IN THE SUPREME COURT OF TEXAS

NO. 06-0911

EDWARDS AQUIFER AUTHORITY ET AL., PETITIONERS,

v.

CHEMICAL LIME, LTD., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued April 1, 2008

JUSTICE BRISTER, concurring.

It has been said that "any law student, after a month in law school, knows that the answer to the question 'Define X,' is: 'For what purpose are we defining this term?'"[1] In this case, we must define "take effect" for the purpose of deciding when our judgments become the law, not when they become final. One would think judgments from this Court would become the law immediately. Indeed, there is no foreboding in the term "Judgment Day" if nothing happens until "Mandate Day."

I agree with the Court that our decisions can take effect whenever we say they do. For example, in the school finance cases we postponed the effective date of one judgment for seven

[1] Alan Hyde, *Response to Working Group on Chapter 1 of the Proposed Restatement of Employment Law: On Purposeless Restatement*, 13 EMP. RTS. & EMP. POL'Y J. 87, 87 (2009).

months,[2] another for six months,[3] and another for more than a year[4] — all long after the judgment was final and the mandate had issued. Similarly, in a handful of special cases the Legislature has provided that an appellate judgment takes effect *before* the mandate,[5] *with* the mandate,[6] and *after* the mandate.[7]

But except in such special cases, it would be a waste of time for courts to set each effective date individually. Circumstances may dictate when a special judgment should take effect, but for all other judgments we need a general rule. Accordingly, I join in the Court's judgment and all parts of its opinion except those that leave the general rule up in the air. For several reasons, the obvious and logical general rule is that our decisions should take effect on the date of judgment.

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[2] *See Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 399 (Tex. 1989) (postponing effective date of October 2, 1989 opinion until May 1, 1990).

[3] *See Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 799 (Tex. 2005) (postponing effective date of November 22, 2005 opinion until June 1, 2006).

[4] *See Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 523 (Tex. 1992) (postponing effective date of January 30, 1992 opinion until June 1, 1993).

[5] *See* TEX. LAB. CODE § 102.074(c) (providing that labor arbitration takes effect 11 days after date of appellate decision).

[6] *See* TEX. ALCO. BEV. CODE § 61.34(c) (providing that if alcoholic beverage license issued by order of district court is reversed on appeal, "the mandate of the appellate court automatically invalidates the license").

[7] *See* Tex. Bus. Corp. Act art. 7.02(F) (allowing period to cure corporate defaults up to 60 days after appellate mandate issues).

I. What Matters Is The Judgment

First of all, we should start with the principle that cases are decided by judgments, not mandates. Judgments are rendered by the court,[8] and a majority of the court must agree to them.[9] Mandates, by contrast, are drafted and signed by the clerk;[10] judges rarely even see them. As Justice Pope wrote for this Court 30 years ago in *Burrell v. Cornelius*: "Judges render judgment; clerks enter them on the minutes."[11] Our decisions should take effect when the justices act, not the clerk.

Second, the appellate rules recognize in many places that the operative act binding the parties is the judgment, not the mandate:

- when a party dies during an appeal, "the appellate court's *judgment* will have the same force and effect as if rendered when all parties were living";[12]
- when public officials leave office, their successors "will be bound by the appellate court's *judgment* . . . .";[13] and
- when a party voluntarily appears on appeal, or learns of its outcome, that party "is bound by the opinion, *judgment*, or order . . . ."[14]

Because the judgment is the operative act of a court, its date should be the operative date.

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[8] *See, e.g.*, TEX. R. APP. P. 43.1, 43.3, 43.5, 46.1, 46.2, 60.5.

[9] TEX. R. APP. P. 41.1.

[10] *See* TEX. R. APP. P. 18.1.

[11] 570 S.W.2d 382, 384 (Tex. 1978).

[12] TEX. R. APP. P. 7.1(a)(1) (emphasis added).

[13] TEX. R. APP. P. 7.2(b) (emphasis added).

[14] TEX. R. APP. P. 15.2 (emphasis added).

