MODELS OF STATUTORY INTERPRETATION APPLIED TO YOUR DAILY PRACTICE

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I. INTRODUCTION

Why worry about statutory interpretation? Issues of statutory interpretation are among the issues most frequently addressed by appellate courts. Continued legislative inroads into the common law indicate this trend will continue. The booming interest in statutory interpretation is justified in Texas as well. Recent skirmishes between the judicial and legislative branches in Texas, such as school financing, judicial pay, court funding, appellate redistricting, and tort reform have highlighted the importance of statutory interpretation and the different roles played by courts and legislatures. But just below the surface, occasionally bubbling up with little fanfare, is a power struggle between the courts and the legislature over statutory interpretation. Unlike many states, Texas has statutory guidelines for statutory construction in addition to the common-law canons. *See generally* Abner J. Mikva & Eric Lane, *An Introduction to Statutory Interpretation and the Legislative Process* 4 (1997). Thus, there is a continual dialogue between the courts and the legislature about how to interpret statutes.

How do you explain the difficulty to lay people? Try this example, adapted from a speech by Professor David Dow. An ordinance forbids apartment tenants from owning pets. An elderly, African-American woman with no family in the state, owns a fish bowl containing a single goldfish. Can she be evicted if she refuses to get rid of her goldfish? We'll come back to this example as we discuss the models of statutory interpretation.

II. LEGISLATIVE BODIES ARE NOT ALWAYS CLEAR ABOUT THEIR INTENT

Further, nothing indicates that legislators have incurred quantum leaps in their ability to be clear about their intent. Take the example from the Class Action Fairness Act, which provides that a court of appeals *may* accept such an appeal "if application is made to the court of appeal **not *less*** than 7 days after entry of the order." Application was filed 6 days after the order (and another one 43 days after entry of the order). The panel held the first application was timely, even though only six days had elapsed, but the latter notice was held untimely -- even though the statute imposes no final date. The panel held that Congress really intended to say "**not *more*** than 7 days." *Amalgamated Transit Local Union 1309 v. Laidlaw Transit Services, Inc.*, 435 F.3d 1140 (9th Cir. 2006).

A minority of judges wanted to grant rehearing en banc (sua sponte). Because the statutory language was unambiguous, the duty of interpretation never arose. The plain meaning of the rule should have been enforced. The "scrivener's error exception" does not apply where there is no obvious clerical or typographical error. "Absurdity doctrine" does not apply because the plain language does not lead to "patently absurd results." "Congressionally-imposed deadlines are 'inherently' arbitrary and are not absurd, even when they may seem irrational." *Amalgamated Transit Union Local 1309, AFL-CIO v. Laidlaw Transit Services, Inc.*, 448 F.3d 1092, 1098-99 (9th Cir. 2006).

III. WHAT'S HAPPENING?

A debate is raging among scholars and judges about how to determine legislative intent. They typically employ four models that can be grouped as text and text, plus. Federal rules of statutory construction have been proposed. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085 (2002). A Restatement has been proposed. Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. Legis. & Pub. Pol'y 333 (2003-04). Recent national seminars, books, and articles also have focused on this issue.[1] *See, e.g.*,Larry Alexander & Saikrishna Prakash, *"Is that English You're Speaking?" Why Intention-Free Interpretation Is an Impossibility*, 41 San Diego L. Rev. 967 (Summer 2004); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 Mich. L. Rev. 885 (2003); Abner J. Mikva, *Symposium on Statutory Interpretation: The Muzak of Justice Scalia's Revolutionary Call to Read Unclear Statutes Narrowly*, 53 SMU L. Rev. 121 (Winter 2000); Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. Rev. 1253 (2000); Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 Suffolk U. L. Rev. 807 (1998).

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[1] Several of the ideas in this paper stem from recent seminars presented by the Council of Appellate Lawyers at the recent American Bar Association Convention in Chicago, *Unplain Meaning, Cheap Talk, and Loose Canons: The Continuing Clash over Statutory Interpretation and Proposals for Resolving It* (ABA Aug. 6, 2005), and at the Council of Appellate Lawyers and Appellate Judges Education Institute Summit in San Francisco, *Statutory Interpretation: Views and Approaches* (ABA Sept. 30, 2005). We also are indebted to Timothy Terrell, *Statutory Epistemology: Mapping the Interpretation Debate*, 53 Emory L.J. 523 (2004), and thus almost assuredly also to George Gopen.

