JURY CHARGE ISSUES

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- "Preserving Issues in Post-Trial Motions" Austin Bar Association Civil Litigation Section Ultimate Trial Notebook Seminar (June 2007)
- "Shaking Out the New Multidistrict Litigation Rules and MDL Panel Decisions" Permian Basin Oil & Gas Law Weather Report (March 2007)
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JURY CHARGE ISSUES

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The charge is one of the most critical components of a trial. The charge gives the jury the "legal lens" through which the evidence is viewed. *Southwestern Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 616 (Tex. 2004). The charge also provides the jury with a roadmap to answer the questions that will decide the outcome of the dispute.

While the charge provides guidance for the jury, it is also an important tool for attorneys who take the time to prepare it early in a case. Having a proposed charge in your notebook not only assists in developing case themes and keeps you focused on the arguments and evidence that need to be developed, but also guides the presentation of the evidence to maximize your client's interests.

Finally, understanding charge and preservation issues can be critical in securing a judgment that can withstand appeal, or in formulating fertile ground for error and reversal on appeal.

The focus of this paper is to provide an overview of charge error preservation and then discuss some of the more common charge issues and current cases.

I. PRETRIAL JURY CHARGE CONSIDERATIONS: FORMULATING A PROPOSED CHARGE

A. When to formulate.

A draft charge should be prepared by both parties soon after the lawsuit is filed. Having a draft charge provides a roadmap and helps focus discovery and other evidentiary evaluations from the outset. What questions and instructions will the plaintiff likely seek? What affirmative defenses will the defendant raise? Having the charge in the formulation stage from the beginning allows litigants to be more effective in discovery and in presenting evidence at trial.

B. What tools/sources are used to formulate the charge.

When formulating a proposed charge, the live pleadings are the starting point to identify the claims, defenses and damages. Reviewing the live pleadings when drafting your proposed charge also gives the opportunity to identify problems for which special exceptions should filed. *See Southwestern Bell Tel. Co. v. Garza*, 164 S.W.3d at 616-17.

The current, controlling law on the claims and defenses governs the charge. Certainly the Pattern Jury Charge (PJC) can be a starting point, but cannot be the sole source. Current case law must be reviewed to determine if the PJC has been questioned or rejected. *See Ford Motor Co. v. Ledesma*. Consider if there are conflicts among the courts of appeals. The Restatement, federal, or out of state cases may also provide guidance. *See Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 452-53 (Tex. 2006) (relying on Restatement (Second) of Torts §442 in determining new and independent cause).

The court must submit questions, instructions, and definitions that are raised by the pleadings and evidence. TEX. R. CIV. P. 278; *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 663 (Tex. 1999). A trial court may refuse to submit a question only if no evidence exists to warrant its submission. *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992); *see also Wright Way Const. Co. v. Harlingen Mall Co.*, 799 S.W.2d 415, 422 (Tex. App.—Corpus Christi 1990, writ denied) (jury is asked controlling issues, those that present a complete ground of recovery or defense).

A trial court must submit instructions and definitions to enable the jury to render a verdict. TEX. R. CIV. P. 277; *Union Pac. R.R. Co. v. Williams*, 85 S.W.3d 162, 166 (Tex. 2002). An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) is supported by the pleadings and evidence. TEX. R. CIV. P. 278; *Union Pac.*, 85 S.W.3d at 166. A definition is proper if it assists the jury in rendering a verdict. TEX. R. CIV. P. 277; *Wichita County, Texas v. Hart*, 917 S.W.2d 779, 783-84 (Tex. 1996).

When a trial court refuses to submit a requested instruction, the issue on appeal is whether the omitted instruction was reasonably necessary to enable the jury to render a proper verdict. *Texas Workers' Comp. Ins. Fund v. Mandlbauer*, 34 S.W.3d 909, 912 (Tex. 2000).

II. GENERAL CHARGE ERROR PRESERVATION CONSIDERATIONS

A. Standard for preservation: Error must be raised or it's waived.

Errors in the charge must be timely raised. The failure to raise a complaint about a jury charge waives review of that error on appeal. *In re B.L.D.*, 113 S.W.3d 340, 349 (Tex. 2003); TEX. R. APP. P. 33.1; TEX. R. CIV. P. 274. A party must timely make the trial court aware of the complaint in plain terms and obtain a ruling. *B.L.D.*, 113 S.W.3d at 349; *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992). Complaints must be raised before the charge is read to the jury. TEX. R. CIV. P. 272.

While the discussion below under B. demonstrates that the rule requirements for objecting and requesting can be confusing, the supreme court has recognized that "[t]here should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling." *State Dep't of Highways & Pub. Transp. v. Payne*, 838

S.W.2d 235, 241 (Tex. 1992); *See Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 43 (Tex. 2007) (citing *Payne* on standard for preservation). Given the difficulties in the preservation rules, "cautious counsel might choose to do both in all cases – request and object." *Payne*, 838 S.W.2d at 240.

In explaining *Payne*, the supreme court has stated that *Payne* does not change the rule requirements for charge issues, but it recognized that the requirements must be applied with a common sense manner to serve the purposes of the rules, not to defeat them. *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 451-52 (Tex. 1995). For example, the San Antonio Court relied on *Payne* to conclude that objections at an informal charge conference preserved error. *Green Tree Fin. Corp. v. Garcia*, 988 S.W.2d 776, 780-82 (Tex. App.—San Antonio 1999, no pet.).

In a case from this year, the supreme court echoed the rationale of *Payne*. In *Arkoma Basin Exploration Co. v. FMF Assocs. 1990-A, Ltd.*, a party raised a no evidence issue in a post-trial motion by stating there was no evidence to support the jury's answers to each part of a damage question. 249 S.W.3d 380, 387 (Tex. 2008). The court of appeals concluded the objection was not specific enough. The supreme court disagreed.

According to the supreme court, the record demonstrated that the plaintiff satisfied the "cardinal rule for preserving error" by objecting in a manner clear enough to give the trial court the opportunity to correct the error. *Id.* at 387. The trial court held a hearing on the post-trial motion and granted remittitur. *Id.* at 387-88. The supreme court noted that stock objections may not preserve error, but a no evidence objection to a single issue preserves error. *Id.*

The court also instructed that the rules relating to post-trial objections "should be liberally construed so that the right to appeal is not lost unnecessarily." *Id.* at 388. The court recognized that post-trial objections will rarely be as detailed as arguments on appeal. Thus, "an objection is not necessarily inadequate because it does not specify every reason the evidence was insufficient." *Id.*

In *Brock Indep. Sch. Dist. v. Briones*, the Fort Worth Court addressed the sufficiency of an objection to an instruction on agency. No. 02-07-002-CV, 2008 WL 704174 (Tex. App.—Fort Worth March 13, 2008, no pet.) (mem. op.). Brock ISD objected to an instruction that stated the actions of the agent are those of the principal (BISD). At trial, BISD only objected that the instruction was a comment on the weight of the evidence and that there was no evidence that the school district approved the acts of the agent. On appeal, BISD expanded its arguments to contend that the instruction misstated the law of agency and erroneously removed the issue from the jury.

The court of appeals rejected Briones argument that BISD waived its expanded appellate arguments. According to the court, citing *Payne*, BISD made the trial court aware of its complaint. "Though not expressed as eloquently as its exhaustive appellate arguments, BISD's objection that it did not ratify or approve of DSA's actions comports with its arguments on appeal and timely and plainly made the trial court aware of its complaint." *Id.* at 6.

