HOLDING: Affirmed.
REASONING: The attorney argued the Debtor knowingly and willingly consented to the dual representation. Additionally, the attorney's representation of Wells Fargo did not adversely affect his legal representation of the Debtor because the transaction allowed an early completion of and withdrawal from the Chapter 13 filing. Because of the Debtor's consent and the lack of adverse affect on the Debtor, the attorney argued, his actions fell within those allowed by the Rules of Professional Conduct. The court, however, determined that the attorney could not have represented the Debtor with absolute loyalty because his legal advice was likely tainted by his desire to remain employed with Wells Fargo. These conflicting duties of loyalty created an obvious conflict of interest. Even though the attorney obtained the Debtor's consent regarding the dual representation, the court cited the Missouri Supreme Court's holding that some conflicts can't be cured by the client's knowing and voluntary consent. *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W. 3d 729, 739 (Mo. 2004) (en banc).. The court also determined the attorney's dual representation constituted a *per se* conflict of interest and, as such created "such an inherent and impermissible conflict that it cannot be waived." As a result, the court upheld the bankruptcy court's decision to deny attorney's fees and order the attorney to disgorge fees received for legal services rendered in this case.

MISCELLANEOUS

VOIR DIRE QUESTIONS PREVIEWING WHETHER EVIDENCE IS OUTCOME DETERMINATIVE ARE WITHIN TRIAL COURT DISCRETION

Hyundai Motor Co. v. Vasquez, 189 S.W. 3d 743 (Tex. 2006).

FACTS: Plaintiffs Victor and Brenda Vasquez filed suit against Hyundai Motor Company and Hyundai Motor America, Inc. ("Hyundai") after Plaintiffs' daughter died in a low-speed automobile collision. Plaintiffs alleged that Hyundai's airbag was defective, deploying with so much force as to break their daughter's neck. Hyundai responded that the Plaintiff's daughter would not have been injured if she had been wearing a seat-belt as required by state law or if she had been placed in the back seat as recommended by the automobile manufacturer.

The trial judge dismissed two jury panels after voir dire. During voir dire of the first two jury panels, the jurors were asked whether their decisions would be predisposed by the lack of a seat belt in the accident. Because a significant number of jurors answered affirmatively to the question, the judge dismissed the first two jury panels. During voir dire for the third jury panel, the judge allowed general questions regarding the jurors' seat belt habits but prohibited disclosure regarding the lack of a seat belt in the case. Then three jurors were excused for cause; twelve jurors and one alternate were selected.

The jury found in favor of Hyundai, and the trial court rendered a take-nothing judgment. On appeal, Plaintiffs argued that the trial court erred in disallowing voir dire questions regarding the lack of a seat belt in this case. The Fourth Court of Appeals first affirmed. However, upon subsequent rehearing en banc, the Fourth Court of Appeals reversed and held that the trial court abused its discretion is disallowing the voir dire question. Hyundai petitioned the Texas Supreme Court for review.
HOLDING: Reversed and remanded.
REASONING: Voir dire serves the purpose of determining whether a potential juror is disqualified by statute because of bias or prejudice. In *Compton v. Henrie*, 364 S.W. 2d 179 (Tex. 1963), the court stated bias would be found in a juror whose state of mind would naturally infer that he will not act impartially. Prejudice was defined as prejudgment. Voir dire questions addressing bias and prejudice are appropriate.

Cortez v. HCCI-San Antonio, Inc., 159 S.W. 3d 87 (Tex. 2005) held that voir dire questions are improper if they seek to determine how jurors would respond when given case-specific facts. The general rule lies on the policy that a fair and impartial juror reaches a verdict on the basis of the evidence. Similarly, the Court in *Babcock v. Northwest Memorial Hospital*, 767 S.W. 2d (Tex. 1989), differentiated between voir dire questions that assessed the weight jurors placed on external versus case-specific evidence. The Court held that questions regarding bias or prejudice that arise from societal influence outside the case are permissible. Questions regarding an operative fact, however, would improperly skew jurors' view of the case facts.

It is the substance, not the form, of the question which is determinative.

In Texas the trial judge has broad discretion in conducting voir dire. The Court disagreed with the court of appeals' ruling that the proposed questions "clearly focuses on the ability of the juror to be fair." Instead, the Court reasoned that the question focused on a fact that was specific and material to the case. Although the question was worded in terms of preconceived notions, it emphasized a relevant fact of the case. It is the substance, not the form, of the question which is determinative. Thus, the Court reversed the ruling of the court of appeals.

AMENDING A COMPLAINT TO ADD A DEFENDANT "COMMENCES" A NEW SUIT UNDER THE CLASS ACTION FAIRNESS ACT OF 2005

Braud v. Transport Serv. Co. of Illinois, 445 F.3d 801 (5th Cir. 2006).

