michelin. Juan, a Mexican resident, subsequently amended his petition to add Ford and Michelin as defendants. *Id.* Finally, another one of Cesar’s daughters, a minor who was also a legal resident of Texas and a United States citizen, intervened in the lawsuit as a plaintiff against Ford and Michelin. *Id.*

In challenging the trial court’s denial of its motion to dismiss, Ford has made two alternative arguments. First, it urges that the definition of “plaintiff” under the forum non conveniens statute specifically excludes a “third-party plaintiff.” A “third-party plaintiff” is “a defendant who files a pleading in an effort to bring a third party into the lawsuit.” BLACK’S LAW DICTIONARY 1489 (7th ed. 1999). Because Cesar’s estate was a defendant and filed a pleading to bring Ford into the lawsuit, Ford argued that Cesar’s estate was a third-party plaintiff and, because the intervening Texas-resident plaintiffs were bringing “the exact same kind of claims” as those brought by Cesar’s estate, they, too, were third-party plaintiffs and, therefore, did not qualify as a “plaintiff” under the statute.

Alternatively, Ford contended that, even if the Texas-resident intervenors did qualify as “plaintiffs” under the statute, they could not be deemed Texas residents entitled to the protections of § 71.015(e) because the supreme court has previously held that a wrongful death beneficiary stands “in the same legal shoes” as the decedent as a matter of Texas law and, therefore, because the decedent was not a Texas resident, the intervening wrongful death plaintiffs could not be deemed Texas residents.

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6 Michelin settled with the plaintiffs and did not join in the forum non conveniens challenge.

7 “Plaintiff” refers “a party seeking recovery of damages for personal injury or wrongful death” and, in an action for personal injury to or the wrongful death of another person, is intended to include both that other person and the party seeking recovery. *Id.* at § 71.051(h)(2). The statute expressly states that the term “plaintiff” does not include a counterclaimant, cross-claimant or third-party plaintiff or any person who is assigned a cause of action for personal injury or accepts an appointment as personal representative in a wrongful death action in order to avoid the effect of the statute. *Id.*
A. What is it?

In 2009, the Texas legislature created a cause of action against a person who “engaged in the trafficking of persons or who intentionally or knowingly benefits from participating in a venture that traffics another person.” See Tex. Civ. Prac. & Rem. Code § 98.002 (West 2009). “Trafficking of persons” is defined by reference to conduct that constitutes an offense under Chapter 20A of the Texas Penal Code. See id. at § 98.001. Chapter 20A.01(4) defines “traffic” as meaning to “transport, entice, recruit, harbor, provide, or otherwise obtain another person by any means.” A person is deemed to have committed an offense (of trafficking of persons) if the person knowingly:

1. traffics another person with the intent that the trafficked person engage in forced labor or services (that does not involve sexual conduct),

2. receives a benefit from participating in a venture involving forced labor or services, and

3. traffics another person and, through force, fraud or coercion, causes the trafficked person to engage in sexual conduct prohibited by law (e.g., prostitution, etc.).

Tex. Penal Code § 20A.02.

B. What’s it good for?

The good news for a potential claimant is that, if the claimant prevails at trial, he or she is entitled to actual damages, including damages for mental anguish even if an injury other than mental anguish is not shown, court costs and reasonable attorney’s fees. Id. at § 98.003(a) (emphasis added). Such a claimant may also recover exemplary or punitive damages. Id. at § 98.003(b). The even better news is that it is not a defense to liability under this provision that a defendant has been acquitted or not prosecuted or convicted under Chapter 20A or has been convicted of a different offense or different type or class of offense for the conduct alleged to have given rise to the defendant’s liability under Chapter 98. Id. at § 98.002(b). Finally, this cause of action is deemed to be cumulative of any other remedy provided by common law or statute. Id. at § 98.004.
C. Joint and several liability lives!

