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> **Governmental Immunity:** *A governmental entity's copyright violation, without more, is not a* per se *taking of the copyright owner's property and the governmental entity remains immune from suit.*

Without the copyright owner's permission, the University of Houston downloaded a copyrighted photograph and published it on its website after allegedly removing all attribution and copyright information. The photographer and copyright owner first discovered this use of his work years later and sued the University to recover "just compensation" for an unlawful *per se* – as opposed to a regulatory or constructive – taking in violation of the state and federal constitutions. A *per se* taking usually involves the physical taking or invasion of tangible property.

Under an opinion by Justice Devine, a majority of the court begins its analysis in *Jim Olive Photography v. Univ. of Houston System* by noting that "property" refers not to a physical thing, but to "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." From this beginning, the opinion sharply turns a corner by emphasizing that the appropriation of intangible intellectual property is not a *per se* "taking" for purposes of the takings clause. The opinion relies on a law review article for the proposition that

> [i]n a takings claim involving intellectual property, … the distinction between things and property becomes more important. Because the "thing" is intangible, *use of or damage to that thing need not have any significant impact on the owner's legal rights in the thing*.

In other words, unauthorized use of intangible property does not – and cannot – involve the physical invasion or control necessary for a *per se* taking because the "property" is – wait for it – intangible. However, in this case the copyright owner "pleaded and presented this case [so that] the property at issue is the copyright … [,]not [the] original photograph or the unauthorized copy displayed on the University's website." Based on this distinction, the majority characterizes the claim as one, not for a mere violation of the copyright, but "as a loss of control over [the] copyrighted material" itself.

Under the majority's analysis, this approach proved fatal to the claim because "copyright infringement … does not take possession or control of, or occupy, the copyright." But the majority's reasoning focuses on the provision in the copyright statute that ""no action by any governmental … purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect." Thus, the majority turns a provision intended to protect copyrights from governmental interference into a governmental get-out-of-jail-free card because a taking is a legal impossibility.

Further, because the copyright is intangible property, there can be no physical invasion or control essential to a *per se* taking. The majority was also unsympathetic that exclusivity is the "core" of of a copyright holder's rights or that the government's unauthorized use of copyrighted material is a prohibited taking. According to the majority, it is not a *per se* taking because "[i]t does not deprive the copyright owner of the right to possess and use the copyrighted work" nor "deny the copyright owner the right to exclude third parties." After all, the majority reasons,

the copyright holder can still prevent third parties from using the copyrighted material and even dispose of the copyrighted material despite the government's unauthorized use.

Because the majority found the claimant only alleged a *per se* taking and there was no viable basis alleged for such a claim. Copyright infringement short of "confiscation" is not a taking for which governmental immunity is waived under Texas law.

Justice Busby, joined by Justice Lehrmann and partially by Justice Blacklock filed a concurring opinion to point out that the *text* of the takings clause in the Texas Constitution provides broader protections than its federal counterpart, but that the plaintiff in this case failed to plead a governmental transgression of these broader protections. Essential to the decision of the concurring justices was that the claimant failed to urge that the difference between the protections of the takings clauses in the Texas and federal constitutions would have required a different result. Justice Busby's concurrence is worthy of the attention of anyone making a "takings" claim because it roadmaps the broader protection under the Texas version of the takings clause.

> **Default Judgments – Substituted Service:** *Substituted service directed to the individual identified as the owner of a limited partnership was ineffective to confer personal jurisdiction when the limited partnership designated a corporate registered agent for service of process, even though the registered agent's corporate filings were signed by the same individual that was alleged to have been the "owner" of the limited partnership.*
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> **Registered Agents for Service:** *A corporation may continue serve and be served as registered agent for a business entity for up to ninety days after its corporate charter is forfeit.*

In *WWLC Investment, L.P. v. Miraki,* plaintiff obtained a default judgment against a Texas limited partnership following substituted service on the individual identified by one of plaintiff's employees as the defendant's "owner," "president" and "CEO." The trial court later commented at the new trial motion this individual was the "only person" involved with the defendant. Process directed to a Texas limited partnership should be served on an LP's registered agent. Tex. Bus. Orgs. Code §§ 5.201(b)(1), 5.255(2).

In this case, the registered agent was a Texas corporation. Plaintiff, however, made no effort to serve the registered agent. While the substituted service attempts directed to the LP's purported owner-president-CEO were ongoing, the LP's registered agent forfeited its corporate charter. The registered agent's corporate filings with the Secretary of State's office were signed by the same individual as the LP's owner-president-CEO to whom the suit papers were delivered under the order permitting substituted service. These filings were executed by this individual as an "authorized person" without indicating she was either the corporation's registered agent or president as the judgment holder would later allege.

