

**By the Honorable Nancy Stein Nowak, Soledad Valenciano, and Melanie Fry**

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**Bankruptcy; Objection to Claim; Service**  
*In re Perez*, 10-52146-RBK (King, Oct. 31, 2011)

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**Motion to Dismiss; Texas Constitution; ADA; EEOA**  
*Montemayor v. Miller*, SA-11-CV-24-XR (Rodriguez, Sept. 6, 2011)

Student sued UTSA and instructors alleging he is Mexican-American and dyslexic and was denied rights under Texas Constitution, Americans With Disabilities Act ("ADA"), and Equal Educational Opportunities Act ("EEOA"). Court granted defendants' motion to dismiss. Texas Constitution does not allow money damages. Individual instructors are not personally liable under Title II of ADA. ADA claim against UTSA was not barred by Eleventh Amendment, but plaintiff failed to allege discrimination on the basis of his dyslexia. EEOA does not impose obligations upon state higher education systems. Texas Tort Claims Act did not bar plaintiff's claim for intentional infliction of emotional distress or invasion of privacy against instructors but plaintiff failed to sufficiently allege facts to support such claims.

**18 U.S.C. § 2241(c); 18 U.S.C. § 2255(a); Subject Matter Jurisdiction**  
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**Bankruptcy; Plan of Reorganization**  
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Debtors filed voluntary petitions under Chapter 11 of Bankruptcy Code and filed a plan of reorganization. Two creditors filed claims. One creditor objected to the plan, alleging it violated Bankruptcy Code section 1129(a)(11) because it did not have a reasonable likelihood of success. As evidence of feasibility, debtors offered one debtor's testimony and projections compiled by his sister. Debtors offered no independent expert testimony. Court held evidence was insufficient to prove feasibility of the plan. Creditor also asserted that debtors manufactured an impaired class and engaged in gerrymandering the vote on the plan by putting a dissenting creditor into a separate class. Court agreed; debtors had classified two unsecured creditors differently in order to obtain an accepting impaired class. Court denied confirmation of debtors' plan.

**Remand; Supplemental Jurisdiction; Diversity Jurisdiction**  
*Buttelman v. Wells Fargo Bank, N.A.*, SA-11-CV-00654-XR (Rodriguez, Oct. 27, 2011)

Plaintiff sought to enjoin home foreclosure by defendant bank. Bank removed action and plaintiff moved to remand. Plaintiff conceded court had federal question jurisdiction over claim raised under federal law. Court would therefore have supplemental jurisdiction over any remaining claims that are "so related" to the federal claim that they "form a part of the same case or controversy." However, 28 U.S.C. § 1441(c) permits remand if the remaining claims are separate and independent from the removed federal question claim. Court had supplemental jurisdiction over the remaining claims because the claims were not separate and independent from plaintiff's federal claim, involved "substantially the same facts," and arose out of the same case or controversy: the alleged wrongful acceleration and foreclosure. Remand of the remaining claims was also improper because such claims were not "otherwise non-removable." Rather, court had diversity jurisdiction over such claims. Given foreclosure had not yet occurred, plaintiff's "entire property," rather than its equity,

was the object of the litigation and therefore its value was used to satisfy the requisite amount in controversy for diversity jurisdiction.

**Temporary Restraining Order**  
*Risenmay v. Eldridge*, SA-11-CA-733-XR (Rodriguez, Sept. 12, 2011)

Court granted in part and denied in part plaintiffs' motion for TRO against neighbor. Plaintiffs alleged neighbor engaged in race-based harassment and intimidation, including leaving dead raccoons on their property, shooting projectiles from a rifle toward their property, and preventing or otherwise impeding the school bus carrying plaintiffs' children from entering their subdivision. Plaintiffs had a substantial likelihood of success on the merits on their claims for tortious interference with contractual rights, intentional infliction of emotional distress, and (after amending their complaint) violations of state and federal Fair Housing Acts. A substantial threat of irreparable harm existed. The threatened injury outweighed any harm resulting from the issue of the TRO and its issuance would not undermine the public good. Court denied plaintiffs' motion for TRO against the parties' homeowners association as the association neither condoned nor participated in the neighbor's acts.

