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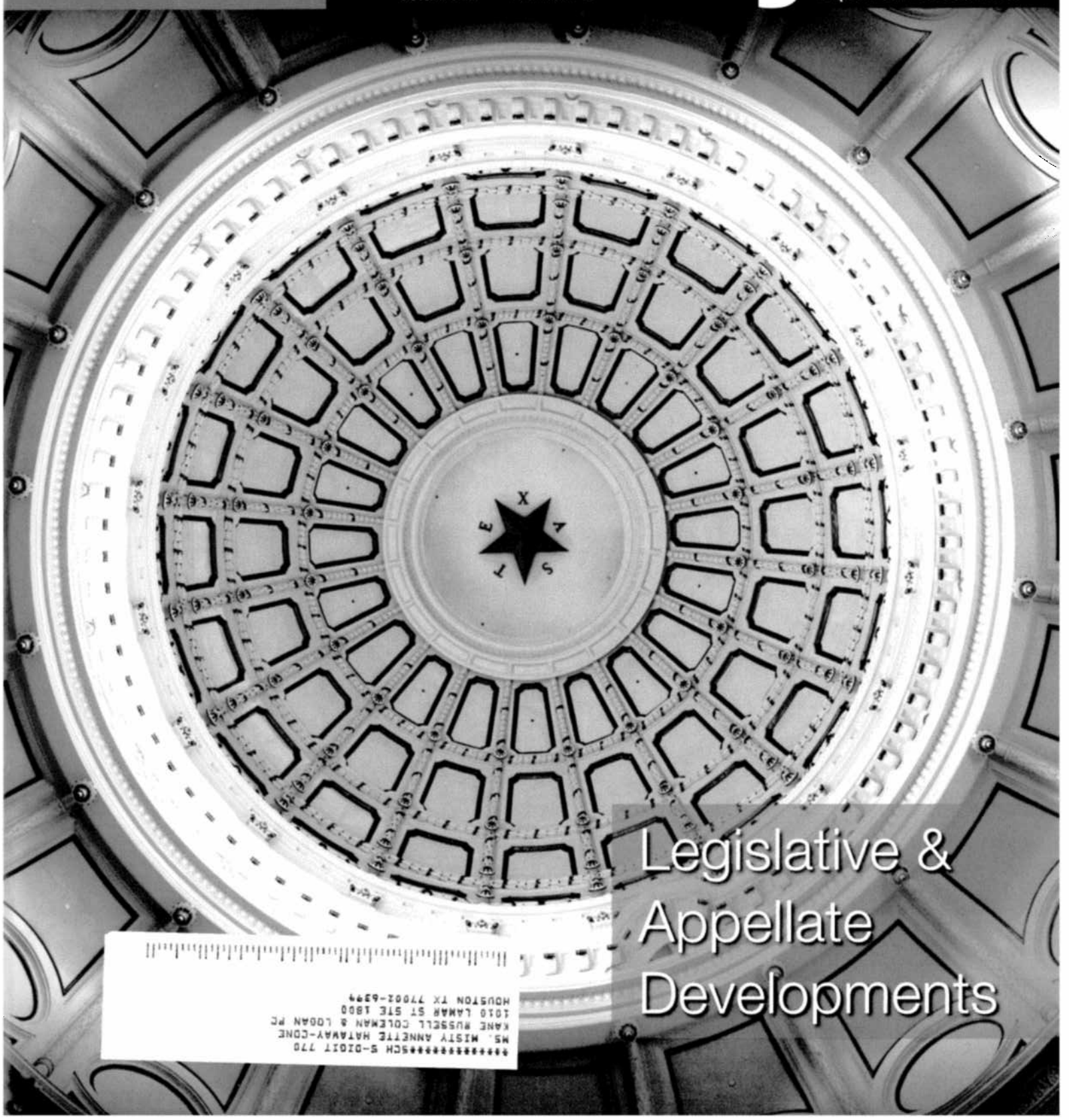

Legislative & Appellate Developments

occur should be included in the calculation of Plan payments.

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What Constitutes the Last Word after *Chemical Lime:* the Mandate or the Judgment?

