

# ADMINISTRATIVE CASE LAW UPDATE

**PRESENTED BY:**

**TEXAS TECH ADMINISTRATIVE LAW JOURNAL**

Texas Tech University School of Law

1802 Hartford Avenue

Lubbock, Texas 79410

alj.law@ttu.edu

## SPEAKER

Laurie Ratliff

## CONTRIBUTING AUTHORS

*(Texas Tech Administrative Law Journal Editors, Vol. 18)*

Emily Copeland  
*Editor in Chief*

Madison Murray  
*Executive Managing Editor*

Miriam Aguayo  
*Executive Lead Articles Editor*

Kathryn Hand  
*Exec. Student Writing Editor*

Lauren Arredondo  
*Org. Development Chair*

Joseph Higgins  
*Executive Business Manager*

Meagan Ghormley  
*Executive Technology Editor*

Brandon King  
*Comment Editor*

Tiffany Pham  
*Comment Editor*

Erin Van Pelt  
*Article Editor*

Ashley Yi  
*Article Editor*

Brandon Callahan  
*Staff Editor*

Abbey Coufal  
*Staff Editor*

Joseph Ellis  
*Staff Editor*

Maira Gonzalez-Sanchez  
*Staff Editor*

Taylor Guerrero  
*Staff Editor*

Matt Joeckel  
*Staff Editor*

Sarah Kline  
*Staff Editor*

Janet Moreno  
*Staff Editor*

Mario Perez  
*Staff Editor*

Andrew Smith  
*Staff Editor*

Camilo Valencia  
*Staff Editor*

Allie Winkle  
*Staff Editor*

THE UNIVERSITY OF TEXAS AT AUSTIN  
**12TH ANNUAL ADVANCED TEXAS ADMINISTRATIVE LAW SEMINAR**  
AUGUST 24 - 25, 2017  
AUSTIN, TEXAS

**Speaker Biographies**

**Laurie Ratliff**

Ikard Golden Jones  
512 472 4601 | laurieratliff@igjlaw.com

Laurie Ratliff received her J.D. degree from the Texas Tech University School of Law in 1992. She received her B.B.A. from the University of Texas at Austin in 1989.

After law school, she served as a Briefing Attorney for Justice John T. Boyd in the Seventh Court of Appeals in Amarillo. Later, she was a staff attorney for the Third Court of Appeals in Austin.

Laurie Ratliff is board certified in civil appellate law by the Texas Board of Legal Specialization and was selected as a "Super Lawyer" by Thompson Reuters every year since 2005. She was a Third Court of Appeals Pro Bono Committee member from 2008-2014.

A frequent speaker on court of appeals practice and trial procedure, Laurie Ratliff has written a monthly column for the Austin Lawyer magazine for many years. This column comments on recent Austin Court of Appeals' opinions. She also has co-authored an annual article, "Texas Supreme Court Update," for The Appellate Advocate.

**Student Author Biographies**

¥ **Miriam Aguayo**, J.D. 2017, was the Executive Lead Articles Editor for Volume 18 of the Texas Tech Administrative Law Journal. Miriam was born in Monterrey, N.L., Mexico and moved to the United States at the age of 6. She graduated magna cum laude from the University of Texas at Brownsville with a Bachelor's degree in History. Miriam was the president and founder of the Immigration Law Association and served as the Student Chair of Immigration Efforts. She has a strong interest in immigration law and hopes to one day help influence immigration policy.

φ **Lauren Arredondo**, J.D. 2017, was the Organizational Development Chair for Volume 18 of the Texas Tech Administrative Law Journal. Born and raised in San Antonio, Texas, she received her Bachelor of Arts from the University of Texas at Austin in 2014, majoring in Government, with a minor in History and certificates in Business and European Studies. Her primary legal interests include business, energy, and employment law.

