State Bar
Section Report
School Law

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Dear School Law Section Members:

I am pleased to report that the Executive Committee has finalized plans for the 2003 summer retreat and continuing education seminar. The retreat will be held July 18-19, 2003, in Galveston. The retreat activities will be held at the San Luis Resort near the beach. We have reserved a block of rooms at the San Luis and at the Hilton, which is within walking distance of the San Luis. A brochure with complete details will be mailed to all members in the spring of 2003. If you have suggestions for program topics, please let me know, and I will forward your ideas to the planning committee. We would also like your feedback regarding the retreat in general. Do you participate in the family dinner on Friday night of the retreat, or would you prefer a Saturday lunch? Is the length of the CLE program too long, too short, or just right?

We also would like to hear your general suggestions regarding the operation of the School Law Section. Feel free to e-mail any of the officers or council members with your suggestions. Our e-mail addresses are listed in this newsletter and on our section's web page.

Finally, I want to close by thanking Debbie Esterek and Dorcas Green for yet another outstanding issue of our newsletter. Jon McCormick will be taking Debbie's place as a coeditor and the Section thanks Debbie for her hard work as coeditor. The newsletter continues to be informative and interesting to our members. If you would like write an article for an upcoming issue, please contact Dorcas Green or Jon McCormick.

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➡ REMINDER ⬅

With the exception of one edition each year, future editions of the School Law Newsletter will be sent electronically. Be sure the School Law Section has your current e-mail address.

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Calendar of Events

Jan 27-29, 2003	TEA Midwinter Conference - Austin
Feb 27-28, 2003	UT School Law Seminar - Austin
July 18-19, 2003	School Law Retreat - Galveston

LIABILITY OF PUBLIC EMPLOYEES UNDER THE STATE CREATED DANGER DOCTRINE

by Michael Shirk
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In July, 2001 a three judge panel of the Fifth Circuit held for the first time that damages may lie against a state actor because of the criminal conduct of a private third party. When the Court rendered its decision in *McClendon v. City of Columbia*[1], it joined the other federal courts of appeal in formally recognizing a constitutional right of recovery referred to as the "state created danger theory."

In response to the panel decision, the Fifth Circuit granted an en banc hearing to review the viability of state created danger doctrine in this circuit, and resolve a conflict within the circuit regarding when a rule of law is 'clearly established' in order to defeat qualified immunity. Unfortunately, the Court's recent ruling on state created danger is anything but definitive; in a per curiam ruling the Court affirmed the district court's dismissal of the case based upon the factual record, but provided practitioners and public employers with little new guidance to shape and inform an understanding of potential liability.[2]

Efforts to recover against the government for physical injury caused by a private wrongdoer under the state created danger doctrine are not novel; by the time the panel issued its ruling in *McClendon* the elements for recovery had been firmly articulated by the Fifth Circuit in a half dozen decisions over the past decade.[3] School districts appear to be the most favored defendants as parents respond to the vicious injuries inflicted upon their children by other youth.[4]

> The epidemic of violence in American public schools is a relatively new phenomenon, but one which has already generated considerable caselaw. Whether that epidemic invokes constitutional consequences for the innocent, law-abiding students forced to attend those schools raises questions that must be carefully analyzed.[5]

It is essential to note that the en banc decision in *McClendon ("McClendon II")* declined to impose liability because "under the facts established by the summary judgment record . . . there is no constitutional violation" and because the doctrine was not clearly established with sufficient particularity in 1993 to defeat the individual defendant's qualified immunity.[6]

McClendon II indicates that while there is an obvious reluctance by the Fifth Circuit to impose "constitutional consequences" under the state created danger doctrine the en banc court has definitively not foreclosed recovery liability under the right facts.[7]

The Players

The Plaintiff, Peter McClendon, was shot in the face by Kevin Loftin. The pistol that was used for the shooting had been loaned to Loftin by Detective Carney of the City of Columbus Police Department.

As any experienced lawyer will tell you, the 'perfect' client is about as difficult to find as is the mythical 'reasonable person' of tort law. After reading the summary judgment evidence set out in the two decisions it is safe to assume that neither Mr. McClendon, the Plaintiff, nor Mr. Loftin, the shooter, were especially outstanding citizens.

The evidence established that in early July, 1993, Loftin approached Detective Carney and asked to borrow a pistol. The two knew each other well; Loftin was a paid informant and is described in Judge Parker's dissent as "a gang member with a history of drug involvement" and by Judge Wiener's concurring dissent as "an intimate member of the illicit drug culture."

Loftin had two very profound reasons to need a deadly weapon; most immediately he "feared that McClendon might retaliate against [him] for supplying a gun to an individual who subsequently shot McClendon's friend."[8] However, and as if this wasn't trouble enough, Loftin was sans armes; his own gun, having been used in the murder of McClendon's friend, had been confiscated for evidence by the Columbus Police.

Loftin advised Detective Carney that "McClendon was 'fixing to try [him]' and that the situation between the two of them was at a 'boiling point.'" Detective Carney knew that Mr. Loftin was in trouble – he had personally heard McClendon make "threats" against Loftin.[9]

Officer Carney, wishing to diffuse the tensions and prevent violence from erupting, outfitted Loftin with a pistol which had been seized by the Columbus police in yet another, unrelated, investigation, and which was also being held as evidence.[10]

A week later, on July 12, 1993, Mr. Loftin shot McClendon in the face and permanently blinded him with the gun provided to him by Officer Carney.

The Constitutional Issue – Substantive Due Process

School law practitioners are as knowledgeable about the substantive due process rights secured to citizens by virtue of the Fourteenth Amendment to the United States constitution as any group of lawyers in Texas.[11] It was, after all, the historic decision in *Doe v. Taylor Independent School District* which firmly established a student's substantive due process right to be free from government-occasioned infringement to bodily integrity.[12]

Substantive due process restrains the government, at all levels, from arbitrarily interfering with the personal freedoms encompassed within citizens' liberty interests. As established in *Doe*, freedom from physical harm at the hands of state actors is a protected liberty interest.

Substantive due process "confers protection to the general public against unwarranted governmental interference, but it does not confer an entitlement to governmental aid as may be necessary to realize the advantages of liberty guaranteed by the [due process] clause.[13] Because it is a judicially crafted doctrine with few "guideposts for reasonable decision making" it is juridically disfavored.[14] Recovery for its breech requires proof of "deliberate indifference toward the constitutional rights" of a Plaintiff.[15]

The state created danger doctrine, which has now been adopted by every federal circuit in the nation except the Fifth, is a species of personal rights emanating from the substantive due process right to be free from government-occasioned harm to one's bodily integrity. However, unlike *Doe v. Taylor Independent School District* and other cases which permit recovery for injury attributable to state action, the state created danger doctrine imposes liability upon public actors for injury caused by private third parties; it recognizes "an affirmative constitutional duty to protect" an individual from harm resulting from the acts of a private individual.[16] "When state actors knowingly place a person in danger, the due process clause of the constitution has been held to render them accountable for the foreseeable injuries that result from their conduct * * * * The key to the state-created danger cases …lies in the state actors' culpable knowledge and conduct in affirmatively placing a person in a position of danger… Actual knowledge of a serious risk of physical danger to the plaintiff has been a common feature of the state-created danger cases".[17]

Different Courts

McClendon's case was initially dismissed by the district court on summary judgment for failure to articulate a cognizable constitutional claim.[18] The district court also determined that even if the state created danger doctrine could form the basis of recovery, only one Fifth Circuit decision had analyzed it and this involved differing facts. Officer Carney was, therefore, entitled to qualified immunity since the one decision, *Salas v. Carpenter*, did not constitute clearly established law in 1993.[19] The court also dismissed the claim against the city for lack of a policy or custom as required under 42 U.S.C. § 1983.

A panel of the Fifth Circuit consisting of Judges Politz, DeMoss and Stewart reinstated McClendon's claim against Detective Carney. The Court held that Officer Carney's conduct in arming Loftin in response to McClendon's threats reflected deliberate indifference by Carney to the rights of McClendon sufficient to give rise to a substantive due process violation. The panel also held that Officer Carney was not entitled to qualified immunity because the law – as set forth not just in Salas but in other circuits' decisions involving the state created danger doctrine - was sufficiently well established in 1993 to have placed Officer Carney on notice regarding the objective unreasonableness of his conduct.

> We find it beyond peradventure that a police officer's actions of giving a person a weapon in a situation the officer knows or should know has a strong potential for violence constitutes deliberate indifference on the part of the officer . . . We conclude that, at the time of the shooting it was clearly established that a state actor creating a danger, knowing of that danger, and using his authority to create an opportunity for a third person to commit a crime that otherwise might not have existed was subject to liability for a violation of the victim's rights.

258 F.3d 441.

The Court frankly acknowledges "we have not yet determined whether a state official has a duty to protect individuals from state-created dangers."[20] This is the approach the Fifth Circuit has taken in virtually all state created danger cases which have come before it. The Court will assume without deciding that the theory is viable, set forth very detailed rules of causation and culpability, but inevitably deny recovery due to an inadequate showing of deliberate indifference to support a substantive due process violation claim.

The Court concluded that Officer Carney was merely negligent in providing Loftin with a pistol in response to McClendon's anger and Loftin's (very accurate) prediction that McClendon was "fixing to try [him]."

