

## D. Todd Smith

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**From:** Osler McCarthy [Osler.McCarthy@courts.state.tx.us]  
**Sent:** Friday, August 31, 2007 10:25 AM  
**Subject:** Texas Supreme Court orders and opinions 8.31.07

## TEXAS SUPREME COURT ADVISORY

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### ORDERS AND OPINIONS ISSUED AUGUST 31, 2007

LINKS TO FULL-TEXT OPINIONS FOLLOW SUMMARIES.

NOTE: *Summaries are prepared by the Court's staff attorney for public information and reflect his judgment alone on facts and legal issues. These summaries are not part of the Court's opinion in the case.* Links are to Adobe's PDF format (duplication of the document) and to HTML documents (rendition). [Click here to download a free Adobe Reader.](#)

[AUGUST 31 ORDERS](#) (in HTML)

[Decisions in cases \(motions, requests, etc.\) from August 23 through Wednesday](#) (PDF)

### OPINIONS

03-0995

HEB Ministries Inc., et al. v. Texas Higher Education Coordinating Board  
from Travis County and the Third District Court of Appeals, Austin  
For petitioners: J. Shelby Sharpe, Fort Worth; Kelly J. Shackelford, Plano  
For respondents: Amy Warr, Austin

Justice Willett did not participate

REVERSED AND REMANDED, opinion by Justice Hecht:

The issue is whether state law violates the federal or state constitutions (1) by prohibiting unaccredited, private post-secondary institutions from awarding degrees or their equivalents without state certification and (2) by prohibiting an institution from using "seminary" in its name if it cannot lawfully award degrees. In this case HEB Ministries sued to declare that two sections of the Texas Education Code unconstitutionally infringe on its rights to religious freedom and free speech under the First Amendment and Article I, section 6 of the Texas Constitution. HEB brought the suit after the Higher Education Coordinating Board assessed penalties for awarding degrees without state certification and for using the name Tyndale Theological Seminary and Biblical Institute. HEB argues that the challenged Education Code sections violate its right to free religious exercise and to be free of government involvement in religion and, by restricting use of seminary in its institutional name, violate its free speech rights. The trial court granted summary judgment for the state on the degree-granting restrictions and for HEB on use of seminary in Tyndale's name. The court of appeals affirmed the judgment for the state and reversed the judgment favoring HEB on use of seminary.

The Supreme Court HOLDS that restrictions on what HEB can call what it awards its students for educational attainment and the use of seminary in the Tyndale name violates both of the First Amendment's establishment and free exercise clauses. The Court does not reach HEB's free speech issue.

*Establishment clause.* Education Code sections 61.304 and 61.313(a), restricting

institutions from granting degrees without meeting state educational standards and prohibiting "seminary" in an institution's name if it does not meet those standards, clearly effectuate a state preference for one model of

religious education over others, a preference that the Establishment Clause simply does not permit. Neither meets the three-prong *Lemon v. Kurtzman* test. The principal purpose of the state regulation, to prevent public deception by “diploma mills,” may not be to advance or inhibit religion. But it is fair to say that a principal or primary effect is to advance religious education the state approves and inhibit what it does not. That the statute clearly and excessively entangles the government in religious instruction is beyond dispute. The Board of Higher Education’s standards, and those of recognized accrediting agencies, cannot be applied without a thorough, detailed and repeated examination of an institution’s operations and curriculum. The Education Code (Subchapter G) clearly expresses the state’s endorsement of particular religious education by allowing institutions that meet its standards to use restricted terminology. A “seminary” is a state-endorsed school and a “bachelor’s” diploma a state-endorsed award. It is hard to imagine a more active involvement in religious training than by determining whether it meets the comprehensive standards set by the Coordinating Board and equally hard to imagine a more direct state sponsorship of religious education than by indicating in every institution’s name and on every academic award whether the State approves the programs of study.