By DYLAN O. DRUMMOND

Decades of conflicting statutes, Texas Supreme Court opinions, and procedural rules have left unclear whether an appellate court's decision takes effect the moment the court issues its judgment, or later when the clerk issues the mandate. This past June, the Texas Supreme Court issued its decision in *Edwards Aquifer Authority v. Chemical Lime, Ltd.*, which presented the Court with the opportunity to finally settle the debate.[1]

However, while the majority opinion authored by Justice Hecht decided the case on other grounds, both Justices Brister and Willett filed concurring opinions opining as to whether the mandate or the judgment should be the proper jurisprudential vehicle for the Court's final action.

Both Justices Brister and Willett agreed with the majority that the Court's decisions "can take effect whenever we say they do."[2] In the absence of such an explicit pronouncement, however, the Justices disagreed as to what the default rule should be.

In his concurrence, Justice Brister makes the argument that "[p]ostponing *enforcement* of our decisions is not the same as postponing when they are *effective*."[3] He begins by meticulously recounting seven reasons why the judgment matters more than the mandate. Chief among these is his objection to lending precedence to the mandate, which is drafted and signed by the Clerk, instead of the judgment, which is rendered by the Court.[4] Thus, Justice Brister concludes that decisions of the Texas Supreme Court "should take effect when the justices act, not the clerk."[5] Justice Brister also points to several rules of appellate procedure, statutes, and cases that either rely upon the judgment as the operative act binding the parties, or that otherwise give the appellate decision effect.[6] He also points to instances in which the Court never issues a mandate at all—orders in mandamus proceedings and denials of petitions for review—as yet another reason why the mandate cannot serve as the act giving effect to a Court's decision.[7] Justice Brister's final argument is perhaps the most intriguing. He reasons that, because the Texas Constitution confers the power to suspend laws only to the Legislature, and the Court itself may only suspend a law it deems to be unconstitutional, the Court is likely without constitutional authority to keep a law suspended until the mandate issues after the Court has determined the law in question to be constitutional.[8]

Justice Willett, as is fast becoming his hallmark, relies upon such varied authority as Yogi Berra and Jerry Seinfeld—"[n]ot that there's anything wrong with that"—as well as more traditionally precedential sources to argue that the better default effective date is the date upon which the mandate issues, not the judgment.[9] Justice Willett explains that the "mandate under our rules is not a mere ministerial postscript or duplicative reminder," because the Court is required by Texas procedural rules "to prepare a mandate, without which an appellate-court judgment cannot be enforced."[10] If "the mandate served no meaningful purpose," he reasons, "there would be no need to require one."[11] Building upon this point, Justice Willett questions "what is the mandate of a mandate," if the "judgment is operative for all purposes upon issuance?"[12] He also points to the fact that, until the mandate issues, the court ordinarily has "authority . . . to modify its own opinion or judgment . . ., regardless of whether the judgment awards monetary, injunctive, or declaratory relief."[13] Justice Willett concludes that this debate "warrants the Court's rulemaking attention" to "deliver bright-line guidance going forward."[14]

So, it appears the Court's last word on whether the judgment or the mandate is the final effective and operative act of an appellate court is . . . "perhaps." More specifically, Justice Hecht's majority opinion alluded that "this is an aspect of Texas appellate procedure that could well benefit from more definite rules and procedures."[15] As it is Justice Hecht who represents the Court on the Texas Supreme Court Rules Advisory Committee and who oversees the Court's Rules Attorney, there is at least a substantial likelihood that this decades-long quandary will not endure much longer.

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Endnotes

1. 52 Tex. Sup. Ct. J. 929, No. 06-0911, 2009 WL 1817239 (Tex. June 26, 2009). **2.** *Id.* at *9, *16. **3.** *Id.* at *12. **4.** *Id.* at *9. **5.** *Id.* **6.** *Id.* at *9-10. **7.** *Id.* at *11. **8.** *Id.* at *12. **9.** *See, e.g., id.* at *13 n.2, *16 n.27. **10.** *Id.* at *13. **11.** *Id.* **12.** *Id.* at *16. **13.** *Id.* at *15. **14.** *Id.* at *13, *16. **15.** *Id.* at *6.