Judge Parker's dissent takes issue with that conclusion, "What would a reasonable person think would happen if a police officer in the course of his employment takes a pistol from the evidence locker or from his desk and gives it to a gang member with a history of drug involvement who needs it for a confrontation with a drug dealer."[21]

The *McClendon I* panel was cognizant of the lack of Fifth circuit precedent on the state created danger theory in 1993 (the date of the shooting) as it approached the qualified immunity questions. As with any constitutional cause of action brought under 42 U.S.C §1983, McClendon had to overcome the qualified immunity of the state actor by proving, *inter alia*, that Officer Carney's conduct was objectively unreasonable and violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[22]

After reviewing the extensive treatment afforded the state created danger doctrine by other federal courts the panel found that "[t]he overwhelming authority in the United States was that this was a viable theory of law."[23] This, in the panel's opinion, was sufficient to allow the doctrine to be 'clearly established' within the Fifth Circuit even though only one state created danger case had been reviewed by the Fifth Circuit at the time Carney loaned a gun to Loftin.

> Although generally in cases of qualified immunity we look to the law of this circuit and the Supreme Court to determine whether the applicable law was clearly established at the time of the constitutional violation, we are not limited to looking only at those decisions to make this determination.[24]

The panel found support for its position in *Melear v. Spears*, 862 F.2d 1177 (5th Cir.1989), which permitted a review of decisions outside of, and beyond, simply those decided by the Fifth Circuit and the Supreme Court in ascertaining whether a rule of law was clearly established or not.

In *McClendon II* the en banc court was called upon to resolve a conflict within the circuit, inasmuch as a panel sub-

sequent to *Melear* had held that "in determining whether a right is clearly established, we are confined to precedent for our circuit or the Supreme Court".2[5]

The Court resolved this conflict in favor of the rule articulated in *Melear* as more consistent with the Supreme Court's decision *Wilson v. Layne*.[26] In ascertaining whether a rule is well established, and "in the absence of controlling authority, a 'consensus of cases of persuasive authority' might, under some circumstances, be sufficient to compel the conclusion that no reasonable officer could have believed that his or her actions were lawful."[27] The language in *Shipp*, which strictly limits courts to precedent from the Fifth Circuit or the Supreme Court in ascertaining the objective reasonableness of government action, was overruled in *McClendon II*.[28]

This, however, was not sufficient to deprive Officer Carey of his qualified immunity. The other circuits' decisions, while reflecting a generalized consensus about the constitutional principles making up the state created danger theory, lacked sufficient specificity to place Detective Carney specifically, and public officials generally, on notice regarding the precise conduct which would result in constitutional violation.

In finding that Detective Carney's conduct was not, as a matter of well-established law, objectively unreasonable, the Court looked at decisions which predated his arming of Loftin. In light of the almost ten years which have passed, and the greater number of fact patterns which have been brought to courts under the State created danger doctrine in this and the other federal circuits, an officer today might be held to a different standard.

Conclusion

The holding of *McClendon II* provides limited guidance.[29] The specter of the state created danger doctrine haunts this circuit and is poised to resurrect itself. The basis of the decision that the behavior of detective Carney was not sufficiently culpable to reflect deliberate indifference, and that the law was insufficiently developed to warrant a finding of objective unreasonableness, do not restrict the Court's later decisions.

The en banc Court has not foreclosed recovery under the state created danger doctrine; rather, it has delayed the day when citizens of this circuit will have the same legal protections as are secured to the citizens of every other circuit in the nation under the substantive due process clause of the Fourteenth Amendment.

ENDNOTES

1 258 F.3d 432 (5th Cir. 2002); *vacated and reh'g en banc granted*, 285 F.3d 1078 (5th Cir. 2002), rev'd in part, 2002 WL 2027329 (5th Cir. 2002).

2 Judge Parker's dissent, joined by Judges Wiener and DeMoss notes that "the majority's Achilles' heel is its unwillingness to either adopt or reject the state-created danger theory as the law of the Circuit. *Id*. at *16.

3 *See*, *e.g.*, *Piotrowski v. City of Houston*, 51 F.3d 512, 515 (5th Cir. 1995)(Plaintiff must prove that state actors, acting with deliberate indifference, increased Plaintiff's expose to harm. Deliberate indifference, for purposes of state created danger theory requires proofs that "the environment created by the state actors must be dangerous; [state actors] must know it is dangerous; and . . . they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur." *Id*. at 516, fn. 9 (citations omitted).

4 *Leffall v. Dallas Independent School District*, 28 F.3d 521 (5th Cir. 1994), *Johnson v. Dallas Independent School District*, 38 F.3d 198 (5th Cir. 1994); *see also*, *Doe v. Hillsboro Independent School District*, 113 F.3d 1412 (5th Cir. 1997), *Young v. Austin Independent School District*, 885 F.Supp. 972 (W.D. Tex.- 1995).

5 *Johnson*, 38 F. 3d at 199-200.

6 2002 WL 2027329 *1. The city was dismissed by the panel ("*McClendon I*") for lack a policy or practice to support municipal liability under 42 U.S.C. §1983. This was affirmed by the en banc Court ("*McClendon II*").

7 Judge Emilo M. Garza concurred in the judgment only. *Id*. at 15. His dissent would have foreclosed all future efforts to impose liability under the state created danger doctrine. He quoted from a previous decision which stated, in part, "the state has no duty to protect nor liability from failing to protect a person under the due process clause of the Fourteenth Amendment from violence at the hands of a private actor." *Walton v. Alexander*, 44 F.3d 1297, 1306 (5th Cir. 1995)(en banc) It is, therefore, not fanciful to assume that such a repudiation of constitutional duty in response to the state created danger doctrine was proposed to, but rejected by, by the en banc Court in *McClendon*.

8 According to the panel decision ("*McClendon I*") McClendon's gun had been used to murder Loftin's **cousin**. Whether McClendon's weapon killed Loftin's cousin or friend did not distract from Loftin's obvious fear of McClendon.

9 *McClendon II* at *1.

10 Judges Parker, Wiener and DeMoss point out that "Detective Carney's action in taking the gun from the evidence drawer/locker and giving it to Loftin constituted embezzlement by a public official" under Mississippi law.

11 The Texas Constitution, Article I §19 also contains a substantive due process protection. There are cases which stand for the proposition that Texans' have greater substantive due process protections under Article I than under the Fourteenth Amendment; *Texas Workers Compensation Commission v. Garcia*, 893 S.W. 2d 504, 505 (Tex. 1995). However, this author believes that the 'new federalism' movement of years past is moribund.

12 *Doe v. Taylor Independent School District*, 15 F.3d 443 (5th Cir. 1994)(en banc.) This familiarity with the doctrine is not without confusion; *Compare*, *Moore v. Willis Independent School District*, 233 F.3d 871 (5th Cir. 2000)(injury to student resulting from corporal punishment not a substantive due process violation because disciplinary purpose being served) *with Jefferson v. Ysleta Independent School District*, 817 F.2d 303 (5th Cir. 1987)(tying student to chair for *instructional* purposes rather than *disciplinary* purposes constitutes violation of substantive due process rights).

13 *Walton v. Alexander*, 44 F.3d 1297, 1302 (5th Cir. 1995)(en banc); *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 (1989)(holding that substantive due process guarantee "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.").

14 *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992).

15 *Doe, supra*., 15 F.3d at 454, Johnson, at, 201.

16 *Leffall v. Dallas Independent School District*, 28 F.3d 521, 525 (5th Cir. 1994).

17 *Johnson v. Dallas Independent School District*, 38 F.3d 198, 200-201 (5th Cir. 1994)("The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off sources of private aid.")

18 The complaint alleged that "the Defendants violated McClendon's due process rights under the Fourteenth Amendment by knowingly and affirmatively creating a dangerous situation that resulted in injury to McClendon." The complaint further asserted that "in providing Loftin with a handgun, Detective Carney 'created a serious danger' that 'caused Peter McClendon harm and violated McClendon's due process rights.'"

19 The Fifth Circuit's decision in *Salas v. Carpenter*, 980 F.2d 299 (5th Cir. 1992).

20 *McClendon II* at *6.

21 *Id.* at * 15. Judge Parker's dissent asks the further rhetorical question, "[w]hat does the majority think Loftin intended to do with the gun provided to him by Detective Carney - - place it on his wall as a souvenir? Of course not, gang members who ask for guns typically have violent intentions as any competent police officer knows. *Id.* at *19.

22 *McClendon II* at *8, citations omitted.

23 *McClendon I*, 258 F.3d at 440.

24 *Id.* at 339-440.

25 *McClendon II* at *9; quoting, Shipp v. McMahon, 234 F.3d 907, 915 (5th Cir. 2000).

26 526 U.S. 603, 119 S.Ct. 1692 (1999).

27 *McClendon II* at *10, quoting 526 U.S. at 617, S.Ct. at 1692).

28 *Id.*

29 Judge Jolly's concurring dissent points this out, noting that the decision has left "the bench and bar in doubt as to whether and to what extent such a cause of action exists in this circuit." *McClendon II* at *15.

ADMINISTRATOR CONTRACT PROTECTS MORE THAN A JOB

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When the Round Rock Independent School District reassigned a principal to another administrative position that did not require certification, without changing his term contract, salary, or benefits, one more thing was left unchanged–the employee's right to all the nonrenewal procedures under Texas Education Code Chapter 21[1] and local policy, according to a Commissioner of Education decision issued in March. *Landers v. Round Rock ISD* [2] was originally issued January 9, 2002, by the Commissioner of Education's designee. On motion for rehearing, that decision was withdrawn and replaced by one issued March 26, 2002.