⌘ **Brandon Callahan**, J.D. Candidate 2018, is an Articles Editor for Volume 19 of the Texas Tech Administrative Law Journal. He grew up in Sandy, Utah and received a Bachelors of Science degree in Business Administration from Brigham Young

University-Idaho. After graduating from college, he worked at a brokerage until deciding to go to law school. Brandon is interested in estate planning, as well as civil litigation, and hopes to practice both.

v **Emily Copeland**, J.D. 2017, was the Editor in Chief of Volume 18 of the Texas Tech Administrative Law Journal. She is from Dallas, Texas, but traveled north of the Red River for college. In May 2014, Emily received her Bachelor of Arts from the University of Oklahoma majoring in Journalism, with a focus in Public Relations, and minoring in Spanish. Her legal interests include family, business, and tort law and civil litigation.

£ **Abbey Coufal**, J.D. Candidate 2018, is the Executive Comment Editor for Volume 19 of the Texas Tech Administrative Law Journal. She was born and raised in Vernon, Texas. She received her Bachelor of Arts from West Texas A&M University in 2014, majoring in Mass Communication with an emphasis on Advertising/Public Relations and Broadcast Journalism. Her primary legal interests include water, environmental, and oil & gas law.

Λ **Joseph Ellis**, J.D. Candidate 2018, is the Executive Business Manager for Volume 19 of the Texas Tech Administrative Law Journal. He was born in San Angelo and raised in Brownwood, Texas. Joe received his Bachelors of Science from the United States Air Force Academy (2008) where he graduated on the Dean's List. He earned his Masters of Arts with an Emphasis in International Relations from the University of Oklahoma (2013). He served as an Intelligence Officer in the United States Air Force for over seven years and served multiple tours overseas and combat deployments. He is primarily interested in criminal litigation, military law, and administrative law.

μ **Meagan Ghormley**, J.D. 2017, was the Executive Technology Editor for Volume 18 of the Texas Tech Administrative Law Journal. She graduated cum laude from Texas A&M University with her Bachelor of Science in Agricultural Communications. She interned for Texas State Representative Kevin Brady in Washington, D.C. before coming to Tech Law. Her legal interests are oil and gas, water, and criminal law.

Δ **Maira Gonzalez-Sanchez**, J.D. Candidate 2018, is the Executive Managing Editor for Volume 19 of the Texas Tech Administrative Law Journal. She was born and raised in the Rio Grande Valley. In 2012, she graduated magna cum laude from Texas A&M University majoring in Political Science and minoring in Sociology. She is the American Bar Association 13<sup>th</sup> Circuit Lt. Governor of the Volunteer Income Tax Assistance (VITA) Program and a member of the Phi Delta Phi legal honor society. Her legal interests include civil litigation, income tax, family, and criminal law.

Ξ **Taylor Guerrero**, J.D. Candidate 2018, is an Articles Editor for Volume 19 of the Texas Administrative Law Journal. She was raised in White Deer, Texas, but the coaching life took her to many different towns: Seymour, Breckenridge, Van Vleck, and Austin. She received a Bachelor of Arts in History and Government from the University of Texas in Austin, Texas. She is involved in Hispanic Law Student Association and Longhorn Bar Association, as well as a member of Phi Delta Phi, a legal honor society. Her legal interests include human rights, specifically human trafficking, and becoming a federal prosecutor.

ψ **Joseph Higgins**, J.D. 2017, was the Executive Business Manager of Volume 18 of the Texas Tech Administrative Law Journal. Joe, a citizen of both the United States and Canada, was born in Spring, Texas and spent part of his childhood living in Victoria, B.C. before moving to Carrollton, Texas in 4th grade. Joe received a Bachelor of Science in Sport Management

with a certificate in Business Foundations from the University of Texas at Austin in 2013. His primary legal interests include sports and administrative law.

β **Kathryn Hand**, J.D. 2017, was the Executive Student Writing Editor for Volume 18 of the Tech Administrative Law Journal. She was born and raised in Spring, Texas. She received her Bachelor of Arts from The University of Oklahoma in Norman, Oklahoma where she studied majored in Letters and minored in Spanish. She was a Contracts tutor for first year students. Her primary legal interests are employment and administrative law. Kathryn will be an Associate in the litigation group at Cotton Bledsoe Tighe & Dawson, P.C. in Midland.