FACTS: On August 30, 2004, Pamela Braud and certain other plaintiffs ("Braud plaintiffs") brought a putative class action in state court against Transport Service Company of Illinois ("Transport"), arising from a chemical spill. On April 8, 2005, the Braud plaintiffs amended their petition to add Ineos Americas, LLC ("Ineos"), as an additional defendant, contending that Ineos was the owner and co-shipper of the chemical that allegedly spilled. Ineos was served on April 19, 2005.

On May 19, 2005, Ineos timely removed the action to federal court, basing removal jurisdiction on the Class Action

Fairness Act (CAFA). On June 17, 2005, the Braud plaintiffs moved to remand to state court, and on July 12, 2005, they filed a purported motion to dismiss Ineos. On December 9, 2005, the United States District Court for the Eastern District of Louisiana remanded the action to state court, finding that CAFA did not apply because the initial complaint filed on August 30, 2004 preceded CAFA's effective date of February 18, 2005, despite the fact that Ineos was not named as a defendant until afterwards. Transport appealed.

HOLDING: Reversed and remanded.

REASONING: Section 9 of CAFA provides that amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act, that date being February 18, 2005. The courts of appeals have unanimously held that commencement of a lawsuit for the purposes of CAFA is determined by state law. *Bush v. Cheaptickets, Inc.*, 425 F.3d 683 (9th Cir. 2005). In most states, a lawsuit is commenced when the suit is filed, or when complaint or summons is served. In some states, suits are commenced upon service. In Louisiana, a suit is commenced by filing a pleading presenting the demand to a court of competent jurisdiction, and thus, the Braud plaintiffs' original action commenced on August 30, 2004. La. Code Civ. Proc. Ann. rrt. 421.

CAFA is clear in that any single defendant can remove (without the consent of other defendants) the entire class action.

The distinct issue in this case, however, is whether an amendment of the complaint through the addition of a new defendant commences a new suit for purposes of CAFA. Case law generally holds "a party brought into court by an amendment, and who has, for the first time, an opportunity to make defense to the action, has a right to treat the proceeding, as to him, as commenced by the process which brings him into court." *United States v. Martinez,* 195 U.S. 469 (1908). Thus, the court found that under Louisiana law, the Braud plaintiffs' commenced their suit against Ineos after the effective data of CAFA. Such reasoning follows that Ineos's addition changes the character of the litigation so as to make it substantially a new suit. CAFA is clear in that any single defendant can remove (without the consent of other defendants) the entire class action. 28 U.S.C. § 1453(b). Plaintiffs have some power to seek to avoid federal jurisdiction by defining a proposed class in particular ways, but they lose that power once a defendant has properly removed a class action to federal court. In addition, when a plaintiff amends a complaint after removal in a way that destroys diversity, a district court must consider the reasons behind the amendment in determining whether remand to state court is proper. If the sole reason for the amendment was to destroy diversity, then remand should not be granted. The Braud plaintiffs could not offer any reason for Ineos's dismissal, thus, it appears dismissal was intended solely to destroy diversity and avoid federal jurisdiction.

FOUR-YEAR STATUTE OF LIMITATIONS APPLIES TO UNJUST ENRICHMENT CLAIMS

Friberg-Cooper Water Supply Corp. v. Elledge, ____ S.W.3d ____ (Tex. App.—Fort Worth 2006).

FACTS: Friberg-Cooper Water Supply Corporation ("Friberg-Cooper") sued Bobby Elledge ("Elledge"), alleging that Friberg-Cooper paid invoices submitted by Elledge for insurance and equipment in connection with a contract for improvements. Friberg-Cooper contended that the contract was actually with Wichita County and that the terms of the contract provided that Elledge would supply his own insurance and equipment. Friberg-Cooper alleged that it was entitled to restitution because Elledge would be unjustly enriched if he were allowed to retain the monies or the benefit of the payments.

Friberg-Cooper filed suit between two and four years after the payments. The trial court granted traditional summary judgment in favor of Elledge, applying the two-year statute of limitations contained in Section 16.003 of the Texas Civil Practice and Remedies Code. Friberg-Cooper appealed the decision and argued a four-year statute of limitations applied to unjust enrichment claims.

HOLDING: Reversed and remanded.