The decision concludes that the term contract signed by the administrator was unaffected by a subsequent reassignment during the term. The decision involved a principal on a two year term "Administrator" contract reassigned after the first year to a central office administrative position, "Administrator on Temporary Assignment for Elementary Fine Arts." The new position did not require certification by law or local policy. No new contract was executed. Near the end of the contract, the district notified the administrator that his term contract would not be renewed, but he was offered the opportunity to continue to work on an at will basis. The administrator declined, claiming the right to the nonrenewal process applicable to term contracts under Texas Education Code Chapter 21, Subchapter E.[3]

Although a reassignment clause in the contract authorized the district to assign the principal to another administrative position during the two-year term, the main issue was whether the administrator's term contract status could be changed to an at will status. If so, the term contract would be allowed to expire without the use of the term contract nonrenewal process set out in Education Code Chapter 21, since he was now in a position not requiring certification. Were it not for the term contract originally executed, the position could have been an "at will" position. The decision states that when the administrator term contract was executed, the contract was for a certified administrator meeting the definition of "teacher," under Texas Education Code Section 21.201, i.e., "a superintendent, principal, supervisor, classroom teacher, counselor, or other full-time professional employee who is required to hold a certificate issued under Subchapter B or a nurse."[4] As such, he was entitled to the nonrenewal process set out in the Education Code, Chapter 21, Subchapter E, and those rights were unaffected by a subsequent reassignment to a position not requiring certification.

Additionally, although not required, the district had adopted the certified hearing examiner process applicable to mid-contract terminations for use with its nonrenewals. The process, set out in Education Code Chapter 21, Subchapter F, includes stringent criteria for changing the hearing examiner's Findings of Fact and Conclusions of Law, both of which the board of trustees changed in part when the hearing examiner's recommendation came before them for consideration.[5] The district was unsuccessful in its argument that the hearing examiner lacked jurisdiction over the matter based on the fact that the employee was not being proposed for termination during the contract. It was also unsuccessful in its attempt to change some of the Findings of Fact and Conclusions of Law.

Some interesting lessons can be gleaned from this decision. Presumably, had the district not adopted the certified hearing examiner process for its nonrenewals, the hearing examiner would not have had jurisdiction over the matter. If so, it appears the administrator could have proceeded with an appeal to the Commissioner once he received notice that his contract had not been renewed (as opposed to being *proposed* for nonrenewal under the Education Code.[6]) Also, presumably the outcome would have differed if at the time of reassignment the district and administrator had executed a new contract or other employment agreement that did not include statutory term contract protections, such as a contract for non-certified administrators.

ENDNOTES:

1 TEX.EDUC.CODE, Chapter 21

2 *Landers v. Round Rock ISD*, Docket No. 032-R1-1101 (Comm'r Educ. March 2002)

3 TEX.EDUC.CODE, Chapter 21, Subchapter E

4 TEX.EDUC.CODE § 21.201(1)

5 *See*, TEX.EDUC.CODE § 21.259

6 TEX.EDUC.CODE § 21.206

STUDENT DRUG TESTING: WHERE ARE WE NOW?[1]

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In 2002, the United States Supreme Court considered whether a drug testing policy that provides for random, suspicionless urinalysis testing of public secondary students who participate in extracurricular activities violates the Fourth Amendment to the United States Constitution. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatamie County v. Earls*, 122 S. Ct. 2559 (2002). In a 5-4 decision, the Court held that the school district's policy was a reasonable means of furthering its important interest in protecting the safety and health of its students. School officials are now asking whether the Court's decision would permit drug testing of all secondary school students. While further litigation related to this issue is inevitable, it is this author's opinion that the Supreme Court would not uphold such an expansive testing regime unless a school district was confronted with an overwhelming drug problem. This article seeks to analyze the Supreme Court's decision in *Earls* and conflicting case law predating that decision, as well as to answer questions relating to the constitutional parameters for testing as they currently exist.

The Fourth Amendment

The Fourth Amendment to the United States Constitution – often the basis of challenges to student drug testing programs – was the basis for the challenge in *Earls*. Accordingly, this article's primary focus relates to an analysis of Fourth Amendment precedent.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. It is well settled that the collection and testing of urine by state actors constitutes a search under the Fourth Amendment. As a general rule, the Fourth Amendment requires that a search be undertaken pursuant to a warrant issued upon a showing of probable cause. However, the Supreme Court has recognized exceptions to this general rule "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirements impracticable." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). When considering the school context, the Court has held that these requirements are unnecessary because they would "unduly interfere" with a school district's need for "swift and informal disciplinary procedures." *Id.*

Even where "special needs" make meeting the warrant and probable cause requirements unnecessary, a search must still be "reasonable." *Earls*, 122 S. Ct. at 2564 (citations omitted); *see also Vernonia*, 515 U.S. at 653. Whether random, suspicionless urinalysis testing of public school students is "reasonable" has led to considerable debate, some of which has recently been resolved by the Supreme Court's decision in Earls.

One settled principle serves as an appropriate launching pad for exploration of the more difficult issue of reasonableness. In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the Supreme Court recognized that public school children do not have Fourth Amendment rights that are co-extensive with those of free adults. *T.L.O.* teaches that any determination as to reasonableness requires consideration of a school district's responsibilities as custodian and tutor to the students entrusted to its care.

Recognizing that school districts have custodial and tutelary responsibilities, however, does not end the inquiry as to reasonableness. As discussed below, the Supreme Court upheld drug testing of student athletes in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995). The Court fashioned the four-factor balancing test for assessing whether a drug testing program is reasonable. Given that the Supreme Court's decision in Earls was based on the balancing test first articulated in Vernonia, it is appropriate to revisit that case before considering the decision in Earls.

Vernonia School District 47J v. Acton

In 1995, the Supreme Court considered the first constitutional challenge to student drug testing. The school district in *Vernonia* initiated its drug testing policy in response to a sharp increase in drug use. The policy required that all parents of students and the students who participated in interscholastic athletics consent to drug testing at the beginning of the athletic season and random testing throughout the remainder of the season. The student being tested was also required to produce a urine sample in the presence of an adult monitor. The samples were then sent to a testing laboratory, marked in a manner that ensured the anonymity of the individual who produced the sample. The district exercised extreme care to ensure that the results of the tests remained confidential and implemented chain of custody procedures to ensure the integrity of the sample results. If a sample returned a positive result, the student was required to submit to testing as quickly as possible. If the second sample returned a negative result, no further action was taken. If, however, the second sample also returned a positive result, the parents of the student were informed, and a conference was held among the principal, the student, and the student's parents. During the conference, the student was required to decide whether to enroll in a drug assistance program, which included weekly urinalysis testing, or to be suspended from athletic competition for the remainder of the current athletic season and the following athletic season. After completion of any suspension, the student was required to undergo testing with the other students in order to be eligible to participate in the next athletic season. If, after a confirmed positive test and completion of either a suspension or assistance program, a second confirmed violation occurred, the student was automatically suspended from participation in athletics for the remainder of the current season and the following academic year. A third confirmed violation resulted in suspension for the remainder of the current and following two athletic seasons.

Jason Acton, a seventh grader enrolled in a grade school in Vernonia, Oregon, wanted to play football. Acton was not allowed to participate, however, because he and his parents refused to sign consent forms that would require him to submit to random drug tests pursuant to the school district's drug testing policy. The Acton family sued the district, alleging the policy violated the Fourth and Fourteenth Amendments of the

United States Constitution, and Article I, § 9 of the Oregon Constitution.

The district court found no constitutional violation and upheld the policy. *Acton v. Vernonia Sch. Dist.47J*, 796 F. Supp. 1354 (D. Or. 1992). The Ninth Circuit Court of Appeals reversed the district court, finding violations of the Fourth Amendment of the United States Constitution and Article I, § 9 of the Oregon Constitution. *Vernonia Sch. Dist. 47J v. Acton*, 23 F.3d 1514 (9th Cir. 1994). In reversing the Ninth Circuit, the Supreme Court articulated a four-factor balancing test that considers: (1) the nature of the privacy interest intruded upon by the search; (2) the character of the intrusion caused by the complained upon search; (3) the nature and immediacy of the governmental concern; and, (4) the efficacy of the means employed by the government for meeting its concern.

The first factor articulated by the court focuses upon the nature of the privacy interest intruded upon by the search. If an individual does not have a legitimate subjective expectation of privacy that society is prepared to accept as legitimate, that individual is not protected by the Fourth Amendment. Pivotal to the *Vernonia* decision was the fact that the individuals being searched were children under the care and custody of the public schools. The court noted that while children do not "shed their constitutional rights at the schoolhouse gate, the nature of those rights [retained by children] is what is appropriate for children in school." *Vernonia*, 515 U.S. at 655-66 (*internal citations omitted*). The court further recognized that school officials act "in loco parentis," and have "custodial and tutelary" power and responsibilities over the children entrusted to their care. *Id*. at 655 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985)).

In addressing whether school children participating in athletics have a legitimate subjective expectation of privacy, the court observed that children participating in athletics engage in "communal undress," and "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally." *Id*. at 657. The court observed that children participating in athletics undergo a pre-season physical examination, sign waivers, adhere to special dress codes, and attend after-hours practice and training. In concluding schoolchildren enrolled in athletics have a reduced expectation of privacy, the court analogized them to adults who choose to participate in a highly regulated industry and concluded that these students should expect some degree of intrusion upon their privacy.

The second factor focused on the character of the intrusions posed by sample collection and accessing the information revealed by the analysis performed on the sample. The district's sample collection methods required male students to produce samples with their back to a male monitor while standing, fully clothed, at a urinal. The monitor was not required to watch male students produce samples, but only remain in students' presence to guard against tampering. Female students were allowed to produce samples in a closed bathroom stall while a female monitor waited outside of the closed door. Regarding the intrusion relating to sample collection, the court, while noting that the act of collecting the samples involved an "excretory function traditionally shielded by great privacy," found the district employed adequate safeguards to ensure minimal intrusion upon the privacy interests of the students. *Id.* at 658. In light of the fact that school children use public restrooms on a regular basis and that the samples were produced in conditions mirroring that environment, the court determined that the degree of intrusion created by the manner in which samples were taken was "negligible."