*Free Exercise.* The Coordinating Board insists that section 61.313 does not violate HEB’s free exercise rights by restricting its use of a single word, “seminary,” when others are available. But section 61.313 restricts not only the use of a listed term but also “a term having a similar meaning.” If the board is wrong and section 61.313 restricts not only the use of “seminary” but any other word of related import, then the statute denies a religious school that does not meet state standards all access to names used by such schools. If the board is right, the statute nevertheless limits access to the name that, unlike all others available, distinctly describes religious schools. Either way, the statute in its application to schools offering only religious instruction targets religious practices, discriminating between those that comply with state standards from those that do not. Standards for the content of educational instruction are not neutral with regard to religious studies merely because they also apply to secular studies, as the standards under subchapter G plainly show. Academic freedom, for example, which the Coordinating Board’s standards require, has no more than a limited role, and perhaps no place at all, in a school the mission of which is to advance a specific faith’s doctrinal tenets. The Free Exercise Clause requires that the law advance interests of the highest order and be narrowly tailored. Protection against diploma mills is an important state interest, but the law at issue in this case is not narrowly tailored to pursue those interests and avoid unnecessary interference with religious studies.

[Opinion in HTML](#)

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Chief Justice Jefferson CONCURRING AND DISSENTING, joined by Justice Green:

The statute does not unconstitutionally impinge on HEB’s freedom of speech or rights guaranteed by the Establishment Clause and the Free Exercise Clause, but section 61.313’s restriction on the use of the name “seminary” by schools offering only religious programs of study violates the Free Exercise Clause. Subchapter G governs a secular matter: the creation of a system that recognizes certain types of post-secondary educational achievement. Accreditation signals not the approval of the school’s message, but a certification that the institution meets a variety of educational standards, and any institution—religious or otherwise—may apply for authorization to issue degrees. The comprehensive regulations at issue here are entirely voluntary and do not purport to interfere with the parochial mission of any school and the statute, as well as the Coordinating Board’s accompanying regulations, expressly permit religious institutions to be certified without meeting the accreditation standards. Because the statute permissibly regulates commercial speech, and because it presents no Establishment Clause or Free Exercise Clause violation, the Court’s judgment that concludes otherwise errs.

[Jefferson concurrence/dissent in HTML](#)

[Jefferson concurrence/dissent in PDF](#)

Justice Wainwright CONCURRING AND DISSENTING, joined by Justice Johnson:

Contrary to the plurality, the state, within constitutional limits, may require private educational institutions to comply with minimum educational criteria before they may confer post-secondary degrees on their students. A holding that the Legislature is barred by the U.S. Constitution from setting minimum standards

for college and graduate degrees by religious institutions establishes a constitutional right for one type of institution to issue post-secondary degrees regardless of compliance with public standards. This holding precludes the Legislature from considering permissible alternatives, such as allowing religious institutions to issue college degrees with appropriate disclosures on their graduation documents indicating that their degrees are not from state-certified programs. This would permanently tie the hands of the Legislature, precluding it from considering constitutionally permissible alternatives so that it may concurrently protect religious freedom while ensuring that all private post-secondary degrees from Texas institutions represent meaningful educational achievement. The First Amendment's religion clauses do not compel this result.

[Wainwright concurrence/dissent in HTML](#)

[Wainwright concurrence/dissent in PDF](#)

03-1059

In re Merrill Lynch Trust Co. FSB, et al.

from Duval County and the Fourth District Court of Appeals, San Antonio

Justice Green did not participate

MANDAMUS RELIEF CONDITIONALLY GRANTED, per curiam opinion:

For the reasons stated in an almost identical case issued August 24, see [In re Merrill Lynch Trust Co.](#), the Court holds the trial court abused its discretion in refusing to compel arbitration with the Merrill Lynch broker and his brokerage and in refusing to stay the litigation against the Merrill Lynch Trust.

[Opinion in HTML](#)

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05-0272

Entergy Gulf States Inc. v. John Summers

from Jefferson County and the Ninth District Court of Appeals, Beaumont

For petitioner: Christine S. Kibbe, Beaumont

For respondent: Steven C. Barkley, Beaumont

REVERSED AND JUDGMENT RENDERED, opinion by Justice Willett:

The issue is whether a premises owner who hires an independent contractor and provides workers-compensation insurance for the contractor's employees can be a "statutory employer" for workers-comp purposes. In this case Summers, hired by a company to work at Entergy's plant, sued Entergy for negligence for on-the-job injuries. Summers' company worked under a contract with Entergy that labeled the company an "independent contractor" but provided also that Entergy would not be precluded from raising the standard workers comp defense – that the company's employees would be considered Entergy's employees, eligible for workers compensation and precluded from suing for negligence. In a later provision Entergy agreed to provide workers comp coverage. The trial court granted summary judgment for Entergy on the coverage issue. But the court of appeals reversed, holding that under the workers comp statute a premises owner could not be a general contractor.

