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## **2010 PROPERTY TAX CASES**

### **And Attorney General's Opinions**

Last updated: December 30, 2011

### **Cases**

#### ***In re Scarver***

2010 WL 5514349 (Tex. App. – Houston [14<sup>th</sup> Dist.], December 30, 2010, no pet.) (not reported)

Issues: excess proceeds following tax sale

Taxing units filed suit to collect delinquent taxes on real property. They sued the property owner and also a lienholder, MFNI, which was in bankruptcy. The property was sold at a tax sale pursuant to the order of the state court, and the sale resulted in excess proceeds. MFNI's bankruptcy trustee filed a claim for the excess proceeds just before the two-year time period for doing so expired. The trustee, however, did not follow up by requesting a hearing on his claim. After four months, the court released the excess proceeds to the taxing units. (Under §34.03 of the Tax Code, excess proceeds go to the taxing units if no other claimant *establishes* its entitlement to the proceeds within two years after the date of the tax sale.) Several months later the trustee filed another claim for the proceeds. In response, the judge signed an order directing the clerk to release any proceeds "*currently held*" by the court to the trustee. When the clerk did not send the trustee any money, the trustee asked the trial judge to hold the clerk in contempt and throw her in jail until she delivered the excess proceeds (plus interest and attorneys' fees) to the trustee. The trial judge refused, and the trustee sought a writ of mandamus from the court of appeals.

The court of appeals denied the trustee's request. The higher court explained that the trial judge's order only directed the clerk to pay the proceeds "*currently held*" by the court to the trustee. When the trial judge signed the order, the court no longer had any excess proceeds; there was no money left for the clerk to release. The clerk did nothing wrong when she failed to give the trustee money that the trial court no longer had.

#### ***Finna Fail, LP v. Moore***

2010 WL 5437272 (S.D. Tex., December 27, 2010)

Issues: governmental immunity

Blanchard filed for bankruptcy protection in 2008. The automatic stay precluded his creditors from taking any actions to collect what Blanchard owed them outside the context of the bankruptcy case. The county nevertheless sued Blanchard in state court in 2009 for delinquent taxes on his property. After the state court entered a judgment, the county proceeded to hold a tax sale in early 2010. Finna made the winning bid at the sale and paid the constable. The county then realized that the sale was prohibited by the bankruptcy stay. It directed the constable to return Finna's money rather than execute a deed. Finna then filed suit in the federal district court claiming that the county, its tax assessor-collector and its lawyers had committed fraud and violated Finna's constitutional rights. The defendants claimed that they were immune from the suit.

The federal district court ruled that the defendants were immune. The county was immune because it was a political subdivision of the State of Texas performing the governmental function of collecting its taxes (even though it was using a private law firm). The tax assessor-collector and the lawyers were immune because they were officers and/or agents of the county. Because their actions were taken in the course of collecting the county's taxes, they were acting in their official capacities, not their individual capacities. Under the 11<sup>th</sup> Amendment to the U.S. Constitution, federal courts recognize the governmental immunity of states, their political subdivisions and their agents. The court dismissed the case.

***Hoppenstein Properties, Inc. v. McLennan County Appraisal District***

341 S.W.3d 16 (Tex. App. – Waco, December 22, 2010, pet. denied)

Issues: governmental immunity

In November of 2007, the appraisal district signed a 60-month lease for office space in Hoppenstein's building. The lease required Hoppenstein to renovate the space. Disputes soon arose between the parties. The appraisal district stopped paying rent in mid-2008 and moved out in the spring of 2009. Hoppenstein sued the district for breach of the lease and sought to recover for damages it had already suffered and for damages it would suffer in the future. The district claimed that Hoppenstein could not sue it because of the doctrine of governmental immunity. The trial court dismissed the case based on the district's claim of immunity, and Hoppenstein appealed.

The court of appeals ruled that Hoppenstein could sue the district because the district's immunity had been waived by a state statute. Section 271.152 allows a local government to be sued on breach-of-contract claims by someone who contracted to provide the local government with *goods* or *services*. A lease of office space is not normally considered a contract for goods or services, but this lease called for Hoppenstein to perform the service of renovating the space. Because the lease included a service component (even though the service was not the primary purpose of the lease), Hoppenstein could sue the district for the alleged breach of any part of the lease. Hoppenstein could also claim damages based on the future profits that it lost as a result of the district's alleged breach of the lease. The lost profits were "direct damages" rather than "consequential damages."

***Bello v. Tarrant County***

2010 WL 5019517 (Tex. App. – Fort Worth, December 9, 2010, pet. denied) (not reported)

Issues: service of process; delinquency of taxes; visiting judge

In 2003, taxing units sued Bello for delinquent taxes for several past years. Bello was then served through a notice published in the newspaper after constables could not find him to deliver the suit papers personally. In 2006, the trial court entered a judgment for the taxing units. In 2008, the property had still not yet been sold. Bello showed up and filed a motion asking the trial court to vacate its judgment. The court granted that Motion. Bello then filed an answer and a motion for summary judgment in the reopened case. He contended: 1) that he had never been served; 2) that his taxes were not delinquent; and 3) that the taxing units did not have valid contracts with their lawyers. The taxing units filed their own motion for summary judgment. A visiting Judge conducted the hearing at which Bello offered receipts showing that he had been making some payments on his back taxes, but the unpaid amounts nevertheless totaled over \$26,000. Bello did not claim to have entered a payout agreement with the taxing units. The taxing units offered their delinquent tax records as evidence. The visiting judge said that he would grant judgment for the taxing units. Two weeks later, the judgment was actually signed by the court's regular judge. Bello appealed.

The court of appeals upheld the judgment for the taxing units. The court explained that it saw nothing wrong with the way in which Bello was served by publication (under Rule 117a of the Texas Rules of Civil Procedure) after constables had been unable to serve him personally. In any event, Bello waived any right to complain about service when he eventually filed his answer and other papers in the trial court. Despite the fact that Bello had been making some payments on his back taxes, the unpaid amounts were nonetheless delinquent and the trial court was correct in granting a judgment against Bello for those unpaid amounts.

A visiting judge is appointed through a written order of the presiding judge of an administrative region. Such an order does not necessarily limit the authority of the trial court's regular judge to act in a case (although the order may contain language to that effect). Both the regular judge and the visiting judge may make decisions and sign orders in the case. The order appointing the visiting judge in this case was not included in the record presented to the court of appeals. Without it, Bello could not show any reason why the trial court's regular judge could not sign a judgment after the visiting judge had verbally announced his decision at the conclusion of the hearing. The court of appeals also ruled that it would not consider Bello's claim about the contracts between the taxing units and their lawyers because Bello had not briefed his claim sufficiently.

***Bexar Appraisal District v. American Opportunity for Housing--Perrin Oaks L.L.C.***

2010 WL 4978099 (Tex. App. – San Antonio, December 8, 2010, no pet.)(not reported)

Issues: who can file a protest or appeal

Perrin Ltd. was the record owner of an apartment complex. Perrin Ltd.'s sole limited partner was Housing Inc. Housing Inc. also owned all the shares of AOP. AOP claimed that it was really the owner of the complex as the result of a merger between it and Perrin Ltd. AOP attempted to apply for an exemption for the complex in 2008, but the appraisal district said that the application would have to be filed by the record owner, Perrin Ltd. The application was then filed in the name of Perrin Ltd. When the district denied the application, Perrin Ltd. filed a protest, which was denied by the ARB. Then, AOP filed suit to appeal the ARB's order. The district asked the court to dismiss the case because AOP was not the complex's record owner and AOP had not filed a protest with the ARB. AOP responded that it was the "assignee and successor in interest" to Perrin Ltd. The trial court refused to dismiss the case, and the district appealed.

The court of appeals ruled for the district and dismissed the case. The court explained that in order to file suit to appeal an ARB's order, a party: 1) must be the owner of the property; and 2) must have exhausted its administrative remedies before the ARB. AOP did not meet either requirement. The documents effectuating the so-called merger did not convey the complex from Perrin Ltd. to AOP. Instead, they conveyed Housing Inc.'s intangible interest in the Perrin Ltd. partnership to AOP. Perrin Ltd. still existed and still owned the complex. AOP and Perrin Ltd were separate legal entities, and it had been Perrin Ltd., not AOP that had filed the protest. AOP could not file the suit to appeal the ARB's order, and the trial court had no jurisdiction to consider AOP's suit. AOP also tried arguing that the district was estopped from questioning its right to appeal after the district had insisted that the exemption application be filed in the name of Perrin Ltd., but the court explained that jurisdiction cannot be established by estoppel.

***Dhingra v. Aldine Independent School District***  
2010 WL 4677773 (Tex. App. – Houston [1<sup>st</sup> Dist.], November 18, 2010, no pet.) (not reported)

Issues: delinquent-tax suits; appeal from master's order

Taxing units sued Dhingra for delinquent taxes, and the trial court referred the case to a master. The taxing units filed a motion for summary judgment, and served a copy of their motion on Dhingra by mail or fax. Just twenty-one days later, the master considered the motion and recommended that the trial court grant it. Six days later, Dhingra filed a notice of appeal. The trial court, however, did not give Dhingra a new hearing and simply signed an order confirming the master's recommendation and granting summary judgment for the taxing units. Dhingra appealed.

The court of appeals reversed the trial court's judgment when the taxing units generally agreed with Dhingra on two issues. First, Dhingra was entitled to twenty-four days notice before the master could consider the motion for summary judgment (twenty-one

days under Rule 166a of the Texas Rules of Civil Procedure plus three extra days under Rule 21a because the motion was served on him by mail or fax). The taxing units served him only twenty-one days before the master considered the motion. Second, because Dhingra filed a notice of appeal within ten days of the master's decision, he was entitled by §33.71 of the Tax Code to a hearing in the trial court. The trial court erred when it confirmed the master's recommendation without conducting its own hearing. Dhingra also argued that he should receive a judgment releasing him from the taxes altogether because the taxing units did not offer evidence in the trial court proving the amounts due. The court of appeals disagreed and remanded the case to the trial court where Dhingra could have his hearing and the taxing units could prove the amounts due.

***Ross v. Llinebarger, Goggan, Blair & Sampson, LLP***

333 S.W.3d 736 (Tex. App. – Houston [1<sup>st</sup> Dist.], November 18, 2010, no pet.)

Issues: governmental immunity

Taxing units sued a partnership for delinquent taxes, and the trial court entered a default judgment in their favor. Ross (who apparently had some unexplained connection to the partnership and/or the property) learned about the judgment and contacted the taxing units' lawyers. She signed a payout agreement, but stopped making her payments after a few months. The taxing units proceeded with the tax sale. Ross later attempted to redeem the property from the buyer, but her attempt came about a month too late. She then sued the taxing units, their lawyers and the buyer on various claims including breach of contract, negligent misrepresentation and violation of her constitutional right to due process of law. She alleged that they had failed to notify her about her breach of the payout agreement and the tax sale and that they had misinformed her about the deadline for redeeming the property. The taxing units and their lawyers claimed that they were immune from the suit. The trial court dismissed Ross's claims against the lawyers, and Ross appealed.

The court of appeals had to decide whether Ross could file an appeal (called an *interlocutory* appeal) while her claims against the taxing units and the buyer were still pending before the trial court. The court explained that an interlocutory appeal was proper under §51.014 of the Civil Practice and Remedies Code because the lawyers were agents of the taxing units, not independent contractors. They were subject to having the taxing units direct the details of their activities. Ross alleged as much in her pleadings and made no effort to prove otherwise. The lawyers were sued in their official capacities (not their individual capacities) because Ross's claims all concerned actions that they had taken in the course of their efforts to collect delinquent taxes.