Finally, this chapter expressly provides for joint and several liability for the entire amount of damages arising from the trafficking for all of those persons directly involved in or benefitting from the conduct complained of. Id. at § 98.005. In other words, this provision expressly shields a claimant from the effects of the Texas Proportionate Responsibility Act, which would otherwise require that a particular defendant only be liable to a claimant for the percentage of damages found by the trier of fact to be equal to the defendant’s percentage of responsibility with respect to the harm caused the claimant. See Tex. Civ. Prac. & Rem. Code § 33.013(a). This exemption from the Act is consistent with the preservation of joint and several liability in cases involving a defendant who, with a specific intent to do harm to others, acts in concert with another to engage in certain criminal acts identified in the Act and thereby causes legally recoverable damages to a claimant. See id. at 33.013(b).

6. CHAPTER 98A — LIABILITY FOR COMPELLED PROSTITUTION & CERTAIN PROMOTION OF PROSTITUTION

A. What is it?

In 2013, the Texas legislature followed up on its initiative in enacting Chapter 98, Liability for Trafficking in Persons, with a companion piece of legislation: Chapter 98A—Liability for Compelled Prostitution & Certain Promotion of Prostitution, which creates a cause of action against a person who:

(1) engages in compelling prostitution with respect to the victim;

(2) knowingly or intentionally engages in promotion of prostitution or aggravated promotion of prostitution that results in compelling prostitution with respect to the victim; or

(3) purchases an advertisement that the defendant knows or reasonably should know constitutes promotion of prostitution or aggravated promotion of prostitution, and the publication of the advertisement results in compelling prostitution with respect to the victim.

B. What’s it good for?

Here again, a successful claimant is entitled to actual damages, including damages for mental anguish even if an injury other than mental anguish is not shown, court costs and reasonable attorney’s fees. *Id.* at § 98A.003(a) (emphasis added). A claimant who prevails at trial may also recover exemplary or punitive damages. *Id.* at § 98A.003(b). Finally, this remedy is cumulative of any other remedy provided by common law or statute, except that a person may not recover damages in a suit under Chapter 98A where the conduct complained of is the basis for a suit under Chapter 98. *Id.* at § 98A.004.

C. Joint and several liability…again!

As under Chapter 98, a defendant who is found liable for damages sought pursuant to Chapter 98A is deemed jointly and severally liable with any other defendant for the entire amount of damages arising from the conduct complained of. *Id.* at § 98A.005. This provision is identical to the provision in Chapter 98 that expressly shields a claimant from the effects of Chapter 33 of the Texas Civil Practice & Remedies Code, otherwise known as the Texas Proportionate Responsibility Act, which would otherwise require that a particular defendant only be liable to a claimant for the percentage of damages found by the trier of fact to be equal to the defendant’s percentage of responsibility with respect to the harm caused the claimant. *See* Tex. Civ. Prac. & Rem. Code § 33.013(a). As noted above, this exemption from the Act is consistent with the preservation of joint and several liability in cases involving a defendant who, with a specific intent to do harm to others, acts in concert with another to engage in certain criminal acts identified in the Act and thereby causes legally recoverable damages to a claimant. *See id.* at 33.013(b).

7. CHAPTER 132 – UNSWORN DECLARATION

A. The notary public unemployment act.

In 2009, the Texas legislature amended Chapter 132 to permit the use of unsworn declarations in lieu of a written sworn declaration, verification, certification, oath or affidavit required by statute, rule, order or other requirement provided by law. *See* Tex. Civ. Prac. & Rem. Code § 132.001(a) (West 2013). To be effective, such an unsworn declaration must be (1) in writing; and (2) subscribed by the person making the declaration as true under penalty of perjury. *Id.* at § 132.001(c).
B. Different jurats for different folks.

Chapter 132 provides form jurats for three different types of declarants: civil litigants, inmates, and state agency or political subdivision employees. See § 132.001(d)–(f). Failure to include a jurat that substantially complies with the applicable form set forth in the statute renders the unsworn declaration ineffective. See generally id.