★ **Matt Joeckel**, J.D. Candidate 2018, is the Executive of Organizational Development for Volume 19 of the Texas Tech Administrative Law Journal. He was born and raised in Arlington, Texas. He received his Bachelor of Business Administration in Marketing from Texas A&M University and a Masters of Liberal Arts from Texas Christian University. He is primarily interested in civil litigation.

η **Brandon King**, J.D. 2017, was a Comment Editor for Volume 18 of the Texas Tech Administrative Law Journal. He was born and raised in the Southeast, having lived in Georgia, Alabama, and Mississippi. Importantly, Brandon is the only Auburn fan in an Alabama household, so he doesn't return home often. He received his Bachelor of Arts from Texas Tech University, graduating cum laude and majoring in History and Russian Language Studies. He is primarily interested in civil litigation. Brandon has accepted a clerkship with the Honorable Jeffrey S. Boyd of the Supreme Court of Texas.

π **Sarah Kline**, J.D. Candidate 2018, is a Comment Editor for Volume 19 of the Texas Tech Administrative Law Journal. Sarah is from Paradise, Texas, and graduated from Bridgeport High School in 2011. She then went on to Texas Christian University, where she double majored in English and Political Science and graduated cum laude in 2014. She is interested in intellectual property and energy law.

Σ **Janet Moreno**, J.D. Candidate 2018, is an Articles Editor for Volume 19 of the Texas Tech Administrative Law Journal. She was born in Midland, Texas. In May 2015, Janet graduated magna cum laude from Texas Tech University majoring in Journalism and Political Science. Janet is on the Pro Bono Board of Directors and a member of the Hispanic Law Student Association. She has a strong interest in criminal law and hopes to become a prosecutor.

δ **Madison Murray**, J.D. 2017, was the Executive Managing Editor for Volume 18 of the Texas Tech Administrative Law Journal. She was born in Amarillo and raised in Monahans, Texas. She graduated magna cum laude from Texas Tech University majoring in Public Relations and Communication Studies and minoring in Spanish. Her legal interests include labor and employment, non-profit, civil litigation, and family law.

Ϟ **Mario Perez**, J.D. Candidate 2018, is an Articles Editor for Volume 19 of the Texas Tech Administrative Law Journal. Although he was born in Laredo, Texas, he was raised in both Laredo, Texas and Nuevo Laredo, Mexico. He graduated magna cum laude from Texas Tech University double majoring in History and Political Science. His legal interests include municipal law, administrative law, civil litigation, and immigration law.

ø **Tiffany Pham**, J.D. 2017, was a Comment Editor for Volume 18 of the Texas Tech Administrative Law Journal. She was born in Fort Smith, Arkansas, but raised in Spring, Texas. She received her Bachelor of Science in Communication Studies from the University of Texas at Austin in 2014. She was the treasurer of the Hispanic Law Student Association, as well as a member of the Phi Delta Phi legal honor society. Her legal interests include oil & gas, toxic torts, and water law. Tiffany has accepted a position at Walters, Balido, & Crain in Houston, Texas.

⊕ **Andrew Caleb Smith**, J.D./MBA Candidate 2018, is the Editor in Chief of Volume 19 of the Texas Tech Administrative Law Journal. Andrew grew up in Provo, Utah and is the proud father of four daughters. He received a Bachelor of Arts degree from Brigham Young University, majoring in International Relations. He also holds a Master of Education degree from Southern Methodist University. He is the president of

the J. Reuben Clark Law Society. He is interested in education law and alternative dispute resolution.

Γ **Camilo Valencia**, J.D. Candidate 2018, is an Articles Editor for Volume 19 of the Texas Tech Administrative Law Journal. Although he was born in Medellin, Colombia. He spent his formative years in Garland, Texas. In May 2015, he graduated with a Bachelor of Arts from Austin College, majoring in Economics and Political Science. He is interested in civil litigation.

ϐ **Erin Van Pelt**, J.D. 2017, was an Articles Editor for Volume 18 of the Texas Tech Administrative Law Journal. Erin is from Las Cruces, New Mexico and received her Bachelor of Arts degree from Texas Tech University in 2014, graduating Summa Cum Laude with Highest Honors. Her legal interests include criminal, family, and non-profit law.