B. Raising charge errors: Object or request or both?

The answer depends on whether the error is a defect in the charge or an omission from the charge altogether.

1. If a definition or instruction is defective, object. TEX. R. CIV. P. 274 (any complaint to a question, definition or instruction for any defect, omission or fault in pleading is waived unless included in a party's objections); *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994).

2. If a definition or instruction is omitted, request. TEX. R. CIV. P. 278 (failure to submit a definition or instruction shall not be reversible unless the definition or instruction is tendered in substantially correct wording); *Texas Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629, 637-38 (Tex. 1995).

3. If a question is defective, object. TEX. R. CIV. P. 274; *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 387 (Tex. 2000).

4. If a question is omitted and the question is your burden, request. TEX. R. CIV. P. 278; *Alaniz v. Jones & Neuse, Inc.*, 907 S.W.2d 450, 451-52 (Tex. 1995) (question); *Myers v. Mega Life & Health Ins. Co.*, 2008 WL 1758640 (Tex. App.—Amarillo April 17, 2008, no pet.) (mem.op.) (party with burden of proof on affirmative defense must request all elements of defense or ground is waived).

5. If a question omits a necessary element, and it is your opponent's burden, object. TEX. R. CIV. P. 274; *Diamond Offshore Mgmt. Co. v. Guidry*, 171 S.W.3d 840, 843-44 (Tex. 2005) (defendant only required to object to charge's failure to include a question on course and scope of employment); *Lawler v. Digiuseppe*, No. 05-03-00468-CV, 2004 WL 1209569, at *2 (Tex. App.—Dallas 2004, pet. granted) (argued October 25, 2005). The objection avoids deemed findings on the omitted elements of a claim or defense.

6. The best approach: Make the requisite objection and separately tender a request in

substantially correct wording. TEX. R. CIV. P. 274 (object to question, instruction or definition on account of a defect or omission or fault in pleading).

C. What are the requirements of a request?

A valid request for a question, instruction or definition must be:

- presented to opposing counsel and the court within a "reasonable time after the charge is given to the parties;" TEX. R. CIV. P. 273;
- in writing; TEX. R. CIV. P. 273, 278;
- made separate from objections to the charge; TEX. R. CIV. P. 273;
- not obscured or concealed by voluminous unfounded requests or objections; TEX. R. CIV. P. 274;
  - in substantially correct wording; TEX. R. CIV. P. 278. "Substantially correct" does not mean absolutely correct; the request must be "in substance, and in the main correct. . . ." *Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987).

The requesting party must obtain a written ruling on its request. TEX. R. CIV. P. 276. The trial court may either mark the request "refused" or "modified as follows:" and sign the request. TEX. R. CIV. P. 276. The requesting party should then file the signed requests with the clerk.

D. What are the requirements of an objection?

A valid objection to question, instruction or definition must:

- be in writing or oral on the record; TEX. R. CIV. P. 272;
- be made separate from requests; TEX. R. CIV. P. 273;
- distinctly identify the objectionable matter; TEX. R. CIV. P. 274;
  - distinctly identify the grounds for the objection; TEX. R. CIV. P. 274;
- not be obscured or concealed by voluminous unfounded requests or objections; TEX. R. CIV. P. 274;
- not adopt by reference of an objection to another part of the charge; TEX. R. CIV. P. 274.

The trial court must rule on an objection to the charge by endorsing the rulings on the objections if written, or by orally announcing the rulings on the record. TEX. R. CIV. P. 272.

E. Other general preservation considerations

1. Cannot invite error and later complain about the error. While most cases conclude that preservation occurs at the formal charge conference, comments at an informal charge conference can be construed as inviting error. For example in *Bluestar Energy, Inc. v. Murphy*, defendant's counsel agreed at an informal charge conference to submit only a breach of contract claim and forego its fraud claim. 205 S.W.3d 96, 100-01 (Tex. App.—Eastland 2006, pet. denied). At the formal charge conference, defense counsel objected to the charge for failing to include fraud. *Id.* at 101.

The Eastland Court concluded defendant invited error. *Id.* The court held that a party cannot invite error by agreeing to an omission of a claim on which it has the burden and then subsequently object to the omission. *Id.*; *see also General Chem. Corp. v. De la Lastra*, 852 S.W.2d 916, 920 (Tex. 1993) (party cannot challenge on appeal the very issues it requested); *B.L.D.*, 113 S.W.3d at 350 (litigants cannot waive, consent to or fail to complain about trial court errors and surprise an opponent on appeal by raising a complaint for the first time on appeal).

2. Each party stands on its own. Each party should make their own objections and requests and not rely on another party's objections.

3. Inadequate time to review proposed charge. A party must object if not given adequate time to review the charge. TEX. R. CIV. P. 272.

4. Each objectionable part of the charge stands alone. A party cannot incorporate objections from one part of the charge to another. TEX. R. CIV. P. 274.

5. Must object to conditional submissions. Issues are often conditionally submitted, requiring the jury to answer a question only if a having first answered another question. A party must object to the conditional submission if it deprives a party of a question supported by the pleadings and evidence. *Hunter v. Carter*, 476 S.W.2d 41, 46 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.); *Washington v. Reliable Life Ins. Co.*, 581 S.W.2d 153, 160 (Tex. 1979).

6. Object to improper burden of proof/persuasion. A party must object to improper placement of burden of proof in the charge. *Turk v. Robles*, 810 S.W.2d 755, 759 (Tex. App.—Houston [1st Dist.] 1991, writ denied). A charge properly places the burden of proof so that an affirmative answer indicates that the party with the burden of persuasion on the fact established the fact by a preponderance of the evidence. *Maxus Energy Corp. v. Occidental Chem. Corp.*, 244 S.W.2d 875, 884 (Tex. App.—Dallas 2008, pet. denied).

7. Avoid raising irrelevant objections that obscure the valid objections. TEX. R. CIV. P. 274; *Tesfa v. Stewart*, 135 S.W.3d 272, 275 (Tex. App.—Fort Worth 2004, pet.denied).

8. Confirm that written objections and requests are in the record. Objections, requests and rulings must appear in the record. In *Jelinek v. Casas*, the hospital requested an unavoidable accident instruction on the record during the charge conference, but no written request appeared in the record. The court of appeals concluded that because the record did not contain the requested instruction any error was waived. *Jelinek v. Casas*, No. 13-06-00088-CV, 2008 WL 2894889 at *8 (Tex. App.—Corpus Christi July 29, 2008, no pet h.) (mem. op.).

III. PARTICULAR JURY CHARGE ERROR DEVELOPMENTS.

A. Use of Pattern Jury Charges

Pattern Jury Charges are not the law and are not binding, but are frequently used and approved by the courts. *Keetch v. Kroger Co.*, 845 S.W.2d 276, 281 (Tex. App.—Dallas 1990), *aff'd*, 845 S.W.2d 262 (Tex. 1992). While *Ledesma* concluded that a particular PJC was erroneous, the court has not signaled a retreat from use of the PJC. As the supreme court noted in *Ledesma*, "we rarely disapprove of these charges." 242 S.W.3d at 45.