The same circumstances that lead the court to accept the appeal also lead it to conclude that the lawyers were immune from being sued. Although the lawyers worked for a private firm, they were performing a governmental function on behalf of the taxing units. They were entitled to the same governmental immunity as the taxing units

themselves. The court of appeals upheld the trial court's dismissal of Ross's claims against the lawyers.

***Braniff CB Ltd. v. Harris County Appraisal District***

2010 WL 4684704 (Tex. App. – Houston [14<sup>th</sup> Dist.], November 18, 2010, no pet.) (not reported)

Issues: who can file a protest or appeal

In 2008, the appraisal district appraised a real property in the name of Sam Houston Parkway (SHP). SHP protested the appraisal of the property, and then filed suit to appeal the ARB's order. The district then discovered that the property had been sold to Braniff in the spring of 2007. The district asked the trial court to dismiss the case because the plaintiff, SHP did not own the property. Before the trial court could act on the appraisal district's request, SHP amended its pleadings to add Braniff as a plaintiff. The district again urged the trial court to dismiss the case. The trial court granted the district's request, and the plaintiffs appealed.

The court of appeals upheld the dismissal of the case. The court explained that because SHP did not own the property in 2008, it had no standing to contest the 2008 appraisal in a protest or lawsuit. The plaintiffs tried arguing that §42.21 of the Tax Code allows the pleadings in a pending suit to be amended to "correct or change the name of a party." The court of appeals rejected that argument and explained that §42.21 does not allow a property owner like Braniff to appear as a plaintiff in an appeal when it never filed a protest with the ARB. The plaintiffs also tried arguing that SHP was not really a separate entity, that it was really just a "common name" for Braniff and that the Rules of Civil Procedure allow a party to substitute its formal name for its common name during the course of a suit. The record, however, contained no evidence that Braniff had ever done business under the name of SHP. They were separate companies.

***Hartman REIT Operating Partnership III L.P. v. Harris County Appraisal District***

2010 WL 4684707 (Tex. App. – Houston [14<sup>th</sup> Dist.], November 18, 2010, no pet.) (not reported)

Issues: who can file a protest or appeal

In 2008, the appraisal district appraised a real property in the name of a parent corporation (Hartman Parent). Hartman Parent protested the appraisal of the property, and then filed suit to appeal the ARB's order. The district then discovered that the property had been sold to a subsidiary (Hartman Subsidiary) in 2005. The district asked the trial court to dismiss the case because the plaintiff, Hartman Parent did not own the property. Before the trial court could act on the appraisal district's request, Hartman Parent amended its pleadings to add Hartman Subsidiary as a plaintiff. The district again urged the trial court to dismiss the case. The trial court granted the district's request, and the plaintiffs appealed.

The court of appeals upheld the dismissal of the case. The court explained that because Hartman Parent did not own the property in 2008, it had no standing to contest the 2008 appraisal in a protest or lawsuit. The plaintiffs tried arguing that §42.21 of the Tax Code allows the pleadings in a pending suit to be amended to “correct or change the name of a party.” The court of appeals rejected that argument and explained that §42.21 does not allow a property owner like Hartman Subsidiary to appear as a plaintiff in an appeal when it never filed a protest with the ARB. The plaintiffs also tried arguing that Hartman Parent was not really a separate entity, that it was really just a “common name” for Hartman Subsidiary and that the Rules of Civil Procedure allow a party to substitute its formal name for its common name during the course of a suit. The record, however, contained no evidence that Hartman Subsidiary had ever done business under the name of Hartman Parent. They were separate companies.

***In re Kizzee-Jordan***

626 F.3d 239 (5<sup>th</sup> Cir., November 11, 2010)

Issues: bankruptcy status of transferred tax claim

Kizzee-Jordan owed delinquent taxes on his property and agreed to allow Tax Ease to pay them. He signed a note promising to repay Tax Ease and to pay interest at a rate of 14.8%. The taxing units transferred their tax liens to Tax Ease. The next year, Kizzee-Jordan filed a Chapter-13 bankruptcy. He submitted to the bankruptcy court a plan under which he proposed to pay Tax Ease, but with an interest rate of only 5%. Tax Ease objected and argued that the bankruptcy court had no authority to reduce the interest rate. The bankruptcy court denied the objection and ruled that it could reduce the interest rate. Before the bankruptcy court approved Kizzee-Jordan’s plan finally, Tax Ease appealed to the district court. The district court ruled that the interest rate could not be changed, and Kizzee-Jordan appealed that ruling to the court of appeals.

The court of appeals first considered whether the bankruptcy court’s order on the interest rate was a final order subject to appeal. The order did not contain language actually approving Kizzee-Jordan’s plan, but it was nevertheless final and appealable because it was a “final disposition of a discrete dispute within the larger bankruptcy case.” The court of appeals then explained that under §511 of the Bankruptcy Code, the interest rate on a “tax claim” is the rate prescribed by nonbankruptcy law and may not be changed by a bankruptcy court. Even though the taxing units had been paid and even though Kizzee-Jordan had signed a note to Tax Ease, the claim asserted by Tax Ease was a tax claim for purposes of §515. The bankruptcy court could not reduce the 14.8% rate that applied to Tax Ease’s claim under Texas law. The court of appeals affirmed the district court’s ruling.

***GSL Welcome BP 32 LLC. v. Harris County Appraisal District***

2010 WL 4484361 (Tex. App. – Houston [1<sup>st</sup> Dist.], November 10, 2010, no pet.) (not reported)

Issues: who can file a protest or appeal

In 2008, the appraisal district appraised a real property in the name of Sub 13. Sub 13 protested the appraisal of the property, and the ARB reduced the appraised value. Sub 13 then filed suit to appeal the ARB's order and seek an even lower appraised value. The district then discovered that the property had been sold to GSL in the fall of 2007. The district asked the trial court to dismiss the case because the plaintiff, Sub 13 did not own the property. Before the trial court could act on the appraisal district's request, Sub 13 sought to substitute GSL as the plaintiff. The district again urged the trial court to dismiss the case. The trial court granted the district's request, and the plaintiffs appealed.

The court of appeals upheld the dismissal of the case. The court explained that because Sub 13 did not own the property in 2008, it had no standing to contest the 2008 appraisal in a protest or lawsuit. The plaintiffs tried arguing that §42.21 of the Tax Code allows the pleadings in a pending suit to be amended to "correct or change the name of a party." The court of appeals rejected that argument and explained that §42.21 does not allow a property owner like GSL to appear as a plaintiff in an appeal when it never filed a protest with the ARB. Even if GSL's appearance could date back to the time when Sub 13 originally filed the suit, that would not solve the problem of GSL's not having protested. The plaintiffs also tried arguing that Sub 13 was not really a separate entity, that it was really just a "common name" for GSL and that the Rules of Civil Procedure allow a party to substitute its formal name for its common name during the course of a suit. The record, however, contained no evidence that GSL had ever done business under the name of Sub 13. They were separate companies.

***Romo v. Cavender Toyota, Inc.***

330 S.W.3d 648 (Tex. App. – San Antonio, October 20, 2010, no pet.)

Issues: governmental immunity

Sanchez financed his new Mazda with a finance company. The tax assessor-collector's office failed to note the finance company's lien on the vehicle's title. Sanchez promptly traded the Mazda in on a new Toyota and neglected to tell the Toyota dealer about the finance company's lien. The Toyota dealer later learned of the lien and had to pay off the finance company in order to have a clean title to the Mazda. The Toyota dealer sued the tax assessor-collector for failing to note the lien on the title. The tax assessor-collector asked the trial court to dismiss the case on the basis of her governmental immunity. The dealer argued that her immunity had been waived by §501.137 of the Certificate of Title Act that reads as follows: "An assessor-collector who fails or refuses to comply with this chapter is liable on the assessor-collector's official bond for resulting damages suffered by any person." The trial court refused to dismiss the case, and the tax assessor-collector appealed.

The court of appeals explained that if a statute is going to waive governmental immunity, it must do so in clear and unambiguous language. Section 501.137 was not sufficiently clear or unambiguous. The court noted that: the statute did not expressly say

that immunity was waived; it did not require the assessor-collector to be joined in a lawsuit; it did not limit the assessor-collector's potential liability; and it served purposes other than waiving immunity. Because the statute did not waive the assessor-collector's immunity, the dealer's suit against her had to be dismissed. Further, because the dealer was seeking money from the assessor-collector, he could not avoid her immunity by attempting to characterize his suit as a claim for a declaratory judgment.

***KM TS Cypress L.L.C. v. Harris County Appraisal District***

2010 WL 3921126 (Tex. App. -- Houston [14<sup>th</sup> Dist.], October 7, 2010, pet. denied)(not reported)

Issues: appraisal district's participation in ARB hearing

KM protested the 2008 appraisal of its property. At the ARB's hearing, KM's agent reached an agreement with the appraisal district's employee. KM, however, then filed suit to contest the agreed value. It argued that the agreement was invalid because it was not made with the chief appraiser himself and because the chief appraiser did not personally attend the hearing. At the appraisal district's request, the trial court dismissed the case. KM appealed.

The court of appeals upheld the dismissal of the case. The court explained that a chief appraiser does not have to perform all of his duties personally. Section 6.05(e) of the Tax Code provides that "The chief appraiser may delegate authority to his employees." An appraisal-district employee may attend a hearing and agree to settle a protest on behalf of the chief appraiser. The settlement agreement is final and does not need the ARB's approval. The agreement may not be challenged in court.

***Lewis v. San Jacinto County Appraisal District***

2010 WL 3784492 (S.D. Tex., September 23, 2010)

Issues: whistle-blowing employee

Lewis was a consumer service manager working for the appraisal district. She raised several complaints about the chief appraiser and other district personnel, including claims that: the chief appraiser instructed her to lie to property owners about whether they had been sent appraisal notices; he improperly accepted a late application for an agricultural appraisal; and employees were making favorable adjustments to the appraisals of properties belonging to their friends and relatives. Lewis presented her claims to the district's board of directors, which commissioned an investigation and directed the chief appraiser to protect the due-process rights of property owners. According to Lewis, the chief appraiser and other employees ostracized her and made her work environment unbearable. She resigned via e-mail and ninety-one days later sued the district and the chief appraiser in federal district court. Her complaint raised claims under the Texas Whistleblower Act (Chapter 554 of the Government Code) and a federal civil-rights statute (42 U.S.C. §1983). She claimed that her free-speech rights

were violated when the chief appraiser retaliated against her for complaining to the board.

The court dismissed Lewis's claims. The Whistleblower Act protects a public employee from retaliation but requires the employee to file suit within ninety days after she discovers the retaliation. Lewis obviously knew about the retaliation against her when she sent her resignation e-mail. Thus, her suit, filed ninety-one days later, was not timely. The court also ruled that Lewis's communications with the board were not free speech protected by the Constitution. The First Amendment does not protect statements that a public employee makes pursuant to her official duties. Lewis was performing an employment duty when she complained to the board. She was acting as an employee, not as a concerned citizen. She could not claim any violation of her First-Amendment rights.