C. Exceptions to the rule.

The statutory provision permitting the use of unsworn declarations does not apply to a lien required to be filed with a county clerk, an instrument concerning real or personal property required to be filed with a county clerk or an oath of office or an oath required to be taken before a specified official other than a notary public. Id. at § 132.001(b).

8. CHAPTER 134A – THE TEXAS UNIFORM TRADE SECRETS ACT

Chapter 134A, also known as the “Texas Uniform Trade Secrets Act” (TUTSA), is a newly-enacted statute designed to create a harmonious framework of the existing laws currently applicable to trade secret litigation. See Committee on State Affairs, Bill Analysis, Tex. S.B. 953, 83rd Leg., R.S. (2013) (hereinafter “Bill Analysis, S.B. 953”). It is intended to simplify and clarify issues involving trade secret litigation in Texas and make Texas law in this area more consistent with the majority of states around the country that currently employ some version of the Uniform Trade Secrets Act. Id. In addition to simplification of the current law, the drafters hope to see a better alignment of trade secret law with current business practices and technologies. Id.

A. New Definitions

Chapter 134A provides a broader definition for “trade secret” than existing Texas common law. Greg Porter, New Statute Modernizes Trade Secret Protection and Litigation in Texas, 51 HOUS. LAW. 28, 28 (Aug. 2013). For example, the new definition eliminates the “continuous use” language once employed by Texas courts and the Restatement of Torts § 757 and, instead, attaches the term “potential” to its description of protected information that derives economic value. Tex. Civ. Prac. & Rem. Code § 134A.002 (West 2013). See Trilogy Software, Inc. v. Callidus Software, Inc., 143 S.W.3d 452, 463–64 (Tex. App.—Austin 2004, no pet.); Hyde Corp. v. Huffines, 314 S.W.2d 763, 777 (Tex. 1958); Restatement (First) of Torts § 757 (1939). Presumably, this will have the effect of providing protection for sometimes currently excluded, but “potentially valuable confidential information that is: (1) still in development and thus not in use, e.g., research and development information; (2) used previously, e.g., a sales
bid; or (3) “negative know-how,” e.g., expensive research determining paths not to pursue.” Porter, supra at 28.

The new definition of trade secret under chapter 134A encompasses:

information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers, that:

(A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Tex. Civ. Prac. & Rem. Code Ann. § 134A.002 (West 2013). Some practitioners have commented on the generous inclusion of “financial data” and “list[s] of actual or potential customers or suppliers” within the Act’s definition of trade secret, noting that the Uniform Trade Secret Act upon which the Texas statute is modeled does not include them. Porter, supra at 29.

B. New Remedies

i. Multiple varieties of injunctive relief are now available

In addition the Act’s broad definition of trade secret, the Act also provides ample protection for trade secrets in the form of both injunctive relief and secret preservation by the court. In terms of injunctive relief, both “actual and threatened misappropriation may be enjoined.” Tex. Civ. Prac. & Rem. Code Ann. § 134A.003(a) (West 2013). As some have recognized, the inclusion of threatened misappropriation may prove to be extremely efficient for certain circumstances of misappropriation. For example, according to one of the Act’s drafters, “an employer will be able to seek an injunction to prevent a former employee’s threatened disclosure of key trade secrets to a new employer without having to resort to a potentially difficult to enforce non-compete agreement.” Porter, supra at 29. Also, although injunctions are normally terminated once the trade secret no longer exists, under this statute, an injunction may be continued for “an additional reasonable [] time in order to eliminate [any] commercial advantage” that would otherwise be derived from the misappropriation. Tex. Civ. Prac. & Rem. Code Ann. § 134A.003(a). Alternatively, if circumstances are such that “a prohibitive injunction
[would be] inequitable, an injunction may condition future use upon payment of a reasonable royalty” for the period of time for which use could have been prohibited. *Id.* § 134A.003(b).