Ω **Allie Winkle**, J.D. Candidate 2018, is a Comment Editor for Volume 19 of the Texas Tech Administrative Law Journal. She grew up in Coppell, Texas and graduated from the University of Texas at Austin where she majored in Sport Management. Allie currently serves as the Vice President of the Organization of Women Law Students and a Longhorn Bar Association member. Her primary legal interest is civil litigation.

∞ **Ashley Yi**, J.D. 2017, was an Articles Editor for Volume 18 of the Texas Tech Administrative Law Journal. Ashley was born and raised in Houston, Texas. She graduated with honors from The University of Texas Austin in 2013 with a Bachelor of Arts in Sociology and a minor in Korean. She was a dual-degree student—J.D./ Masters of Science in Personal Financial Planning. Also, she was the treasurer for the Asian Law Student Association and secretary for the Christian Legal Society. Ashley hopes to practice corporate law in the future.

## Table of Contents

<b>I. INTRODUCTION</b> .....	6
<b>II. AGENCY AUTHORITY</b> .....	6
<i>Cadena Comm. USA Corp. v. Tex. Alcoholic Beverage Comm’n</i> , 518 S.W.3d 318 (Tex. 2017). £ .....	6
<i>Tex. Alcoholic Beverage Comm’n. v. D. Houston, Inc.</i> , No. 03-13-00327-CV, 2017 WL 2333272, 2017 Tex. App. LEXIS 4725 (Tex. App—Austin May 25, 2017, no pet.). Ω .....	6
<i>City of Dall. v. Sabine River Authority of Tex.</i> , No. 03-15-00371-CV, 2017 WL 2536882, 2017 Tex. App. LEXIS 5166 (Tex. App.—Austin June 7, 2017, no pet.). ⊕ .....	7
<i>Premier Learning Acad., Inc. v. Tex. Ed. Agency</i> , No. 03-17-00064-CV, 2017 WL 2536894, 2017 Tex. App. LEXIS 5202 (Tex. App.—Austin June 8, 2017, no pet.). ⊕ .....	8
<i>City of Austin v. Frame</i> , No. 03-15-00292-CV, 2017 WL 1832485, 2017 Tex. App. LEXIS 4104 (Tex App.—Austin May 5, 2017, no pet). Γ .....	8