REASONING: This Court agreed with Friberg-Cooper that the four-year statute of limitations applies to unjust enrichment claims. The Court noted the 1979 amendments to Sections 16.003 and 16.004 of the Civil Practice and Remedies Code eliminated a distinction between those debts that were "not evidenced by a contract in writing" and other debts, listing all actions for debt under the four-year statute. The Court agreed with the El Paso Court of Appeal in *Amoco Production Co. v. Smith*, 946 S.W.2d 162 (Tex. App.—El Paso 1997, no writ), where the court tracked the history of unjust enrichment out of "assumpsit" and as constituting a claim for "debt," and thus covered by the four-year statute of limitations. The Court held that Friberg-Cooper's claim for restitution based on unjust enrichment is a suit founded on a debt not evidenced in writing and is, therefore, subject to the four-year statute of limitations.

COURT DISCUSSES VEXATIOUS-LITIGANT STATUTE

Douglas v. American Title Co., 196 S.W.3d 876 (Tex. App.—Houston [1st Dist.] 2006).

FACTS: In May of 1999, Douglas contracted with American Title Company ("ATC") to perform title services. Thereafter, Douglas was indicted for real-estate fraud. The Harris County District Attorney's Office requested that ATC halt all transactions and closings of properties involved in Douglas's fraud. ATC complied and Douglas sued ATC, alleging a breach of contract. ATC filed a summary judgment motion in the 2003 lawsuit, and the trial court granted the motion.

In January 2004, Douglas filed an original petition for ATC's failure to produce mortgage records. In February of 2004, ATC filed a motion to declare Douglas a vexatious litigant and requested security pursuant to Civil Practice and Remedies Code Sections 11.054 and 11.055. In April 2004, the trial court granted in the 2004 lawsuit ATC's vexatious-litigant motion and

ordered Douglas to pay security in the amount of $5,000. The order also prohibited Douglas from filing, in propria persona, any new litigation in a Texas court without permission from a local administrative judge. In May 2004, the trial court signed an order dismissing the 2004 lawsuit for failure to furnish the ordered security within the time set out in the vexatious-litigant order. Douglas argued that the trial court abused its discretion by granting ATC's vexatious-litigant motion, thereby causing the 2004 lawsuit to be dismissed for his failure to comply with the order on that motion.

HOLDING: Reversed and remanded.

REASONING: The court held that in order to prevail on an order to declare a vexatious litigant, there must not be a reasonable probability that the plaintiff will prevail in the litigation against the defendant, and the defendant must prove one of three grounds before a trial court can declare a vexatious litigant. The court reasoned, although the same defendant, ATC, was involved in both suits, the cause of action, claim, and controversy of the 2003 lawsuit were different from those of the 2004 lawsuit. In the 2003 lawsuit, Douglas sued ATC for breach of contract related to a property. By contrast, in the 2004 lawsuit, Douglas sued ATC for failure to produce documents for different properties. Accordingly, the court held that ATC did not prove subsection two of section 11.054 of the Texas Civil Practice and Remedies Code.

LAWYER'S AGREEMENT FOR PAYMENT AT DISCHARGE IS UNCONSCIONABLE

Hoover, Bax & Slovacek LLP v. Walton,____S.W.3d____(Tex. 2006).

FACTS: John Walton retained attorney Steve Parrot of Hoover, Bax & Slovacek L.L. P. "Hoover" to recover unpaid royalties from several oil and gas companies that operated on his ranch in Winkler County. The fee agreement between Hoover and Walton included a contingency fee and most importantly the following provision:

> You may terminate the firm's legal representation at any time… Upon termination by you, you agree to immediately pay the firm the then value of the Contingent Fee described [in this agreement], plus all costs then owed to the firm, plus subsequent legal fees [associated with the process of transferring the representation to another firm and withdraw from litigation].

Hoover hired local counsel to assist in the representation and reduced its contingency fee from 30% to 28.66%. The firms negotiated two of the royalty settlements for Walton and the contingency fee was paid. Walton authorized settlement for $6 million on his royalty claims against Bass Enterprises. Walton subsequently discharged Hoover after Parrot, the attorney on his case made unreasonable settlement demands of $58.5 million without consulting Walton on this claim. Walton complained the Parrot did little to prosecute his claims against Bass and damaged Walton's credibility when he made the unauthorized and "absurd" 58.5 million demand. Walton retained Andrews & Kurth, LLP, who settled his claim against Bass for $900,000.00. Hoover billed Walton $1.7 million, representing 28.66% of $6 million. Hoover argued that Bass' offer of $6 million and Walton's authority to settle at that amount, established the present value of Walton's claims at the time of discharge. Walton refused to pay Hoover's bill. Hoover sued.

HOLDING: Affirmed in part, reversed in part. Remanded.

REASONING: The court decided that Hoover's termination fee provision penalized Walton for changing counsel, granted Hoover an impermissible proprietary interest in Walton's claims, shifted the risks of the representation almost entirely to Walton's detriment, and subverted several policies underlying the use of contingent fees. The termination fee provision was found to be unconscionable as a matter of law and, therefore, unenforceable.