**ii. Stronger protections to avoid further misappropriation in litigation**

In addition to the injunctive remedies now available, the Texas Uniform Trade Secrets Act seeks to prevent any inadvertent or collateral misappropriation by providing multiple ways for a court to preserve trade secrets while these issues are being litigated. For example, the statute provides that, at the outset of the trade secret litigation, “a court shall preserve the secrecy of an alleged trade secret by reasonable means.” *Id.* § 134A.006. These means include protective orders with provisions “limiting access to confidential information only to the attorneys and their experts, holding in camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.” *Id.* Not only is this helpful in how clearly delineated it is, but it should also prove to be less burdensome for plaintiffs who are seeking protection by no longer requiring the use of the cumbersome Texas Rule of Civil Procedure 76(a) to seal a record. Porter, *supra* at 29.

**iii. Damages now include actual losses, unjust enrichment and punitives**

To repair damage caused by misappropriation, in lieu of or in addition to injunctive relief, “a claimant is entitled to recover damages for misappropriation.” Tex. Civ. Prac. & Rem. Code Ann. § 134A.004(a). These damages include damages for the actual loss caused by the misappropriation, as well as the unjust enrichment obtained by the misappropriating party that is typically not taken into account in computing actual loss. *Id.* Further, in lieu of damages measured by any other methods, damages incurred by misappropriation may be measured by the imposition of liability for a reasonable royalty for the misappropriator’s unauthorized disclosure or use of a trade secret. *Id.*

Finally, if a claimant can prove by “clear and convincing” evidence that the misappropriation was “wilful and malicious,” the fact-finder is authorized to award exemplary or punitive damages not to exceed twice the damages awarded under § 134A.004(a). See § 134A.004(b).

**iv. Attorneys’ fees under certain circumstances**

Section 134A.005 awards attorney’s fees to the prevailing party if: (1) a claim of misappropriation is made in bad faith, (2) a motion to terminate an injunction is made or resisted in bad faith, or (3) wilful and malicious misappropriation exists. § 134A.005. This provision may not only potentially deter frivolous litigation in the trade-secret context, but it will considerably simplify the current process for obtaining attorney’s fees by no longer making it necessary for a
claimant to bring a second cause of action under the Texas Theft Liability Act to bring recovery of attorney’s fees into play. See Bill Analysis, S.B. 953 (discussing the new avenue for recovering attorney’s fees against wilful and malicious appropriators, which used to be pursued through the Texas Theft Liability Act). See also Porter, supra at 29 (noting the increased complexity and costs associated with collecting attorney’s fees before the enactment of the statute).

9. CHAPTER 140[A] – CONTRACTUAL SUBROGATION RIGHTS OF PAYORS OF CERTAIN BENEFITS

A. Revival of the “Made-Whole” Doctrine?

The enactment of chapter 140[A] is expected to greatly benefit plaintiffs in personal injury cases by capping the amount insurance providers can recover through subrogation. Once in effect, the insurance provider will be limited to recovering the lesser of (1) one-half of the covered individual’s gross recovery less attorney’s fees and procurement costs, or (2) the total cost of benefits paid, provided or assumed by the payor as a direct result of the tortious conduct of the third party less attorney’s fees and procurement costs, if applicable.

In effect, this statute seeks to strike a balance between insurance providers and the insured in personal injury cases by overturning the harsh subrogation rule laid down in Fortis Benefits v. Cantu and moving closer to the traditional “made whole” doctrine. See House Committee on State Affairs, Bill Analysis, Tex. H.B. 1869, 83rd Leg., R.S. (2013) (eff. Jan 1, 2014). The “made whole” doctrine, as originally recognized by the Texas supreme court in Ortiz, is a doctrine that states that “[a]n insured should not be required to account for more than the surplus which remain[s] in his hands after satisfying his own excess of loss in full and his reasonable expenses incurred in its recovery.” Ortiz v. Great S. Fire & Cas. Ins. Co., 597 S.W.2d 342, 343 (Tex. 1980) (quoting Camden Fire Ins. Ass'n v. Missouri, K. & T. Ry., 175 S.W. 816, 821 (Tex. Civ. App.—Dallas 1915, no writ)). Thus, an “insurer can recover only the excess collected from the wrongdoer after the insured is fully compensated for his loss, including the costs and expenses of collection.” Id. (citations omitted).