The Supreme Court HOLDS that the governing Labor Code definitions of general contractor and subcontractor do not forbid a premises owner from also being a general contractor and Entergy is a general contractor because it procured "the performance of work" from the independent contractor. The currently applicable definition of "subcontractor," however, reads: "a person who contracts with a general contractor to perform all or part of the work or services that the general contractor has undertaken to perform." This present-day definition does not preclude a premises owner from serving as its own general contractor and undertaking to perform work on its premises by retaining subcontractors. That Entergy took on the task of procuring work from the independent contractor is beyond dispute: Deposition testimony established that Entergy hired the contractor to supply workers to perform maintenance, including "water and turbine-related, generator-related work," at its Sabine Plant. Entergy was a general contractor entitled to the Labor Code's exclusive-remedy defense.

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05-0372

El Paso Hospital District, et al. v. Texas Health and Human Services Commission, et al.

from Travis County and the Third District Court of Appeals, Austin

For petitioners: Marie R. Yeates, Houston

For respondents: Rance L. Craft, Austin

AFFIRMED IN PART, REVERSED IN PART AND REMANDED,

opinion by Justice Medina:

The principal issue is whether the commission's deadline change that limited certain Medicaid claims used for reimbursement rates was a rule subject to the Administrative Procedures Act. In this case the hospital districts sued after the state Health and Human Services Commission broke from past practice. The commission refused to allow the hospitals to appeal certain claims the commission excluded by a February 28 deadline from a database used to calculate Medicaid reimbursement rates. In their action, the hospitals seek to declare the commission's new procedure a new rule that must be approved after a formal hearing process. The trial court ruled against the hospitals. The court of appeals affirmed.

The Supreme Court HOLDS that the commission's methodology is an invalid rule. First, the February 28 cutoff is a statement of general applicability that implements law or describes procedure, meeting one criteria for a rule under the Administrative Procedures Act. The effect of the commission's February 28 cutoff is to modify the base-year rule by controlling the data the commission will use from that year, thus amending another rule, the base year's 12-consecutive-month period of claims data. That meets the second criteria of a rule under the APA. Finally, the February 28 cutoff affects the hospitals' private rights because it is a key formula component that determines prospective reimbursement rates. No definitive test exists for determining whether an agency's statement affects private rights, but one approach is to consider whether an agency's "statement" (here the February 28 cutoff) has a binding effect on a private party. If the cutoff adopts guidelines, practice requirements or enforcement policies that will have a binding effect on private parties, it more likely affects private rights.

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05-0710

Christus Health Gulf Coast, et al. v. Aetna Inc. and Aetna Health Inc.

from Harris County and the 14th District Court of Appeals, Houston

For petitioners: Scott M. Clearman, Houston

For respondents: John B. Shely, Houston

For amicus U.S. Department of Health & Human Services: Isaac J. Lidsky, Washington, D.C.

REVERSED AND REMANDED, opinion by Chief Justice Jefferson:

The issue in this payment dispute over Medicare reimbursements to hospitals is whether, under the Medicare Act, health-care providers without a contract with the managed-care insurer must exhaust Medicare administrative appeals on coverage questions before suing to recover from the insurer. Aetna refused to pay as much as \$13 million for Medicare patients' treatment after the insurer's contract management company became insolvent. The management company had the contracts with the hospitals to pay claims for Medicare patients enrolled in Aetna's HMO. The trial court dismissed the case on Aetna's argument that the hospitals must first exhaust Medicare administrative remedies. The court of appeals affirmed.

The Supreme Court HOLDS that an administrative process is not required. Although the parties did not contract directly with each other, each had agreements with the Medicare plan administrator. Their dispute concerns not whether the services were covered under Medicare, but rather who should bear the loss associated with the plan administrator's failure to pay. Aetna's contention that the Hospitals must first seek an administrative determination of some 6,000 claims misconstrues a claim seeking payment for services provided to Medicare patients as a claim for Medicare benefits. That is, failing to pay because of insolvency or a dispute about who is contractually obligated to pay is different from failing to pay because of lack of coverage. The federal administrative scheme exists, first and foremost, to protect enrollees' rights to health care, not to act as a de facto claims administrator for Medicare organizations and their delegates.