Third, our judgments should mean what they say. "The controlling intention of the court's judgment is that expressed on the face of the judgment . . . ."[15] If our judgment says something can or can't be done, then that ought to be the law — immediately.[16] If a judgment orders children taken from or returned to their parents, that should not wait for the mandate. If a judgment declares a fee unconstitutional, collection ought to stop at once.[17] If our judgments have no effect until the mandate issues, then they do not mean what they say.[18]

Fourth, our standard treatment of stay orders shows we intend judgments to take effect immediately. The clerk cannot lift a stay order; the court must do so, and our standard procedure has been to lift a stay when we issue our judgment.[19] The same practice is used in the courts of appeals:

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[15] *Harrison v. Manvel Oil Co.*, 180 S.W.2d 909, 915 (Tex. 1944).

[16] *See Flanary v. Wade*, 113 S.W. 8, 10 (Tex. 1908) (holding appellate reversal of trial court judgment immediately barred enforcement of it, even though judgment had not been superseded and appeal was not final); *Carpenter v. First Nat'l Bank*, 20 S.W. 130, 131 (Tex. 1892) (holding Supreme Court order quashing writ "took effect at once, and put the parties in the same position as if no order of quashal had ever been entered"); *Bichsel v. Heard*, 328 S.W.2d 462, 467 (Tex. Civ. App.—San Antonio 1959, no writ) (holding police chief could not be held in contempt for insisting on polygraph allowed by court of appeals during pendency of rehearing because court could not "punish him for taking for granted that we meant just what we said when we stated that the injunction was dissolved"); *accord*, *Matter of Bohart*, 743 F.2d 313, 321 n.7 (5th Cir. 1984).

[17] In *In re Long* we held the Dallas County Clerk could not be held in contempt for charging an improper fee "until the appeals were final and mandate issued." 984 S.W.2d 623, 626 (Tex. 1999). But in that case the Clerk filed a writ of error in this Court, thereby superseding the court of appeals' judgment so that it did not take effect immediately. *See* TEX. R. APP. P. 51.1(b).

[18] Applying the same rule, if we order the trial court to vacate an injunction rather than doing so ourselves, *see, e.g.*, *HEB Ministries, Inc. v. Texas Higher Educ. Coordinating Bd.*, 235 S.W.3d 627, 661 (Tex. 2007), then the effective date would be postponed until then.

[19] *See, e.g.*, *Univ. of Tex. Med. Sch. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995) (noting that this Court lifted stay when it denied mandamus relief); *In re Helena Chem. Co.*, No. 13–09–00040–CV, 2009 WL 866838 *2 (Tex. App.—Corpus Christi Mar. 31, 2009, orig. proceeding) (noting that Texas Supreme Court lifted stay when it granted mandamus relief).

stays are lifted when the judgment issues.[20] If our judgments do not take effect immediately, then parties can do whatever they want in the purgatory between judgment and mandate.

Fifth, for several decades we have tried to simplify the rules of procedure by insisting that judgments bear a date and that deadlines run from it. To quote Justice Pope in *Burrell* again:

> Law professors should teach, writers of legal form books should so correct their books, lawyers should so draft documents, and judges should make certain that above the signature on each judgment or order there are the words: "Signed this_____ day of_____, 19___."[21]

Today, an appellate decision takes effect on the date of judgment for many purposes, including: when plenary power expires in the court of appeals;[22] when a judgment becomes dormant;[23] when limitations runs for filing a bill of review;[24] when indemnity and third-party claims accrue;[25] and when tolling ends on alter ego claims.[26] Clarity and certainty are lost if the judgment date counts for these purposes, but does not count when deciding when the judgment takes effect.

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[20] *See, e.g.*, *In re Office of Attorney Gen.*, 257 S.W.3d 695, 697 (Tex. 2008) (noting that court of appeals lifted stay when it denied mandamus relief); *In re Dallas Area Rapid Transit*, 967 S.W.2d 358, 359 (Tex. 1998) (same); *Waite v. Waite*, 76 S.W.3d 222, 223 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (dismissing appeal as moot and lifting stay).

[21] *Burrell v. Cornelius*, 570 S.W.2d 382, 384 (Tex. 1978).