The rationale behind this doctrine was that, if either the insured or the insurer must go unpaid, in part or in whole, because of a judgment-proof defendant or the expense of litigation, “the loss should be borne by the insurer [because] that is a risk the insured has paid it to assume.” Id. at 344 (quoting Garrity v. Rural Mut. Ins. Co., 253 N.W.2d 512, 514 (Wis. 1977)).

Over time, the “made-whole” doctrine has been applied and limited in different ways. Tracking the doctrine through its supreme court evolution, it was first applied in full in Ortiz. In Ortiz, a couple held a policy on their home with Great Southern Fire and Casualty Insurance that
covered the dwelling, but not the contents of their home. *Ortiz*, 597 S.W.2d at 343. Sometime after obtaining the insurance, the couple’s home caught fire, causing considerable damage to it and the contents inside. *Id.* As a result, the couple filed suit against a third-party and its employee for negligent placement of carpet padding over a floor furnace, alleging that it had caused the fire. *Id.* The damages alleged included $4,000 to real property and at least $11,614 to personal property. *Id.* To help repair the damages to the home, Great Southern paid the insured $4,000 in accordance with policy. Later, to recoup its payout, Great Southern intervened in the claim the Ortizes had with the third party to claim a right to subrogation of the $4,000. *Id.* However, the couple denied the claim and entered into a settlement agreement with the third party for $10,000. *Id.* The $10,000 was then deposited with the court and Great Southern entered a motion, which was granted, for its subrogation. *Id.* This judgment was then affirmed only to be reversed by the supreme court. *Id.* The supreme court reversed, citing the “made whole” doctrine and finding that, because the Ortizes’ damages were in excess of $15,000, while they had only been compensated $14,000 and it was not on the record what portion of the settlement was allocated to real property loss, Great Southern was not entitled to subrogation or reimbursement out of the third-party tortfeasor’s settlement payment. *Id.* at 344.

After *Ortiz*, however, the “made whole” doctrine seemed to come under fire by way of subrogation provisions in insurance contracts that provided for total reimbursement. In *Esparza*, for example, the court was presented with the question of whether or not “a contractual agreement providing for a right of subrogation completely remove[d] the issue of subrogation from the realm of equity.” *Esparza v. Scott & White Health Plan*, 909 S.W.2d 548, 550 (Tex. App.—Austin 1995, writ denied), abrogated by *Fortis Benefits v. Cantu*, 234 S.W.3d 642 (Tex. 2007). The *Esparza* court decided it did not. *Id.* at 553.

The Esparzas (the insured) had settled a medical malpractice claim with the treating physician for injuries sustained by their son in delivery for $1.6 million dollars. *Id.* at 550. In the course of their son’s treatment, the Esparzas’ son had been hospitalized multiple times and their health care plan with Scott & White had paid $264,625. *Id.* After the settlement, Scott & White filed a plea in intervention, seeking subrogation for the $264,625 it had paid plus attorney’s fees. *Id.* However, the Esparzas contested Scott & White’s claim and introduced testimony that the $1.6 million did not make them whole and that it was their understanding that the $1.6 million did not include past medical expenses. *Id.* Alternatively, they argued that if Scott & White was awarded subrogation, forty percent of the award should be deducted for attorney’s fees “because Scott & White did not participate in the suit that led to the collection of the $1.6 million settlement.” *Id.* Ultimately, however, the trial court rendered judgment for Scott & White in the amount of $132,312 (half of the requested amount) plus $1500 in attorney’s fees and both Scott & White and the Esparzas appealed. *Id.* at 550–51. Coming down somewhere between the two parties on appeal, the court affirmed the trial court judgment, finding that “[w]hile an insurance contract providing expressly for subrogation may remove from the realm of equity the question
of whether the insurer has a right to subrogation, it cannot answer the question of when the insurer is actually entitled to subrogation or how much it should receive.” Esparza, 909 S.W.2d at 551 (emphasis added).