[f2 Opinion in HTML](#)

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05-0823PHC-Minden, L.P. v. Kimberly-Clark Corp.

from Gregg County and the 12th District Court of Appeals, Tyler

For petitioner: R. Brent Cooper, Dallas

For respondent: James K. Horstman, Chicago

REVERSED AND JUDGMENT RENDERED, opinion by Chief Justice Jefferson:

The issues in this medical-negligence case are (1) whether a Louisiana hospital had sufficient contacts with Texas based on purchases from Texas vendors to establish personal jurisdiction over it in this state and, if not, (2) whether the hospital's parent corporation had sufficient contacts for personal jurisdiction under the single business-enterprise theory. This case arose from a wrongful-death claim against Kimberly-Clark, filed by the family of a Texas woman who died of toxic-shock syndrome. Kimberly-Clark then sued the Louisiana hospital for medical negligence. The trial court denied the hospital company's special appearance and held that Texas had jurisdiction. The court of appeals affirmed, based on both the hospital's own contacts with the state and on the single business-enterprise theory.

The Supreme Court HOLDS that neither the hospital by itself nor through its parent corporation had sufficient contacts to establish personal jurisdiction in Texas. The Court concludes that the relevant period for assessing contacts for personal jurisdictional ends at the time suit is filed. General jurisdiction is dispute-blind. Accordingly, and in contrast to specific jurisdiction, the incident made the basis of the suit should not be the focus in assessing continuous and systematic contacts—contacts on which jurisdiction over any claim may be based. Even when amassed, Minden's Texas contacts simply are not “continuous and systematic general business contacts” sufficient to support general jurisdiction. In this case the court of appeals held that the parent corporation and Minden operated as a single business enterprise—a theory the Texas Supreme Court has never endorsed—and that the parent's Texas contacts could be imputed to Minden. The court's analysis failed to recognize, however, that veil-piercing for purposes of liability (“substantive veil-piercing”) is distinct from imputing one entity's contacts to another for jurisdictional purposes (“jurisdictional veil-piercing”). Upon close examination, the parent corporation clearly does not exercise control over Minden that is required to fuse them for jurisdictional purposes.

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05-0832

Lamar Homes Inc. v. Mid Continent Casualty Co.

certified questions from the U.S. Court of Appeals, Fifth Circuit

For appellant: Lee H. Shidlofsky, Austin

For appellee: Jennifer Bruch Hogan, Houston

CERTIFIED QUESTIONS ANSWERED IN THE AFFIRMATIVE,

opinion by Justice Medina:

In this case, involving an insurer's refusal to defend a contractor from homeowners claiming construction defects, the Fifth Circuit certifies three questions of Texas law: (1) When a homeowner sues his general contractor for construction defects, alleging only damage to or loss of use of the home itself, do such allegations allege an “accident” or “occurrence” sufficient to trigger the duty to defend or indemnify under a commercial general liability insurance policy? (2) When a homeowner sues his general contractor for construction defects and alleges only damage to or loss of use of the home itself, do such allegations allege “property damage” sufficient to trigger the duty to defend or indemnify under a commercial general liability policy? and (3) If the answers to those questions are yes, does Texas Insurance Code article 21.55 apply to a commercial general liability insurer's breach of a duty to defend? The unsettled questions among Texas courts of appeals is whether a construction-defect suit asserts, for insurance coverage purposes, a foreseeable loss or not and whether defective work constitutes property damage under a commercial liability policy. The trial court concluded that the suit was for contract breach that the policy did not cover.