IV. Where is Texas in all of this?

Unlike many jurisdictions, Texas already has statutory guidelines for statutory construction—in addition to the common-law canons. The Code Construction Act was enacted by the Texas Legislature. The Act expressly says courts should resort to extrinsic aids of construction regardless of whether the statute is ambiguous. Courts should consider:

> Object sought to be attained;
> Circumstances under which the statute was enacted;
> Legislative history;
> Common law or other statutory provisions, including laws on the same or similar subjects;
> Consequences of a particular construction;
> Administrative construction of the statute; and
> Title (caption), preamble, and emergency provision.

Tex. Gov't Code § 311.023.

V. What about the Code Construction Act?

The supreme court sometimes agrees with the Code Construction Act: "Even when a statute is not ambiguous on its face, we can consider other factors to determine the Legislature's intent, including...the legislative history." *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). On the other hand: "if a statute is unambiguous, rules of construction or other extrinsic aids cannot be used to create ambiguity." *Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 865-66 (Tex. 1999).

VI. Does confusion reign?

One appellate court says that "if the statute is unambiguous, the reviewing court typically adopts the interpretation supported by the plain meaning of the statute's words; rules of construction and extrinsic aids should not be applied, nor extraneous matters inquired into." *Am. Hous. Found. v. Brazos County Appraisal Dist.*, 166 S.W.3d 885, 888 (Tex. App. — Waco 2005, pet. denied).

A different appellate court holds that "[a] court may consider the legislative history of a statute without making a finding that the statute is ambiguous." *Collins v. Collins*, 904 S.W.2d 792, 797 (Tex. App. — Houston [1st Dist.] 1995), *writ denied per curiam*, 923 S.W2d 569 (Tex. 1996).

This leads to a conundrum. Texas's confusion in the common-law about statutory interpretation is based on an internal contradiction: When a court says it is limited to considering the plain meaning of the text of statutes, the court can make that statement only by refusing to follow the plain meaning of the text of a statute that says the courts are not limited to the text of statutes.

VII. What about the common law?

Common-law canons concerning statutory construction can vary from case to case. *See, e.g.*, Karl Llewellyn, *The Common-Law Tradition: Deciding Appeals* 521 (1960) ("there are two opposing canons on almost every point"). Here's a real-world example: On the one hand, "the Legislature must be regarded as intending statutes, when repeatedly reenacted, as in the case here, to be given that interpretation which has been settled by the courts" *Wich v. Fleming*, 652 S.W.2d 353. 355 (Tex. 1983). On the other hand, "[i]naction of the legislature cannot be interpreted as prohibiting judicial reappraisal of the judicially created pecuniary loss rule" as the correct interpretation of the Wrongful Death Act. *Sanchez v. Schindler*, 651 S.W.2d 249, 252 (Tex. 1983).

Yet everyone agrees about one thing: Determining legislative intent is mandatory. "Legislative intent remains the polestar of statutory construction." *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999).

VIII. So where are we?

We have the four models of statutory interpretation: (1) text; (2) intent; (3) purpose; and (4) dynamic.

In general, the purpose and dynamic models are more activist; the text and intent models are more deferential. Also, in general, the intent and dynamic models are more focused on the equities of the parties at bar; the text and purpose models are more focused on a rule for future cases.

A. The text model

The text model looks only at the words in the statute: "What are the actual words used in the statute and what do they mean to a reasonable reader?" This model usually worries a lot about the original intent of the drafters, because only by knowing the ordinary meanings when the words were used can one determine what the drafters probably meant by using those words. Thus, the court views itself as the agent of the legislature.

"If possible, we must ascertain the Legislature's intent from the language it used in the statute and not look to extraneous matters for an intent the statute does not state." *Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000). "We determine legislative intent from the entire act and not just its isolated portions." *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 25 (Tex. 2003).

The goldfish may have to go. A goldfish in a fish bowl probably is a pet under the dictionary definition. So the text model suggests that the ban on pets also applies to the goldfish. The equities of this particular case are probably irrelevant.

B. The intent model

The intent model considers extrinsic aids to determine legislative intent: "How would the legislature that drafted this statute decide the case at bar?" Under this model, courts consult whatever extrinsic aids will help them to divine the legislature's subjective intent. The courts tend to focus more specifically on the equities of the case at bar, but they still consider themselves to be the agent of the legislature.