The court then focused upon what was done with the information revealed by the search. The district's policy had four safeguards to protect the privacy interests of students. The laboratory analysis of the samples looked only for drugs; it did not probe into the student's physical condition. All students tested were screened for the same drugs, and the test results were disclosed to only a small number of school officials. Finally, the results of the tests were not disclosed to law enforcement officials. In light of these safeguards, the court concluded that the invasion of the students' privacy interests was not significant.

The third factor addressed the "nature and immediacy of the governmental concern." *Id*. at 660. Classifying the nature of the governmental concern is not, according to Fourth Amendment jurisprudence, a simple litmus test, but involves a balancing of factors. A court must consider whether the government's interest is "important enough to justify the particular search at hand," balanced against factors supporting the proposition the search intrudes upon a person's legitimate expectation of privacy. *Id*. at 661 (emphasis in original). The court felt that the government's interest in this particular instance was important and "perhaps compelling." *Id*. The court observed that the crisis plaguing the district was greater than situations in which the court previously upheld suspicionless searches. For example, the crisis plaguing the district was deemed more severe than the drug use by railroad employees in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and substantially greater than that of *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), which upheld suspicionless searches of customs agents to combat importation of drugs into the country.

The court also noted drug use by children has a more profound effect upon them than does drug use by adults and results in lifelong learning losses that disrupt the educational process. Considering the fact that the children subject to the challenged policy were entrusted to the care of the government for education, the court noted the district's interest was "magnified by the fact that this evil is being visited not just upon individuals at large, but upon the children for whom it has undertaken a special responsibility of care and direction." *Id*. at 662.

By narrowly tailoring the policy to test only students participating in athletics, (a characteristic not shared by the policy in *Earls*, to be discussed below), the government was able to bolster its argument that its interest was great compared to the burden placed upon the privacy interests of students required to submit to testing. The drugs the policy tested for presented substantial risks to individuals when their use was combined with physical exertion. To illustrate this point, the court noted amphetamines increase an individual's heart rate and suppress an individual's awareness of fatigue. Marijuana results in fluctuations in blood pressure and bonds with hemoglobin, thereby reducing the blood's ability to supply

the body with oxygen. It also interferes with the body's ability to regulate temperature by suppressing the body's ability to sweat. Cocaine use can increase blood pressure and result in possible coronary spasms. In light of these risks, the court determined the balance of factors fell in favor of the school district's interest.

The court was reluctant to question the trial court's determination that the immediacy of the district's concerns was sufficient to justify its action. It was satisfied with the lower court's finding that the district was plagued by a drug problem among its students, "particularly those involved in interscholastic athletics," and that an increase in disciplinary actions that attained "epidemic proportions" was directly attributable to that problem.

The fourth and final factor articulated by the court focused upon the "efficacy of the means" employed for attaining the government's interest. *Vernonia*, 515 U.S. at 660. The court found the efficacy of the district's policy to be "self evident," considering that the drug problem was "largely fueled by the 'role model effect of athletes' drug use, and of particular danger to athletes.'" *Id*. at 663. By ensuring the athletes do not use drugs, the district, in essence, removed the fuel from the fire, and effectively addressed the problem.

In finding no violation of the Fourth Amendment, the court dismissed the Actons' argument that a drug testing policy calling for testing only after a student was suspected of using drugs would be a "less intrusive means to the same end" and concluded the district's suspicionless policy was superior to one based upon suspicion. The court reasoned that parents willing to submit their children to suspicionless drug testing may be unwilling to submit their children to drug testing resulting from an allegation of drug use. Additionally, the court seemed troubled by the possibility that a teacher could retaliate against a child by referring him or her for testing due to behavior problems and by the additional expenses of providing suspected children with sufficient procedural safeguards and defending lawsuits created by a suspicion-based program. Finally, the court noted that most teachers are not qualified to accurately identify students who exhibit characteristics of drug use.

The Earls Case

The *Earls* case arose in the small rural community of Tecumseh, Oklahoma. In 1998, the school district adopted a student drug testing policy requiring all secondary students who participate in extracurricular activities to consent to urinalysis testing. Despite the stated breadth of the policy, in practice it was applied only to competitive extracurricular activities sanctioned by the Oklahoma Schools Activities Association. The policy requires that students submit to a urinalysis test before their initial participation in an extracurricular activity, random testing while participating in that activity, and testing at any time upon reasonable suspicion. The tests are designed to detect the use of illegal drugs, including amphetamines, cocaine, marijuana, opiates, and barbiturates.

Lindsey Earls, who at the time she filed suit was a member of the show choir, the marching band, the Academic Team, and the National Honor Society, along with another schoolmate, challenged the policy as written and as applied, alleging that it violated the Fourth Amendment. The trial court relied on the Supreme Court's decision in Vernonia to reject Earls' challenge, concluding that "special needs" warranting the district's drug testing program exist in the school context. Further, the school district's policy of testing students who participate in competitive extracurricular activities effectively addressed a history of drug abuse that the court determined provided legitimate cause for concern.

The Tenth Circuit Court of Appeals reversed, concluding that the school district could not implement its program without evidence of drug abuse "among a sufficient number of those subject to testing, such that testing that group of students will actually redress its drug problem." *Earls v. Bd. Of Educ. of Tecumseh Pub. Sch. Dist*., 242 F.3d 1264, 1278 (10th Cir. 2001). Finding that the school district failed to demonstrate a drug problem among competitive, extracurricular participants, the court of appeals held the policy violated the Fourth Amendment.

In reviewing the case, the Supreme Court initially addressed whether special needs exist in the school context such that individualized suspicion is not required. Characterizing its prior holdings in *Vernonia* and *T.L.O*. as having held that special needs "inhere in the public school context," the court emphasized that the school district's responsibilities for children may render a finding of individualized suspicion unnecessary. *Earls*, 122 S. Ct. at 2564-2565.

Next, the Court applied *Vernonia's* four-factor balancing test, considering first the nature of the privacy interest at stake. Realizing that the school district is responsible for maintaining discipline, health, and safety, the court concluded that school children's privacy interests are more limited than adults for the simple reason that they attend public schools. The court rejected the argument that *Vernonia* compels the conclusion that the school district prevails in the balancing test only as to students whose participation requires them to be subject to regular physicals and communal undress. It noted that the presence of such facts in *Vernonia* was not essential to its decision in that case.

After recognizing that communal undress and regular physicals were not required to tip the scale in the school district's favor, the court acknowledged that participants in competitive extracurricular clubs and activities subject themselves to the same privacy intrusions as do student athletes – each club and activity has its own rules and requirements for participation with some activities requiring off-campus travel and communal undress. The court also noted that the competitive extracurricular activities at issue in *Earls* were subject to additional regulations of the Oklahoma Secondary Schools Activities Association. Having considered these facts, the court concluded that the students subject to the policy had limited privacy expectations.

The court then considered the character of the intrusion posed by the policy. Similar to *Vernonia*, the policy requires a faculty monitor to wait outside a closed restroom stall while a student produces a sample, listen for normal sounds of urination, and guard against tampering. The sample collection methods differ from *Vernonia* in one respect. In *Earls*, male students produce samples in a stall as opposed to being

directly observed by monitors who stood behind them as they used a communal urinal. Given that male students are provided greater privacy under Tecumseh's policy than were male students in Vernonia, the court found the collection methods in the Tecumseh schools to be "even less problematic" than those at issue in the *Vernonia* case. *Id*. at 2566.

Still analyzing the character of the intrusion, the court separately considered the use and disclosure of test results. Given that a student who tests positive is denied only the right to participate in extracurricular activities but is not subject to criminal, disciplinary, or academic consequences, and test results are kept in confidential files and disclosed to school personnel on a need to know basis, the court concluded that the invasion of student's privacy interests was not significant.

Finally, the court considered the nature and immediacy of the school district's concerns and the policy's efficacy in meeting them. In considering these factors, the court cited with approval its conclusion in *Vernonia* that the government's concern in preventing drug use by schoolchildren is important. Referencing statistical findings of the Department of Health and Human Services, the court concluded that there is reason to believe the problem of student drug use has worsened since *Vernonia* was decided. Pointing to a "nationwide drug epidemic," the court concluded that "the war against drugs" is a "pressing concern in every school." *Id*. at 2567.

Looking to the specific evidence of drug use within the school district, the court rejected the students' argument that there was not a "real and immediate interest" warranting testing. Resolving a central point of contention, the court concluded that a widespread or pervasive drug problem need not be shown before suspicionless testing can be conducted. Refusing to articulate a "constitutional quantum of evidence of drug use necessary to show a 'drug problem,'" the court specifically rejected the Tenth Circuit's requirement that a school district demonstrate an identifiable drug problem among a sufficient number of students subject to testing, concluding that it would be difficult to administer such a test. *Id*. at 2568. The court noted that evidence of a drug problem could, however, be offered to "shore up" a district's contention that special needs warrant testing. *Id*. at 2567-2568 (citing *Chandler v. Miller*, 520 U.S. 305, 319 (1997)).

Perhaps most significant is the court's conclusion that the need to prevent drug use is a sufficiently immediate concern warranting testing. As the court recognized, it makes little sense to require school districts to wait until a substantial portion of the student population is using drugs before implementing a program designed to deter such drug use. Given this reasoning, it would appear that when a school district's articulated interest is to deter drug use, evidence of an existing drug problem is largely irrelevant.