***State v. Gaylor Investment Trust Partnership***

322 S.W.3d 814 (Tex. App. – Houston [14<sup>th</sup> Dist] August 31, 2010, no pet.)

Issues: evidence of value

This is actually a condemnation case, but it has potential relevance for tax cases. The State condemned a half-acre of land belonging to Gaylor, and Gaylor sued to contest the amount of the condemnation award. Gaylor named one appraiser to testify concerning the value of the land. The state named one appraiser to testify concerning the value of the land and two other appraisers to criticize the appraisal done by Gaylor's appraiser. The trial court, however, ruled that each side could call only one appraiser. If the state wanted to criticize Gaylor's appraiser, it could cross-examine him and have its own principal appraiser critique Gaylor's appraiser. After hearing the testimony from each side's one appraiser, the jury decided on a value more favorable to Gaylor than to the state. The state appealed arguing that it should have been able to present the testimony of all three of its appraisers.

The court of appeals upheld the trial court's decision. It explained that a trial court has broad discretion in deciding whether to admit or exclude evidence. A trial court is also supposed to avoid "needless consumption of time" during trials. The state had not shown that it needed more than one expert to: 1) testify to the property's value; and 2) criticize Gaylor's appraisal. Thus, the trial court did not abuse its discretion when it prevented the state's secondary appraisers from testifying, even if their testimony would have been relevant, reliable and helpful to the jury.

***Harris County Appraisal District v. Houston Laureate Associates, Ltd.***

329 S.W.3d 52 (Tex. App. – Houston [14<sup>th</sup> Dist] August 26, 2010, no pet hist.)

Issues: admissibility of expert testimony; lawyers' ethical rules

O'Connor & Associates protested, then appealed on behalf of Houston Laureate. Their expert witness came from Property Evaluation Services (PES). PES was formed by

people from O'Connor, and it worked for O'Connor regularly. It leased its offices and equipment from O'Connor. The expert testified that O'Connor paid PES a flat fee for its work, and that the fee did not depend on what the expert said or how the case turned out. The expert testified that the appraisal district had appraised Houston Laureate's office building unequally compared to comparable buildings. The district had given the other buildings the same class rating and land-use code as Houston Laureate's building. The expert made various adjustments to the appraised values of the other buildings, including adjustments to reflect whether the buildings included parking facilities. The appraised values of some comparable buildings changed between the original 2006 appraisals and the trial (which occurred in 2008), but the expert used the values on the 2006 appraisal roll at the time of the trial. The district did not present any evidence to contradict the PES expert. The trial court ruled for the owner, and the district appealed.

On appeal, the district argued that O'Connor's lawyer acted unethically when he presented the expert's testimony because the expert's fee was contingent on his testimony or on the outcome of the trial. The court of appeals disagreed. It said that O'Connor's fee might have been contingent on the outcome, but PES was a separate company and it was receiving a flat fee. Even if the lawyer had acted unethically, his unethical conduct would not have required the trial court to excluded the evidence that he offered. The district also argued that the expert's testimony was so unreliable that the trial court erred by considering it. Again, the court of appeals disagreed. The expert had accounted for matters such as parking facilities and changed values. He was allowed to base his adjustments on his own expertise and experience. The court of appeals affirmed the trial court's judgment for the property owner.

***Tomdra Investments, L.L.C. v. CoStar Realty Information, Inc.***  
2010 WL 3430493 (N.D. Texas, August 24, 2010)

Issues: claims against party providing information to appraisal district

Tomdra protested the 2008 appraisal of its property, and then appealed the ARB's order. Tomdra and the appraisal district settled the case when the appraisal district agreed to reduce the appraised value of Tomdra's property. Tomdra then sued CoStar alleging that CoStar had provided the erroneous market data that had lead the appraisal district to over-appraise Tomdra's property. CoStar transferred the case to federal district court.

Tomdra alleged that CoStar had violated §12.002 of the Civil Practice and Remedies Code. That statute concerns someone who fraudulently asserts a lien against property and who does so with the intent to injure the property owner. The court ruled that Tomdra had not asserted a viable claim against CoStar because it was not CoStar that fixed or claimed any liens on Tomdra's property. The tax liens belonged to the taxing units, not to CoStar. Tomdra also alleged that CoStar was negligent when it provided information to the appraisal district. Again, the court ruled that Tomdra had failed to state a viable claim. Tomdra did not allege any facts to show that CoStar owed it any

legal duty of care or that an injury to Tomdra was a reasonably foreseeable consequence of CoStar's providing information to the district. The court also explained that a property owner who claims that his property is over-appraised is limited to the procedures and remedies prescribed by the Tax Code (i.e., protests, appeals, etc.). The property owner has no right to sue someone who provided information to the appraisal district. The court dismissed the case.

***Bolkcom v. Cameron Appraisal District***

2010 WL 3180334 (Tex. App. – Corpus Christi August 12, 2010, no pet.)(not reported)

Issues: exhaustion of remedies

Bolkcom sued the appraisal district claiming that it had failed to recognize his partial ownership of a property and failed to send him notices concerning the property. He claimed that the district had been making this error for over twenty-five years and that he had attempted to correct the error through “administrative process (appraisal review board) and failed.” The district responded that Bolkcom had not raised his claims before the ARB and asked the trial court to dismiss his suit. Bolkcom testified that he had attended an ARB protest hearing but that the ARB had ignored him. He did not produce any ARB orders or other records to substantiate his claim. The trial court dismissed the case and Bolkcom appealed.

The court of appeals affirmed the dismissal of the case. The court concluded that Bolkcom had not alleged facts that would affirmatively demonstrate that he had exhausted the remedies available from the ARB or that the trial court had jurisdiction to consider his claims. Bolkcom's due-process rights were not violated because he could have protested the district's alleged mistakes, including its alleged failure to send him notices.

***Land v. Palo Pinto Appraisal District***

321 S.W.3d 722 (Tex. App. – Eastland August 5, 2010, no pet.)

Issues: appraisal of leasehold interests

The Brazos River Authority owned lake lots and leased them to private parties. Because the lots were tax-exempt, the leasehold interests were taxable to the lessees under §23.13 of the Tax Code. The appraisal district appraised the lots using the market approach and actual sales of leasehold interests. It appraised the lessee-owned improvements using the cost approach. It used the Marshall & Swift service and a local modifier. Several lessees filed protests concerning the appraisals of their interests and then sued to appeal the ARB's orders. The trial court ruled for the appraisal district and actually raised the values of several of the leaseholds. The lessees appealed.

The court of appeals affirmed the judgment for the district. The court explained that the market approach was a valid way to appraise leasehold interests. The district did not have to use the alternative “equity method” in which the appraiser capitalizes the

difference between market-based rent and the actual rent that a lessee pays. The sales data considered by the district showed that factors such as the lengths of the leases and the amounts of rent paid did not affect sales prices for the leasehold interests. Consequently, these factors were not individual characteristics that had to be considered by the district. The district was allowed to use a local modifier in connection with its cost-approach appraisals of the improvements.

***Skoda v. Montague County***

2010 WL 3075718 (Tex. App. – Fort Worth August 5, 2010, pet. denied) (not reported)

Issues: sovereign immunity

The county mistakenly sued Skoda for delinquent taxes. Skoda filed counterclaims against the county and its tax assessor-collector. Her claims were vague, but she essentially contended that the county had wrongfully sued her. The county dismissed its claims, but Skoda continued to prosecute her counterclaims. The county and the TAC claimed that they were immune from Skoda's claims. Skoda claimed that she could sue them under the Texas Tort Claims Act (TTCA). (Chapter 101 of the Civil Practice and Remedies Code). The trial court ruled for the county and the TAC and dismissed Skoda's claims. She appealed.

The court of appeals affirmed the dismissal of Skoda's claims. The court explained that under §101.106 of the TTCA, when someone files a tort claim against a governmental entity and one of its employees, the employee must be dismissed from the suit. This meant that the TAC had to be dismissed regardless of whether Skoda was suing her in her official capacity or her individual capacity. The TTCA allows governmental entities to be sued on certain grounds, but it does not apply to claims concerning the assessment or collection of taxes. Thus, both the TAC and the county were immune from Skoda's claims.

***Roberts v. T.P. Three Enterprises, Inc.***

321 S.W.3d 674 (Tex. App. – Houston [14<sup>th</sup> Dist.] August 3, 2010, pet. stricken)

Issues: challenge to tax sale

Taxing units sued Washington for delinquent taxes on a tract of land. The court ordered the sale of the land, and T.P. bought it at the sheriff's sale. T.P. recorded the sheriff's deed on April 22, 2004. On August 4, 2006, Roberts filed suit to challenge the sale. Roberts claimed that she was the rightful owner of the land having acquired it through adverse possession. She claimed that her due-process rights were violated when she was not given notice of the original delinquent-tax suit. T.P. moved for summary judgment on two grounds: 1) Roberts did not file her suit on time; and 2) Roberts did not deposit money with the district clerk to cover the delinquent taxes, penalties, interest, etc. The trial court entered summary judgment for T.P., and Roberts appealed.

The court of appeals affirmed the summary judgment for T.P. Section 34.08 of the Tax Code requires anyone filing suit to challenge a tax sale to deposit money with the district clerk or file a pauper's affidavit. The trial court's record included a certificate from the clerk showing that no deposit had been paid and no affidavit had been filed. Roberts filed no evidence to the contrary.

Section 33.54 provides that a suit to challenge a tax sale must be filed within a certain period of time after the buyer records the sheriff's deed: two years if the property was a residence homestead or agricultural land; one year for any other type of property. Roberts's suit was filed more than two years after the sheriff's deed was recorded. Section 33.54 contains an exception for a party who was not served in the delinquent-tax suit and who paid taxes on the property after the sale. Roberts had filed two affidavits with the trial court. In one, she claimed to have paid taxes on some unidentified property. In the other, she claimed to have paid taxes on a property different than the land in question. Thus, it was undisputed that Roberts had not filed her suit on time and that she did not qualify for the exception to §33.54.

***Rizzo v. Ancira***

2010 WL 2977595 (Tex. App. – Austin July 29, 2010, no pet.)(not reported)

Issues: rollback taxes on agricultural land

Ancira owned land appraised as open-space agricultural land. In July, 2007, one of his daughters told the appraisal district that the land was no longer being used for agriculture. In November, 2007, Ancira sold the land to Rizzo. Their contract provided that if the land became subject to rollback taxes because of a change of use by Ancira, he would pay those taxes. If rollback taxes were triggered by the sale itself or by Rizzo's use of the land after the closing, he would pay the taxes. In December, 2007, the appraisal district made a change-of-use determination and sent notices to Ancira and Rizzo. An employee of the district said that the sale itself triggered the change-of-use determination. When Ancira would not pay the rollback taxes, Rizzo paid them and sued Ancira for fraud, breach of contract and related claims. The trial court entered judgment for Ancira, and Rizzo appealed.

Rizzo argued that under §23.55 of the Tax Code, a sale of a property does not trigger a rollback tax. The rollback could have been triggered only by Ancira's activities, and Ancira had the obligation under the contract to pay the taxes. The court of appeals responded that the district could have made a mistake; it could have made its change-of-use determination based on the sale. The statement from the district's employee supported that conclusion. The trial court could have reasonably concluded that it was the sale that triggered the rollback and that Rizzo was, therefore, responsible for the taxes. The court of appeals affirmed the trial court's judgment for Ancira.