Numerous cases cite with approval the PJC and its comments. *See, e.g., Chu v. Hong*, 249 S.W.3d 441, 444 n.4 (Tex. 2008) (Court cites with approval PJC Business, Consumer, Insurance & Employment 109.1 regarding conditioning conspiracy question on finding of statutory violation or other non-negligence tort); *Southwestern Bell v. Garza*, 164 S.W.3d at 615 n.10 (discussing PJC comment on employment retaliation claim). And, in other cases, the supreme court has disagreed with the PJC. *See, e.g., St. Josephs Hosp. v. Wolff*, 94 S.W.3d 513, 530 & n.52 (Tex. 2002) (Court rejected trial court's use the PJC definition of "joint enterprise" and concluded that the PJC misstated the elements); *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 444 n.4 (Tex. 1989) (Court revised PJC's question on implied warranty of merchantability). .

1. Product liability

The most recent case involving a challenge to a PJC-submitted charge is *Ford Motor Company v. Ledesma*, 242 S.W.3d 32 (Tex. 2007). In *Ledesma*, the parties agreed that a portion of the truck's axle came apart and caused the drive shaft to dislodge from the transmission. *Id.* at 36. The dispute was whether Ledesma's Ford pickup had a manufacturing defect that caused the separation or whether the separation occurred as a result of the truck running into parked cars and a curb. *Id.*

Ford objected to the definitions of manufacturing defect and producing cause, contending both were inaccurate statements of the law. Both definitions were from the PJC.

The court concluded that PJC 71.3 (Malpractice, Premises & Products) regarding manufacturing defects and that the definition of producing cause, PJC 70.1, were erroneous statements of the law. The definition failed to instruct the jury on an indispensable element—whether the product deviated, in its construction or quality, from its specifications or planned output rendering it unreasonably dangerous. *Id.* at 41. The correct standard had been established in *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 434 (Tex. 1997), and applied in three other supreme court cases following *Grinnell*. *Id.* at 41-42, n.17. The court also noted that the current Restatement of Torts provides a similar requirement that the product deviate from its intended design. *Id.* at 42.

Without the additional language, the charge failed to distinguish between manufacturing defects and design defects. The charge only inquired whether a condition rendered the product unreasonably dangerous, without specifying whether the condition was a design or manufacturing defect. *Id.* A design defect requires further proof and a finding of a safer alternative design. *Id.*

The court further concluded that Ford properly preserved the charge error and that the error required reversal. Ford timely objected to the erroneous definitions and submitted a proposed question that included an alternative definition of manufacturing defect. *Id.* at 43. Ford also provided the trial court with the appropriate case authorities to support its proposed submission. *Id.* at 43-44. The jury was not asked to decide an essential element of a manufacturing defect claim and Ford timely and properly objected. *Id*. at 44. Thus, the error was reversible. *Id.*

Finally, the court reversed and remanded in the interest of justice. According to the court, trial courts routinely rely on the PJC for charge submissions and "we rarely disapprove of these charges." *Id.* at 45. The court reversed and remanded for a new trial.

In *H.E. Butt Grocery Company v. Bilotto*, 985 S.W.2d 22 (Tex. 1998), the court addressed PJC 80.1 (Malpractice, Premises & Products) and whether an instruction predicating a damage question on a finding of fifty percent or less of plaintiff's negligence caused plaintiff's injury impermissibly informs the jury of their answers. HEB objected to the instruction, alleging it informed the jury of the legal effect of its answer.

Applying Rule 277, the court concluded the submission was appropriate. Rule 277 expressly allows a damage question to be predicated on an affirmative finding of liability. *Id.* at 23. Rule 277

recognizes that an instruction that is incidental comment on the weight of the evidence or advises the jury of effect of its answers is not objectionable. TEX. R. CIV. P. 277.

According to the Court, to directly advise the jury of the effect of its answers, the instruction must inform the jury how to answer a question for the plaintiff or defendant to prevail. *Id.* at 24. PJC 80.1 does not inform the jury of the effect of its answer; it simply directs the jury to answer the damages question if certain conditions are met. *Id.* Accordingly, the court concluded that PJC 80.1 merely incidentally informs the jury of the effect of its answers.

2. Conspiracy

The conspiracy question and instruction recommended in PJC 109.1 were called into question by the supreme court in *Tri v. J.T.T.*, 162 S.W.3d 552 (Tex. 2005). The PJC instruction provides:

To be part of a conspiracy, *Connie Conspirator* and another person or persons must have had knowledge of, agreed to, and intended a common objective or course of action that resulted in the damages to *Paul Payne*. One or more persons involved in the conspiracy must have performed some act or acts to further the conspiracy.

The PJC also states that the conspiracy question should be conditioned on a finding of a statutory violation or a tort (other than negligence) that proximately caused damages.

The conspiracy instruction given in *Tri* tracked the PJC, but the conspiracy question was not properly conditioned because the only tort theory submitted was negligence. *See Tri*, 162 S.W.2d at 560. The court held that the instruction omitted a necessary element of an actionable civil conspiracy:

This charge did not require the jury to find that there was a meeting of the minds to accomplish an unlawful purpose or to accomplish a lawful purpose by an unlawful means. The charge only required the jury to find that the defendants "agreed to and intended a common objective or course of action that resulted in the damages to" J.T.T. and M.T. Additionally, the charge permitted the jury to conclude that the "common objective or course of action" consisted of acts that were merely negligent. *Id.*

In the ordinary case, it could be argued that the PJC's conspiracy instruction does not need to be rewritten to include an unlawful purpose/means element because that element is supplied by conditioning the conspiracy question on a finding of a tort other than negligence, which the charge in *Tri* failed to do. The comment to PJC 109.1 regarding "Conspiracy to accomplish lawful objective by unlawful means" appears to take this view, stating that "PJC 109.1 submits the proper question if a court or jury has established the existence of an unlawful objective, that is, a statutory violation or a tort (other than negligence)."

On the other hand, if there is no finding that a particular alleged conspirator committed a tort other than negligence, the PJC instruction might allow the jury to find that he was part of a conspiracy even though the common objective or course of action that he intended consisted merely of negligence. If there is evidence to support such an intent, the PJC instruction may need to be modified to ensure that the unlawful purpose/means element is submitted.

3. Breach of fiduciary duty

PJC 104.2 contains a very onerous list of common-law duties that a fiduciary must satisfy. Until recently, the comments to this question did not fully explain when the question should be modified to reflect a more limited set of duties. The forthcoming 2008 edition of the PJC addresses this issue in a revised "Modification of instruction" comment:

The instruction in PJC 104.2 may need to be modified to include additional duties imposed by statute, contract, or common law on a particular fiduciary relationship. Conversely, if a statute or contract limits the scope of fiduciary duties, the instruction should be modified to conform to those limitations. *See National Plan Adm'rs, Inc. v. National Health Ins. Co.*, 235 S.W.3d 695, 700-04 (Tex. 2007); *Sterling Trust Co. v. Adderley*, 168 S.W.3d 835, 846-47 (Tex. 2005). Consult the Texas Revised Partnership Act regarding duties applicable to partners. *See* TEX. BUS. ORG. CODE ANN. §§ 152.003, 152.204(d) (Vernon Pamph. 2007); TEX. REV. CIV. STAT. ANN. ART. 6132b-1.04(a), 4.04(f) and Comment of Bar Committee – 1993.

B. Broad-form submission

Rule 277 requires submission of jury questions in broad-form whenever feasible. TEX. R. CIV. P. 277. As demonstrated in recent cases, problems with broad form can arise with multiple theories, multiple parties, multiple elements of damage, and their interaction with apportionment issues. Use of broad-form questions in these contexts often prevents review if there is an invalid ground of recovery or defense, no evidence to support a ground or an erroneously defined issue.