<i>Laverie v. Wetherbe</i> , 517 S.W.3d 748 (Tex. 2017). Δ.....	9
<i>Univ. of the Incarnate Word v. Redus</i> , 518 S.W.3d 905 (Tex. 2017). ★.....	9
<i>Oncor Elec. Delivery Co. LLC v. Pub. Util. Comm'n of Tex.</i> , 507 S.W.3d 706 (Tex. 2017). £.....	10
<i>Valero Refining-Texas, L.P. v. Galveston Cent. Appraisal Dist.</i> , 519 S.W.3d 66 (Tex. 2016), <i>reh'g withdrawn</i> (June 16, 2017). Ω.....	10
<b>III. AGENCY INTERPRETATION OF STATUTES AND RULES</b> .....	11
<i>King St. Patriots v. Tex. Democratic Party</i> , No. 15-0320, 2017 WL 2870415, 2017 Tex. LEXIS 653 (Tex. June 30, 2017). ☼.....	11
<i>Jenkins v. Crosby Indep. Sch. Dist.</i> , No. 03-15-00313-CV, 2017 WL 2628244, 2017 Tex. App. LEXIS 5428 (Tex. App.—Austin June 15, 2017, no pet. h.). ☼.....	12
<i>Becky, Ltd. v. City of Cedar Park</i> , No. 03-15-00259-CV, 2017 WL 2224527, 2017 Tex. App. LEXIS 4591 (Tex. App.—Austin May 19, 2017, no pet.). ★.....	12
<i>Walters v. Livingston</i> , 514 S.W.3d 763 (Tex. App.—Austin 2016, no pet.). Γ.....	13
<i>Pub. Util. Comm'n of Tex. v. CPS Energy</i> , No. 03-14-00340-CV, 2017 WL 744694, 2017 Tex. App. LEXIS 1622 (Tex. App.—Austin Feb. 24, 2017, no pet.). β.....	13
<i>Tex. Ass'n of Acupuncture &amp; Oriental Med. v. Tex. Bd. of Chiropractic Exam'rs</i> , No. 03-15-00262-CV, 2017 WL 672455, 2017 Tex. App. LEXIS 1396 (Tex. App.—Austin Feb. 17, 2017, no pet.). δ.....	14
<i>Tex. State Bd. of Exam'rs of Marriage and Family Therapists v. Tex. Med. Ass'n</i> , 511 S.W.3d 28 (Tex. 2017). π.....	15
<i>Westlake Ethylene Pipeline Corp., v. R.R. Comm'n of Tex.</i> , 506 S.W.3d 676 (Tex. App.—Austin, 2016, pet. filed). Ξ.....	16
<b>IV. DISCOVERY</b> .....	17
<i>Tex. Dep't of Crim. Justice v. Levin</i> , No. 03-15-00044-CV, 2017 WL 2302603, 2017 Tex. App. LEXIS 4726 (Tex. App.—Austin May 25, 2017, pet. filed). ☼.....	17
<b>V. DUE PROCESS</b> .....	17
<i>Tumlinson v. Barnes</i> , No. 03-15-00642-CV, 2017 WL 1832488, 2017 Tex. App. LEXIS 4105 (Tex. App.— Austin May 5, 2017, no pet.). ☼.....	17
<i>LMV-AL Ventures, LLC v. Tex. Dep't of Aging &amp; Disability Servs.</i> , No. 01-16-00222-CV, 2017 WL 1315384, 2017 Tex. App. LEXIS 2973 (Tex. App.—Austin, April 6, 2017, pet. granted). π.....	17
<b>VI. JURISDICTION</b> .....	18
<b>A. Sovereign Immunity</b> .....	18
<i>City of Austin v. Vykoukal</i> , No. 03-16-00261-CV, 2017 WL 2062259, 2017 Tex. App. LEXIS 4188 (Tex. App.—Austin May 10, 2017, pet. granted). £.....	18
<i>Hughes v. Tom Green Cty.</i> , No. 03-16-00132-CV, 2017 WL 1534203, 2017 Tex. App. LEXIS 3465 (Tex. App.—Austin Apr. 20, 2017, pet. filed). Σ.....	19
<i>City of New Braunfels v. Stop The Ordinances Please</i> , No. 03-14-00198-CV, 2017 WL 2224526, 2017 Tex. App. LEXIS 4498, (Tex. App.—Austin May 18, 2017), <i>reh'g denied</i> (June 5, 2017). Λ.....	19
<i>Tex. Health &amp; Human Servs. Comm'n v. Doe</i> , No. 03-16-00657-CV, 2017 WL 1534209, 2017 Tex. App. LEXIS 3466 (Tex. App.—Austin Apr. 20, 2017, no pet.). ρ.....	21
<i>City of Rollingwood v. Brainard</i> , No. 03-17-00077-CV, 2017 WL 2417388, 2017 Tex. App. LEXIS 4897 (Tex. App.—Austin May 31, 2017, no pet.). Ξ.....	22
<i>Morales v. Tex. Dep't of Ins.-Div. of Workers' Comp.</i> , No. 03-14-00808-CV, 2017 WL 160910, 2017 Tex. App. LEXIS 296 (Tex. App.—Austin Jan. 13, 2017, no pet.). ☼.....	22
<i>McLane Co. v. Tex. Alcoholic Beverage Comm'n</i> , No. 03-16-00415-CV, 2017 WL 474067, 2017 Tex. App. LEXIS 851 (Tex. App.—Austin Feb. 1, 2017, pet. filed). ν.....	23
<i>Gates v. Tex. Dep't of Family &amp; Protective Servs.</i> , No. 3-13-00639-CV, 2016 WL 7584242, 2016 Tex. App. LEXIS 13506 (Tex. App.—Austin Dec. 21, 2016, pet. filed). ρ.....	23
<b>B. Prerequisites to Suits</b> .....	24
<i>S.O. v. Fenves</i> , No. 03-16-00726-CV, 2017 WL 2628072, 2017 Tex. App. LEXIS 5424 (Tex. App.—Austin June 15, 2017, no pet. h.). ☼.....	25