[22] *See* TEX. R. APP. P. 19.1.

[23] TEX. CIV. PRAC. & REM. CODE § 34.001; *John F. Grant Lumber Co. v. Bell*, 302 S.W.2d 714, 715 (Tex. Civ. App.—Eastland 1957, writ ref'd).

[24] *See Caldwell v. Barnes*, 975 S.W.2d 535, 538 (Tex. 1998); *see also* TEX. PROB. CODE § 55(a).

[25] *See Ingersoll-Rand Co. v. Valero Energy Corp.*, 997 S.W.2d 203, 210 (Tex. 1999); *J.M.K. 6, Inc. v. Gregg & Gregg, P.C.*, 192 S.W.3d 189, 200 (Tex. App.-Houston [14th Dist.] 2006, no pet).

[26] *See Matthews Constr. Co., Inc. v. Rosen*, 796 S.W.2d 692, 694 (Tex. 1990).

Sixth, judgments take effect immediately for all who are not parties in the case. Usually our opinions apply both prospectively and retroactively,[27] but sometimes we apply a decision prospectively only, in which case our standard practice has been to declare the law from the date of judgment, not the date of finality or the mandate.[28] This appears to be the practice of our sister court too.[29] It would be very odd for our decisions to take effect for third parties *before* they take effect for the parties involved in the case.

Seventh and finally, we expect lower courts to follow our decisions without receiving an explicit order to do so.[30] In mandamus cases, we generally grant the writ conditionally because we expect lower courts to comply without receiving the writ. But how can we expect lower courts to comply with our opinions immediately if they have not yet taken effect?

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[27] *See Centex Homes v. Buecher*, 95 S.W.3d 266, 277 (Tex. 2002); *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex. 1992).

[28] *See State Farm Fire and Cas. Co. v. Gandy*, 925 S.W.2d 696, 720 (Tex. 1996) (applying decision prospectively from date of opinion); *Elbaor*, 845 S.W.2d at 251 (same); *Reagan v. Vaughn*, 804 S.W.2d 463, 468 (Tex. 1990) (same); *Huston v. F.D.I.C.*, 800 S.W.2d 845, 849 (Tex. 1990) (same); *see also Moser v. U.S. Steel Corp.*, 676 S.W.2d 99, 103 (Tex. 1984) (applying opinion prospectively from date of first opinion rather than opinion on rehearing); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 434 (Tex. 1984) (same); *In re J. J.*, 617 S.W.2d 188, 188 (Tex. 1981) (applying prospective decision to case still pending when decision issued); *see also Acord v. Gen. Motors Corp.*, 669 S.W.2d 111, 115 (Tex. 1984) (applying prospective decision from date rehearing was overruled). *But cf. Lohec v. Galveston County Comm'rs Ct.*, 841 S.W.2d 361, 366 n.4 (Tex. 1992) (applying decision prospectively from date of trial court's judgment); *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 933 (Tex. 1971) (applying decision prospectively from date accident occurred).

[29] *See State v. Cullen*, 195 S.W.3d 696, 699 (Tex. Crim. App. 2006) ("Effective from the date of this opinion, the requirement is: upon the request of the losing party on a motion to suppress evidence, the trial court shall state its essential findings."); *Geesa v. State*, 820 S.W.2d 154, 164–5 (Tex. Crim. App. 1991) (applying decision prospectively from date of opinion).

[30] *See Dallas Area Rapid Transit v. Amalgamated Transit Union Local No. 1338*, 273 S.W.3d 659, 666 (Tex. 2008) ("It is fundamental to the very structure of our appellate system that this Court's decisions be binding on the lower courts.").

II. What About the Opinion?

One could argue that our decisions should take effect on the date of opinion rather than the date of judgment. In cases remanded for proceedings consistent with our opinion, the lower courts must have the opinion to carry out the judgment.[31] Of course in most cases the opinion and judgment issue together, so the effective date for both is the same.[32] But in a few cases they are different, and in those cases the date of judgment is more important.