The court also rejected the student's argument that under *Vernonia* authority for testing was limited to student athletes because of the additional risk of injury student athletes faced if they competed while under the influence of drugs. Focusing on the safety risk posed by drug use generally, the court concluded that safety interests addressed by drug testing were equally applicable to athletes and nonathletes.

The court again considered an argument previously made in *Vernonia* that individualized suspicion is required to drug test students. Rejecting the idea that school districts employ the least intrusive means available, the court declined to impose an individualized suspicion requirement in schools attempting to prevent and detect drug use. The court was not persuaded that testing based on individualized suspicion would be any less intrusive and raised concerns that it would additionally burden teachers struggling to maintain order and discipline and might lead to members of unpopular groups being targeted for testing.

Finally, the court considered whether the school district's means of addressing its concerns were reasonably effective. The court concluded there was a sufficient fit between the testing of extracurricular participants and the school district's interest in protecting the safety and health of its students and thus upheld the drug testing policy in its entirety.

Writing for the four dissenters, Justice Ginsburg argued that the Tecumseh policy was not reasonable, but was "capricious" and "perverse" because it targeted students that are least likely to be at risk from illegal drugs. The dissenters distinguish *Vernonia* on several grounds. First, they argue that student athletes have even more reduced privacy expectations than students who participate in non-athletic extracurricular activities that do not involve routine communal undress, such as the activities Lindsey Earls participated in – choir, show choir, marching band and academic team.

Second, with respect to the character of the intrusion, the dissenters would have held that the district court erred in granting summary judgment with respect to the Earls claim that school district personnel did not maintain the confidentiality of information obtained pursuant to the district's policy. The district court assumed that the school district would honor the policies' confidentiality provisions. The dissenters argue that this assumption was unwarranted at the summary judgment as to "doubtful matters" should not have been resolved in favor of the school district. *Id*. at 2575 (Ginsburg, J., dissenting).

Third, with respect to the "nature and immediacy of the governmental concern," the dissenters argued that the concerns at issue in *Vernonia* "dwarfed" those confronting Tecumseh administrators. *Id*. The district court in *Vernonia* found that a large segment of the student body, particularly including student athletes, "was in a state of rebellion fueled by alcohol and drug abuse as well as the students' misperceptions about the drug culture." *Id*. (quoting *Vernonia*, 515 U.S. at 649). In contrast, Tecumseh school officials had routinely reported that its schools were not experiencing a "major" drug problem. *Id*. The dissenters agreed with the Tenth Circuit's observation that the efficacy of the district's program was "greatly diminished" absent evidence of a "demonstrated drug abuse problem among the group being tested…."

The dissenters also did not find the majority's reliance on Skinner and Van Raab persuasive. While they recognized that the testing programs were upheld without particularized evidence of a drug problem, they argue that the programs were warranted in these two cases because of the enormous risks involved to "the lives and limbs of others." Id. at 2576.

The dissenters also contend that the program was not tailored to meet the risk it believed was most relevant – the risk of immediate physical harm to drug users and others in com-

petitive physical activities. Justice Ginsburg makes her point in colorful language:

> Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree.

In conclusion, the dissenters argue that Tecumseh's purpose in adopting its policy was to "heighten awareness of its abhorrence of, and strong stand against drugs." The dissenters suggest that this interest is more symbolic than real.

Where Are We Now?

While the *Earls* case did much to clarify the issues involved in student drug testing, future litigation is likely, as some school districts will undoubtedly continue to expand their testing programs. What generally appears to be settled is that school districts can condition participation in all extracurricular activities upon student consent to random drug testing.

It is likely that some school districts will consider random drug testing of all students. In this author's opinion, such programs will not pass constitutional muster absent evidence of a substantial and widespread drug problem. Although not fully analyzed in *Vernonia* and *Earls*, it cannot be ignored that the drug testing programs at issue in those cases required students to voluntarily consent to testing in order to participate in extracurricular activities. There was no evidence in those cases that students were coerced into giving consent. When a student chooses not to consent, that student is not permitted to participate in the extracurricular activity, and no testing takes place. Given that students do not have a fundamental or statutory right to participate in extracurricular activities, it was not surprising that the Supreme Court determined that the school district's interests outweighed students' privacy expectations. The same may not be said when a district attempts to condition receipt of an education on student consent to testing given that students generally have a right to education and are compelled by law to attend school.

Plaintiffs may also attempt to limit *Earls* impact by arguing that its holding is limited to competitive extracurricular activities. However, it would be difficult to maintain that the reasoning applied in *Earls* is not equally applicable to all extracurricular activities. Whether a student has diminished expectations of privacy does not turn on whether an extracurricular activities is competitive, but whether the student is subject to additional regulation as compared to students generally. Students who participate in extracurricular activities are in fact subject to additional regulation, including coaches' rules and UIL regulations, but that is not to say that non-competitive extracurricular activities do not involve additional rules and regulations as well. And while such additional rules and regulations may be less extensive, in this author's opinion, whether a program passes constitutional muster should not turn on the degree of regulation present in any given extracurricular activity. Requiring school districts to prove some minimum quantum of regulation with respect to non-competitive extracurricular activities would undoubtedly lead to inconsistent court decisions, as application of such a nebulous test is fraught with uncertainty. This author would argue that a showing that a student agrees to subject himself or herself to any added rules or regulations when seeking to participate in extracurricular activities should be enough to support a drug testing program.

School districts can also expect that plaintiffs will bring state constitutional challenge to student drug testing programs. While an analysis of whether the Texas Constitution affords greater protection against student drug testing than the Fourth Amendment is beyond the scope of this article, this author believes that there is no basis to believe that the Texas Supreme Court would determine that the Texas Constitution affords greater rights than the Fourth Amendment in this context.

Conclusion

As school districts and their legal counsel have an opportunity to digest the *Earls* decision, it is likely that more Texas school districts will explore use of random drug testing as a new tool to combat drug abuse. That a divided Supreme Court upheld the Tecumseh school district's program in a 5-4 decision most likely signals that we have reached the outer limits of constitutionally permissible student drug testing. While some school districts may see *Earls* as paving the way for testing of entire student bodies, even the most expansive reading of the *Earls* decision does not permit such a conclusion. The issue of whether all students, extracurricular and non-extracurricular participants alike, can be required to submit to testing as a requirement of attending public schools is an issue that will have to be addressed at some future date.

ENDNOTE

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BASIC GUIDE TO PROPERTY TAX FORECLOSURES BY TEXAS SCHOOL DISTRICTS AND OTHER TAXING UNITS

F. Duane Force [1]

I. Introduction. Each year, Texas school districts and other taxing units [2] levy a tax on all non-exempt real and tangible personal property located within their boundaries. Taxing units generally collect an estimated 90 to 95 percent of their taxes on a timely basis each year. The remaining 5 to 10 percent of delinquent taxes become subject to procedures for enforced collection. In enforcing the collection of delinquent taxes, the prevailing practice among taxing units in Texas, particularly school districts, is to look to private law firms in carrying out that work.[3] However, a few "in-house" collection operations remain in Texas whereby county attorneys, city attorneys, and in-house counsel for school districts perform the collection work. The work in enforcing the collection of delinquent taxes necessarily includes foreclosures of the tax liens that secure payment of the taxes, that being the focus of this article.

II. The annual tax cycle and tax liens.

A. Levy of tax and current tax bills. While property is generally required to be appraised for tax purposes at its market value as of January 1 of each year[4], taxes are not actually levied by the taxing units until September or October each year, at which time the taxing units adopt their tax rates and notify their tax collectors of same.[5] Upon receiving notice of the tax rate, the tax collectors then apply the rate to the taxable values in order to determine the amount of tax, and current tax bills are mailed to property owners on or about October 1 each year.[6]

B. Delinquent taxes and tax liens. Taxes that are not paid by January 31 of the year following the year for which they are imposed are considered delinquent.[7] On the delinquency date of February 1, the taxes begin to accrue penalty and interest at the rates prescribed by the Tax Code.[8] A tax lien against the taxed property securing payment of the taxes, penalties and interest is provided by Section 32.01(a) of the Code, and the lien attaches by operation of law, and without any perfection requirements, as of January 1 of the year for which the tax was imposed. The tax lien takes priority over virtually any other lien or interest in the property, including other liens and even a homestead interest, regardless of whether the tax lien attached before or after the other lien or interest arose.[9]

III. Judicial foreclosures authorized.[10] At any time after taxes become delinquent, a taxing unit may enforce the collection of the taxes, penalties and interest by filing suit to foreclose the lien against the property, for personal judgment against the owner[11], or both.[12] The suit must of course be brought in a court of competent jurisdiction.[13]

A. Jurisdiction.

1. District courts. The district courts, being the primary trial courts of Texas, have jurisdiction in all cases in which the amount in controversy[14] exceeds $500.[15] Unlike other courts, there is no upper limit to the amount in controversy in district courts.[16] District courts also have jurisdiction over any matter of which exclusive jurisdiction is not granted to some other court. The district court's jurisdiction clearly includes suits seeking the foreclosure of tax liens, except in those cases where a probate court might have exclusive jurisdiction.[17]

2. Constitutional County Courts. The constitutional county courts have original jurisdiction in civil cases in which the amount in controversy is $200.01 through $5,000, exclusive of interest.[18] Constitutional county courts do not have jurisdiction to enforce tax liens on land.[19] However, a suit seeking only a personal judgment against the taxpayer could properly be brought in the constitutional county court so long as the "amount in controversy" does not exceed the jurisdictional amount.