<i>Office of the Comptroller of Pub. Accounts v. Farshid Enters., L.L.C.</i> , No. 03-16-00291-CV, 2017 WL 1404731, 2017 Tex. App. LEXIS 3212 (App.—Austin Apr. 13, 2017, no pet.). ☿	25
<i>E.A. v. Tex. Dep’t of Family and Protective Servs.</i> , No. 03-16-00473-CV, 2017 WL 2062263, 2017 Tex. App. LEXIS 4155 (Tex. App.—Austin, May 9, 2017, no pet.). Δ	26
<i>Texas Health &amp; Human Servs. Comm’n v. Olguin</i> , No. 09-16-00323-CV, 2017 WL 2333279, 2017 Tex. App. LEXIS 4718 (Tex. App.—Austin May 24, 2017, no pet.). π	26
<i>Keystone RV Co. v. Tex. Dep’t of Motor Vehicles</i> , 507 S.W.3d 829 (Tex. App.—Austin 2016), <i>reh’g overruled</i> (Dec. 13, 2016). ☿	27
<i>AC Interests L.P. v. Tex. Comm’n on Env’tl. Quality</i> , No. 03-16-00270-CV, 2016 WL 7335866, 2016 Tex. App. LEXIS 13255 (Tex. App.—Austin Dec. 15, 2016, pet. denied). Σ	27
<i>Ransom v. Eaton</i> , 503 S.W.3d 411 (Tex. 2016). Δ	28
<b>C. Exhaustion of Remedies</b>	28
<i>Mosley v. Tex. Health &amp; Human Servs. Comm’n</i> , 517 S.W.3d 346 (Tex. App.—Austin 2017, pet. filed). ϐ	28
<b>D. Standing</b>	29
<b>E. Right to Judicial Review</b>	29
<i>Forest Oil Corp. v. El Rucio Land &amp; Cattle Co.</i> , 518 S.W.3d 422 (Tex. 2017). Λ	29
<i>Tex. Dep’t of Family &amp; Protective Servs. v. Wallace</i> , No. 03-16-00631-CV, 2017 WL 1534207, 2017 Tex. App. LEXIS 3386 (Tex. App.—Austin Apr. 19, 2017, pet. filed). Ξ	30
<b>VII. MOTIONS FOR REHEARING</b>	31
<b>VIII. OPEN GOVERNMENT: PUBLIC INFORMATION ACT &amp; OPEN MEETINGS ACT</b>	31
<i>The Univ. of Tex. Sys. v. Paxton</i> , No. 03-14-00801, 2017 WL 1315374, 2017 Tex. App. LEXIS 3043 (Tex. App.—Austin Apr. 7, 2017, no pet.). Ω	31
<i>City of New Braunfels v. Carowest Land, Ltd.</i> , No. 03-16-00249-CV, 2017 WL 2857142, 2017 Tex. App. LEXIS 6130 (Tex. App.—Austin June 29, 2017, no pet. h.). ☼	32
<i>Hall v. McRaven</i> , 508 S.W.3d 232 (Tex. 2017). Λ	32
<i>Concurring Opinions</i> ∞	33
<i>Paxton v. City of Dall.</i> , 509 S.W.3d 247 (Tex. 2017). ★	34
<b>IX. ORDERS</b>	34
<i>Ware v. Tex. Comm’n on Env’tl. Quality</i> , No. 03-14-00416-CV, 2017 WL 875307, 2017 Tex. App. LEXIS 1797 (Tex. App.—Austin, Mar. 3, 2017, no pet.). φ	34
<i>Dass v. Tex. Bd. of Prof. Eng’rs</i> , 517 S.W.3d 252 (Tex. App.—Austin 2017, no pet.). μ	35
<b>X. RULES</b>	36
<i>City of Austin v. Util. Associates, Inc.</i> , 517 S.W.3d 300 (Tex. App.—Austin pet. filed). η	36
<i>Bass v. Waller Cty. Sub-Reg’l Planning Comm’n</i> , 514 S.W.3d 908 (Tex. App.—Austin 2017, no pet.). ψ	37
<i>Aleman v. Tex. Med. Bd.</i> , No. 03-16-00339-CV, 2017 WL 875315, 2017 Tex. App. LEXIS 1745 (Tex. App.—Austin Mar. 2, 2017, pet. filed). ¥	37
<b>XI. UTILITIES</b>	38
<i>City of Austin v. Util. Assocs., Inc.</i> , 517 S.W.3d 300 (Tex. App.—Austin 2017, pet. filed). ø	38
<b>XII. MISCELLANEOUS</b>	39