In a few emergencies, we have issued judgments or orders with opinions to follow.[33] For example, in *In re Doe* we issued a judgment on March 10, 2000 and the opinions three months later.[34] In such cases, we clearly intended the judgments to take effect immediately; there was no other reason to issue them before the opinions were ready. And we certainly did not intend those judgments to take effect only when the mandate issued much later. Opinions, motions for rehearing, and mandates can issue in due course, but judgments ought to take effect immediately.

It is true that in emergency cases we can order the mandate issued early and deny the parties the right to file a motion for rehearing.[35] But prohibiting motions for rehearing can mean missing

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[31] *See Perry Nat'l Bank v. Eidson*, 340 S.W.2d 483, 487 n.2 (Tex. 1960) (noting that where a judgment refers to further proceedings consistent with the court's opinion, "[t]he nature of the judgment is therefore determined by an inspection of the opinion").

[32] *See* TEX. R. APP. P. 63 (requiring Supreme Court to "hand down a written opinion in all cases in which it renders a judgment," and our clerk to send both opinion and judgment to the lower court clerks, the regional administrative judge, and the parties); *see also* TEX. R. APP. P. 48.1 (requiring court of appeals' clerk to send both opinion and judgment "[o]n the date when an appellate court's opinion is handed down").

[33] *See, e.g.*, *In re Doe 1*, 19 S.W.3d 300, 300 (Tex. 2000); *Texas Water Comm'n v. Dellana*, 849 S.W.2d 808, 809 n.1 (Tex. 1993); *Davenport v. Garcia*, 837 S.W.2d 73, 73 (Tex. 1992).

[34] 19 S.W.3d 346, 349 (Tex. 2000).

[35] *See* TEX. R. APP. P. 18.1(c), 49.4, 64.1.

an opportunity to correct a mistake. The best way to make judgments effective immediately, while still allowing for mistakes, is to make the effective date the date of judgment.

III. What About the Mandate?

JUSTICE WILLETT'S proposal that our decisions should take effect only when the mandate issues will not work for one primary reason: after many of our opinions there is no mandate. Mandates issue only after a judgment.[36] No mandate issues when we deny a petition, even if we do so by written opinion. Nor do mandates issue in mandamus proceedings, which we decide by "orders" rather than "judgments."[37] If a mandate is required before this Court's decisions take effect, then many of them never have and never will.

But there's more. From 1892 until 1978, Texas law prohibited clerks from issuing a mandate until court costs were paid.[38] Thus, for example, the first rules of civil procedure in 1941 provided:

> On the rendition of a final judgment or decree in the Supreme Court, the clerk of said court shall not issue and deliver the mandate of the court, nor certify the proceedings to the lower court, until all costs accruing in the case in the Supreme Court and the Court of Civil Appeals have been paid . . .[39]

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[36] *See* TEX. R. APP. P. 18.1 ("The clerk of the appellate court that rendered the judgment must issue a mandate in accordance with the judgment . . . .").

[37] *See* TEX. R. APP. P. 52.8(c) ("If the court determines that relator is entitled to relief, it must make an appropriate order.").

[38] Act approved April 13, 1892, 22nd Leg., 1st C.S., ch. 14 § 1, 1892 Tex. Gen. Laws 19, 23 (codified as rule of civil procedure 443 in 1941, amended 1978) ("The clerk of the Supreme Court shall not deliver the mandate of the court until all costs of that court and of the court of civil appeals have been paid."); *see also* Act approved April 13, 1892, 22nd Leg., 1st C.S., ch. 15, § 47, 1892 Tex. Gen. Laws 25, 33 (amended 1978) (companion provision for court of civil appeals).

[39] TEX. R. CIV. P. 507 (adopted Oct. 29, 1940, eff. Sept. 1, 1941, amended 1978); *see also* TEX. R. CIV. P. 443 (adopted Oct. 29, 1940, eff. Sept. 1, 1941, amended 1978) (companion rule for courts of civil appeals).

If costs were not paid within 12 months, the case was simply dismissed *and no mandate ever issued*.[40] These rules were replaced in 1978,[41] but it is hard to say how many judgments before then were never followed by a mandate. So which of our opinions have never taken effect? And how would anyone know without looking through files perhaps 100 years old?