3. County Courts at Law. The legislature created the county courts at law, each with its own enabling statute and its own particular grant of jurisdiction. County courts at law have jurisdiction in civil cases where the amount in controversy exceeds $500, but does not exceed $100,000, excluding mandatory damages and penalties, attorney fees, interest and costs.[20] To determine the jurisdiction of a particular county court at law, the specific Government Code provision for that county's court at law should be consulted in addition to the code provisions that apply to statutory county courts at law generally.[21] A tax foreclosure suit in a county court at law may be proper so long as neither the amounts of taxes sought nor the value of the property exceeds the court's jurisdictional amount.

4. Justice Courts. Justice courts have jurisdiction over cases in which the amount in controversy is no more than $5,000, exclusive of interest and penalties.[22] Like constitutional county courts, the justice courts have no jurisdiction over the foreclosure of liens against real property.[23] However suits seeking mere money judgments for the taxes, based upon personal liability, are proper in the justice courts if within the jurisdictional amount.

B. Filing the tax foreclosure suit.

1. The form of the taxing unit's petition. The required contents of a taxing unit's petition are set out under Tex. Tax Code § 33.43, and subsection (e) of that same section authorizes the state comptroller to prescribe the form of petition. The comptroller's promulgated model form of petition to initiate a delinquent tax suit is found under Rule 9.5151, State Comptroller Property Tax Rules. Section 33.43(e) further authorizes the attorney representing the taxing unit to develop his/her own form of petition. It should be noted that all taxes that are delinquent on a property must be included in the suit.[24] Otherwise, any taxes delinquent at the time final judgment is entered and not included in the judgment are barred from collection in the future.[25] With regards to pleadings, so long as all taxes delinquent at the time of filing are specified in the original petition, additional post-petition taxes that may become delinquent between the time of filing and the date of judg-

ment need not be added by amended pleadings, and may instead be simply proven up and included in the judgment.[26]

2. Persons to be made parties to delinquent tax suit.

a. Property owners and other lienholders. Two general "types" of defendants should be joined as parties: (a) anyone who has or may have an ownership interest in the property (*i.e.*, record owners, persons purchasing the property on contract for deed, heirs, known adverse claimants, etc.), and (b) any persons holding a lien against the property (*i.e.*, deeds of trust or mortgage liens found of record, federal and state tax liens, judgment liens evidenced by recorded abstracts of judgment, mechanic & materialman's liens evidenced by recorded affidavits or contracts, property owner association liens usually evidenced by affidavits filed of record, etc.).[27] Because the tax lien is a first and superior lien, inclusion of junior lienholders as defendants, in addition to the owners of the property, will extinguish their lien on the property through any tax sale which might ultimately be conducted.[28] Further, lienholders should be regarded as necessary parties under Rule 39, Texas Rules of Civil Procedure. Otherwise, any judgment and tax sale will be made subject to those interests held by persons not joined in the tax suit.[29] The goal when seeking a foreclosure should be to apply the entire equity in the property toward satisfying the tax claims, and that is accomplished simply by naming and serving every person with a known interest in the property in the underlying suit.[30] From this, it should become obvious that a title search is essential in advance of filing the tax suit, and reasonable costs associated with that search are recoverable by the taxing unit as an allowed expense.[31]

b. Other taxing units with claims against same property. It is required by Section 33.44 of the Code that all taxing units having delinquent tax claims against the property subject of the plaintiff's petition be joined, thereby enabling a tax foreclosure by all interested taxing units in a single action. Once joined by the plaintiff taxing unit, a taxing unit must file its claim by way of intervention or otherwise and prove up its case. Otherwise, the court is directed to provide for the extinguishment of the non-participating taxing unit's lien on the property in the judgment.[32] A common practice in Texas is the joinder of multiple taxing units as co-plaintiffs, particularly in those cases where the taxing units are represented by the same counsel.

3. Service of process. Judicial foreclosures for delinquent taxes are, like any other civil suit, characterized by the requirement of the court acquiring personal jurisdiction over the defendants. That, of course, is secured by valid service of citation. It is Rule 117a, Texas Rules of Civil Procedure, that generally governs the issuance and form of citations in delinquent tax cases. The rule itself states that the general rules of civil procedure control issuance and service of citation, "except as herein otherwise specially provided." Rule 117a should therefore be read as containing exceptions to the general rules of service in civil actions. The rule sets out complete forms of citation by personal service and citation by publication or posting, stating that if the form of citation used is substantially in the form found under the rule, then it shall be sufficient.

a. Personal service. An important distinction in serving a citation in a tax suit is that, unlike civil suits generally, a copy of the petition need not accompany the citation that is served. *See* Rule 117a(4). Also, once a citation is issued and served on behalf of any one of the taxing unit parties, the rule provides that no further citations are necessary prior to the court's determining all of the tax claims of those taxing units who are then parties or who may thereafter intervene.[33]

b. Substitute service by publication or by posting. Rule 117a(3) authorizes substitute service by publication with respect to the following classes of persons: "Nonresident, Absent from State, Transient, Name Unknown, Residence Unknown, Owner Unknown, Heirs Unknown, Corporate Officers, Trustees, Receivers or Stockholders Unknown, Any Other Unknown Persons Owning or Claiming or Having an Interest." A condition precedent to publication of a citation directed to those classes of persons is the filing of an affidavit by the attorney representing the taxing unit that establishes the defendant as belonging to one of the stated classes of persons and the attorney's reasonable diligence in his/her attempts to ascertain the identity and/or whereabouts of each such person. All defendants so cited may be joined in a single published citation, and the citation commands the parties to appear and defend the suit "at or before 10 o'clock a.m. of the first Monday after the expiration of forty-two days from the date of the issuance thereof." The citation is required to be published one time a week for two weeks in a newspaper published in the county, the first publication to be not less than 28 days prior to the return day fixed in the citation. Also, a publisher's affidavit of the publication must be filed among the papers of the suit. Finally, if there is no newspaper in the county that is willing to publish the citation at the maximum fee of "the lowest published word or line rate of that newspaper for classified advertising", chargeable as costs *and payable upon sale of the property*, all of which is supported by the attorney's affidavit, then service of the citation may be made by posting at the courthouse door at least 28 days prior to the return day fixed in the citation. Proof of posting must be made by affidavit of the attorney for plaintiff, or of the person posting it. *Id*. Finally, as in other civil actions, an attorney ad litem must be appointed to represent any named defendants or classes of persons who have been cited by publication or posting and who have failed to appear or answer.[34] The attorney ad litem is compensated with a reasonable fee set by the court and taxed as part of the costs. Those costs are recoverable only from the defendants or from the costs recovered from the proceeds of any foreclosure sale. The taxing units are exempt from posting any security or liability for costs associated with the attorney ad litem.[35]

4. Costs of suit. Taxing units are exempt from costs of suit and may not be required to post any security for costs,

including filing fees, service of process fees, attorney ad litem fees, arbitration fees, and mediation fees.[36] The only exception to that rule is that a taxing unit is required to pay the cost of publishing citations and notices of sale from the unit's general fund.[37]

IV. Trial.

A. The taxing unit's prima facie case. It is provided by Tex. Tax Code § 33.47(a) as follows:

> (a) In a suit to collect a delinquent tax, the taxing unit's current tax roll and delinquent tax roll or certified copies of the entries showing the property and the amount of the tax and penalties imposed and interest accrued constitute prima facie evidence that each person charged with a duty relating to the imposition of the tax has complied with all requirements of law and that the amount of tax alleged to be delinquent against the property and the amount penalties and interest due on that tax as listed are the correct amounts.

By introducing into evidence its delinquent tax records, a taxing unit establishes its prima facie case as to every material fact necessary to establish its cause of action, including that all notices regarding taxes had been given to defendants.[38] The presumption created in favor of the taxing units by their delinquent tax records under § 33.47(a) also operates in a summary judgment setting in the same manner as in conventional trials.[39] Once the delinquent tax records are admitted, the burden naturally shifts to the defendants on affirmative defenses.

B. Common law defenses to tax foreclosure suits. Prior to the enactment of Title 1 of the Tax Code (Texas Property Tax Code)[40], there were three statutory defenses to a delinquent tax suit: (1) non-ownership of the delinquent land at the time the suit was filed, (2) payment of the taxes in question, and (3) that the taxes were in excess of the limit allowed by law.[41] In order to prevail under the third defense, a taxpayer had the onerous burden of proving at trial that the value upon which the taxes were assessed, as determined by the now defunct quasi-judicial boards of equalization, were the result of "fraud, want of jurisdiction, illegality, or the adoption of an arbitrary and fundamentally erroneous plan or scheme of valuation."[42] In the case of a taxpayer defending on the basis of excessive valuation, that meant that the taxpayer had to show a "grossly excessive valuation" or, as some cases held, a valuation that "is so far above the fair cash market value as to shock a correct mind and thereby raise a presumption that the valuation was fraudulent or does not represent a fair and conscientious effort on the part of the board to arise at the fair case market value."[43] Mere errors of judgment did not suffice in setting aside the board's valuation.[44] Alternatively, a taxpayer could also show in defense a "substantial injury" based on a deliberate and arbitrary preconceived plan of the board in which large amounts of property, owned by others, were undervalued or even omitted from the tax roll, thereby increasing the defendant's tax burden in violation of the constitutional mandate of "equal and uniform" taxation.[45] An almost insurmountable problem of proof, however, was the requirement that the defendant marshal enough evidence to at least make a "reasonable showing" of comparative values of the omitted or other undervalued properties, the loss of tax revenue, and the resulting "substantial injury" to him/her in the form of an increased tax burden (i.e., his/her "out-of-pocket" loss).[46]