## I. INTRODUCTION

This case law update includes many of the administrative law cases decided in Texas between November 2016 and July 2017. This is not an exhaustive review of all administrative law cases, nor do these synopses exhaustively cover all issues raised by these cases. We have attempted to choose cases representative of issues raised in Texas courts and to highlight the most salient points of each. Our views are not to be taken as the views of Texas Tech University School of Law and should not be interpreted as predictive of the result of future cases.

## II. AGENCY AUTHORITY

*Cadena Comm. USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318 (Tex. 2017). ¶

This case is the first time the Texas Supreme Court weighed in on the application of Texas' tied house law. Texas tied house statutes, located in Texas Alcoholic Beverage Code, currently serve to separate the industry into "three independent tiers: manufacturing (brewing), distribution, and retail." TEX. ALCO. BEV. CODE § 102.01-82. Fomento Economico Mexicano, S.A.B. de C.V. (FEMSA) holds a 20 percent interest in the stock of two Heineken entities and has a 100 percent interest in Cadena Comercial USA Corp. (Cadena) through intermediate holding companies. Cadena formed to operate convenience stores in Texas; however, when the company sought a retailer's permit from the Texas Alcoholic Beverage Commission (TABC) to sell alcohol, TABC refused on grounds that FEMSA's ownership interests in Cadena and Hineken would violate the tied house laws if it granted a permit.

On appeal, the district court and the court of appeals both affirmed the TABC's denial of the permit. The supreme court looked at three main issues: (1) the scope of 102.07(a) and the meaning of "an interest in the business of a brewer"; (2) if the TABC properly looked at the separate corporate statutes of the entities when determining Cadena's permit application; and (3) whether Cadena's equal protection rights

were violated by TABC's refusal of Cadena's permits and subsequent holdings of the lower courts. *Cadena* at 323. In regards to the first issue, the court interpreted "interest" to include almost any interest, as well as "corporate stock, affiliate-subsidary relationships, and a level of control" interests that have a stake in the financial performance of a brewer. *Id.* at 329. The court relied on the goal of the three-tier strict separation of the legislature to determine that the phrase applies to both entities engaged in brewing and their stockholders.

In considering the second issue, whether the TABC's veil-piercing for FEMSA and Cadena companies was proper, the court determined that statutes in a regulatory context were intended for that very purpose. The legislature "intended that the TABC and courts look beyond corporate separateness status in enforcing the tied house provisions." *Id.* at 336. The court assessed the Texas alcohol beverage laws and said that the laws specifically granted TABC the authority to deny Cadena's retail permit on the rationale that the permit would have led to a tied house violation based on the parent company's ownership interest.

Finally, the court took up the third issue of whether or not there was a violation of Cadena's equal protection rights in the denial of the retail permit. Cadena did point the court towards examples of existing cross-tier holdings in Texas; however, the court said Cadena did not show that the entities were "similarly situated." For example, FEMSA's multi-million dollar shared interest in Heineken was considered large scale. Additionally, the court did not comment on TABC's speculative application of the "One Share Rule." Section 102.07 triggered when FEMSA's indirect ownership interest in Heineken Group and its breweries combined with the indirect ownership in Cadena.

In a 6-2 decision, the court upheld the TABC's denial of a retail permit to a foreign corporation whose parent company held a 20% ownership interest in a foreign brewer.