The Supreme Court HOLDS that (1) allegations of unintended construction defects may constitute an “accident” or “occurrence” under the commercial general liability policy and that allegations of damage to or loss of use of the home itself may also constitute “property damage” sufficient to trigger the duty to defend under the policy and (2) that former Insurance Code article 21.55 (the prompt-payment statute) applies to an

insurer's breach of the duty to defend. A deliberate act, performed negligently, is an accident if the effect is not the intended or expected result – that is, the result would have been different had the deliberate act been performed correctly. The policy here does not define an “occurrence” in terms of the ownership or character of the property damaged by the act or event, but rather asks whether the injury was intended or fortuitous – whether the injury was an accident. The complaint here alleges an “occurrence” because it asserts that Lamar's defective construction was a product of its negligence. Mid-Continent argues that the economic-loss rule should control because the damages are contract damages. But the economic-loss rule is a liability defense or remedies doctrine, not a test for insurance coverage. Contrary to the carrier's contentions, the policy makes no distinction between tort and contract damages. When the claim involves a defense benefit, the payee will always be either an insured or the insured's attorney, and for purposes of the prompt-payment statute, no reason supports distinguishing between the two. The Legislature did not intend to limit the prompt-payment statute to first-party insurance, but rather intended that it apply to claims personal to the insured (“a first-party claim”).

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Justice Brister DISSENTING, joined by Justices Hecht and Willett:

Homeowners in this case alleged broken promises and breached duties connected with the sale, not property damage claims covered by the builder's liability policy. The Court's conclusion to the contrary turns the construction industry on its head. Instead of builders standing behind their subcontractors' work and making necessary repairs, the Court shifts that duty to insurance companies.

[Brister dissent in HTML](#)

[Brister dissent in PDF](#)

05-0951

In re Southwestern Bell Telephone Co., L.P.

from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg

For relator: Charles R. Watson Jr., Austin

For real parties in interest: Joseph M. Gourrier, Houston

Justice Willett did not participate

MANDAMUS RELIEF CONDITIONALLY GRANTED,

opinion by Chief Justice Jefferson:

The principal issues are (1) whether the Public Utilities Commission has exclusive jurisdiction to decide whether service fees added to telephone bills violate the company's agreement to freeze rates under incentive provisions of the telecommunications-deregulation law and (2) whether plaintiffs' common-law claims outside the PUC's jurisdiction, asserted after the trial court denied the company's jurisdictional plea, deprive the Court of jurisdiction. In this case several Southwestern Bell customers sued over fees the company tacked onto their bills to recover money it pays into a “universal service fund” created by the deregulation law to offset effects on certain telephone customers. The suit alleged the surcharges, approved by PUC, violated Southwestern Bell's agreement to keep its rates the same for several years in the beginning of the deregulation scheme. The trial court denied the telephone company's jurisdictional plea and the court of appeals denied the company's petition for mandamus relief.

The Supreme Court HOLDS that the commission has exclusive jurisdiction over the core claims.

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05-1100

Noemi Guevara v. Corazon Labao Ferrer

from Harris County and the Eighth District Court of Appeals, El Paso

For petitioner: Robert M. (Randy) Roach, Houston

For respondent: J. A. (Jay) Asafi, Houston

REVERSED AND REMANDED, opinion by Justice Johnson:

The principal issue is whether legally sufficient evidence can be based on a sequence from which causation can be properly inferred in a personal-injury case without expert medical testimony. In this case Ferrer sued to recover for injuries her father suffered in a car accident. He died seven months later. Ferrer testified that her father had abdominal surgery the night of the accident, but the record for the initial three and a half months after the accident contained hospital invoices and the police report but not diagnoses or other treatment documents. Testimony by three doctors, covering observations over the remaining three and a half months before Ferrer's father died, established among other ailments that he had a tracheotomy and skeletal injuries; had heart disease; and had hypertension and renal disease. Nothing in the record indicated the cause of death. A jury awarded damages to Ferrer for her father's medical expenses and for pain and mental anguish, but on Guevara's motion the trial court granted a judgment notwithstanding the verdict. The court of appeals reversed, holding in part that causation could be inferred from Ferrer's injury because he was healthy before the accident.

The Supreme Court HOLDS that expert evidence was required to prove many, but not all, of the claims. Evidence of temporal proximity, that is, closeness in time, between an event and subsequently manifested physical conditions is not necessarily irrelevant to the causation issue. Evidence of an event followed closely by manifestation of or treatment for conditions that did not appear before the event raises suspicion that the event at issue caused the conditions. But suspicion has not been and is not legally sufficient to support a finding of legal causation.