A good example is the Texas case allowing a claim for a defective seat-belt, despite a statute expressly barring evidence of seat-belt usage. The majority said it was using an intent model (though it appears to have been a strained application). *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132 (Tex. 1994). Justice Hecht's concurrence also follows the intent model, but with much more candor: "in some circumstances, words, no matter how plain, will not be construed to cause a result the Legislature almost certainly could not have intended." *Id.* at 135. Query whether this is a version of the absurdity doctrine. *See* J. Woodfin Jones, *The Absurd-Results Principle of Statutory Construction in Texas*, 15 Rev. Litig. 81 (1996). Justice Enoch's dissent, by contrast, relies on the text model: "the Court ignores the plain and common meaning of the language . . . and concludes that "use or nonuse of a safety belt" really means only "nonuse of a safety belt." *Id.* at 136.

The goldfish may or may not stay. It is perhaps unlikely that most legislators would have intended the ban on pets to apply to a single goldfish in a small fish bowl. With luck, there may be some legislative history on this point.

C. The purpose model

The purpose model focuses on the legislative objective: "What was the legislature trying to accomplish, in general, with the statute?" Thus, courts will always consider extrinsic evidence, and they are more interested in the interpretation that will work for a general class of cases than in the equities of a particular case. Under this model, courts tend to considers themselves equal partners with the legislature, though limited to the means chosen by the legislature. *E.g.*, *Shell Oil Co. v. HRN, Inc.*, 144 S.W.3d 429, 434-35 (Tex. 2004) (looking to legislative purpose of preventing discriminatory pricing in interpreting good-faith requirement in UCC); *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 383 (Tex. 2000) ("When determining legislative intent, we look to the language of the statute, as well as its legislative history, the objective sought, and the consequences that would flow from alternate constructions.").

The goldfish might stay. Presumably, the ban is to prevent dogs from barking, roosters from crowing, cats from meowing, and all from leaving a mess in common areas. Although a single, spilled fish bowl (as opposed to a large aquarium) might cause some leakage to another unit, it seems a rare risk. On balance, therefore, the purpose of the statute can be fulfilled without applying it to a single goldfish.

D. The dynamic model

The dynamic model considers changed social conditions since the statute was enacted: "What values were the legislature trying to promote with this statute and how can those values be best promoted in the case at bar?" The equities of the case are very likely to influence the decision. Courts will look at virtually any materials to guide their decision, including social-science materials and judicial notice.

Consider two famous (or perhaps infamous, depending on your perspective) examples: *Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex. 1983) ("It is time for this court to revise its interpretation of the Texas Wrongful Death statutes in light of present social realities."); *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing constitutional right to abortion in some circumstances based on developments in medical science).

The goldfish can stay, based on its therapeutic effect for a lonely, elderly resident. Perhaps, too, there is a risk that the goldfish would be used as a pretext for racial or age discrimination.

IX. PUTTING IT ALL TOGETHER

Contrasting models can legitimately be used by different judges in the same case. *E.g.*, *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611 (2005). The majority opinion by Justice Kennedy uses the text model: "[W]e must examine the statute's text in light of context, structure, and related statutory provisions." *Id.* at 2626. "As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Id.* at 2620. Justice Stevens's dissenting opinion, however, uses the intent model. ("we as judges are more, rather than less, constrained when we make ourselves accountable to all reliable evidence of legislative intent." *Id.* at 2628. Justice Ginsburg's dissenting opinion uses the purpose model (considering legislative purpose in light of precedents). *Id.* at 2639-40.

A. Does the Code Construction Act favor a particular model?

No. The Act expressly allows courts always to use extrinsic aids. Thus, it is always permissible to go beyond the text model and to employ the intent model. The Act also tells courts to "consider at all times the old law, the evil, and the remedy" — which indicates that using the purpose model is permissible. § 312.005. The

Act does not foreclose use of the dynamic model: courts are to consider the "consequences of a particular construction," § 311.023(5), and "a just and reasonable result is intended." § 311.021(3).

B. Our recommendation

Courts and advocates should use whatever materials will assist in determining the legislative intent. The legislative directive to always consider extraneous evidence is analogous to contract law: "Whether a contract is ambiguous is a question of law that must be decided by examining the contract as a whole in light of the circumstances present when the contract was entered." *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). In determining intent, the legislative history and other extrinsic aids are the "surrounding circumstances."