For purposes of preservation, object to the use of broad form as a separate objection. *Tesfa v. Stewart*, 135 S.W.3d at 275-76 (objection to broad-form obscured by stock objections). Then, make the additional, substantive objections, for example, no evidence or invalid legal theory. In *In re A.V.*, the supreme court concluded that an objection to broad-form had to be a "specific objection to the charge to put a trial court on notice to submit a granulated question to the jury." 113 S.W.3d 355, 363 (Tex. 2003). In *A.V.*, petitioner did not object to the form of

the question relating to parental termination and the court held he waived error. *Id.* However, in *Harris County*, the court concluded that a no evidence objection preserved error. 96 S.W.3d at 231.

1. Casteel, Harris County and Romero

In *Casteel*, the supreme court addressed whether the inclusion of invalid liability theories in a single jury question was erroneous and harmful. Crown Life objected to the trial court's submission of a single liability question that included multiple theories on the ground that the plaintiff lacked standing to pursue DTPA-based claims. *Crown Life Ins. C. v. Casteel*, 22 S.W.3d 378, 387-88 (Tex. 2000). The court concluded that the submission was erroneous because the plaintiff lacked consumer status under the DTPA.

The court further held that the error was harmful. "When a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory." 22 S.W.3d at 388; TEX. R. APP. P. 61.1.

The jury was given four erroneously submitted liability theories. It was possible that the jury based liability on an erroneously submitted theory, but also, it was impossible for the court to conclude that the jury's answer was not based on an erroneously submitted theory. *Id.* at 389.

The court also instructed that while Rule 277 mandates broad-form submission whenever feasible, it is not feasible when the law governing one of multiple theories of liability is unsettled. *Id.* at 390. In those situations, a granulated submission serves judicial economy and avoids the need for a new trial. *Id.*

In *Harris County v. Smith*, the question was the use of a broad-form damages question when there was no evidence of one element of damages in the instruction. 96 S.W.3d 230 (Tex. 2002). The trial court submitted two damages questions that contained instructions listing many elements for the jury to consider in awarding damages. *Id.* at 231. Harris County objected and requested that the trial court submit each damage element separately. *Id.* The trial court denied the request and Harris County then objected that there was no evidence of loss of earning capacity and no physical impairment. The trial court again overruled the objection. The jury awarded damages to each plaintiff.

The court of appeals agreed the submission was erroneous, but concluded the error was harmless. *Id.* at 232. According to the court of appeals, ample evidence supported the properly submitted elements supported the damage awards. *Id.*

The supreme court reversed, holding that the submission was erroneous and the error was harmful. Relying on *Casteel*, the court concluded that the charge erroneously "mixed valid and invalid elements of damages in a single broad-form submission, and that such error was harmful because it prevented the appellate court from determining 'whether the jury based its verdict on an improperly submitted invalid' element of damage." *Id.* at 234 (citing *Casteel*, 22 S.W.3d at 388; TEX. R. APP. P. 61.1(b)).

The court recognized that the PJC supported its decision regarding segregating damage elements. The PJC has "long recommended that damage elements should be submitted separately 'if there is substantial doubt as to whether there is evidence to support' an element." *Harris County*, 96 S.W.3d at 235.

According to the Court, broad-form is not always better, particularly when the law is unsettled. *Id.* at 235. In such case, submitting alternative liability standards or damage measures serves judicial economy by allowing an appellate court to decide the correct legal standard and render the appropriate judgment. *Id.* at 235-36. Judicial economy is not served, as in this case and in *Casteel*, when an objection raises a substantial concern about a liability theory or element of damage. *Id.* at 236. Requiring the jury to delineate the elements of damages overly complicates the charge and allows the losing party to preserve error. *Id.*

The court expressly cautioned against the use of the harmless error rule as applied by the court of appeals to save an otherwise erroneous charges. *Id.* The incentive would be to submit a defective theory broadly mixed with valid theories and invite error. *Id.*

The dissent characterized the majority as presuming reversible error and as encouraging granulated submissions. *Id.* at 237. The dissent observed that the jury was instructed to consider each damage element separately. *Id.* at 237. The dissent would have applied the traditional harm analysis. *Id.* at 240.

Finally, in *Romero v. KPH Consolidation, Inc.*, the issue was whether apportioning responsibility among defendants in a broad-form question was reversible when the charge included a factually-unsupported claim. 166 S.W.3d 212 (Tex. 2005). The jury found that negligence by the hospital and two individuals caused Romero's injury. The jury also found that the hospital's malicious credentialing of one of the defendant doctor caused Romero's injury. The jury was then asked to apportion responsibility among the defendants. The court of appeals concluded that there was no evidence of malice and reversed and remanded.

The supreme court affirmed. On the question of whether the error was harmful, the court relied on *Casteel* and *Harris County* to conclude that the erroneous submission prevented the hospital from complaining of the jury's apportionment. *Id*. at 226. According to the Court, "unless the appellate court is

'reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it,' the error is reversible." *Id.* at 227-28.

The court also addressed preservation and noted that the hospital objected to form and also to lack of evidence of the malicious credentialing claim. *Id.* at 229.

Significantly, the court rejected the argument that the case encourages granulated submissions. The court observed that *Casteel* and *Harris County* require that parties not submit issues that have no basis in law or fact in a manner that cannot be corrected short of a new trial. *Id.* at 230. According to the Court, if at the close of evidence, if a party "continues to assert a claim without knowing whether it is recognized at law or supported by the evidence, the party has three choices: he can request that the claim be included with others and run the risk of reversal and a new trial, request that the claim be submitted to the jury separately to avoid that risk, or abandon the claim altogether." *Id.* at 230.

2. Current and pending cases

In *Missouri Pacific Railroad Company v. Limmer*, 180 S.W.3d 803 (Tex. App.—Houston [14th Dist.] 2005, pet. granted) (argued November 13, 2007), the charge issue is whether the railroad properly objected to the apportionment question when it combined two theories of liability.

The railroad objected to the submission of one of the negligence questions, but did not object to the apportionment question. *Id.* at 821-22. The railroad contended one of the negligence questions was not a valid liability theory. *Id.*

Citing *Casteel*, *Harris County* and *Romero*, the court of appeals concluded that the railroad was not required to object to the apportionment question to be entitled to the *Casteel* harm analysis if the liability question, to which the railroad objected, is not an independent basis of liability. *Id.* at 823.

After concluding that the challenged liability theory was invalid, the court applied *Romero* and concluded the error prevented the appellant from presenting its case on appeal. *Id.* at 828. According to the court, "we are not reasonably certain that the jury in this case was not significantly influenced by the liability theory that was erroneously submitted. . . ." *Id.* The court reversed and remanded.

In *Schrock v. Sisco*, the issue was whether a defendant's objection to inclusion of an invalid legal theory—intentional infliction of emotional distress—extended to all questions that referenced that theory. 229 S.W.3d 392, 395 (Tex. App.—Eastland 2007, no pet.).

In *Schrock*, the court submitted liability and damages questions for plaintiff's theories of assault and intentional infliction of emotional distress. Schrock objected to the inclusion of intentional infliction. The trial court submitted a single exemplary damages question conditioned on an affirmative finding of either assault or intentional infliction. *Id.* at 393. The jury awarded damages for both torts and also awarded exemplary damages.

