University of Texas Conference on
State and Federal Appeals

June 4, 2004
Austin, Texas

Harm Analysis for Multi-Theory Submission in Federal Court

Russell S. Post

Russell S. Post
Beck, Redden & Secrest, L.L.P.
One Houston Center
1221 McKinney Street
Suite 4500
Houston, Texas 77010-2010

rpost@brsfirm.com
(713) 951-6292

HARM ANALYSIS FOR MULTI-THEORY SUBMISSION IN FEDERAL COURT

Russell S. Post

Introduction

In recent years, Texas has significantly changed its approach to broad-form submission. Although the Texas Supreme Court continues to insist that it favors broad-form submission "whenever feasible," *see Golden Eagle Archery v. Jackson*, 116 S.W.3d 757, 776 (Tex. 2003), the circumstances under which broad-form submission is not "feasible" have grown much more prominent – and more challenging for appellate practitioners – in the last few years.

In particular, the feasibility of submitting multiple theories of recovery or defense in a single broad-form question has become risky in Texas practice, as a result of decisions altering the harmful error analysis for multi-theory submissions. Before 2000, an affirmative finding on a multi-theory question could be affirmed, notwithstanding error in one part of the question, provided there was any valid basis to uphold the finding. Sometimes called the "two-issue rule," that approach to harm analysis in multi-theory submission was consistent with the approach taken in many other state courts. *See* Elizabeth G. Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 FORDHAM L. REV. 1837, 1883 & n.169 (1998). In addition, that approach was consistent with one of the animating purposes of broad-form submission, which was intended to minimize the need for new trials and maximize the ability of courts to uphold judgments if they could be affirmed on any valid basis.

In 2000, that long-settled approach to harmless error analysis underwent a 180° shift. Texas now follows a rule of "presumed harm" or "prima facie harm" in which any error – whether legal or factual – in a multi-theory question is presumed to be harmful and requires the answer to be set aside, even if other theories included in the question were correct.

This new era was heralded by *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000). In that case, the Texas Supreme Court held that the inclusion of a "legally invalid" theory in a multi-theory question infected the entire verdict, even though other valid theories were included in the same question. Because it was impossible to know whether the jury had based its verdict on a "legally valid" or a "legally invalid" theory, the Court presumed the error was harmful. According to the Court, when a question "erroneously commingles valid and invalid liability theories and the appellant's objection is timely and specific, the error is harmful when it cannot be determined whether the improperly submitted theories formed the sole basis for the jury's finding." *Id.* at 388.

Next, in *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), the Texas Supreme Court extended the *Casteel* rule to reach sufficiency challenges. *Harris County* involved a damage question that commingled several damage elements, one of which was supported by no evidence. The Texas Supreme Court held it was impossible to know whether the jury had based its verdict on elements of damages that had no legally sufficient evidence, and reversed the entire finding. *Id.* at 233-34.

Taken together, *Casteel* and *Harris County* have dramatically changed the landscape for multi-theory submissions in Texas. The history of these developments in Texas charge practice, and the vexing issues they pose for appellate practitioners in Texas state court, are chronicled in the excellent paper prepared for this conference by Richard and Jennifer Hogan. Accordingly, this paper does not dwell on Texas law at greater length. Instead, this paper examines the federal approach to the problem of harmful error in multi-theory submissions. The cross-pollination between state and federal court is always a fertile source of new ideas for appellate practitioners, and as the contours of the new Texas approach begin taking shape in case-by-case developments, appellate practitioners will be well-served to draw on the federal experience.

This paper will focus on four major aspects of the federal experience with harm analysis in multi-theory submission. Part I examines the history of the presumed harm philosophy in the United States Supreme Court and the ways it has been applied in the federal appellate courts. Part II discusses the development of various harmless error exceptions for broad-form errors. Part III addresses the surprisingly unsettled rules governing preservation of complaints about error in multi-theory submission. Finally, Part IV highlights areas for potential development of the new Texas presumed harm rule by reference to the federal experience.

I. The Background Rule of Presumed Harm in Federal Court.

A. Development of the Presumed Harm Doctrine in the Supreme Court.

Although the rule of presumed harm came as a shock to a generation of Texas lawyers who came of age under the generous approach of broad-form submission, it has a long pedigree in federal court. The case that is most often cited as the genesis of the rule in federal court is *Maryland v. Baldwin*, 112 U.S. 490 (1884). *Baldwin* was a diversity case involving claims by a putative heir against the administrators of an estate, in which the putative heir sought to recover a share of the estate. The administrators of the estate defended the case on several different bases, all of which were submitted to the jury in a general verdict. *Id.* at 492-93. The jury returned a general verdict for the defendants, and the heir appealed. *Id.* Justice Field, writing for the Court, framed the issue in terms that anticipated the doctrine of presumed harm:

> On the trial evidence was introduced bearing upon all the issues, and, if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered, but its generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given.

Id. at 493.

On the merits, Justice Field found that one of the five defensive theories had been corrupted by the admission of improper hearsay evidence. Specifically, Justice Fields held that the trial court had erred in admitting hearsay evidence to impeach the character of one witness, which tended to discredit his testimony concerning one of the defensive theories. Because it was

"impossible to say what effect it may have had on the minds of the jury," the error was harmful. *Id.* at 494. And because it was impossible to know whether the jury had based its general verdict on that theory, or one of the other defensive theories, the entire judgment had to be reversed. *Id.*

The *Baldwin* principle next manifested itself in *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60 (1907). *Wilmington* was a diversity case involving wrongful death claims brought by the survivors of a laborer killed in a mine explosion. The plaintiffs alleged eight alternative theories of negligence, and the jury returned a general verdict. *Id.* at 64-66. Among other errors, the defendant charged that some of the negligence allegations were not supported by evidence. The Supreme Court agreed, finding insufficient evidence to support three of the eight theories. *Id.* at 77-78. "Under this condition of things we find it impossible to say that prejudicial error did not result." *Id.* at 78 (citing *Maryland v. Baldwin*). Thus, *Wilmington* extended the rule of *Maryland v. Baldwin* to errors involving insufficient evidence.

