TEXAS LAWYER
December 19, 2011
An ALM Publication

Special Report

Game-Changing Appeals

THE IMPACT PLAYERS
Don Martinson and Tom Brandt

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When defending civil litigation, sometimes the biggest victories involve keeping a client out of a trial court. And some of those wins have a ripple effect, changing the legal landscape for many other defendants.

That's what four experts say is the broader impact of the wins scored this year by Don Martinson and Tom Brandt, partners in Dallas' Fanning Harper Martinson Brandt & Kutchin. Each scored victories in highly watched, precedent-setting appellate cases that are game-changers for current and future Texas litigants.

Martinson's victory on behalf of his client, Universal Underwriters of Texas Insurance Co., will impact hundreds of insurance coverage claims pending in the aftermath of 2008's Hurricane Ike, two experts say. And Brandt's win affects one of the most controversial aspects of free-speech law: When is an elementary school principal immune from suit by a student who alleges violations of the right to religious expression?

On May 6, Martinson won *In Re Universal Underwriters of Texas Insurance Co.*, in which a unanimous Texas Supreme Court ruled that the insurance company did not waive its right to compel an appraisal, despite waiting until after it was sued to seek the appraisal.


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Don Martinson (left) and Tom Brandt

Appraisal clauses are common in insurance policies. They provide a means to resolve disputes between insurers and insureds over the amount of losses in a covered claim, short of litigation.

Insurance companies and policyholders closely watched *Universal* for a variety of reasons. Appraisal clauses appear in most property insurance policies written in Texas and have become a serious issue in coverage disputes related to disasters such as hurricanes.

The appeal drew eight amicus briefs and amicus letters from insurers and insureds. The insurance company amici feared they may be exposed to future protracted litigation if the Supreme Court ruled that Universal waived its right to compel an appraisal by not invoking the right earlier. And the insured amici worried their rights to sue insurers over unpaid claims would be hampered if the high court found that Universal did not waive its right to compel appraisal. The high court sided with insurers.

"It is a big deal," says Tom Bishop, a partner in Dallas' Bishop & Hummert who represents insurance companies and is not involved in the case. The decision is important because it allows insurers to settle disputes over monetary losses with their insureds short of going to court. And that's a very big issue in coverage disputes over natural disasters, he says.

Once the appraisal process "is complied with, the insurer has the opportunity to either pay the amount

and eliminate that part of the case — which is a big part of it," or go to court, Bishop says.

"I've known Don for many, many years. We've fought, and we've agreed at times. And he is the right lawyer for that issue because he's dealt with it for years, and he's dealt with it more than anybody in Texas," Bishop says.

Scott Keller, a Dallas solo who represented the insured in *Universal*, did not return a telephone call seeking comment. But after the ruling in May, he told *Texas Lawyer* that appraisals now will become "another hoop that the insured has to jump through in order to be paid what is due to them under the policy."

Martinson says he isn't sure what his victory will mean for insurance companies in the short term. But he expects *Universal* "will result in a decline in the number of first-party property-damage lawsuits being filed in Texas, with many more disputes resolved through the appraisal process."

Schools and Speech

Brandt's win came on Sept. 27 in *Doug Morgan, et al. v. Lynn Swanson, et al.*, a rare en banc reversal of a controversial 5th U.S. Circuit Court of Appeals panel ruling. The full 5th Circuit ruled in a split decision that two school principals, represented by Brandt, were immune from suit for allegedly preventing students from distributing religious gifts at school.

Morgan became known as the "Candy Cane case" and received extensive media coverage after the principals allegedly told the parents the children could not distribute religious-themed gifts, including candy cane-shaped pens and other things, at on-campus winter parties. Attached to the pens were laminated cards titled "Legend of the Candy Cane" and text discussing the "Christian origin of candy canes," the plaintiffs alleged in their brief to the en banc 5th Circuit.

Brandt argued that the principals should be immune from suit because the law was unclear regarding whether an elementary school principal can be sued based on a religious free-speech issue.

Writing for the en banc majority, 5th Circuit Judge Fortunato "Pete" Benavides agreed with Brandt's argument and said the law on whether elementary school administrators can be sued for alleged religious free-speech violations is too unclear to allow the suit go forward.

The decision was a victory for people who educate public school children for a living in Texas, says Dennis Eichelbaum, a partner in the Plano office of Eichelbaum, Wardell, Hansen, Powell & Mehl who has defended school districts in similar cases for 25 years but was not involved in *Morgan*.

"It was important to establish qualified immunity, because educators have enough problems trying to educate children and not having to worry about understanding complex legal issues that have been undecided in the law," Eichelbaum says. "And this case helped establish that educators aren't expected to be judges. That's the worst thing about this — if six judges can't agree what the law is, how can an educator be expected to know what the law is?"

Kelly Shackelford, president and chief counsel for Plano's Liberty Institute, a religious freedom organization that represents the plaintiffs in *Morgan*, says his clients intend to appeal to the U.S. Supreme Court.

Shackelford says the decision makes clear that, while the principals cannot be sued, the actions the principals took violated the plaintiffs' free-speech rights. [*See "Ten of the 5th Circuit's Most Important Opinions of 2011," page 34.*]

"[I]t's a victory for Tom Brandt's two principals. But the law part [of the decision] is more important for millions of schoolchildren," Shackelford says. "The decision that these types of actions are violations, that's clearly established. . . ."

Brandt says he and Martinson were just lucky to win two big defense victories in the same year.

"He and I both were simply doing the best for both of our clients. We weren't setting out to make headlines. We were both just setting about the humble task of zealously advocating our clients' cause," Brandt says "And we're both very honored but we're mostly grateful that we were able to help our clients out."