Sisco argued that Schrock failed to preserve his complaint about exemplary damages because he did not object to the form of the exemplary damages question. *Id.* at 395.

Relying on *Romero* and *Limmer*, the Eastland Court concluded that an objection to submission of a theory of recovery was sufficient to preserve error to each question in the charge that contained that cause of action. *Id.* at 395-96. Applying the harm analysis of *Casteel*, the court concluded that it could not be reasonably certain that the jury was not influenced by the erroneous submission of intentional infliction in awarding exemplary damages. *Id.* at 396.

In *Lundy v. Masson*, the Houston Fourteenth Court considered a challenge to the use of a broad-form fraud question. __ S.W.3d __, 2008 WL 1862331 (Tex. App.—Houston [14th Dist.] April 29, 2008, no pet. h.). Lundy contended that because Masson asserted two distinct factual theories— failure to disclose and an affirmative misrepresentation—the jury should have been asked to specify the theory on which it relied. *Id.* at *6.

The court of appeals noted that the charge tracked the PJC and its comment that fraud may be submitted in one question with instructions that define the appropriate allegations. *Id.* According to the court, trial courts may combine several "species of fraud" into one broad-form question and are not required to ask the jury to indicate the grounds in it answer. *Id.*

C. Inferential rebuttal instructions.

An inferential rebuttal theory rebuts an essential element of a plaintiff's case by proof of other facts. *Dillard v. Texas Elec. Coop.*, 157 S.W.3d 429, 430 (Tex. 2005). Inferential rebuttals must be submitted in an instruction, not in a question. TEX. R. CIV. P. 277.

When a defendant seeks to blame an occurrence on someone or something other than itself, the PJC provides several alternatives. *Id.* at 431-32. Defendants can request instructions on sole proximate cause (if an occurrence is caused by a non-party), unavoidable accident (if an occurrence is not caused by the negligence of any party), new and independent cause (if the occurrence is caused by someone else at a later time), sudden emergency (if the occurrence is cause by something other than defendant's negligence and the cause arises suddenly), and act of God (if the occurrence is caused by nature). *Id.*

1. Unavoidable accident

In *Bed Bath & Beyond, Inc. v. Urista* ("*BBB*"), the court refused to extend for questions, which it had developed in *Casteel* and *Harris County*, to the

submission of an improper inferential rebuttal instruction. 211 S.W.3d 753, 757 (Tex. 2006). The presumed harm analysis as applied in *Casteel* requires a determination of whether the error "probably prevented the petition from properly presenting the case to the appellate courts." *Id.*

The trial court in *Bed Bath & Beyond* included an unavoidable accident instruction. Without addressing whether it should have been submitted, the court addressed harm. According to the Court, "we specifically limited our holdings in *Casteel* and *Harris County* to submission of broad-form question incorporating multiple theories of liability or multiple damages elements." *Id.* at 756. An unavoidable accident is not an alternative theory of liability. *Id.* The unavoidable accident instruction was given with the causation element accompanying a single negligence question. *Id.* at 756-57. Because inferential rebuttals cannot be questions, the court was not persuaded that harm can be presumed. *Id.* at 757.

Instead, the court applied the traditional harmless error analysis. *Id.*; TEX. R. APP. P. 61.1(a). Reviewing the entire record, the court concluded that submitting the unavoidable accident instruction did not cause the rendition of an improper judgment. *BBB*, 211 S.W.3d at 759-60. First, the instruction explains that the jury is not required to find someone at fault. *Id.* at 757 (noting the standard negligence question phrased "negligence, if any," implies someone is at fault). Finally, reviewing the record, it was reasonable to conclude that plaintiff failed to carry its burden without the jury considering the inferential rebuttal instruction. *Id.* at 757-58.

In *Dillard v. Texas Electric Coop.*, the court addressed whether the trial court erred in refusing to give defendant's requested additional inferential rebuttal instruction.

A Texas Electric truck collided with a cow. Shortly thereafter, a car hit the cow and then collided with the Dillard's car, killing Dillard. Texas Electric requested an instruction on unavoidable accident and on sole proximate cause. 157 S.W.3d 429, 431 (Tex. 2005). Texas Electric contended the cow's owner's actions were the sole proximate cause of both accidents. The trial court instructed the jury only on unavoidable accident. *Id.* at 433-34.

The court explained that when a defendant seeks to blame an occurrence on someone or something other than itself, the PJC provides several alternatives. *Id.* at 432. Defendants can request instructions on sole proximate cause (if an occurrence is caused by a non-party), unavoidable accident (if an occurrence is not caused by the negligence of any party), new and independent cause (if the occurrence is caused by someone else at a later time), sudden emergency (if the occurrence is cause by something other than defendant's negligence and the cause arises suddenly), and act of God (if the occurrence is caused by nature). *Id.*

According to the court, inferential rebuttal instructions advise the jury that they do not have to blame a party when evidence shows conditions beyond a party's control caused the incident or that the conduct of a non-party caused the incident. *Id.*

The court noted that the unavoidable accident instruction in PJC General Negligence and Intentional Personal Torts 3.4 informs the jury that it may consider causes of the incident other than the parties' negligence. *Id.* at 433-34. The instruction was broad enough to allow Texas Electric to argue all of its inferential rebuttal theories. *Id.* at 434.

After discussing the PJC's inferential rebuttal instructions, the court noted that "many of these instructions overlap to create redundancies that encourage parties to request several so that the point can be repeatedly emphasized. 157 S.W.3d at 433-34. For example, sole proximate cause and new and independent cause cover the similar issues. *Id.* at 434. Including redundant instructions is "contrary to the spirit of broad-form submission." *Id.* at 434.

The court rejected the use of a granulated charge for inferential rebuttal instructions. *Id.* at 434.

In *Harris v. Vazquez*, No. 03-07-00245-CV, 2008 WL 2309179 (Tex. App.—Austin June 8, 2008) (mem. op.), appellant complained of the trial court giving an unavoidable accident instruction in a car accident case. The trial court used the PJC unavoidable accident instruction. Appellant contended that the unavoidable accident instruction applies to "nonhuman" conditions that are sudden and should not apply with "commonly encountered circumstances," as in this case, parked vehicle. *Id.* at *4.

Citing *Dillard* and *BBB*, the Austin Court rejected appellant's interpretation of unavoidable accident and concluded that the instruction is not limited to nonhuman conditions was appropriate. *Id.* There was evidence that a parked vehicle obstructed the other driver's view and thus supported the jury's finding that incident was not caused by the parties.

2. New and independent cause

A new and independent cause is one that intervenes between the original wrong and the final injury making the injury attributable to the new cause more than the first, more remote cause. *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 450 (Tex. 2006). When an intervening force was foreseeable at the time of defendant's negligence, the cause is "concurring" and does relieve defendant of liability. *Id.* at 451. When an intervening force is extraordinary, not foreseeable or independent of and far removed from defendant's conduct, the cause may constitute a new and independent cause. *Id.*

A new and independent cause instruction informs the jury that they do not have to find a defendant at fault when the cause of the accident is someone else. *Id.* at 450-51.

In *Dew*, the deceased fell through an opening in an oil platform while the platform was under construction. *Id*. at 449. The dispute involved who was responsible for the inadequately protected opening. Crown "barricaded" the opening with rope, which may have been altered or removed before the fall. The evidence indicated that several methods had been used as temporary covers. The jury attributed liability among the owner, the designer and the erector.