***Strauss v. Belt***

322 S.W.3d 707 (Tex. App. – Austin, July 23, 2010, no pet.)

Issues: excess proceeds following tax sale

Strauss sold real property to Gitlin in 1985. Taxing units eventually sued Strauss and Gitlin for delinquent taxes on the property for the years 1984 through 2001. The trial court entered judgment for the taxing units and ordered the property sold. Less than two weeks before the sale, Gitlin sold the property to Belt using a quitclaim deed. The tax sale occurred as scheduled and resulted in \$20,000 in excess proceeds. Belt claimed the excess proceeds, and the trial court awarded them to him. Strauss appealed.

Strauss argued that the deal between Gitlin and belt should be considered as a transfer of excess proceeds. It was invalid because it did not comply with the requirements of §34.04(f) of the Tax Code. That provision allows an assignment of excess proceeds only after they have been deposited with the court and requires the assignor to sign a sworn statement to the effect that he understands what he is doing. The court of appeals, however, ruled that the transaction was a sale of the property itself, not the transfer of a right to excess proceeds. The requirements of §34.04(f) did not apply. Strauss also argued that Belt had waived his claim to excess proceeds when he made no effort to pay the delinquent taxes or postpone the tax sale after buying the property or to redeem it after the tax sale. The court disagreed and found no waiver by Belt.

The court of appeals noted that the legislature amended the law in 2009 to address cases like this one. Now, in most cases, a person like Belt who buys a property after a court has ordered a tax sale but before the sale has occurred cannot claim any excess proceeds from the sale. That amendment, however, came too late to apply to this case. Thus, the court of appeals affirmed the judgment awarding the excess proceeds to Belt.

***Bilinsco, Inc. v. Harris County Appraisal District***

321 S.W.3d 648, (Tex. App. – Houston [1<sup>st</sup> Dist.], July 22, 2010, pet. denied)

Issues: service of process

Bilinsco protested the appraisal of its property and then filed suit to appeal the ARB's order. Its petition was filed timely and named the appraisal district and the ARB as defendants. Bilinsco asked the court clerk to have both the district and the ARB served with the suit papers. The ARB was served, but the district was not. The ARB filed an answer and exchanged discovery documents with Bilinsco. Ten months after the suit was filed, the district and the ARB asked the trial court to dismiss it because the district had not been served. A month after that, Bilinsco contacted the clerk and requested again that the district be served. The district was served and filed an answer objecting to the late service. The trial court dismissed the case, and Bilinsco appealed.

The court of appeals explained that if a plaintiff generally satisfies a statute of limitations by filing his suit on time. The law does not specify a time period within which a defendant must be served, but the plaintiff must be diligent and check with the clerk to make sure that service has occurred. If the plaintiff is diligent, then service on the

defendant will be considered timely even if it occurs after the filing deadline. In this case, however, Bilinsco was not diligent about having the district served.

Bilinsco argued that the same lawyers represent both the district and the ARB and that the ARB's discovery responses included the district's name in the style (title) of the case. The ARB's answer and responses said they were being filed by the "Defendant" without specifying that "Defendant" meant the ARB. Bilinsco claimed that it was misled into believing that the district had waived its right to be served. The court pointed out that the answer had specified that "Defendant" meant the ARB and that the discovery responses had identified the ARB but not the district as a party. Even if the discovery responses were misleading, the ARB filed them more than seven months after the suit was filed. If it had been diligent, Bilinsco would have already had the district served by then. Bilinsco did not have an excuse for its failure to have the district served, and the district was not estopped to complain about the lack of service. The court of appeals affirmed the dismissal of the case.

***AHF-Arbors at Huntsville I, LLC v. Walker County Appraisal District***  
2010 WL 2869764 (Tex. App. – Waco, July 21, 2010, pet. granted)(not reported)

Issues: CHDO exemption

Arbors sought community housing development organization (CHDO) exemptions for two apartment complexes. The appraisal district denied the exemptions, and, after an unsuccessful protest before the ARB, Arbors filed suit. The trial court entered a summary judgment for the district after finding that there was no evidence to show that Arbors satisfied several of the requirements for the exemption. Arbors appealed.

The court of appeals focused on just one of the requirements for an organization seeking a CHDO exemption. Section 11.182(g) of the Tax Code requires the organization to have an annual audit and to provide copies to the appraisal district and to the Texas Department of Housing and Community Affairs. Arbors offered no evidence that it had ever provided copies of audits to the TDHCA. In the absence of any evidence to show that Arbors had satisfied this requirement, the court of appeals affirmed the summary judgment for the district.

***Bolling v. Farmers Branch Independent School District***  
315 S.W.3d 893 (Tex. App. – Dallas, June 26, 2010, pet. denied)

Issues: sufficiency of appellate brief

The trial court entered a judgment against Bolling in a delinquent-tax case, and Bolling appealed. Instead of hiring a lawyer, Bolling wrote his own appellate brief. The brief generally complained that the taxing units had not provided discovery information that Bolling wanted but it did not identify any particular order from the trial court that it alleged to be erroneous. It claimed that Bolling could not be taxed because he had no "commercial nexus" and because he had not agreed to be taxed. He cited some books

about wills and trusts and some federal law having nothing to do with Texas property taxes. The court of appeals gave Bolling a chance to amend his brief, but he failed to make it any more comprehensible. The court dismissed the appeal as a result of Bolling's failure to identify particular questions of law to be decided, make clear legal arguments and cite relevant legal authorities. The court noted that even a party without a lawyer must comply with the requirements for briefs.

***Bryan Independent School District v. Cune***

2010 WL 2541841 (Tex. App. – Houston [14<sup>th</sup> Dist.], June 24, 2010, pet. denied) (not reported)

Issues: excess proceeds following tax sale

Taxing units sued Jenkins for delinquent taxes on real property. When he failed to answer the suit, the court ordered the property sold. The sheriff's sale resulted in excess proceeds. The district clerk sent notices of the excess proceeds to the attorney *ad litem* appointed to represent Jenkins and to Jenkins himself at the address reflected in the court's records. No one attempted to claim the excess proceeds until almost five years after the sale. Then, Cune filed a motion claiming to be the assignee of Jenkins's rights. The taxing units objected to Cune's claim on the basis that it was not filed within the two years following the sale as required by §34.04 of the Tax Code. Cune responded that Jenkins had never received the clerk's notice of the excess proceeds. The trial court awarded the excess proceeds to Cune on the grounds that the delinquent tax claims had already been paid. The taxing units appealed.

The court of appeals reversed the trial court's order. The higher court explained that under §§34.03 and 34.04, a claim for excess proceeds *must* be filed within the two years following a tax sale. Because no timely claim was filed, the clerk should have distributed the money to the taxing units. It did not matter whether Jenkins received the clerk's notice. Even if he did not, the two-year deadline did not violate his right to due process. It did not matter that the taxing units had already had their tax claims paid in full. Further, it did not matter that the taxing units had not filed their own claims. The clerk was supposed to pay them automatically when no one filed a claim during the two-year period. Cune had no right to the money.

***In re Jefferson County Appraisal District***

315 S.W.3d 229 (Tex. App. – Beaumont, June 10, 2010, no pet.)

Issues: discovery of trial preparation

Total sued the appraisal district to contest the appraised value of a refinery. While deposing an appraiser designated by the district as a testifying expert, Total's lawyers learned that the district's lawyers had hired a jury consultant and conducted a practice trial to help them prepare for the actual trial. The expert answered the deposition questions about his experience in the practice trial. Total then sought to make the district provide it with much more information about the consultant and the practice trial.

Total demanded that the district present the consultant for his own deposition. When the district refused, Total sought an order from the trial court. The court ordered the district to provide the requested information and to produce the consultant for deposition. The district then applied to the court of appeals for a writ of mandamus to overrule the trial court's order.

The court of appeals ruled that the district did not have to provide the requested information or produce the consultant for deposition. The court based its ruling on the "work-product privilege" that generally protects a lawyer's ability to analyze a case and prepare for trial without having to disclose all his thoughts and strategies to the other side. The privilege extends to consultants who assist the lawyer. Total had no right to discover information about the consultant who was hired to help the district's lawyers determine the most effective way to persuade a jury. The information might be discoverable if the consultant's opinions had been reviewed by a testifying expert, but the district's testifying appraiser had not read or heard the consultant's advice or opinions. Total had the right to ask the appraiser about his own experience with the practice trial, but it had no right further to information about the work of the district's lawyers and their consultant.

***Harris County Appraisal District v. Wilkinson***

317 S.W.3d 763 (Tex. App. – Houston [1<sup>st</sup> Dist.], June 3, 2010, pet. denied)

Issues: homestead exemption

The Wilkinsons owned a home and received a homestead exemption in Montgomery County from 1999 through 2003. They owned a storage facility in Harris County where a mobile home was located. In December of 2003, they bought a large house in Harris County, but it needed some work before they could move in. At about the same time, they moved into the mobile home. In late January of 2004, they moved into their new house. They claimed that the mobile home was their residence homestead as of January 1, 2004 because they slept there, held a new year's party there and received a bank statement there. Mr. Wilkinson got a driver's license showing the mobile home's address. The appraisal district, however, denied their exemption application. They protested the district's decision, and then took their claims to court. The trial court ruled that the Wilkinsons were entitled to the homestead exemption for the mobile home because it was their principal residence as of January 1, 2004. The district appealed.

The court of appeals explained that a person's *principal* residence is his main or primary residence that he occupies on a regular basis. In this case, the Wilkinsons intended the mobile home to be only a temporary residence while they waited for the work to be completed on their new house. In the court's words, "A transient stay in a mobile home pending a move from one primary residence to another does not transform the temporary residence into a 'principal residence.'" The court of appeals reversed the trial court and ruled that the mobile home did not qualify for the homestead exemption.

*Editor's comment:* Although the court's opinion does not mention this fact, it is clear that the Wilkinsons wanted to establish a very low school-tax freeze on the mobile home and then transfer it to their new house. The court's opinion may help end this kind of abuse of tax freezes.

***Hotel Corp. International v. Harris County Appraisal District***

2010 WL 2195461 (Tex. App. – Houston [14<sup>th</sup> Dist.], June 3, 2010, no pet.)(not reported)

Issues: exhaustion of remedies; payment of taxes pending appeal

Hotel Corp. protested the 2006 appraisals of its real and personal property, but failed to appear at the ARB's hearings. Sometime later, Hotel Corp. filed motions under §25.25(d) of the Tax Code asking the ARB to correct the values. It appeared for the hearing on its personal-property, and the ARB reduced that value. It did not appear for the hearing on its real-property. Hotel Corp. then sued the appraisal district and the ARB demanding that both values be lowered and that the ARB conduct more hearings. It did not pay any taxes until months after they became delinquent on February 1, 2007. At the request of the defendants, the trial court dismissed the case, and Hotel Corp. appealed.

The court of appeals upheld the trial court's dismissal of the case. It explained that because Hotel Corp. failed to pay taxes on time, it forfeited whatever rights it might have otherwise had to appeal the ARB's actions or to have the ARB conduct additional hearings. Section 41.15 applies to a situation in which a property owner is entitled to a hearing but the ARB will not hold the hearing. It allows a property owner to sue and allows a court to order the ARB to hold a hearing. It does not apply where the ARB attempts to hold hearings but the property owner does not appear. Further, when the ARB attempts to give a property owner a hearing (even a flawed hearing), §41.15 does not provide an alternative to an appeal of the ARB's determination. The property owner can only file an appeal under Chapter 42, and he must comply with Chapter 42's statute of limitations and its requirement for a conditional payment of taxes.