As we explained in *Continental Casualty Co. v. Street* in 1963, a mandate is a procedural device intended to keep courts from issuing conflicting orders:

> The rules relating to the return of the mandate from the appellate to the trial court are . . . primarily procedural in nature. They provide for an orderly dispatch of judicial business by adopting procedures under which both the appellate and trial courts may have knowledge of the status of pending litigation and thus prevent the issuance of conflicting orders by the courts of the trial and appellate levels.[42]

Mandates are thus a means of communication between courts; they were not even required to be sent to the parties until 2003.[43]

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[40] TEX. R. CIV. P. 509 (adopted Oct. 29, 1940, eff. Sept. 1, 1941, repealed 1978) ("When a case is reversed and remanded, no mandate shall issue after twelve months from the rendition of final judgment of the Supreme Court, or the overruling of a motion for rehearing. When a cause is reversed and remanded by the Supreme Court, and the mandate is not taken out within twelve months as hereinbefore provided, then, upon the filing in the court below of a certificate of the clerk of the Supreme Court that no mandate has been taken out, the case shall be dismissed from the docket of said lower court."); *see also* TEX. R. CIV. P. 445 (adopted Oct. 29, 1940, eff. Sept. 1, 1941, repealed 1978) ("In cases which have been reversed and remanded by a Court of Civil Appeals, if no mandate shall have been taken out and filed in the court where the cause originated within one year after the motion for rehearing is overruled or final judgment rendered, then upon the filing in the court below of a certificate of the clerk of the Court of Civil Appeals where the cause was pending that no mandate has been taken out, the case shall be dismissed from the docket."); Act approved April 10, 1901, 27th Leg., R.S., ch. 54, § 1, 1901 Tex. Gen. Laws 122, 123 (repealed 1978). For examples of the application of these rules, *see Dignowity v. Fly*, 210 S.W. 505, 506 (Tex. 1919); *Davy Burnt Clay Ballast Co. v. St. Louis Sw. Ry. Co.*, 32 S.W.2d 209, 211 (Tex. Civ. App.—Dallas 1930), *writ ref'd*, 32 S.W.2d 822 (Tex. 1930).

[41] *See* TEX. R. CIV. P. 507 & 443 (amended by order of July 11, 1977, eff. Jan. 1, 1978).

[42] 364 S.W.2d 184, 187 (Tex. 1963).

[43] TEX. R. APP. P. 12.6 (1997, amended 2003); TEX. R. APP. P. 18.1 (1997, amended 2003).

This is why the rules provide for enforcement of our decisions only after the mandate.[44] Postponing *enforcement* of our decisions is not the same as postponing when they are *effective*; indeed an injunction or declaratory judgment cannot be enforced by contempt unless it becomes effective sometime earlier. Appellate courts do not entertain motions for turnover, garnishment, or contempt; those must be filed in the trial court. Absent supersedeas, this means the case can be proceeding in two courts at once. In such cases, the mandate is our notice to the trial court that it can start enforcing a new judgment or proceed with enforcement of the old one without stepping on our toes.

This is also why a judgment in an interlocutory appeal "takes effect when the mandate is issued."[45] Here again, an interlocutory appeal (unlike a final appeal) means the case is pending in two courts at once. As a result, there is a daily potential for conflicting orders. The standard solution is to abate action in one of the two courts, as we do in cases of dominant jurisdiction.[46] Sometimes, a statute or stay from the appeals court keeps the trial court from issuing conflicting orders.[47] But in other cases, it may be best for the trial court to proceed, with the appellate court's orders taking effect only with the mandate. The reason our rules abate the effective date in interlocutory appeals

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[44] *See* TEX. R. APP. P. 51.1(b) ("When the trial court clerk receives the mandate, the appellate court's judgment must be enforced."); TEX. R. APP. P. 65.2 ("If the Supreme Court renders judgment, the trial court need not make any further order. Upon receiving the Supreme Court's mandate, the trial court clerk must proceed to enforce the judgment of the Supreme Court as in any other case.").