C. The "common law" constitutional defenses are supplanted by the Tax Code.[47] Underlying the onerous burdens historically placed on taxpayers in delinquent tax suits was the public policy favoring the orderly collection of revenue for local government.[48] However, with the enactment of the Property Tax Code in 1979, that policy was carefully balanced against the competing interests of taxpayers to have their property taxed in a constitutional manner.[49] The code sets out a detailed statutory scheme of taxation and "provides for a regular, systematic, certain, and effective remedy for a taxpayer who believes his tax to be erroneous for any reason whatever, including its alleged unconstitutionality * * *."[50] Appraisal Review Boards (ARB) are established, replacing the former boards of equalization, and the new boards are charged with determining taxpayer protests.[51] Those protests may rest on essentially any ground, including excessive valuations and unequal valuations.[52] Prior notice of proposed values is required to be furnished to taxpayers, thereby enabling them to protest administratively through the ARB prior to a final determination of their tax.[53] Further, appeals to district court are allowed by authorizing the filing of a petition for judicial review of the ARB's determination, in which the district court conducts a trial *de novo* on the issues presented.[54] It is important to note that with only two exceptions noted below, the Code's remedies of administrative and judicial review provided to taxpayers are *exclusive* and, in the absence of exhaustion of the taxpayer's remedies under Chapters 41 and 42, a taxpayer may not raise a defense in a delinquent tax suit that is based upon any ground for which a protest and judicial review are authorized under Section 41.41.[55] Moreover, compliance with the Code's procedures under Chapters 41 and 42 is a jurisdictional prerequisite for judicial review of a tax assessment in any proceeding.[56] While payment of the taxes in question would naturally be a "defense" to any delinquent tax suit, that issue does not relate to the "exhaustion doctrine" since the operative facts surrounding payment arise after the administrative review process has been carried out by the ARB. Thus, proof of payment simply serves to rebut the taxing unit's prima facie case established from its delinquent tax records. However, a lack of situs of the property within the boundaries of a taxing unit seeking to foreclose its lien against real property does constitute one of the two affirmative defenses provided by the Code, regardless of whether the defendant exhausted any remedies under Chapters 41 and 42.[57]

D. But, are those pesky constitutional defenses *really* supplanted? The courts have generally found that the Tax Code's detailed provisions for a right to protest, a right to notice of hearing before the ARB, a right to judicial review under Chapters 41 and 42, and the exclusive remedies provision of Section 42.09 meet the constitutional right of due process.[58] However, beginning in 1985, a line of cases began to develop that held that a taxpayer was not necessarily confined to the remedies provided by the Code, and that a tax assessment could be collaterally attacked following delinquency if the notice of appraised value required by Section 25.19 was not delivered by the county appraisal district.[59] The reasoning of these cases is that the ARB never acquires "jurisdiction" over a proposed increase in value in the

absence of delivery of notice of appraised value. Thus, the question of whether or not a taxpayer exhausted his/her administrative remedies is reached only after the ARB obtains jurisdiction.[60] The underlying principle in these cases is, of course, the taxpayer's right to due process before his/her property is encumbered with an additional tax lien.[61] In an apparent effort to fill the due process void, while at the same time protecting the government's revenue stream, the Legislature enacted a new Section 41.411 to the Code[62]. That section authorizes a property owner to protest before the ARB the failure of the chief appraiser or the ARB to provide any notice to which the taxpayer is entitled. To the extent that Section 41.411, coupled with the exclusive remedies provision of Section 42.09, will serve to minimize successful collateral attacks based on lack of notice remains to be seen as the case law develops in this area.

V. Judgment, order of sale, and enforcement by tax sale.

A. Judgment. In its judgment, the court must of course order the foreclosure of the tax lien and the sale of the property, and the judgment must specify the amounts of delinquent taxes, penalties, and interest awarded.[63] The court must also incorporate in its judgment a finding of the market value of the property, with the appraised value of the most current appraisal roll being presumed to be the correct value at the time of trial.[64] The finding of market value is for the purpose of aiding the officer charged with selling the property in setting the "minimum opening bid" at tax sale, which is the market value of the property stated in the judgment or the aggregate amount of the judgments against the property, whichever is less.[65] The court is further directed to reflect in its judgment the extinguishment of any liens for delinquent taxes owing to a taxing unit that was joined in the action but that failed to appear and establish its claims.[66]

B. Order of sale. The order of sale is issued ministerially by the clerk of the court, upon application by the taxing unit.[67] The order must specify that the property may be sold to a taxing unit that was a party to the suit or to any other person, other than a person owning an interest in the property or any party to the suit that is not a taxing unit, for the "minimum bid amount."[68] In a case where the judgment amounts for taxes exceed the value of the property as stated in the judgment, the minimum bid is the value. However, neither the defendant nor any other person owning an interest in the property may take advantage of bidding the value, thereby escaping the shortfall in taxes. Those persons must instead bid the aggregate amount of judgments against the property if they are to bid at all.[69]

C. The tax sale. Upon receipt of the Order of Sale, the officer charged with the sale must publish a notice of sale in some newspaper[70] published in the county once a week for three consecutive weeks, the first publication being not less than 20 days immediately preceding the day of sale.[71] Notice of the sale must also be given by the officer to the defendant(s), or defendant's attorney, in writing either by mail or in person, as required by Rule 647 and in the manner provided by Rule 21a, Texas Rules of Civil Procedure.[72] However, a failure to deliver or receive the notice, standing alone, is not sufficient to invalidate the sale.[73] The forms of notices of sale are governed generally by Rule 647, Texas Rules of Civil Procedure, which sets out the requisite contents of a notice of sale. However, TEX. TAX CODE § 34.01 also governs notices of sale in tax cases and, to the extent of any conflict with Rule 647, § 34.01 controls.[74] Real property sold by virtue of an execution in a tax case must be sold at public auction at the courthouse[75] of the county in which the land is located on the first Tuesday of the month, between the hours of 10:00 a.m. and 4:00 p.m.[76] In the absence of any bids by the public in the prescribed minimum bid amount, the officer conducting the sale is required to bid the property off to the taxing unit that requested the sale.[77] A taxing unit taking title in that fashion then holds the property in trust for itself and for all other taxing units participating in the judgment until such time as the property may be resold.[78] Whether the property is bid off to the taxing unit or actually sold to a third party bidder from the public, the officer conducting the sale is required to furnish a deed[79], and that deed operates so as to convey to the purchaser all of the interest owned by the defendants included in the underlying tax suit and judgment, including the right to possession of the property, subject only to the former owner's right of redemption as set out under Section 34.21 of the Code.[80]

VI. Observations regarding this area of practice. There is some truth to the perception that the voluminous filing and prosecution of delinquent tax foreclosure suits have historically been characterized more by form-driven work than by any actual lawyering. As the old pre-code cases illustrate, a taxpayer's prospects of successfully defending a tax suit were dismal. That fact, coupled with the relatively insignificant amount of taxes usually in controversy, served to deter actual contested cases. As a result, cases were routinely settled by payment more often than not or, alternatively, by default judgment. Much has changed, however, in recent years. It is no secret that property taxes, particularly taxes imposed by school districts, have skyrocketed. Taxpayers are increasingly finding it in their financial interest to contest delinquent tax claims, notwithstanding the "exclusive remedies rule", with creative arguments such as those made in *Garza v. Block Distributing Co., supra*. With a growing legion of competent and formidable taxpayer counsel in Texas, even more creative theories are sure to arise in the never-ending effort to "beat city hall."

ENDNOTES

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2 "Taxing units" are defined under TEX. TAX CODE § 1.04(12) as including school districts and "any other political unit of this state, whether created by or pursuant to the constitution or a local, special, or general law, that is authorized to impose and is imposing ad valorem taxes on property even if the governing body of another political unit determines the tax rate for the unit or otherwise governs its affairs."

3 Contracts for collection of delinquent taxes by private attorneys is authorized under TEX. TAX CODE § 6.30.

4 TEX. TAX CODE § 23.01(a).

5 TEX. TAX CODE §§ 26.05, 26.09.

6 TEX. TAX CODE § 31.01(a).

7 TEX. TAX CODE § 31.02(a).

8 TEX. TAX CODE § 33.01(a).

9 TEX. TAX CODE § 32.05.

10 Beyond the scope of this article is the remedy of tax warrants for the summary seizure of personal property owned by a person who owes delinquent taxes and the seizure of certain real property that has been abandoned, unused and vacant for prescribed periods of time. *See* TEX. TAX CODE §§ 33.21 *et seq*., 33.91 *et seq*.

11 It is the person who owns or acquires the property as of January 1 of the tax year in question who is personally liable for the tax. TEX. TAX CODE § 32.07(a).

12 Tex. Tax Code § 33.41(a).

13 *Id*.

14 "Amount in controversy" in delinquent tax cases is the amount of taxes sought, or the value of the property, whichever is higher. *See Corsicana I.S.D. v. Corsicana Venetian Blind Co*., 270 S.W. 2d 296 (Tex.Civ.App.—Waco 1954, no writ); *Flowers v. Lavaca County Appr. Dist*., 766 S.W. 2d 825 (Tex.App.—Corpus Christi, 1989, writ denied); *Delk v. City of Dallas*, 560 S.W. 2d 519 (Tex.Civ.App.—Texarkana 1977, no writ).

15 See *Peek v. Equipment Serv. Co*., 779 S.W.2d 802, 803-04 n.4 (Tex989) (assumed, but did not decide, that district court jurisdiction does not extend below $500.00).