***F-Star Socorro, L.P. v. El Paso Central Appraisal District***

324 S.W.3d 172 (Tex. App. – El Paso, May 28, 2010, no pet.)

Issues: exhaustion of remedies; findings of fact and conclusions of law

Several taxing units agreed to grant 50% tax abatements on F-Star's new commercial development. F-Star then leased the property to Thompson through a lease calling for Thompson to pay the taxes on the property. F-Star misunderstood the nature of tax abatements and apparently thought that: 1) the appraisal district should appraise the property at its full value; 2) Thompson should pay taxes on the full, unabated value; and 3) the taxing units should share the taxes with F-Star. When the appraisal district applied the abatement correctly and exempted 50% of the property's value, F-Star sued it without first filing a protest with the ARB. At the request of the appraisal district, the

trial court dismissed the case. The court ignored F-Star's request for findings of fact and conclusions of law. F-Star appealed.

The court of appeals upheld the trial court's dismissal of the case because F-Star had not exhausted the remedies available from the ARB. F-Star's claim, i.e., that the appraisal district had wrongly exempted some of the property's value, had to be raised before the ARB before it could be raised in court. Under §§41.41 and 42.09 of the Tax Code, any action by an appraisal district must be protested if it applies to a property owner and affects the owner adversely. Further, the trial court had no duty to make findings and conclusions because it dismissed the case as a matter of law. There were no disputed factual issues and the trial court did hear evidence or decide any factual issues.

***Unified Housing of Parkside Crossing, LLC v. Appraisal Review Board of Williamson County***

2010 WL 2133955 (Tex. App. – Austin, May 26, 2010, no pet.) (not reported)

Issues: exhaustion of remedies

In 2005, United protested the appraisal district's denial of an exemption for United's property. In the notice of protest, United's lawyer listed several dates when he would be unavailable and asked that the ARB not schedule its hearing on one of those dates. The ARB sent the lawyer a notice stating that the hearing was scheduled on one of those black-out dates. According to the lawyer, he telephoned the ARB and someone told him that the hearing would be rescheduled if he faxed in a written request. He sent the written request, but the ARB did not reschedule the hearing. A representative called the lawyer to tell him that the hearing would not be rescheduled. Neither the lawyer nor anyone else appeared at the hearing on behalf of United, and the ARB dismissed the protest. In 2008, United sued the ARB alleging that it had been improperly denied a hearing on its 2005 protest. The ARB asked the trial court to dismiss the case because it was filed too late and because United had not exhausted its remedies before the ARB. The court dismissed the case, and United appealed.

The court of appeals affirmed the dismissal of the case. Although United had pleaded a claim under §41.45 of the Tax Code to compel the ARB to hold another hearing and had not sought to appeal an ARB order under Chapter 42, the same statute of limitations applied. The suit was barred because United did not file within the forty-five days after it received notice of the ARB's dismissal of its protest. (see §42.21, which now provides a sixty-day period for the filing of an appeal). Additionally, United failed to exhaust the remedies available from the ARB. By not sending a representative or even an affidavit to the protest hearing, United denied the ARB a meaningful opportunity to consider the protest. The trial court had no jurisdiction to consider a matter that had not been considered by the ARB.

***Estate of Dorothy Springer v. Dallas County***

2010 WL 1909597 (Tex. App. – Dallas, May 12, 2010, no pet.)(not reported)

Issues: evidence in delinquent-tax suit; service of process; parties to delinquent-tax suit

Several taxing units sued Springer's estate for delinquent taxes on real property. Gore filed an answer as the executor of the estate. The school district was not a party, and the city was dismissed as a party during the course of the case. The trial court entered judgment for the other taxing units. Six months later, they asked the court to vacate its judgment and reopen the case so that the city and the school district could be included. The court agreed, and the city and school district intervened. When the court conducted a new hearing, Gore did not show up. The taxing units offered their delinquent-tax records as evidence. Those records showed that the property was owned by someone named King. The court nevertheless entered a default judgment in favor of all the taxing units and against the estate. The estate appealed.

On appeal, the estate made several arguments. It argued that it had not been properly served with the original petition filed by the taxing units. The court of appeals explained that the estate had waived that claim when Gore filed an answer on its behalf. The estate argued that it had not been sent copies of some of the pleadings and motions filed by the taxing units. The record, however, showed that the copies had been mailed to Gore at the two addresses that he had used on the estate's own pleadings. The estate complained about the way the trial court had vacated its first judgment in order to allow the city and school district to intervene. The court of appeals explained that §33.56 of the Tax Code allows a taxing unit that is a party to a case to file a motion asking a trial court to vacate a judgment so that necessary parties can be included. There is no time limit on the filing of such a motion. The city and the school district were necessary parties under §33.44, and the trial court properly vacated its first judgment in order to allow them to intervene.

The estate also argued that the delinquent-tax records did not constitute sufficient evidence to support a judgment against the estate. The court of appeals agreed. It reasoned that when delinquent-tax records do not show the property to be owned by the defendant in the case, they do not support a judgment against that defendant. Ordinarily, under §33.47, delinquent-tax records provide all the proof necessary for a judgment, but not when they do not identify the defendant as the owner of the property. The court of appeals reversed the trial court's judgment and sent the case back to the lower court for a new trial.

*Editor's Comment.* If taxing units discover that their records show the wrong person as the owner of a property, they should notify the appraisal district. Under §25.25, the appraisal district can correct the records. When the taxing units sue the actual owner, their records will correctly show him as the owner.

***Brandywood Housing, Ltd. v. Harris County Appraisal District***

2010 WL 1752334 (Tex. App. – Houston [14<sup>th</sup> Dist.], May 4, 2010, no pet.)(not reported)

Issues: low-income housing exemption

Brandywood owned an apartment complex that provided housing to low and moderate-income residents. Brandywood applied to the appraisal district for an exemption for the complex under §11.1825 of the Tax Code. Its applications concerned the 2004 and 2005 tax years. The applications were still pending in mid 2006 when the appraisal district asked Brandywood to provide evidence that the taxing units that taxed the complex had approved the exemption. In very populous counties (those with 1.4 million or more people), a low-income housing exemption is a local-option exemption that must be approved by taxing units. Brandywood did not produce any evidence of approval by the taxing units, and the appraisal district denied the applications. After an unsuccessful protest before the ARB, Brandywood filed suit. The trial court entered a summary judgment for the district, and Brandywood appealed.

On appeal, Brandywood argued that the appraisal district had waived the requirement that a low-income housing exemption be approved by the taxing units. It claimed that the waiver occurred when the district did not raise the issue until mid 2006. The court of appeals rejected Brandywood's argument and found no legal deadline for the district to have raised the question of whether the taxing units had approved the exemption. The district had never shown any clear intent to not enforce the requirement of taxing-unit approval. The court of appeals did not decide whether an appraisal district even *could* waive a legal requirement intended to benefit taxing units. The court affirmed the trial court's judgment for the district.

***Harris County Appraisal District v. KMI Yorktown LP***

2010 WL 1729401 (Tex. App. – Houston [1<sup>st</sup> Dist.], April 29, 2010 no pet.) (not reported)

Issues: who can file a protest or appeal

In 2008, the appraisal district appraised a property in the name of Yorktown. Yorktown protested the appraisal of the property, and then filed suit to appeal the ARB's order. Yorktown named itself in the lawsuit "as the property owner." Then, the appraisal district realized that Yorktown did not actually own the property. It had sold the property to Timbercreek in 2006. Yorktown amended its pleadings to add Timbercreek as a plaintiff. The appraisal district asked the trial court to dismiss the case because Yorktown did not own the property and because Timbercreek had not filed a protest. The trial court refused to dismiss the case, and the appraisal district appealed.

The court of appeals reversed the trial court's decision and dismissed the case. The court explained that because Yorktown had ceased to own the property prior to 2008, it had no standing to contest the 2008 appraisal in a protest or lawsuit. The plaintiffs tried arguing that §42.21 of the Tax Code allows the pleadings in a pending suit to be amended to "correct or change the name of a party." The court of appeals rejected that argument and explained that §42.21 does not allow a property owner like Timbercreek to appear as a plaintiff in an appeal when it never filed a protest with the ARB. The plaintiffs also tried arguing that Yorktown was not really a separate entity, that it was really just a "common name" for Timbercreek and that the Rules of Civil Procedure

allow a party to substitute its formal name for its common name during the course of a suit. The record, however, contained no evidence that Timbercreek had ever done business under the name of Yorktown. They were separate companies.

***Harris County Appraisal District v. Shen***

2010 WL 1729397 (Tex. App. – Houston [1<sup>st</sup> Dist.], April 29, 2010, no pet.)(not reported)

Issues: who can file a protest or appeal

In 2007, the appraisal district appraised a property in the name of Shen. Shen protested the appraisal of the property, and the ARB reduced the appraised value. Shen then filed suit to appeal the ARB's order and seek an even lower appraised value. Shen named himself in the lawsuit "as the property owners." The district then discovered that the properties had been sold by Shen to Norberwick sometime prior to January 1, 2007. The district asked the trial court to dismiss the case because the plaintiff, Shen did not own the property. Before the trial court could act on the appraisal district's request, Shen amended its pleadings to add Norberwick as a plaintiff. The district again urged the trial court to dismiss the case. The trial court refused to dismiss the case, and the appraisal district appealed.

The court of appeals reversed the trial court's decision and dismissed the case. The court explained that because Shen did not own the property in 2007, he had no standing to contest the 2007 appraisal in a protest or lawsuit. The plaintiffs tried arguing that §42.21 of the Tax Code allows the pleadings in a pending suit to be amended to "correct or change the name of a party." The court of appeals rejected that argument and explained that §42.21 does not allow a property owner like Norberwick to appear as a plaintiff in an appeal when it never filed a protest with the ARB. The plaintiffs also tried arguing that Shen was not really a separate entity, that he was really just a "common name" for Norberwick and that the Rules of Civil Procedure allow a party to substitute its formal name for its common name during the course of a suit. The record, however, contained no evidence that Norberwick had ever done business under the name of Shen. Norberwick was a limited partnership, and Shen was a separate and distinct, flesh-and-blood human being.

***Milbank 521 Sam Houston I, LLC v. Harris County Appraisal District***

2010 WL 1729396 (Tex. App. – Houston [1<sup>st</sup> Dist.], April 29, 2010, no pet.) (not reported)

Issues: who can file a protest or appeal

In 2008, the appraisal district appraised several real properties in the name of Atrium. Atrium protested the appraisals of the properties, and the ARB reduced the appraised values. Atrium then filed suit to appeal the ARB's orders and to seek an even lower appraised value. Atrium named itself in the lawsuit "as the Property Owners and the Property Owners." The district then discovered that the properties had been sold by Atrium to Milbank in 2007. The district asked the trial court to dismiss the case because

the plaintiff, Atrium did not own the properties. Before the trial court could act on the appraisal district's request, Atrium amended its pleadings to add Milbank as a plaintiff. The district again urged the trial court to dismiss the case. The trial court granted the district's request, and the plaintiffs appealed.

The court of appeals upheld the dismissal of the case. The court explained that because Atrium did not own the properties in 2008, it had no standing to contest the 2008 appraisals in a protest or lawsuit. The plaintiffs tried arguing that §42.21 of the Tax Code allows the pleadings in a pending suit to be amended to "correct or change the name of a party." The court of appeals rejected that argument and explained that §42.21 does not allow a property owner like Milbank to appear as a plaintiff in an appeal when it never filed a protest with the ARB. The plaintiffs also tried arguing that Atrium was not really a separate entity, that it was really just a "common name" for Milbank and that the Rules of Civil Procedure allow a party to substitute its formal name for its common name during the course of a suit. The record, however, contained no evidence that Milbank had ever done business under the name of Atrium. They were separate companies.