[45] TEX. R. APP. P. 18.6.

[46] *See Perry v. Del Rio*, 66 S.W.3d 239, 252 (Tex. 2001) ("As a rule, when cases involving the same subject matter are brought in different courts, the court with the first-filed case has dominant jurisdiction and should proceed, and the other cases should abate.").

[47] *See* TEX. CIV. PRAC. & REM. CODE § 51.014; TEX. R. APP. P. 52.10.

until the mandate, but say nothing about abating the effective date for final appeals, is because the two cases are not the same.

IV. What About Finality?

If finality is the goal, the mandate is not the answer. First of all, mandates issue 10 days *after* our judgment is final;[48] any argument to postpone the effective date until finality does not justify postponing it 10 days more. Moreover, mandates can be recalled;[49] so while judgments and opinions can change, mandates can too.

The problem is that it is hard to say when our decisions are final. The rules of procedure place no explicit limit on our plenary power, as they do for the courts of appeals.[50] And as we have noted several times before, judgments become "final" for different purposes at different times.[51] Thus, for the purpose of review by the United States Supreme Court, a judgment from this Court is "final" immediately, not when the mandate issues.[52] For purposes of res judicata and collateral

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[48] *See* TEX. R. APP. P. 18.1(b); *John F. Grant Lumber Co. v. Bell*, 302 S.W.2d 714, 717 (Tex. Civ. App.—Eastland 1957, writ ref'd) (Although a mandate cannot issue until the judgment is final, "the issuance of a mandate was not necessary 'to render the judgment final.'") (citing *Cont'l Gin Co. v. Thorndale Mercantile Co.*, 254 S.W. 939, 941 (Tex. Com. App. 1923, judgment adopted)).

[49] TEX. R. APP. P. 18.7.

[50] *See* TEX. R. CIV. P. 19.

[51] *See Sultan v. Mathew*, 178 S.W.3d 747, 751 (Tex. 2005) (noting that "the term 'final,' as applied to judgments, has more than one meaning"); *Street v. Hon. Second Ct. of Appeals*, 756 S.W.2d 299, 301 (Tex. 1988).

[52] See SUP. CT. R. 13(3) ("The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice).").

estoppel, a judgment is also "final" even if the appeal is not.[53] Holding that our judgments do not take effect until they are "final" serves only to confuse when they actually take effect.

As a historical matter, our judgments almost never change on rehearing. In the last 10 fiscal years, this Court issued more than 1100 majority and per curiam opinions. On rehearing, we changed less than 50 of the opinions, and those almost always in minor respects that had no effect on the judgment. In only four cases did the prevailing party in the judgment change.[54] Thus, the chance that an original judgment will differ from the final judgment is about 1 in 300. We should not let such long odds dictate the general rule about when our judgments take effect.

Finally, there are also constitutional considerations in deciding when our decisions take effect. The Texas Constitution grants the Legislature alone the power to suspend laws.[55] That provision has never prevented the courts from suspending a law that is itself unconstitutional. But once we decide that a law *is* constitutional, keeping the law suspended during our administrative steps leading to finality and a mandate is (to say the least) problematic.

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[53] *See Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986).

[54] *See Evanston Ins. Co. v. ATOFINA Petrochemicals, Inc.*, 256 S.W.3d 660 (Tex. 2008); *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42 (Tex. 2008); *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680 (Tex. 2007); *John G. & Marie Stella Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268 (Tex. 2002).

[55] *See* TEX. CONST. art. I, § 28 ("No power of suspending laws in this State shall be exercised except by the Legislature.").

When a mandate conflicts with a judgment or opinion, it is the mandate that must yield.[56] The same should be true regarding when our decisions take effect. Perhaps "it ain't over till it's over," but a judgment from the Supreme Court of Texas ought to mean "it's over." Accordingly, as a general rule I would hold that our decisions take effect when we issue a judgment.

OPINION DELIVERED: June 26, 2009

[56] *See, e.g.*, *O'Neil v. Mack Trucks, Inc.*, 551 S.W.2d 32, 32 (Tex. 1977).