As to how much Scott & White should have received, the court determined that a rigid application of the “made whole” doctrine was inappropriate and that the trial court should be allowed to weigh factors such as the existence of a written subrogation agreement, the parties’ conduct during settlement and before the court, and evidence of damages. Id. at 553. Thus, the trial court’s decision did not lead to an inequitable result because it could have found that neither party was without fault: that is, Scott & White for failing to intervene before settlement and the Esparzas for disregarding Scott & White’s interests and settling below the provider’s maximum. Id. at 552–53.

At the time, Esparza may have seemed like a good balance, but, taking a contrasting approach and abrogating Esparza, Fortis came out with the holding that “[t]he equitable ‘made whole’ doctrine is inapplicable when the parties' agreed contract provides a clear and specific right of subrogation.” Fortis Benefits v. Cantu, 234 S.W.3d 642, 651 (Tex. 2007). In an auto accident settlement for $1.445 million, the supreme court held that the insurance company was entitled to $247,534.14 in subrogation that it had paid in medical expenses, despite the fact that the injured party’s future medical expenses would come out to be $1.7 million and $5.3 million under two life care plans and she would not be made whole. Id. at 651. It reasoned that “‘equity follows the law,’ which requires equitable doctrines to conform to contractual and statutory mandates.” Id. at 648. Given this and the absence of public policy striking down subrogation and reimbursement clauses, the parties were free to negate the “made whole” doctrine contractually. Id. at 649. Applying this logic, the Fortis court found that, in the absence of a provision that the plaintiff first be made whole, Fortis retained an “unfettered” right to recover the proceeds from the settlement, with the only limitation being the amount paid. Id. at 651.

With the enactment of chapter 140[A], however, which enters into effect on January 1, 2014, practitioners will see a return to the equitable principles that once served to mitigate the harsher effects of unfettered subrogation.

B. Key Provisions of the New Subrogation Statute

i. Limitations on subrogation rights—section 140[A].005

Section 140[A].005 limits the amounts that a payor may be entitled to from its insured’s recovery from a third-party tortfeasor. When an insured is not represented by an attorney, the payor is limited to recovering an amount that is equal to the lesser of (1) one-half of the covered insured’s gross recovery; or (2) the total cost of benefits paid, provided, or assumed by the payor
as a direct result of the tortious conduct of the third-party. Tex. Civ. Prac. & Rem. Code § 140[A].005(b) (West 2013). If an insured is represented by an attorney, then the payor is limited to an amount that is equal to the lesser of (1) one-half of the covered insured’s gross recovery less attorney’s fees and procurement costs; or (2) the total cost of benefits paid, provided, or assumed by the payor as a direct result of the tortious conduct of the third-party less attorney’s fees and procurement costs. Id. § 140[A].005(c).

ii. **Attorney’s fees are recoverable from the payor—section 140.007**

The statute contemplates three different modalities for determining and awarding attorney’s fees:

Under the first arrangement, if a payor is not actively represented by an attorney in an action to recover for personal injury on behalf of an insured, the payor shall pay a fee in an amount determined under an agreement between the attorney and the payor plus a pro rata share of expenses incurred. Id. § 140[A].007(a).

In the second arrangement contemplated by the statute, if a payor is not actively represented by an attorney in the personal injury action but has no agreement with the attorney, then the court shall award to the attorney, payable out of the payor’s total gross recovery, a reasonable fee for recovery of the payor’s share not to exceed one-third of the payor’s recovery. Id. § 140[A].007(b).