***RRB Land Investments, Ltd. v. Harris County Appraisal District***

2010 WL 1729390 (Tex. App. – Houston [1<sup>st</sup> Dist.], April 29, 2010, no pet.)(not reported)

Issues: who can file a protest or appeal

In 2008, the appraisal district appraised real property in the name of Cypresswood. Cypresswood protested the appraisal of the property, and the ARB reduced the appraised value. Cypresswood then filed suit to appeal the ARB's order and seek an even lower appraised value. Cypresswood named itself in the lawsuit "as the Property Owners and the Property Owners." The district then discovered that the properties had been sold by Cypresswood to RRB in 2006. The district asked the trial court to dismiss the case because the plaintiff, Cypresswood did not own the property. Before the trial court could act on the appraisal district's request, Cypresswood amended its pleadings to add RRB as a plaintiff. The district again urged the trial court to dismiss the case. The trial court granted the district's request, and the plaintiffs appealed.

The court of appeals upheld the dismissal of the case. The court explained that because Cypresswood did not own the property in 2008, it had no standing to contest the 2008 appraisal in a protest or lawsuit. The plaintiffs tried arguing that §42.21 of the Tax Code allows the pleadings in a pending suit to be amended to "correct or change the name of a party." The court of appeals rejected that argument and explained that §42.21 does not allow a property owner like RRB to appear as a plaintiff in an appeal when it never filed a protest with the ARB. The plaintiffs also tried arguing that Cypresswood was not really a separate entity, that it was really just a "common name" for RRB and that the Rules of Civil Procedure allow a party to substitute its formal name for its common name during the course of a suit. The record, however, contained no evidence that RRB had ever done business under the name of Cypresswood. They were separate companies.

***Dallas Central Appraisal District v. 717 S. Good Latimer Ltd.***

2010 WL 1729343 (Tex. App. – Dallas, April 29, 2010, pet. denied) (not reported)

Issues: tax payment while appeal is pending

Good Latimer protested the 2008 appraisal of its property and then filed suit to appeal the ARB's order. February 1, 2009, the delinquency date for 2008 taxes, came and went without Good Latimer having paid anything at all. In May of 2009, Good Latimer filed a pauper's affidavit claiming that it was unable to pay any 2008 taxes on the property. The appraisal district asked the trial court to dismiss the case on the basis of Good Latimer's failure to pay. Good Latimer asked the court to rule that it had substantially complied with the payment requirement of §42.08 of the Tax Code. The trial court ruled for Good Latimer, and the appraisal district appealed.

The court of appeals explained that §42.08 ordinarily requires a property owner to pay at least some of the taxes on his property. If he does not, the trial court should dismiss his appeal. The statute, however, also allows a property owner to file a pauper's affidavit. If the trial court finds that requiring the property owner to pay (or dismissing his case) would unreasonably restrain his right of access to the court, the court can allow the case to proceed without a payment. The court of appeals also noted that a property owner need only "substantially comply" with §42.08. That means that he must perform the "essential requirements" of the statute. Section 42.08 allows the filing of a pauper's affidavit and does not expressly require that it be filed before the delinquency date. The court of appeals concluded that Good Latimer had substantially complied with §42.08 and affirmed the trial court's ruling for Good Latimer.

*Editor's Comment:* Because §42.08 allows the filing of a pauper's affidavit as a substitute for a tax payment, it is reasonable to infer that the legislature intended the same deadline to apply to both. The court rejected this inference, and its opinion provides no guidance about when a property owner may file a pauper's affidavit. Further, suppose that a corporate property owner has the money to pay taxes in January, but it does not pay. In April, it distributes all its money to its shareholders and has none left for paying taxes. Can the property owner claim pauper's status based on events that occur after the delinquency date? This opinion raises troubling questions.

***Lee v. Dykes***

312 S.W.3d 191 (Tex. App. – Houston [14<sup>th</sup> Dist], April 27, 2010, no pet.)

Issues: evidence of market value

This is not a property tax case, but does concern how one proves the market value of a property. When Mr. Dykes and Ms. Lee broke off their engagement, he sued her to recover the market value of her engagement ring. In an effort to prove the ring's value, Dykes testified that he had paid \$26,000 for it seventeen months prior to the break-up.

The jury found that the ring was worth \$13,000 at the time of the break-up. Lee appealed.

The court of appeals ruled that the purchase price of the ring did not constitute sufficient evidence of its market value, even if Lee did not object to Dykes's testimony. There was no other evidence of the ring's value. Dykes did not even testify to his own opinion of the value at the time of the break-up. Because Dykes had failed to prove the ring's value, he was not entitled to any compensation for his loss. The court of appeals reversed the trial court's judgment for Dykes.

***In re Village at Oakwell Farms, Ltd.***

428 B.R. 372 (Bkrcty. W.D. Tex., April 19, 2010)

Issues: deadline for contesting tax in bankruptcy

Oakwell protested the 2009 appraisal of its apartment complex. Oakwell did not appeal the ARB's order to a state court under Chapter 42 of the Tax Code. During the sixty-day period for filing an appeal, however, Oakwell filed a petition with the bankruptcy court. Sometime after the sixty-day period had passed, Oakwell, acting as a debtor in possession, sought to contest the 2009 appraisal in the bankruptcy court under §505 of the Bankruptcy Code. The bankruptcy court had to decide which deadline applied and whether Oakwell could still contest the appraisal. Oakwell argued that §108 of the Bankruptcy Code gave it two years in which to contest the appraisal. The court, however, ruled that the controlling statute was §505(a)(2)(C). That section says that a bankruptcy court cannot consider the amount or legality of a property tax if the deadline has passed for contesting the tax under non-bankruptcy law. Because it was too late for Oakwell to file an appeal in state court under §42.21 of the Tax Code, it was also too late for Oakwell to contest the appraisal of its property in bankruptcy court. Oakwell's bankruptcy did not stop the sixty-day period from expiring.

***Hunt v. CIT Group/Consumer Finance, Inc.***

2010 WL 1508082 (Tex. App. – Austin, April 15, 2010, pet. denied) (not reported)

Issues: foreclosure of transferred tax lien; fraud

CIT held a deed of trust on a condominium owned by McKenzie. McKenzie failed to pay his 2004 taxes. Then, he agreed to allow Exodus to pay those taxes in exchange for his promissory note and a transferred tax-lien deed of trust on the condominium. Just a few months later, Exodus claimed that McKenzie wasn't paying on his note and directed the trustee to foreclose. The trustee deeded the property to Cornerstone. Exodus, Cornerstone and the trustee were acting in cahoots, and the foreclosure failed to meet many legal requirements. They failed to notify McKenzie by certified mail. They failed to notify CIT at all. They failed to post a notice at the courthouse or to file a notice with the county clerk. They did not conduct the foreclosure sale at the courthouse. Cornerstone then reconveyed the condominium to Cairns who gave only his note in exchange. Cairns made no payments on his note.

When CIT learned of the foreclosure, it attempted to redeem the condominium, but its request was refused. CIT then sued everybody (except McKenzie) for fraud and wrongful foreclosure. The trial court found the defendants guilty of fraud, voided the foreclosure and any liens claimed by the defendants and ordered the defendants to pay CIT's attorneys' fees. The trustee appealed. The other defendants attempted to appeal, but failed to file proper notices of appeal.

The court of appeals upheld the trial court's judgment for CIT. The court explained that CIT as the holder of a lien on the condominium was a proper party with standing to challenge the improper foreclosure. The issue was not the validity of a tax sale conducted on behalf of a taxing unit under Chapter 34 of the Tax Code. That would have required CIT to pay the taxes in question into the trial court's registry in order for it to challenge the sale. Instead, this was the foreclosure of a transferred tax lien under Chapter 32, and CIT was not required to make any payment to the court. The trustee made other claims on appeal (including a claim that "he who pays the property tax gets the property"), but he had either waived those claims or he failed to brief them properly. The court of appeals did not consider those other claims. The court went on to sanction the defendants for having filed a frivolous appeal.

***Woodway Drive LLC v. Harris County Appraisal District***

311 S.W.3d 649 (Tex. App. – Houston [14<sup>th</sup> Dist.], April 8 2010, no pet.) (2007 tax year)

***Woodway Drive LLC v. Harris County Appraisal District***

2010 WL 724174 (Tex. App. – Houston [14<sup>th</sup> Dist.], March 4, 2010, no pet.) (not reported) (2008 tax year)

Issues: who can file a protest or appeal

In 2007 and 2008, the appraisal district appraised a property in the name of First Reliance. First Reliance protested each year's appraisal of the property and then filed suits to appeal the ARB's orders. The appraisal district discovered that First Reliance did not actually own the property. First Reliance had sold the property to Woodway in 2006. First Reliance amended its pleadings to add Woodway as a plaintiff. The appraisal district asked the trial courts to dismiss the cases, and the trial courts granted that request. First Reliance and Woodway appealed.

The plaintiffs tried arguing that §42.21 of the Tax Code allows the pleadings in a pending suit to be amended to "correct or change the name of a party." The court of appeals rejected that argument and explained that the Code does not allow a new and different party (a party that had not filed a protest) to appear during the course of a pending suit. The plaintiffs also tried arguing that First Reliance was not really a separate entity, that it was really just a "common name" for Woodway and that the Rules of Civil Procedure allow a party to substitute its formal name for its common name during the course of a suit. The court of appeals rejected that argument. It explained that because First Reliance had ceased to own the property prior to 2007, it had no standing to contest the

2007 or 2008 appraisals in a protest or lawsuit. Woodway was the owner of the property, but it had not been involved in the protests. The record contained no evidence that Woodway had ever done business under the name of First Reliance. They were separate entities. The court of appeals upheld the trial courts' dismissals of the two cases.

***Hamilton v. County of Bastrop***

2010 WL 1253584 (Tex. App. – Austin, April 1, 2010, mand. denied.)(not reported)

Issues: excess proceeds following tax sale

The county sued Gibson for delinquent taxes. Pursuant to the court's order, the sheriff sold Gibson's property. The sale resulted in excess proceeds. Gibson died two months later, and his relatives inherited his property including his right to claim excess proceeds. Hamilton made agreements with several of Gibson's heirs to buy their rights to claim excess proceeds and paid them \$2,000. He then filed a claim with the court for over \$10,000 in excess proceeds. While these events were occurring, the legislature was amending §34.04 of the Tax Code to prohibit such deeply discounted sales of rights to excess proceeds. Under the amended statute, a purchaser must pay a seller at least 80% of the seller's claim amount. The amendment took effect just a few days before the trial court considered Hamilton's claim. The county opposed Hamilton's claims. The court applied the new law and awarded Hamilton only \$2,500 in excess proceeds, the maximum claim that Hamilton could have purchased for \$2,000. Hamilton appealed.

On appeal, Hamilton argued that the amendment to §34.04 should not be applied to claims that were pending at the time that the act took effect. The court of appeals explained, however, that the language of the bill made it clear that the legislature *did* intend for it to apply to pending claims regardless of when they arose or when they were filed. Hamilton claimed that the amendment was a retroactive law that deprived him of vested, contractual rights in violation of the Texas Constitution. The court of appeals responded that Hamilton had no vested rights at the time the amendment took effect. He had some of Gibson's rights to claim excess proceeds, but other parties such as a taxing unit or a lienholder might have asserted claims with higher priorities and taken the excess proceeds. His rights were not vested until the trial court determined the matter. Hamilton also argued that the county had no standing to oppose his claim. The court of appeals explained that §34.04 makes the county a party to the case in which Hamilton was claiming excess proceeds and gives the county the right to oppose his motion. The court of appeals ruled against Hamilton and affirmed the trial court's judgment.