**Social Security Disability Benefits**  
*Ocampo v. Astrue*, SA-10-CA-0502-XR (Rodriguez, Sept. 13, 2011)

Court accepted Magistrate Judge's Report and Recommendations affirming prior decisions by Commissioner, Administrative Law Judge and Appeals Council to deny social security benefits. Applicant alleged findings were erroneous that: (1) his psoriasis did not meet eligibility requirements; and (2) he had residual functioning capacity to perform light work and past work as a courier. Substantial evidence existed that applicant's psoriasis was not extensive and had not persisted for at least three months despite continuing treatment as prescribed. Applicant's reliance on his arthritis and his medication's restrictions against prolonged exposure to sunlight was insufficient to defeat finding that he could perform light work or past work, as applicant's arthritis was mild and light duty could be performed inside. That applicant performed more strenuous employment

such as mowing lawns and attempted to resume his courier job after having been fired was further evidence that applicant had residual functioning capacity to perform light work and past work as a courier.

**Rule 68 Offer of Judgment; Class Actions**  
*Boles v. Moss Codilis, LLP*, SA-10-CV-1003-XR (Rodriguez, Sept. 15, 2011)

Court granted plaintiff's motion to strike defendants' Rule 68 offer of judgment. Offer of judgment was made ten days after plaintiff filed a motion to certify class. Under Rule 68, if judgment obtained by the offeree is not more favorable than a pretrial offer of settlement, the offeree must pay costs incurred after the offer. An offer of judgment prior to class certification directed solely at the named plaintiff that gives all legally-entitled relief could have the effect of picking off the named plaintiff, requiring dismissal of the case. For this reason, a case may not be mooted by a Rule 68 offer of judgment while a motion for class certification is pending. Plaintiff remained concerned that the offer of judgment required her to choose between settling and risking being burdened with class certification costs. Recognizing a split in authority regarding (1) whether a Rule 68 offer is ripe for review prior to a request for costs, and if so, (2) whether striking such offer is the correct procedural mechanism to resolve the matter, court held the offer was ripe for review and could be stricken.

**Bankruptcy; Denial of Discharge; Summary Judgment**  
*In re Gavigan*, 10-53118-RBK and 10-5128-RBK (King, Oct. 14, 2011)

Court granted judgment creditor's motion for summary judgment based on debtor's violations of § 727 of the Bankruptcy Code. Debtor sought to discharge a sizable judgment held by judgment creditor. Discharge in bankruptcy may be denied under § 727(a)(4) if the debtor, with the requisite fraudulent intent, makes false statements and omissions in his bankruptcy schedules and statements. Discharge may also be denied under § 727(a)(3) if the debtor fails to keep any records of his financial condition and offers only unsupported explanations for his deficiency in assets and income to pay creditors. Because he made numerous omissions and false

statements, and because he amended his filings after falsity was revealed, debtor's fraudulent intent to conceal his true financial condition was proven, and denial of debtor's discharge under § 727(a)(4) was proper. Because debtor left judgment creditor "to speculate" as to debtor's financial status and provided only "suspect" explanations, denial of debtor's discharge under § 727(a)(3) was proper.

**Motion to Dismiss; Americans With Disabilities Act**  
*Dube v. Tex. Health & Human Servs. Comm'n*, SA-11-CV-354-XR (Rodriguez, Sept. 6, 2011)

Court granted in part and denied in part defendants' motion to dismiss. Employee alleged she was terminated after an 11-week absence, 11 days before her scheduled return-to-work date, in violation of the Americans With Disabilities Act ("ADA"). Front pay in lieu of reinstatement is not available when sovereign immunity is invoked, despite *Ex Parte Young* which provides an exception to sovereign immunity in suits where only prospective relief is sought. Although dismissal of an ADA claim may be available under 42 U.S.C. § 12101(3), which protects a covered entity that establishes the perceived impairment is both transitory (expecting to last 6 months or less) and minor, defendants did not meet burden of proof. Relying solely on the employee's return-to-work date was insufficient, and it was not facially apparent from the employee's complaint that her impairment was transitory or minor.



Nancy Stein Nowak is a United States Magistrate Judge for the Western District of Texas. Since 1986, Judge Nowak has summarized significant decisions of the local judiciary for the Subpoena and the San Antonio Lawyer.



Soledad Valenciano and Melanie Fry practice commercial litigation with Cox Smith Matthews.

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