At the bill of review proceeding, the purported owner-president-CEO acknowledged that she held these titles for the LP, but further testified the corporation which served as the LP's registered agent was its general partner. The court's *per curiam* opinion points out that holding none of these positions supported the trial court's inference this person was also the LP's general partner authorized by statute to receive service of citation for a limited partnership. The opinion further points out that the substituted service attempts occurred before the registered agent sacrificed its corporate charter. Moreover, even after the corporate registered agent lost its certificate of formation, it could still act as registered agent for an additional 90 days under § 153.155 of the Business Organizations Code.

The defendant LP could have been but was not served in the proper manner. Therefore, it was entitled to relief by bill of review without being obligated to also establish that it had a meritorious defense which it was prevented from making by the plaintiff's fraud, accident, or wrongful act or by an official mistake. The bottom line is that the ability to sustain a default judgment depends on the ability *on the face of the record* to demonstrate punctilious compliance with the prescribed means for service of citation. Otherwise, the court has no jurisdiction over the person of the defendant.

Corporate Representative Depositions: *The deposition of a corporate representative must be more beneficial than burdensome to satisfy rule 192.4's proportionality standard but is not categorically precluded for issues presented in the case because the testimony may be inadmissible or available from other sources or other discovery devices.*

Uninsured Motorists Discovery: *When the insurer concedes coverage, the issues germane to the liability of the insurer under the insured's uninsured motorist coverage is limited to the uninsured motorist's liability, the fact of injury and the amount of resulting damages. However, the corporate representative's deposition must be carefully tailored to eliminate issues related to the insurer's claims handling which are only germane to any extracontractual liability because there is no potential extracontractual liability until the liability of the uninsured motorist within policy limits is established.*

Rule 192.4 gives trial courts discretion to limit discovery that is duplicative, obtainable from a more convenient, less burdensome, or less expensive source based on a case-by case balancing of these considerations. *In re USAA General Indemnity Co.* was an original proceeding by an insurer in an uninsured/underinsured motorist case challenging the trial court's order allowing the insured to dispose the insurer's corporate representative. In a unanimous opinion by Justice Lehrmann, the Texas Supreme Court held the corporate representative's deposition was not categorically precluded, though it may be when proportionality is lacking; that is, when the burden of obtaining the information outweighs its benefit. The scope of the deposition of the corporate representative is limited to the present disputed issues, not those that might arise on the outcome of the proceeding.

In this case the insured settled with the underinsured motorist then sued his insurer to recover the unpaid settlement balance. When the insurer stipulates to UIM coverage for the insured, the issues between the insurer and the insured are liability, fact of injury and the amount of damages. The insured is entitled depose the insurer's corporate representative concerning these issues even though that information may be second-hand and more efficiently obtainable from other sources. That the information may be second hand does not deprive it of relevance or make it undiscoverable. Discoverability is predicated on leading to admissible evidence, not admissibility of the information discovered. An insurer's information concerning the disputed issues in the UIM liability case – which does not include matters related to claims handling or the good faith basis for failure to promptly pay a claim – is not categorically prohibited on the basis that it may not be directly relevant to the disputed issues concerning the other motorist's liability or amount of resulting damages.

To satisfy the proportionality requirements, the party seeking discovery must offer evidence, not merely conclusory allegations. In this case, the insurer offered the accident report to establish that none of its personnel were witnesses or had personal knowledge of the fact. However, lack of personal knowledge or the cumulative nature of the information sought does not necessarily make the deposition of its corporate representative disproportionately burdensome. Depositions may, by nature, be a more burdensome form of discovery but that alone does not make the corporate representative's deposition inherently disproportionate. The discovery rules do not favor a particular method of discovery over others and do not require parties to exhaust the least burdensome discovery mechanism before seeking to depose a corporate representative. A party opposing such a deposition may prove disproportionality by showing documents disclosed already supply the necessary information, but that party must *prove* that fact. The party seeking the discovery is not obliged to show the corporate representative's deposition would not be without value. If the discovery opponent does not adduce the necessary evidence of cumulativeness or other facts that undermine the discoverability of the deposition testimony, corporate representative depositions, even when the lead off discovery mechanism, are not categorically disproportionate.

The scope of the deposition, however, is limited to only those issues germane to the uninsured/underinsured motorist's liability and the amount of the insured's resulting damages. When, as here, the insurer concedes coverage, the insured's request for a corporate representative's testimony about the insured's compliance with conditions precedent, are not relevant. Likewise, requested corporate representative testimony about offsets against recovery are "premature" until the trier of fact determines the amount of liability exceeds the uninsured motorist's policy limits. Moreover, the insured has equal access to the information concerning recovery from the other driver so that this topic is proscribed under rule 194.2. In no event may the insured seek corporate representative testimony on issues that are germane to extracontractual liability. Those issues do not arise until there is a liability to the insured under the UIM

coverage. Moreover, the extracontractual liability is to be resolved in a separate bifurcated proceeding in which the issues of good faith basis for the treatment of the claim differ from those that fix the insurer's contractual liability. Thus, questions about the basis for an insurer's valuation of the claim or its investigative process are not appropriate subjects for a corporate representative's deposition before the determination of the insurer's contractual liability.