Crown argued that the trial court erred in refusing to submit its requested instruction on new and independent cause. According to Crown, that the ropes were altered or removed constituted a new and independent cause. *Id.* at 452.

The court rejected Crown's argument and concluded that Crown was not entitled to a new and independent cause instruction. *Id.* at 453. The court noted that an intervening act that exploits an original act of negligence and does not fundamentally alter the foreseeable consequences of the original negligence. *Id.* at 453. The court reversed and remanded to the court of appeals to consider additional grounds.

The dissent concluded there was sufficient evidence to submit the instruction and that the failure to submit it was harmful.

In *Columbia Rio Grande Regional Healthcare, L.P. v. Hawley*, 188 S.W.3d 838 (Tex. App.—Corpus Christi 2006, pet. filed), the issue is whether the trial court erred in refusing requested instructions on new and independent cause and loss of chance. The court of appeals concluded the trial court did not abuse its discretion in refusing both requests.

A post-operative pathology report indicated that a patient had cancer but the hospital failed to communicate the diagnosis to the patient or her physicians. The hospital argued that the physician's failure to follow up on the pathology report was unforeseeable and a new and independent cause. *Id.* at 861-62. The court of appeals concluded that an unforeseeable event does not necessarily equate to a new and independent cause that relieves a defendant of liability. *Id.* at 862. The court characterized the treating physicians' conduct as a "concurring cause" to the hospital's negligence. *Id.* at 862.

The hospital also sought an instruction that the plaintiff must have had a greater than 50% chance of survival on the date the hospital diagnosed cancer for the hospital's negligence to the be proximate cause of plaintiff's injuries. *Id.* at 862-63.

The court of appeals concluded that while the requested instruction was a correct statement and supported by the evidence, the trial court correctly refused it because it would not have assisted the jury. *Id.* at 863. The court also concluded that there was no abuse of discretion in refusing the instruction when there is no precedent endorsing the use of such an instruction. *Id.*

3. <u>Waiver as an inferential rebuttal</u>.

In *Pleasant v. Bradford*, __ S.W.3d __, 2008 WL 2544814 (Tex. App.—Austin June 26, 2008, no pet. h.), the Austin Court addressed the trial court's failure to submit a question on waiver in a dispute over the square footage of a home when purchased. Appellants contended that the purchasers waived reliance on the realtor's square footage representation by signing an agreement to make an independent investigation of any important matters and thus a question on waiver should have been submitted. The court disagreed. *Id.* at *7.

According to the court, the requested question on waiver was an inferential rebuttal and its submission was prohibited by Rule 277. *Id.* Therefore, the trial court properly refused to submit it. The court noted that appellants failed to object to the trial court's refusal to submit an *instruction* on waiver. Appellants instead submitted a *question* on inferential rebuttal. *Id.* at *8.

D. Statutory causes of action

When addressing a statutory cause of action in a charge, it is important for the liability question to track the statute or regulation as closely as possible. *Southwestern Bell Tel. Co. v. Garza*, 164 S.W.3d at 615.

In *Southwestern Bell*, Garza alleged that he was discharged for filing a workers' compensation claim. The charge asked whether Southwestern Bell disqualified or discharged Garza because he instituted a workers' compensation claim in good faith. Labor Code §451.001(1) provides that a person may not discharge or in any manner discriminate against an employee for filing a compensation claim in good faith.

On appeal, Bell argued that the charge failed to track the statute's definition of liability. According to Bell, the distinction between the charge's term "disqualify" and the statutory term "discriminate" made a difference. The court rejected Bell's argument, concluding that there was no difference in asking whether Garza was disqualified for filing a comp claim or whether he was discriminated against in filing a worker's compensation claim. *Id.* at 616. Because the disqualification was disciplinary in nature and the jury found that Bell disciplined Garza for filing a comp claim, Bell had violated the anti-retaliation statute. *Id.*

The court instructed that the better practice would have been to track the statute, but it concluded that the jury was not confused by the question. *Id.* In addition, the court noted that a defendant should carefully review a plaintiff's statutory cause of action and pursue

special exceptions to have the pleadings clarified if necessary. *Southwestern Bell*, 164 S.W.3d at 616-17.

In *Diamond Offshore Management Co. v. Guidry*, 171 S.W.3d 840 (Tex. 2005), the court addressed the proper charge question in a Jones Act case. The deceased was killed while riding with a co-employee onshore. Although the charge mentioned course and scope of employment, the charge failed to ask the jury whether the deceased was acting in the scope of his employment when the accident occurred. *Id.* at 841-42.

The court concluded that course and scope was an element of the plaintiff's claim and that Diamond properly preserved error by objecting to the charge's failure to ask about course and scope. *Id.* at 844. The court reversed and remanded for a new trial.

E. Damages

If damages need to be segregated, a party must object. *Equistar Chems., L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864 (Tex. 2007). Here, the party waived error by failing to object to question that failed to segregate tort and contract damages. *Id.* at 868. With a failure to object, the damages were measured by the question and instructions given. *Id.*

There is a similar requirement to object when recoverable attorney's fees are not segregated from non-recoverable attorney's fees. In *K-2, Inc. v. Fresh Coat, Inc.*, 253 S.W.3d 386 (Tex. App.—Beaumont 2008, no pet. h.), the defendant failed to object to an aggregate submission of attorney's fees, expenses and costs, when the charge also submitted claims for which attorney's fees were not recoverable. The Beaumont Court concluded that the complaint regarding the segregation of attorneys' fees was waived by the failure to object and failure to request a question regarding segregation. *Id.* at 397-98.

In *Columbia Medical Ctr. v. Hogue*, 132 S.W.3d 671 (Tex. App.—Dallas 2004, pet. filed) (argued April 12, 2005), surviving family members sued a hospital for failure to provide emergency echocardiogram services and for failure to maintain an on-call list by specialty. The deceased had a pre-existing heart condition, but failed to disclose it to the hospital when admitted.

The trial court refused the hospital's request to include a contributory negligence issue with the liability question. *Id.* at 678. The trial court ultimately included contributory negligence in the exemplary damage portion of the trial, and the jury found no contributory negligence. Applying the traditional harm analysis, the court of appeals concluded that the inclusion of contributory negligence in the exemplary damages question was not improper and was not harmful. *Id.* at 679. According to the court of appeals, the issue was ultimately submitted and the fact that it was submitted after the liability portion of the trial was inapposite. *Id.*

F. Punitive Damages

"While States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on those awards." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). Since the U.S. Supreme Court decided *BMW of North America, Inc. v. Gore* over 10 years ago, disputes over punitive damages have often focused on *substantive* limits: the three guideposts—reprehensibility, ratio, and comparable penalties—that determine when an award is so "grossly excessive" that it violates the Due Process Clause of the Fourteenth Amendment. 517 U.S. 559, 568, 574-75 (1996).

Increasingly, however, courts are beginning to focus on the *procedural* concern that led the Court to impose these limits on punitive awards in the first place: unguided juries. As the Court explained in *State Farm*, the guideposts were a response to "[v]ague instructions" that left "the jury with wide discretion in choosing amounts," allowed it to "express biases," and "d[id] little to aid" it in "assigning appropriate weight to evidence" that was "only inflammatory" or had "little bearing as to the amount of punitive damages that should be awarded." 538 U.S. at 418. Some Justices have hinted that if juries were properly guided, their punitive awards would be presumptively valid, not searchingly scrutinized under the guideposts. *See BMW*, 517 U.S. at 586-88, 595-96 (Breyer, J., concurring).