With the third arrangement, if a payor is actively represented by an attorney in the personal injury action, the court shall award and apportion between the insured’s and the payor’s attorneys a fee payable out of the payor’s subrogation recovery. Id. § 140[A].007(c). When apportioning the fee award, the court is expected to consider the benefit accruing to the payor as a result of each attorney’s service, but the total fee awarded may not exceed one-third of the payor’s recovery. Id.

iii. **The common-law made-whole doctrine does not apply under chapter 140[A]**

To ensure that courts don’t interpret chapter 140[A] as a complete resurrection of the made-whole doctrine, the legislature included a provision expressly stating that the “common law doctrine that requires an injured party to be made whole before a subrogee makes a recovery does not apply to the recovery of a payor” under this chapter. Id. § 140[A].005(d).
iv. **Payors exempt from application of chapter 140[A]—section 140[A].002(f)**

Chapter 140[A] expressly does not apply to a worker’s compensation insurance policy or any other source of medical benefits under Title 5, Labor Code, Medicare, the Medicaid program under Chapter 32, Human Resources Code, a Medicaid managed care program operated under Chapter 533, Government Code, the state child health plan or any other program operated under Chapter 62 or 63, Health and Safety Code, or a self-funded plan that is subject to ERISA of 1974. *Id.* § 140[A].002(f).

v. **Payors prohibited from pursuing Medpay or UM/UIM—section 140[A].008**

Also, a payor of benefits may not pursue a recovery against a covered individual’s first party recovery unless the payor is pursuing recovery against uninsured/underinsured motorist coverage or medical payments coverage and the covered individual, or the covered individual’s immediate family, did not pay the premiums for the coverage. *Id.* § 140[A].008.

10. **CHAPTER 140[B] – CIVIL RACKETEERING RELATED TO TRAFFICKING OF PERSONS**

A. **What is it?**

In 2013, the Texas legislature amended the current law governing the civil prosecution of racketeering related to trafficking of persons by enacting Chapter 140[B], which authorizes the state, through the Office of the Attorney General, to bring suit against a person or enterprise who, for a financial gain, commits trafficking of persons or continuous trafficking of persons under certain circumstances for racketeering related to human trafficking and to obtain civil penalties, costs, reasonable attorney’s fees and injunctive relief. *See* Tex. Civ. Prac. & Rem. Code § 140[B].003 (West 2013). This chapter does not, however, authorize a private cause of action by any person who sustains an injury as a result of racketeering related to human trafficking. *Id.* at § 140[B].003(b).

Racketeering is deemed to have been committed if, for financial gain, a person or enterprise commits an offense under Chapter 20A of the Texas Penal Code and the offense or an element of the offense either occurs in more than one county in Texas or is facilitated by the use of United States mail, email, telephone, facsimile or wireless communication from one county in Texas to another. *Id.* at 140[B].002. A suit brought under this chapter must be brought in a district court in a county in which all or part of the alleged racketeering offense giving rise to the lawsuit occurred. *Id.* at § 140[B].003(c).
B. Fun facets

i. Constructive trust

A person or enterprise who, through racketeering, acquires property or prevents another person from receiving property that is required to be transferred or paid to that person is an “involuntary trustee.” *Id.* at § 140[B].005(a). An involuntary trustee is deemed to hold the property and proceeds from the property in constructive trust for the benefit of any person entitled to remedies under this chapter. *Id.* A bona fide purchaser for value who was reasonably without notice of the unlawful conduct engaged in and who did not knowingly take part in an illegal transaction is not considered to be an involuntary trustee and is not subject to the constructive trust imposed by Chapter 140[B]. *Id.* at § 140[B].005(b).

ii. Extended statute of limitations

A suit under this chapter must be commenced on or before the seventh anniversary of the date on which the racketeering offense was actually discovered. *Id.* at § 140[B].007.

iii. Allocation of award

An award obtained in an action brought under this chapter is to be distributed as follows: after deduction of any costs of suit including reasonable attorney’s fees and court costs, eighty percent (80%) of the remaining amount of the award must be paid to the state; the remaining twenty percent (20%) must be paid, on a pro rata basis, to each law enforcement agency and district attorney’s office found by the court to have assisted in the lawsuit. *Id.* at § 140[B].012(b).