Editor's Comment: I believe this story comes from Roger Price's book, *The Great Roob Revolution*. Some vultures heard the sounds of a distant battle. "Let's go!" they said. "Wars have always provided lavish feasts for vultures." They flew off in the direction of the noise and were vaporized in a tactical nuclear explosion. The moral: *In a few years, things change.*

***Lambertz v. Robinson***

2010 WL 1077858 (Tex. App. – Houston [14<sup>th</sup> Dist.], March 25, 2010, pet. denied) (not reported)

Issues: contesting alleged ARB errors

Lambertz protested the appraisal of his property, and, following a hearing, the ARB denied his protest. Lambertz filed suit to appeal the ARB's order, but he also sued the chief appraiser and the ARB's chairman. He claimed that the ARB had denied him the right to introduce evidence at his hearing and otherwise "mistreated" him. The appraisal district had allegedly failed to train and supervise the ARB properly. Lambertz filed claims under federal civil-rights statutes alleging violations of his constitutional right to due process of law. The trial court dismissed those claims, and Lambertz appealed.

The court of appeals affirmed the trial court's order. The court explained that Lambertz's due-process rights were protected by the Tax Code's protest and appeal provisions. Lambertz had an opportunity to have his claims heard by the ARB, and any errors that the ARB might have made could be corrected when the trial court conducted a trial de novo. Lambertz was limited to pursuing a normal appeal under the Tax Code's procedures and had no basis for filing federal civil-rights claims.

***Sweed v. City of El Paso***

349 S.W.3d 40 (Tex. App. – El Paso, March 24, 2010, pet. denied)

Issues: demolition of property following tax sale

The city sued Sweed for delinquent taxes on his improved real property. The court entered judgment for the city and ordered the property sold. When there were no bidders at the tax sale, the property was struck off to the city. Nine months later, the city demolished the building on the property. Sweed sued the city claiming that the demolition of the building was an unconstitutional taking of his property. At the city's request, the trial court dismissed the case. Sweed appealed.

The court of appeals affirmed the trial court's dismissal of the case. Sweed had no standing to complain about the demolition of the building. He lost the property in the tax sale and made no effort to redeem it during the six-month redemption period. By the time the city demolished the building, Sweed no longer had any interest in the property. The city was the sole owner of the property and had every right to demolish its own building.

***Travis Central Appraisal District v. Wells Fargo Bank Minnesota, N.A.***

2010 WL 983924 (Tex. App. – Austin, March 19, 2010, no pet.) (not reported)

Issues: appraisal district's duty to make changes ordered by court

Wells Fargo owned a closed landfill, which was now the site of an apartment complex. It applied to the TCEQ for a determination that the property qualified for a pollution-control exemption. The TCEQ approved two stormwater retention ponds and some equipment for extracting, containing and measuring gases arising from the buried garbage. This equipment was apparently incorporated into the ground floor of the apartment complex. Wells Fargo applied to the appraisal district for the exemption. The appraisal district exempted the ponds, but did not otherwise change its appraisal of the property. After an unsuccessful protest before the ARB, Wells Fargo sued the district claiming that it was entitled to a broader exemption. The trial court rejected the district's argument that it had already applied the exemption properly and issued a vague judgment directing the district to follow the TCEQ's ruling. The district filed an unsuccessful motion for a new trial but did not appeal and did not change its appraisal of the property or broaden the exemption. Wells Fargo went back to the trial court complaining that the district had ignored the court's order and seeking enforcement of the order. The court determined that the entire ground floor of the complex should be exempted and ordered the district to pay Wells Fargo \$97,459 representing the taxes Wells Fargo had paid on the ground floor. The court also ordered the district to pay \$7,500 of Wells Fargo's attorneys' fees.

The court of appeals upheld the trial court's actions. According to the court of appeals, the district should have understood from the trial court's judgment that the manner in which the district had initially applied the exemption was not acceptable and that it had to grant some additional exemption to the property. In its motion for a new trial, the district acknowledged that the trial court had ordered a broader exemption. If the district disagreed with the judgment, it should have filed an appeal. Because it did not appeal, the district could not argue later that its original appraisal was right all along. The trial court had the authority to enforce its judgment, and its order directing the district to pay roughly \$105,000 was not an abuse of discretion.

***Holcombe v. Reeves County Appraisal District***

310 S.W.3d 86 (Tex. App. – El Paso, March 17, 2010, no pet.)

Issues: unequal appraisal; school tax freeze

Responding to Comptroller's value studies, the appraisal district raised values substantially in 2007 and 2008. After losing a protest before the ARB, Holcombe filed suit to contest the appraised value of his homestead property. In the trial, the chief appraiser and a realtor testified based on comparable sales that the appraised value was not excessive. The chief appraiser explained that the district had done broad reappraisals based on comparable sales, but it had not included low-end residences because there was no sales data relevant to those residences. Holcombe testified that he did not think that he could sell the property for the amount of its appraised value. The trial court upheld the appraised value, and Holcombe appealed.

On appeal, Holcombe argued that the district's failure to include the low-end residences in its reappraisal constituted some kind of illegal discrimination. The court of appeals explained that Holcombe had not raised this claim in the trial court and he could not

raise it for the first time on appeal. Holcombe also argued that the district could not raise his appraised value from one year to the next because he was over 65 and his school taxes were frozen. The court of appeals declined to even consider this argument because Holcombe had not addressed it sufficiently in his briefs. The court of appeals did not consider either of Holcombe's arguments and affirmed the trial court's judgment for the district.

***In re Vasquez***

2010 WL 934210 (Bkrtcy. S.D. Tex., March 10, 2010)

Issues: enforcing transferred tax debt in bankruptcy

Vasquez entered an agreement with RioProp under which RioProp paid Vasquez's delinquent taxes and the tax liens were transferred to RioProp. The agreement called for Vasquez to repay RioProp with interest at the rate of 16%. Vasquez then filed for Chapter 13 bankruptcy protection. RioProp filed a claim for the unpaid debt, and Vasquez objected. The bankruptcy court upheld RioProp's claim. The court explained that when a lender like RioProp receives a transferred tax lien from a taxing unit, it has the same rights as the taxing unit. The claim is still treated as a tax claim in bankruptcy. Interest on the debt is determined according to state law. Texas law allows interest as high as 18% on tax-lien transfers. Thus, the 16% interest rate originally agreed to by Vasquez was legal under Texas law and was a valid part of RioProp's claim in the bankruptcy court.

***Scott Plaza Associates Ltd. v. Harris County Appraisal District***

2010 WL 724189 (Tex. App. – Houston [14<sup>th</sup> Dist.], March 4, 2010, no pet.) (not reported)

Issues: who can file a protest or appeal

In 2007, the appraisal district appraised a property in the name of Steward. Steward protested the appraisal of the property, and the ARB reduced the value of the property. Steward then filed suit to appeal the ARB's order and sought a greater reduction of the property's value. The appraisal district realized that Steward did not actually own the property. Steward had sold the property to Scott in 2006. Steward amended its pleadings to add Scott as a plaintiff. The appraisal district asked the trial court to dismiss the case, and the trial court granted that request. Steward and Scott appealed.

The plaintiffs tried arguing that §42.21 of the Tax Code allows the pleadings in a pending suit to be amended to "correct or change the name of a party." The court of appeals rejected that argument and explained that the Code does not allow a new and different party (a party that had not filed a protest) to appear during the course of a pending suit. The plaintiffs also tried arguing that Steward was not really a separate entity, that it was really just a "common name" for Scott and that the Rules of Civil Procedure allow a party to substitute its formal name for its common name during the course of a suit. The court of appeals rejected that argument. It explained that because Steward had ceased

to own the property prior to 2007, it had no standing to contest the 2007 appraisal in a protest or lawsuit. Scott was the owner of the property, but it had not been involved in the protest. The record contained no evidence that Scott had ever done business under the name of Steward. They were separate entities. The court of appeals upheld the trial court's dismissal of the case.

***Brooks v. Burnet Central Appraisal District***

306 S.W.3d 419 (Tex. App. – Austin, February 26, 2010, no pet.)

Issues: statute of limitations in appeal of ARB order

Brooks protested the 2008 appraisal of his property. The ARB denied his protest and sent him notice of its order. He received the notice on September 20, 2008. On October 29, Brooks filed a timely suit against the appraisal district (and some improper parties such as taxing units) to appeal the ARB's order, but he did not arrange to have the suit papers served on the district. On December 19, he filed amended pleadings and finally had the appraisal district served. At the district's request, the trial court dismissed the case based on Brooks's failure to have the district served in a timely manner. Brooks appealed.

The court of appeals explained that under §42.21 of the Tax Code, a property owner filing suit to appeal an ARB's order must do so within 45 days after receiving notice of the order. (In 2009, this time period was expanded to 60 days.) The Code, however, does not establish a deadline for the property owner to have the suit papers served on the appraisal district. Brooks satisfied the Code's statute of limitations when he filed his suit within 45 days after receiving notice of the ARB's order. His delay in having the district served did not deprive the trial court of the jurisdiction to consider his case or otherwise invalidate the case. The court of appeals reversed the trial court's dismissal of the case and referred the case back to the trial court. The court of appeals refused to consider some federal civil-rights claims that Brooks attempted to raise for the first time on appeal.

***Parra Furniture & Appliance Center, Inc. v. Cameron Appraisal District***

2010 WL 672882 (Tex. App. – Corpus Christi, February 25, 2010, no pet.) (not reported)

Issues: governmental immunity

Parra protested the 2006 appraisal of its property and appeared at a hearing before the ARB. Dissatisfied with the ARB's order, Parra filed suit to appeal the order and named the appraisal district and the ARB as defendants in its suit. Parra sought a trial de novo concerning the appraisal of its property, but it also asked the trial court to appoint a board of conservators to take over the appraisal district. Parra accused the district of violating the Tax Code's appraisal requirements and violating its constitutional rights to due process of law. The district and the ARB admitted that Parra was entitled to a trial de novo concerning the appraisal of its property, but claimed that they were protected

from Parra's other claims by the principle of governmental immunity. The trial court dismissed those other claims, and Parra appealed.

The court of appeals affirmed the dismissal of Parra's other claims. The court explained that governmental bodies are ordinarily immune from suit and from liability unless the legislature waives that immunity and allows them to be sued. The legislature waived governmental immunity to some extent when it enacted Chapter 42 of the Tax Code and allowed property owners to sue appraisal districts for de novo review of ARB orders. The legislature, however did not waive the appraisal district's immunity against the other claims asserted by Parra. The court also noted that Parra's due-process rights were not violated because Parra had received a hearing from the ARB and because it had the right to appeal and have the trial court review the ARB's order de novo.

***Seiflein v. City of Houston***

2010 WL 376048 (Tex. App. – Houston [1<sup>st</sup> Dist.], February 4, 2010, no pet) (not reported)

Issues: evidence and proof in delinquent-tax case

In 2003, the city sued Seiflein for delinquent taxes on real property going back to 1983. At trial, the city introduced certified copies of its delinquent-tax records for the property. Those records showed the property to be owned by Intercoastal Refining Co. The city, however, also introduced a certified copy of a 1993 deed conveying the property to Seiflein and a 2005 letter from Seiflein's lawyer asking the appraisal district to appraise the property in Seiflein's name. Seiflein offered no evidence. The trial court ordered the foreclosure of the tax liens for all the years in question and adjudged Seiflein to be personally liable for the taxes for 1994 and subsequent years. Seiflein appealed.