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06-0258

Denis Proulx v. Michael A. Wells

from Tarrant County and the Second District Court of Appeals, Fort Worth

REVERSED AND REMANDED, per curiam opinion:

In this case the court of appeals held that limitations barred the plaintiff's suit because, as a matter of law, he was not diligent in serving the defendant with process. The Supreme Court HOLDS that the summary-judgment evidence failed to conclusively establish that the plaintiff did not exercise diligence in effecting service. In light of the evidence presented regarding Proulx's continuous investigation and repeated service attempts, coupled with evidence that Wells was deliberately avoiding service, Wells failed to conclusively establish lack of diligence.

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06-0293

Robert F. Ford Jr. v. Exxon Mobil Chemical Co.

from Jefferson County and the Ninth District Court of Appeals, Beaumont

Justice O'Neill did not participate

REVERSED IN PART AND JUDGMENT RENDERED, per curiam opinion:

In the fourth and final deed, Ford granted a pipeline easement across three tracts of land, but now claims he did so based on misrepresentations about the three previous deeds. The Supreme Court HOLDS that limitations applies to this action to quiet title because deeds obtained by fraud are voidable rather than void, and remain effective until set aside. Texas law is well settled that once a statute of limitations has expired for setting aside a deed for fraud, that bar cannot be evaded by simply asserting the claim in equity.

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06-0544

In re Michelle Moore

from Nueces County and the 13th District Court of Appeals, Corpus Christi/Edinburg  
MANDAMUS RELIEF CONDITIONALLY GRANTED, per curiam opinion:

The Supreme Court HOLDS that the court of appeals abused its discretion by imposing sanctions in this suit affecting custody. The language in the court of appeals' opinion leaves no doubt that the court imposed the fees and costs to penalize Moore for filing a second suit contesting custody of her purported grandchild after it had found that she lacked standing in a first suit. Assuming without deciding that the court of appeals had the authority to issue the sanctions order, the court nonetheless abused its discretion in doing so. By imposing the sanctions, the court failed to acknowledge that Moore, by having constant physical custody of the child for six months, alleged standing on a different ground in the second suit. Moore did not act inconsistently with the court of appeals' standing ruling in the first suit by filing the second.

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[Briefs](#)

06-0655

Stonebridge Life Insurance Co., et al. v. Gayle G. Pitts and Mary Vanderford

from Nueces County and the 13th District Court of Appeals, Corpus Christi/Edinburg  
REVERSED AND REMANDED, per curiam opinion:

In this class-certification challenge involving telemarketing to sell life insurance, the Supreme Court HOLDS that individualized inquiry will predominate over common issues of proof. In this case class members claim they were each subjected to essentially the same telemarketing effort and initially consented to the trial program. They contend the only issue in the case is whether Stonebridge charged their credit cards or debited their bank accounts for premiums which "in equity and good conscience" belong to the class members. Assuming that Stonebridge's marketing tactics are unfair or misleading as the class representatives allege, the equitable claim they assert entitles Stonebridge to present facts or defenses that tend to show the policy premiums "in equity and good conscience" belong to the company under the particular circumstances of each case.

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## **ISSUES SUMMARIES FOR CASES GRANTED**

### **ORAL ARGUMENT IN TODAY'S ORDERS**

06-0867

Pine Oak Builders Inc. v. Great American Lloyds Insurance Co.

from Harris County and the 14th District Court of Appeals, Houston

Oral argument date pending

The principal issues are (1) whether evidence outside the pleadings and policy provisions may be introduced to determine a duty to defend and (2) whether the exposure rule or manifestation rule should determine when under an insurance policy the duty to defend is triggered.

[Briefs](#)

[Court of appeals opinion](#)

07-0147

In re Calla Davis, et al.

from Dallas County and the Fifth District Court of Appeals, Dallas

In this dispute over an order for a local-option election to approve beer and wine sales, the principal

issues are (1) whether county commissioners abused their discretion by refusing to order the election after petitions were certified calling for an election and, if so, (2) whether the election should be called for the current justice-of-the-peace precinct (from which petitions were gathered) or separate elections for areas of two historic precincts that previously voted “dry” in the 1870s.

[Briefs](#)

[Court of appeals opinion](#)