16 TEX. GOV'T CODE §§ 25.0003(c), 26.042(d), 27.031.

17 *See Bailey v. Cherokee County Appraisal District*, 862 S.W.2d 581 (Tex. 1993); TEX. PROB. CODE § 5C. (the probate court has exclusive jurisdiction of delinquent tax claims against property held by an estate that is the subject of a pending "dependent" administration if the probate has been pending for 4 years or less and in the same county in which the taxes were imposed)

18 TEX. GOV'T CODE § 26.042(a).

19 TEX. GOV'T CODE § 26.043.

20 TEX. GOV'T CODE § 25.0003(c); *Smith v. Clary Corp*., 917 S.W.2d 796,798 (Tex.1996).

21 See Chapter 25, TEX. GOV'T CODE.

22 TEX. GOV'T CODE § 27.031(a)(1).

23 TEX. GOV'T CODE § 27.031(b)(5).

24 TEX. GOV'T CODE § 33.42(a).

25 TEX. GOV'T CODE § 33.42(c).

26 TEX. GOV'T CODE § 33.42(b).

27 *See Coakley v. Reising*, 436 S.W. 2d 316 (Tex. 1969). Failure to do so however does not deprive the court of jurisdiction to hear and determine the case and to render judgment as to those parties actually before it. *See Id.; Sanchez v. Hillyer-Deutsch-Jarratt Co*., 27 S.W.2d 634 (Tex. Civ. App.—San Antonio 1930, writ ref'd); *Murphee Property Holdings Ltd. v. Sunbelt Savings*, 817 S.W.2d 850 (Tex. App.—Houston [1st Dist.] 1991, no writ).

28 *See* TEX. TAX CODE § 34.01(n), providing that a tax deed following a tax foreclosure sale conveys to the purchaser all of the interest owned by the defendants in the underlying tax suit, subject only to the right of redemption.

29 *American Realty Corp. v. Tinkler*, 107 S.W.2d 627, 629 (Tex. Civ. App.—San Antonio 1937, writ ref'd)(In order for a judgment to bind a person, it is necessary for that person to have been made a party. Otherwise, the judgment as to an omitted person is absolutely void.)

30 In seeking only a personal money judgment against a taxpayer, neither lienholders nor any other persons with no statutory obligation to pay the taxes are necessary parties, because they have no stake in the outcome.

31 Taxing unit may recover "reasonable expenses that are incurred by the taxing unit in determining the name, identity, and location of necessary parties and in procuring necessary legal descriptions of the property on which a delinquent tax is due; * * *" TEX. TAX CODE § 33.48(a)(5).

32 Tex. Tax Code § 33.44(c).

33 As stated in the subsection (4) of the rule: "After citation or notice has been given on behalf of any plaintiff or intervenor taxing unit, the court shall have jurisdiction to hear and determine the tax claims of all taxing units who are parties plaintiff, intervenor or defendant at the time such process is issued and of all taxing units intervening after such process is issued, not only for the taxes, interest, penalties, and costs which may be due on said property at the time the suit is filed, but those becoming delinquent thereon at any time thereafter up to and including the day of judgment, without the necessity of further citation or notice to any party to said suit; and any taxing unit having a tax claim against said property may, by answer or intervention, set up and have determined its tax claim without the necessity of further citation or notice to any parties to such suit."

34 Rule 244, Texas Rules of Civil Procedure.

35 TEX. TAX CODE § 33.49(a); *Aldine Independent School District v. Moore*, 694 S.W.2d 454, 455 (Tex. App.—Houston [1st Dist.] 1985, no writ).

36 *Id*.

37 TEX. TAX CODE § 33.49(b).

38 TEX. TAX CODE § 33.47(a); *Davis v. City of Austin*, 632 S.W.2d 331, 333 (Tex. 1982); *Phifer v. Nacogdoches County Central Appraisal District*, 45 S.W.3d 159, 174 (Tex. App.—Tyler 2000, pet den.); *D & M Vacuum Service v. Zavala County Appraisal District*, 812 S.W.2d 435 (Tex. App.—San Antonio 1991, no writ); *Brian Independent School District v. Lamountt*, 726 S.W.2d 192, 193 (Tex. App.—Houston [14th Dist.] 1987, no writ).

39 *See Ivan Dement, Inc. v. Stratford Independent School District*, 742 S.W.2d 820 (Tex. App.—Amarillo 1987, no writ).

40 Acts 1979, 66th Leg., p. 2217, ch. 841, § 1, generally effective January 1, 1982.

41 VERNON'S ANN. CIV. ST. art. 7329, repealed by Acts 1979, 66th Leg., p. 2329, ch. 841, § 6(a)(1), eff. Jan. 1, 1982 (with the enactment of the Property Tax Code).

42 *State v. Whittenburg*, 265 S.W.2d 569, 572-573 (Tex. 1954).

43 *See City of Waco v. Conlee Seed Company, Inc*., 449 S.W.2d 29, 32 (Tex. 1969).

44 *Id*., 449 S.W.2d at 30(citing State v. Whittenburg, supra.)

45 *Whelan v. State*, 282 S.W. 2d 378, 383 (Tex. 1955)(*citing State v. Whittenburg, supra*)

46 *See, e.g., Orange v. Levingston Shipbuilding Co*., 258 F.2d 240 (5th Cir. 1958)

47 *Valero Transmission Co. v. Hays Consolidated Independent School District*, 704 S.W. 2d 857, 861-862 (Tex. App.—Austin 1985, writ ref'd n.r.e.) [citing *Texas Architectural Aggregate v. Adams*, 690 S.W.2d 640 (Tex. App.—Austin 1985, no writ)]

48 *See Id*., 704 S.W. 2d at 860 note 1.

49 *Id*.

50 *Id*.

51 TEX. TAX CODE § 41.01.

52 TEX. TAX CODE § 41.41.

53 TEX. TAX CODE § 25.19.

54 *See* Chapter 42, TEX. TAX CODE.

55 TEX. TAX CODE § 42.09.

56 *See Appraisal Review Board v. Internat'l Church of the Foursquare Gospel*, 719 S.W.2d 160 (Tex. 1986); *Northwest Texas Conference of United Methodist Church v. Happy Independent School District*, 839 S.W.2d 140, 143 (Tex. App.—Amarillo 1992, no writ) (defense to delinquent tax suit based upon claim of tax exemption not within jurisdiction of the trial court in the absence of compliance with Tax Code provisions).

57 TEX. TAX CODE § 42.09(b)(2). The other affirmative defense, being nonownership as of January 1 of the year for which the tax was imposed, is available to a taxpayer in a suit that seeks merely to enforce personal liability for the tax. TEX. TAX CODE § 42.09(b)(1).

58 *See, e.g., Brooks v. Bachus*, 661 S.W.2d 288 (Tex. App.—Eastland 1983, writ ref'd n.r.e.)

59 *See, e.g., Garza v. Block Distributing Co*., 696 S.W.2d 259 (Tex. App.—San Antonio 1985, no writ); *New v. Dallas Appraisal Review Board*, 734 S.W.2d 712 (Tex. App.—Dallas 1987, writ denied).

60 *New*, 734 S.W.2d at 714 (citing *Garza v. Block Distributing Co., supra*.).

61 *Garza*, 696 S.W.2d at 262.

62 Acts 1985, 69th Leg., ch. 504, § 1, eff. June 12, 1985.

63 TEX. TAX CODE §§ 33.52, 33.53.

64 Tex. Tax Code §§ 33.50(a).

65 TEX. TAX CODE §§ 33.50(b), *and see Clint Independent School District v. Cash Inv., Inc*., 970 S.W.2d 535 (Tex. 1998).

66 TEX. TAX CODE §§ 33.44(c).

67 TEX. TAX CODE §§ 33.53(b).

68 TEX. TAX CODE §§ 33.50(b).

69 TEX. TAX CODE §§ 33.50(c).

70 The newspaper selected must (1) devote not less than 25% of its total column lineage to general interest items, (2) be published at least once each week, (3) be entered as second-class postal matter in the county where published, and (4) have been published regularly and continuously for at least 12 months before the particular notice of sale is published. GOV'T CODE § 2051.044(a). [See also Subsection (b) of § 2051.044 which provides that a newspaper has been published "regularly and continuously" under Subsection (a) if the newspaper omits not more than two issues in the 12 month period.]

71 The date of publication of the first of the three notices of sale may be counted as day one in determining whether notice was published for 3 consecutive weeks preceding the sale. *Concrete, Inc. v. Sprayberry*, 691 S.W.2d 771, 772 (Tex. App.—-El Paso 1985, no writ).

72 *Collum v. DeLoughter*, 535 S.W.2d 390 (Tex. App.—-Texarkana 1976, *writ ref'd n.r.e.*).

73 TEX. TAX CODE § 34.01(d).

74 Under subsections (a) and (s) of Sec. 34.01, it is provided that in the event of a conflict between Sec. 34.01 of the Code and the Texas Rules of Civil Procedure, Section 34.01 controls and prevails over the Rules.

75 The sale must be in the same location of the courthouse that is designated by commissioners' court under Sec. 51.002, Property Code, for the sale of real property generally. TAX CODE § 34.01(r).

76 Rule 646a, Texas Rules of Civil Procedure; TEX. TAX CODE § 34.01(r).

77 TEX. TAX CODE § 34.01(j).

78 TEX. TAX CODE § 34.01(k).

79 TEX. TAX CODE § 34.01(m).

80 TEX. TAX CODE § 34.01(n).

Notes

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