Last year, the Court emphasized that "the Due Process Clause *requires* States to provide assurance that juries are not asking the wrong question"—*i.e.*, to "insist[] upon proper standards that will cabin the jury's discretionary authority." *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062, 1064 (2007) (emphasis added). But jury instructions have been slow to change because the Supreme Court has been reluctant to tell state courts precisely what their instructions should look like, pattern jury charge committees do not want to get out ahead of the law, and state legislatures have been capping punitive awards instead of enacting new standards to guide juries. Thus, progress in developing additional punitive damage instructions is most likely to result from counsel offering such instructions and complaining on appeal if courts fail to give them.

A recently-approved comment to PJC 110.34 may be helpful to counsel in persuading courts to give additional instructions. This new comment, which revises and expands the current comment entitled "Out-of-state conduct," provides as follows:

> **Limits on conduct to be considered**. When there is a significant risk that a jury may seek to punish a defendant for a constitutionally improper reason, the Due Process clause requires that an additional instruction be given to protect against that risk. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064-65 (2006).
>
> For example, the defendant's lawful out-of-state conduct may be probative on some issues in a punitive damages case in certain circumstances. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 422 (2003). When such evidence is admitted, "[a] jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *Campbell*, 538 U.S. at 422.
>
> In addition, evidence that the defendant's conduct risked harm to persons who are not before the court may be probative in determining the reprehensibility of that conduct. *Williams*, 127 S. Ct. at 1064-65. But when such evidence is admitted, the jury should be instructed that it may not punish the defendant for any harm it may have caused to persons who are not parties to the litigation. *Id*. at 1060, 1064-65.

G. The statutory cap on punitive damages

The statutory cap on punitive damages enacted by the Texas Legislature will provide fertile ground for future charge litigation because the present list of exceptions was only added in 1995 and many questions regarding their application remain unanswered. Some of those questions are identified below.

The statutory cap provides that exemplary damages against a defendant cannot exceed the greater of (1) twice the amount of economic damages plus the amount of non-economic damages up to $750,000, or (2) $200,000. TEX. CIV. PRAC. & REM. CODE ANN. ("CPRC") § 41.008(b) (Vernon Pamph. 2007). The cap does not apply, however, "to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in [one of fifteen listed] sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally." CPRC § 41.008(c).

1. Findings

Texas courts have approached these exceptions in different ways: some require findings that each element of the alleged crime was committed knowingly or intentionally, while others apply an exception if there is sufficient evidence of the listed crime. The Eastland Court of Appeals has taken the latter view. *Konkel v. Otwell*, 65 S.W.3d 183, 188 (Tex. App.—Eastland 2001, no pet.) (default judgment); *Myers v. Walker*, 61 S.W.3d 722, 732 (Tex. App.—Eastland 2001, pet. denied) (bench trial). The Dallas Court of Appeals disagreed in *Signal Peak Enterprises v. Bettina Investments, Inc*., 138 S.W.3d 915, 927 (Tex. App.—Dallas 2004, pet. stricken). *Signal Peak* held that the plaintiffs could not rely on the exceptions because "the jury did not make findings regarding the elements of the offenses or determine whether the conduct constituting the offenses was committed knowing or intentionally," and a finding of fraud or malice alone was insufficient to establish any exception. *Id*. Similarly, in *Harris v. Archer*, 134 S.W.3d 411, 439 (Tex. App.—Amarillo 2004, pet. denied), the court held that jury findings of the elements of the exception as listed in the Penal Code were required. *See also Madison v. Williamson*, 241 S.W.3d 145, 161 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (collecting cases). Given these decisions, the safest course is to submit a jury question on the relevant exception.

2. Standard of proof

The standard of proof that applies in proving the elements of an exception to the cap is also not settled. It could be argued that the clear and convincing evidence standard for proving exemplary damages in CPRC § 41.003 should apply because § 41.008 caps the damages allowed by § 41.003. On the other hand, because the exceptions in § 41.008 are taken from the Texas Penal Code, which requires proof beyond a reasonable doubt (TEX. PEN. CODE § 2.01 (Vernon 2003)), it could be argued that the same standard should apply in determining whether a defendant's conduct satisfies one of the listed Penal Code sections for purposes of lifting the cap. The latter approach was taken by an appellate court in *Mission Resources, Inc. v. Garza Energy Trust*, 166 S.W.3d 301, 315 (Tex. App.—Corpus Christi 2005, pet. granted), but the court did not explain the reason for its choice.

The nature of punitive damages arguably provides additional support for the standard of proof beyond a reasonable doubt. As the Texas Supreme Court explained in *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 16-17 (Tex. 1994):

> [P]unitive (or exemplary) damages are levied against a defendant to punish the defendant for outrageous, malicious, or otherwise morally culpable conduct . . . . The legal justification for punitive damages is similar to that for criminal punishment, and like criminal punishment, punitive damages

> require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment.

Because punitive damages are akin to criminal punishment, and similar procedural safeguards are required, it could be argued that proof beyond a reasonable doubt standard should be one of those safeguards. Counsel should keep these competing standards in mind in formulating charge requests and objections regarding an exception to the cap.

3. Causation

To invoke a statutory exception to the cap, a plaintiff must prove that her "cause of action" and "recovery of exemplary damages" are "*based on* conduct described as a felony" in one of the listed Penal Code sections. CPRC § 41.008(c) (emphasis added). Thus, it can be argued that there must be more than some felonious conduct floating somewhere in the background. Instead, the felonious conduct (1) must be the basis for the plaintiff's claims and (2) must be the *cause* of the injury about which it complains. The PJC questions regarding the cap exceptions do not address these issues. Based on the language of the cap statute, however, a party could request an instruction that the jury consider only conduct that formed a basis of the plaintiff's claim in answering a cap exception question, as well as a question asking what portion of any exemplary damage award is based on that conduct.

4. Intent

As noted previously, the cap statute generally requires that the "conduct" allegedly creating an exception be "committed knowingly or intentionally." CPRC § 41.008(c). Counsel should scrutinize the PJC question regarding the relevant felony exception carefully to ensure that it implements this requirement, especially if the felony also includes a specific intent requirement. For example, to commit the felony of fraudulent alteration of a writing (and thereby remove the statutory cap on exemplary damages), a person must alter a writing "with intent to defraud or harm another." TEX. PEN. CODE § 32.47(a) (Vernon 2003) (emphasis added). Thus, PJC 110.37 asks: "Did Don Davis alter [a writing] with intent to defraud or harm another?" It then provides a definition of intent. This question suggests that intent must be found only with respect to defrauding or harming another. Section 41.008(c) suggests, however, that not only the harm but also the relevant conduct—alteration—must be intentional in order to lift the cap.

5. Location of conduct

Finally, under the Penal Code, a felony is cognizable by Texas courts only if "either the conduct or a result that is an element of the offense occurs inside this state." TEX. PEN. CODE § 1.04(a) (Vernon 2003). No court appears to have addressed whether this requirement also applies to the cap exceptions for felonious conduct. The U.S. Supreme Court decisions discussed above arguably support such a requirement, however. As the Court held in *State Farm*, Texas "cannot punish a defendant for conduct that may have been lawful where it occurred." 538 U.S. at 421. Nor does Texas "have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." *Id*. Thus, if there is a dispute about whether an element of the relevant cap exception that addresses conduct or results occurred in Texas, counsel may wish to request an instruction based on section 1.04 of the Penal Code.