The court reasoned that the attorney who is discharged without cause has two remedies available: to seek compensation in quantum meruit or to file suit to enforce the contract by collecting the fee from any damage award the client subsequently recovers. The court said that these remedies are subject to a prohibition against charging and collecting an unconscionable fee. The court also reminded that clients have a right to choose their attorneys and may terminate with or without cause. The court held that Hoover's termination fee provision requiring immediate payment of the firm's contingent interest exceeded the scope of prevailing case law and forced the client to liquidate a percentage of his claim as a penalty for discharging the lawyer. The court decided that this termination fee which imposed an undue burden on the client's ability to choose counsel violated public policy and was unconscionable as a matter of law.

The termination fee provision was found to be unconscionable as a matter of law and, therefore, unenforceable.

The court also reasoned that this termination fee provision was unconscionable because the Supreme Court of Texas previously held that a lawyer is entitled to receive the contingent fee "only when and to the extent the client receives payment." A contingency fee that was greater than the client's actual recovery was held unconscionable. The termination fee provision also created valuation and administrative problems. Failure of the lawyer to give his client at the outset, a clear and accurate explanation of how his fee would be calculated weighed in favor of the court finding that this provision was unconscionable. Although experts could calculate the value of the claim at the time of discharge, the additional time, expense and uncertainty could have been avoided by an hourly billing provision.

PATIENT'S CLAIMS AGAINST MANUFATURER OF ANGIOPLASTY CATHETER WERE PREEMPTED BY MEDICAL DEVICE AMENDMENTS FOR FOOD AND DRUG ACT

Riegel v. Medtronic, Inc. 451 F.3d 104 (2d Cir. 2006).

FACTS: The Evergreen Balloon Catheter ("Catheter") was a prescription medical device that Medtronic, Inc. ("Medtronic") developed for patients with coronary disease. The Catheter entered the market pursuant to the pre-market approval (PMA) process in the mid 1990's. The FDA approved Medtronic's

application for the Catheter in April 1995 and later that month approved their PMA supplements requesting approval for revised labeling of the device. In May of 1996, Charles Riegel ("Appellant") underwent a percutaneous transluminal coronary angioplasty, during which his surgeon used the Catheter. The device label for the Catheter specified that its use is contraindicated for patients with "diffuse or calcified stenoses" and that it should not be inflated beyond eight atmospheres. During the procedure, Appellant's doctor inserted the Catheter into Appellant's artery, eventually inflating the device up to a pressure of ten atmospheres. Upon the final inflation, Appellant rapidly deteriorated but ultimately survived. Appellant and his wife filed suit against Medtronic, alleging five state common law causes of action: negligence; strict liability; breach of express warranty; breach of implied warranty; and loss of consortium. In Medtronic's amended answer they raised the affirmative defense of federal preemption of the Medical Device Amendments to the Food, Drug, and Cosmetic Act "FDCA".

Medtronic moved for summary judgment. The district court held that the Appellant's claims, except for the negligence manufacturing and breach of express warranty claims, were preempted by the amendments to the FDCA. Medtronic later moved for summary judgment on these remaining claims and the court granted that motion. It dismissed the breach of express claim because the instructions on the Catheter clearly disclaimed any express warranty. It dismissed the negligent manufacturing claim because there was insufficient evidence to conclude that the burst was due to negligent manufacturing, rather than a combination of other reasons.

HOLDING: Affirmed

REASONING: The Court agreed with Medtronic that all of the Appellant's claims were preempted by the Medical Device Amendments (MDA) Section 360k(a) under the FDCA. The court recognized that the application of Section 360k(a)'s preemption provision to medical devices that have entered the market was through the PMA process The Court noted that the issue of PMA processes were examined in *Becker v. Optical Radiation Corp.*, 66 F.3d 18 (2d Cir. 1995). There, the court held that claims of alleged product defects as to a PMA approved device, notwithstanding that device's compliance with the PMA process, were preempted by Section 360k(a). In the case at hand, the Court believed that the Catheter at the time of its PMA application submission, had been unreasonably safe and ineffective, the FDA would have had the power to condition PMA approval on changes it felt was necessary. However, the FDA concluded the Catheter was safe and effective when it explicitly approved the labeling of the Catheter through the PMA process. The Court held that the claims presented did not rest on the premise that the catheter deviated from the standards contained in the approved PMA application for the Catheter. Rather, the claims rested on the premise that the Catheter itself in its PMA approved form was defective. The Court affirmed the district court's ruling that the Appellant's claims were preempted by the MDA because the product had been through the PMA approved device process.