*Tex. Alcoholic Beverage Comm'n. v. D. Houston, Inc.*, No. 03-13-00327-CV, 2017 WL 2333272, 2017 Tex. App. LEXIS 4725 (Tex. App—Austin May 25, 2017, no pet.). Ω

This is an appeal from the district court's judgment dismissing D. Houston, Inc. d/b/a Treasures' (Treasures) claims involving issues of jurisdiction and declaratory and injunctive relief. Treasures operates what it terms a "gentleman's club" in Houston, TX. The Texas Alcoholic Beverage Commission (TABC) initiated a proceeding to impose civil penalties in response to alleged violations of the Alcoholic Beverage Code through the sexual misconduct of the club's dancers.

Under section 2001.038 of the Administrative Procedures Act (APA), Treasures first asserted a claim against TABC for declaration regarding the applicability of TABC Rule 35.31(B), which states the offenses that give rise to a violation of the Alcoholic Beverage Code. Treasures claimed that the dancers operated as independent contractors, and therefore, the Rule was not applicable. The district court dismissed the claim for want of jurisdiction and for failure to exhaust administrative remedies. On appeal, Treasures emphasized that section 2001.038 allows pre-enforcement adjudication of rule applicability issues. Further, its claim brought under section 2001.038 was a question of law, and did not require resolution of factual issues. The court previously limited a rule applicability challenge under section 2001.038 to determining whether a rule is relevant to the current situation. The Court of Appeals determined that Treasures sought a declaration to the rule's *application*, rather than the "applicability" of the rule to the particular facts. Clearly, the rule was relevant to the factual situation at hand. For those reasons, this court affirmed the district court's judgment dismissing the claim for want of jurisdiction.

Treasures' second claim sought declaratory and injunctive relief under section 11.641(c) of the Alcoholic Beverage Code. This section states that a civil penalty may not be imposed where a court finds a defendant not guilty in a criminal prosecution, criminal charges were dismissed, or if no final adjudication occurred. Treasures alleged that TABC pursued penalties in the underlying enforcement proceeding based on accusations against Treasures' dancers that the court had not adjudicated. Treasures' brought claims for

declaratory and injunctive relief under the Uniform Declaratory Judgments Act to restrain TABC's suspension of Treasures' permit pursuant to section 11.641(c). The district court ruled it had jurisdiction under section 2001.038 and granted summary judgment for Treasures. The district court dismissed the remaining claims relating to section 11.641(c), as they were redundant to Treasures' section 2001.038 challenge.

The Court of Appeals determined that the plain meaning of section 11.641(c) unambiguously prohibits a criminal prosecution from serving as the basis of a civil penalty. It did not prohibit TABC from imposing penalties on the basis of common facts that underlie criminal prosecution. The Court reversed the district court's judgment awarding Treasures relief on the merits of its claim brought under APA section 2001.038 and dismissed the claim for want of subject-matter jurisdiction. The Court affirmed the dismissal of Treasures' remaining claims concerning section 11.641(c).

***City of Dall. v. Sabine River Authority of Tex.***, No. 03-15-00371-CV, 2017 WL 2536882, 2017 Tex. App. LEXIS 5166 (Tex. App.—Austin June 7, 2017, no pet.). ☪

The Sabine River Authority (Respondent) began charging Dallas (Petitioner) more for water. The Petitioner filed a claim for review with the Public Utility Commission (Commission), and the State Office of Administrative Hearings appointed an administrative law judge to hear the case. Because the dispute revolved around contracts between the two parties, Tex. Admin. Code sec. 24.131(a) required the judge to abate review proceedings. The Petitioner filed suit under the Texas Uniform Declaratory Judgments Act (UDJA) in district court, alleging that the Respondent's rate increase was an unlawful legislative act. However, the court ruled in favor of the Respondent by granting its plea to the jurisdiction, as the Respondent claimed governmental immunity. The Petitioner appealed.

The appellate court reviewed the case *de novo*. It reasoned that a breach of contract claim, barred by sovereign immunity, differs from a UDJA claim where a petitioner might raise a



Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Administrative Case Law Update

Also available as part of the eCourse

[2017 Advanced Texas Administrative Law eConference](#)

First appeared as part of the conference materials for the  
12<sup>th</sup> Annual Advanced Texas Administrative Law Seminar session  
"Case Law Update, Part I"