On appeal, Seiflein acknowledged that §33.47 of the Tax Code ordinarily allows a taxing unit to prove up its case in a delinquent-tax trial by simply offering certified copies of its records. In the absence of contrary evidence from the defendant, those records provide all the proof necessary to support a judgment for the taxing unit. Seiflein, however, argued that §33.47 should not apply in this case because the city's records showed the wrong property owner. (Seiflein did not deny actually owning the property.) The court of appeals rejected that argument and explained that the city's other evidence was sufficient to prove that Seiflein was the owner of the property, at least since the 1993 deed. The city's evidence, taken together, proved all that the city needed to prove. The court also noted that under §25.02, an appraisal-roll error concerning the name of a property owner does not invalidate the taxes on his property. The court of appeals affirmed the judgment for the city.

***Dallas County Tax Collector v. Andolina***

303 S.W.3d 926 (Tex. App. – Dallas, January 26, 2010, no pet.)

Issues: application of tax payment

A company called Horizon filed for Chapter 11 bankruptcy protection. The reorganization plan ordered by the bankruptcy court called for Horizon to pay \$70,000 in taxes on its real and personal property and to sell its assets to Andolina, one of the company's owners. The plan stated that there would be no sale of the company's real or personal property until the taxes were paid in full. Horizon proceeded to sell its real property to Andolina, and the title company sent the tax collector \$60,000 to pay the taxes on the real property. The tax collector applied the payment first to pay the personal-property taxes in full and then applied the remainder to the real-property taxes. This left \$10,000 of real-property taxes unpaid and secured by liens on the real property. Andolina sued the tax collector demanding that the whole payment be applied to the real-property taxes. The trial court ruled for Andolina and ordered the tax collector to reapply the whole payment to the real-property taxes. The tax collector appealed.

The court of appeals recognized that under the Tax Code real-property taxes are assessed and collected separately from personal-property taxes and are secured by separate tax liens. A taxpayer can pay one kind of taxes without paying the other. In this case, however, the bankruptcy court's order had the effect of combining the tax liens on Horizon's real and personal property. It prohibited the sale of any property until all of the taxes were paid. When Andolina filed suit in the trial court, he was asking that court for an order inconsistent with the bankruptcy court's order. A court cannot allow that kind of "collateral attack" on an earlier court order. Thus, the trial court was wrong when it ruled for Andolina. The court of appeals reversed the trial court's judgment.

***SWP Remic Properties II LP v. Harris County Appraisal District***

2010 WL 26524 (Tex. App. – Houston [14<sup>th</sup> Dist.], January 7, 2010, no pet.)(not reported)

Issues: who can file a protest or appeal

In 2007, the appraisal district appraised a real property in the name of SWP. SWP protested the appraisal of the property, and the ARB reduced the appraised value. SWP then filed suit to appeal the ARB's order and seek an even lower appraised value. SWP named itself in the lawsuit "as the Property Owners and the Property Owners." The district then discovered that the property had not been owned by SWP for several years; it was owned by Equitex. The district asked the trial court to dismiss the case because the plaintiff, SWP did not own the property. Before the trial court could act on the appraisal district's request, SWP amended its pleadings to add Equitexas a plaintiff. The district again urged the trial court to dismiss the case. The trial court granted the district's request, and the plaintiffs appealed.

The court of appeals upheld the dismissal of the case. The court explained that because SWP did not own the property in 2007, it had no standing to contest the 2007 appraisal in a protest or lawsuit. The plaintiffs tried arguing that §42.21 of the Tax Code allows the pleadings in a pending suit to be amended to "correct or change the name of a party." The court of appeals rejected that argument and explained that §42.21 does not allow a property owner like Equitex to appear as a plaintiff in an appeal when it never filed a

protest with the ARB. The plaintiffs also tried arguing that SWP was not really a separate entity, that it was really just a “common name” for Equitex and that the Rules of Civil Procedure allow a party to substitute its formal name for its common name during the course of a suit. The record, however, contained no evidence that Equitex had ever done business under the name of SWP. They were separate companies.

## **Attorney General’s Opinions**

### **Opinion No. GA-0827**

December 6, 2010

Issues: public-property exemption

A city leased real property (maintenance facilities) at its airport to a private company that used the property for “operations involving aircraft modification, finish-out and servicing for U.S. and foreign government military and other government agency aircraft.” The attorney general was asked several questions concerning the taxability of the property. He generally declined to answer using the excuse that he is not responsible for determining factual matters. He explained, however, that an appraisal district considering such a property would want to determine first whether the property itself was taxable to the city. If the property was exempt (as public property used for public purposes under §11.11 of the Tax Code), the district would next consider whether the company’s leasehold interest was taxable under §25.07. A leasehold interest is not taxable if it concerns a “public transportation facility,” and “a maintenance hangar that is intended for the safe and efficient operation of a municipal airport constitutes a public transportation facility.”

### **Opinion No. GA-0805**

September 30, 2010

Issues: homestead value cap

The attorney general was asked to explain how the cap on residence homestead values would affect properties damaged by Hurricane Ike in September of 2008. He was asked to consider three examples, each involving a house appraised at \$300,000 as of January 1, 2008. The first house was partially damaged by the storm but still habitable and usable. It was appraised at \$150,000 as of January 1, 2009 but restored to its pre-storm condition by the end of that year. If the work done to the house was considered to be “repairs,” the maximum 2010 appraised value would be \$165,000 (the 2009 value of \$150,000 plus 10%). If, on the other hand, the work was considered to create “new improvements,” the 2010 capped value could include: the 2009 appraisal of \$150,000; plus 10% of that value; plus the value of the new improvement.

The second house was severely damaged and rendered uninhabitable by the storm. It was appraised at \$100,000 as of January 1, 2009 but rebuilt to its pre-storm condition

by the end of that year. The 2010 capped value would be based on the value that the house would have had on January 1, 2009 if the storm had not occurred. That hypothetical 2009 value would be increased by 10% to establish the cap for 2010.

The third house was also severely damaged and rendered uninhabitable by the storm. It was appraised at \$100,000 as of January 1, 2009. Later that year, it was replaced with a larger house with a higher-quality exterior (e.g., vinyl siding replaced by brick). The 2010 capped value would be determined by starting with the value that the original house would have had on January 1, 2009 if the storm had not occurred. That hypothetical value could be increased by 10%, then the value of the new house (a “new improvement”) would be added to it.

**Opinion No. GA-0798**

September 20, 2010

Issues: truth in taxation

A hospital district stopped assessing property taxes after 1996 because it had money from other sources. The district, however, anticipates that it will need to resume its taxation sometime soon. It asked the Attorney General what it would need to do to follow truth-in-taxation laws. Specifically, how would it calculate its effective and rollback tax rates in a particular year when it had not assessed taxes in the preceding year? The Attorney General was unable to answer. He explained that the Tax Code does not address the question. He could not predict how a court would rule.

**Opinion No. GA-0790**

August 23, 2010

Issues: appraising land and improvements together

In this opinion, the Attorney General explained that an appraisal district’s chief appraiser has the discretion to decide whether an improvement on land will be combined with the land and appraised under a single account or parcel number. Even if the property owner renders his land and improvements separately, the appraisal district is not obligated to list them separately.

**Opinion No. GA-0787**

July 26, 2010

Issues: tax-lien transfers; deferred collection

Section 33.06 of the Tax Code allows a person sixty-five or older to defer the collection of taxes on his homestead. If the property owner files an affidavit with the appraisal district or with a court considering a delinquent-tax suit, collection efforts must stop. The tax liens on the property cannot be foreclosed as long as it remains the person’s

homestead. The Attorney General was asked whether these deferral rules also apply to tax liens that have been transferred to private lenders. He explained that a private lender who acquires a tax lien stands in the shoes of the taxing unit from which he acquired it. He has no greater right to foreclose or collect the debt than the taxing unit would have if the lien had not been transferred. If the property owner files a deferral affidavit, he can stop collection efforts by the private lender just as he could stop collection efforts by a taxing unit. This rule applies even if the delinquent taxes arose before the property owner turned sixty-five.

**Opinion No. GA-0775**

May 20, 2010

Issues: school districts' rollback elections

In this opinion, the Attorney General responded to several questions concerning school districts' rollback elections. He was asked whether a school district would have to hold a rollback election if its adopted M&O rate exceeded the M&O component of its rollback rate but its total adopted rate did not exceed its total rollback rate. He explained that such a situation could not occur. Under §26.08 of the Tax Code, a district's debt rate is added without adjustment into the district's total rollback rate. The higher the debt rate, the higher the rollback rate. Thus, the debt rate never determines whether a rollback election is necessary. If a district's adopted M&O rate exceeds the M&O component of its rollback rate, the district has to hold an election.

Another question concerned a district that successfully adopts a rate that exceeds its rollback rate in a particular year. How will that affect the district's rollback rate in the following year? The Attorney General explained that a district must calculate its rollback rate using two different equations. The lower of the two calculated rates is the rollback rate. The first equation, gives the district full credit for the rate (above the rollback rate) that was approved in the prior year. For example, if voters approved a rate 3¢ above the rollback rate in the first year, the district would add 3¢ when calculating its rollback rate in the second year. Under the second equation, however, things are not so simple. The district cannot simply add in the rate of additional taxes approved in the prior year's election. But, the revenues raised in the prior year, including the revenues resulting from the tax effort over and above the prior year's rollback rate will affect the district's effective M&O rate and thus affect its rollback rate for the current year under the second equation. Thus, the way that a favorable rollback election in the first year affects the rollback rate in the second year depends on the particular circumstances involved.

The Attorney General also addressed §26.08(a), which, in the event of a disaster, allows a district to adopt a tax rate that exceeds its rollback rate without holding an election. He explained that the provision applies only in the year following the year in which the disaster occurs. In the second year following the disaster, the district is once again subject to the rules governing rollback elections. He also explained that a school district that calculates its rollback rate before it has received its certified appraisal roll from the appraisal district must use the appraisal district's estimated values. It cannot

substitute its own estimates. Further, once a district has adopted a rate that exceeds its rollback rate and that rate has been approved by the voters, the trustees may not go back and lower the adopted rate.

**Opinion No. GA-0758**

February 9, 2010

Issues: truth-in-taxation procedures for water districts

The South Texas Water Authority (STWA) is a water district, a species of conservation and reclamation district created pursuant to Art. XVI, §59 of the Texas Constitution. As such, it is subject to the special truth-in-taxation rules set out in Chapter 49 of the Water Code. The STWA, however, asked whether it could use the Tax Code's truth-in-taxation procedures instead of those found in the Water Code. It wanted to use the same procedures used by cities and counties. The STWA pointed out that the legislative act creating it provides that "[t]he laws of this state applicable to cities and towns may be adopted and shall be used [by the STWA] to the extent pertinent and practicable."

The Attorney General responded that the STWA had to use the Water Code's truth-in-taxation procedures. When the legislature adopted procedures specifically for districts like the STWA, it implicitly determined that the Tax Code's procedures were not "pertinent and practicable" for use by those districts. Thus, the act creating the STWA could not be read to allow the district to use the Tax Code's procedures.