H. Supplemental instructions

A party objecting to supplemental instructions must follow with the preservation rules relating to the submission of the original charge. *Bayer Corp. v. DX Terminals, Ltd.*, 214 S.W.2d 586, 602 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). In response to the jury's inquiry seeking clarification, Bayer did not object to the court's refusal to give a clarifying instruction. The following day, Bayer requested a proposed supplemental instruction, which the trial court denied. *Id*. at 601-02. On appeal, Bayer argued that the trial court erred in omitting its requested instruction. The court of appeals concluded Bayer failed to preserve its supplemental instruction. The court noted that Bayer's instruction appeared only orally in the record, not in writing as required by the rule. Additionally, Bayer's request was untimely. *Id.* at 603.

I. Post-verdict charge preservation issues

1. Omitted and deemed findings

Rule 279 provides that if an element of a submitted ground is omitted, without a request or objection, and factually sufficient evidence supports the finding, the trial court may make written findings on the omitted element in support of the judgment. Rule 279. If no written findings are made, the omitted elements "shall be deemed found by the court in such manner as to support the judgment." TEX. R. CIV. P. 279.

The issue in *Lawler v. Digiuseppe* is whether the party awarded specific performance must have a jury issue asking whether plaintiff is ready, willing and able to perform. 2004 WL 1209569 (Tex. App.—Dallas 2004, pet. granted) (argued October 25, 2005). Following a jury verdict in favor of plaintiffs for breach of contract, the trial court signed a judgment granting plaintiffs specific performance.

The court recognized that with the equitable remedy of specific performance, a party must plead and prove that she is ready, willing and able to

perform. *Id.* at *1. Here, no party sought a jury finding on whether plaintiffs were ready, willing and able to perform under the contract and the evidence was disputed. Thus, a disputed fact issue existed that had to be resolved before an equitable remedy could be determined. Here, there were no jury findings on specific performance—an issue on which plaintiffs had the burden of proof. *Id*. at *2.

The court rejected plaintiffs' argument that the necessary findings could be deemed under Rule 279. Rule 279 provides that if no element of a cause of action is included in the charge without a request or objection, the cause of action is waived. If one element of plaintiffs' cause of action was submitted to the jury and is "necessarily referable" to that cause of action, an omitted findings may be deemed found. *Id.* at *2. The court concluded that the submitted question on breach contract was not an element "necessarily referable" to a claim for specific performance. Accordingly, the finding could not be deemed. The court therefore reversed the judgment awarding specific performance. *Id.* at *3.

2. Incomplete or inconsistent verdict

Rule 295 provides that if a verdict is incomplete or not responsive or has conflicting answers, the trial court shall give the jury written instructions of the issue and send the jury for additional deliberations. TEX. R. CIV. P. 295. To preserve a complaint about an incomplete or unresponsive verdict or conflicting findings, an objection must be made before the jury is discharged. *Lundy v. Masson*, __ S.W.3d __, 2008 WL 1862331 at *7.

In *Lundy*, the court questioned the presiding juror about a mark on the charge. The presiding juror responded that the mark was to indicate "approximately" for an amount of compensation. The judge orally instructed the jury that the number cannot be approximate and the presiding juror said to strike the mark. Lundy did not object to the jury's answer or to the trial court's handling of the correction until a motion for new trial. The court of appeals concluded that Lundy waived any error.

3. Immaterial findings

A trial court may disregard a jury finding when it is immaterial or not supported by the evidence. *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994). A finding is immaterial if it should not have been submitted or was properly submitted but other findings render it immaterial. *Spencer*, 876 S.W.2d at 157; *Southeastern Pipe Line Co., Inc. v. Tichacek*, 997 S.W.2d 166, 172 (Tex. 1999); *see also Billy Smith Enters., Inc. v. Hutchison Constr., Inc.*, __ S.W.3d __, 2008 WL 2852361 (Tex. App.—Austin July 24, 2008, no pet. h.) (finding subcontractor breached contract rendered jury findings on violations of Prompt Pay Act immaterial).

V. APPELLATE REVIEW OF CHARGE ERRORS

A. Standard of review

The standard of review for charge errors is abuse of discretion. *Texas Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). As long as the charge is legally correct, trial courts have broad discretion in submitting jury questions, instructions and definitions. *Hyundai*, 995 S.W.2d at 664. Charge error is generally reversible only, if in light of the entire record, the error probably caused the rendition of an improper judgment. *Reinhart v. Young*, 906 S.W.2d 471, 473 (Tex. 1995); TEX. R. APP. P. 44.1(a); 61.1.

Rule 278 provides that the court shall submit questions, instructions and definitions that are raised by the pleadings and evidence. TEX. R. CIV. P. 278; *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d at 663. There is a substantive, nondiscretionary directive to trial courts to submit requested questions if there are pleadings and evidence to support them. *Elbaor v. Smith*, 845 S.W.2d at 243. The trial court has broad discretion in submitting jury questions as long as the questions fairly place disputed issues before the jury. *Toles v. Toles*, 45 S.W.3d 252, 263 (Tex. App.—Dallas 2001, pet. denied). Jury questions submitted must be on controlling issues. *Wright Way Const. Co. v. Harlingen Mall Co.*, 799 S.W.2d at 422 (jury is asked controlling issues, those that present a complete ground of recovery or defense).

As it relates to instructions and definitions, the trial court shall submit the instructions and definitions that are proper to enable a jury to render a verdict. TEX. R. CIV. P. 277. A trial court is afforded more discretion in its submission of instructions than with questions submitted. *Wal-Mart Stores Inc. v. Middleton*, 982 S.W.2d 468, 470 (Tex. App.—San Antonio 1998, pet. denied). The trial court, however, has no discretion to misstate the law; whether an instruction misstates the law is reviewed *de novo. St. Joseph's Hosp.*, 94 S.W.3d at 525.

When a trial court refuses to submit a requested instruction, the issue on appeal is whether the omitted instruction was reasonably necessary to enable the jury to render a proper verdict. *Shupe v. Lingafelter*, 192 S.W.3d 577, 579 (Tex. 2006); *Texas Workers' Comp. Ins. Fund v. Mandlbauer*, 34 S.W.3d at 912.

B. Harm that prevents proper presentation of case on appeal.

The supreme court has applied the second part of the reversible error standard found in Rule 44.1(a)(2) and 61.1(b) with certain charge error analysis and concluded certain errors prevent a party's ability to

properly present its case on appeal. *See* TEX. R. APP. P. 44.1(a)(2); 61.1(b).

The supreme court found three errors relating to broad-form submission prevented an appellant from properly presenting its case on appeal. *Casteel*, 22 S.W.3d at 388 (harmful error when invalid liability theories were submitted in a single question); *Harris County*, 96 S.W.3d at 234 (harmful error when submitting in a single damage question valid and invalid elements) and *Romero*, 166 S.W.3d at 226 (harmful error when jury was asked to apportion responsibility among defendants in a broad-form question that contained a factually-unsupported claim).

According to the court in *Romero*, "unless the appellate court is 'reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it,' the error is reversible." *Romero*, 166 S.W.3d at 227-28