The third important decision in the development of the presumed harm doctrine was *United New York and New Jersey Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613 (1959). *Halecki* was a wrongful death suit involving allegations of both unseaworthiness and negligence. *Id.* at 614. Because unseaworthiness is a strict liability regime, the jury was instructed it could find for the plaintiff "even if they should find that the shipowner had exercised reasonable care." *Id.* at 618. But the Court held that the case did not come within the unseaworthiness doctrine, and "it was error to instruct the jury" on that theory of liability. *Id.* Because the jury had returned a general verdict, the Court remanded the case for a new trial "for there is no way to know that the invalid claim of unseaworthiness was not the sole basis for the verdict." *Id.* at 619. Justice Brennan dissented on the merits of the decision, but he agreed that the general verdict "must of course be supportable on each aspect in which the case was left to the jury." *Id.* at 620 (Brennan, J., dissenting).

A fourth case, *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19 (1962), reaffirmed the rule of *Maryland v. Baldwin*. *Sunkist* was an antitrust action alleging a conspiracy among agricultural associations, which were entitled to immunity from antitrust law under specific provisions of the Clayton Act. *Id.* at 27-29. In light of this statutory immunity, the Supreme Court concluded that the conspiracy instruction was erroneous and held that the erroneous jury instruction required reversal of the general verdict:

> Since we hold erroneous one theory of liability upon which the general verdict may have rested . . . it is unnecessary for us to explore the legality of the other theories. As was stated of a general verdict in *Maryland v. Baldwin*, 112 U.S. 490, 493, 5 S. Ct. 278, 280, 28 L. Ed. 822 (1884), "(I)ts generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld."

Id. at 29. In an opinion by Justice Scalia, the Supreme Court cited this aspect of *Sunkist* with approval in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 384 (1991), signaling that it continues to stand behind the presumed harm rule of *Maryland v. Baldwin*.

B. Application of the Presumed Harm Rule in Federal Court.

As these four cases illustrate, the Supreme Court has applied its presumed harm rule to multi-theory verdicts tainted by (1) inadmissible evidence (*Baldwin*); (2) insufficient evidence (*Wilmington*); and (3) erroneous jury instructions (*Halecki* and *Sunkist*). This line of precedent represents the background rule of harm analysis for multi-theory submissions in federal court.

Federal courts generally do not distinguish among types of errors that may taint a verdict, but apply the same rule to every case. *See, e.g., Hay v. Irving*, 893 F.2d 796, 799 (5th Cir. 1990) ("A general verdict must ordinarily be reversed when one or more claims was improperly submitted to the jury since it is not possible to tell whether the verdict is based upon the erroneously submitted claim."); James W. Moore, 9 MOORE'S FEDERAL PRACTICE § 49.11[1][a] (3rd ed. 2004) (citing cases). This rule is of ancient vintage in the Fifth Circuit, which was one of the first federal courts to embrace the presumed harm rule. *See Traveler's Ins. Co. v. Wilkes*, 76 F.2d 701, 705 (5th Cir. 1935); Ryan Phair, *Appellate Review of Mult-Claim General Verdicts: The Life and Premature Death of the Baldwin Principle*, 4 J. APP. PRAC. & PROC. 89, 95 (2002). The presumed harm rule has been applied in a wide variety of circumstances, including:

- Multiple liability theories combined in one question or special interrogatory, one of which is not supported by sufficient evidence.[1] *E.g., Jones v. Miles*, 656 F.2d 103, 106 n.4 (5th Cir. 1981) ("If the judge accepts a general verdict in a case containing multiple issues, the verdict is immune from attack only as long as the evidence under each count is sufficient to authorize the result.") (citing *Smith v. Southern Airways, Inc.*, 556 F.2d 1347 (5th Cir. 1977)); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1055-57 (11th Cir. 1994) (interrogatory based on two alternative liability theories, one of which was supported by insufficient evidence, reversed) (citing Fifth Circuit authority); *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 853-54 (5th Cir. 1989) (same); *Dudley v. Dittmer*, 795 F.2d 669, 673 (8th Cir. 1986) (general verdict based on two liability theories, one of which was supported by insufficient evidence, reversed); *Syufy Enter. v. American Multicinema, Inc.*, 793 F.2d 990, 1001 (9th Cir. 1986) ("general jury verdict will be upheld only if there is substantial evidence to support each and every theory of liability submitted to the jury"); *Doherty v. American Motors Corp.*, 728 F.2d 334, 344 (6th Cir. 1984) (general verdict based on multiple alternative liability theories, one of which was not supported by sufficient evidence, reversed); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56 (2nd Cir. 1980) (same); *Simko v. C&C Marine Maint. Co.*, 594 F.2d 960, 967 (3rd Cir. 1979) (same); *Fatovic v. Nederlandsch-Ameridaansche Stoomvaart*, 275 F.2d 188, 190 (2nd Cir. 1960) (same); *Albergo v. Reading Co.*, 372 F.2d 83, 85-86 (3rd Cir. 1966) ("Where, as here, a general verdict may rest on either of two claims—one supported by the evidence and the other not—a judgment thereon must be reversed.").

[1] Despite this long line of cases, courts and practitioners should be aware of a more recent line of cases suggesting that errors based on insufficient evidence to support one element of a multi-theory submission are *not* subject to the rule of presumed harm. *See* pp. 23-25, *infra*.

- Multiple factual allegations combined in one question on one liability theory, where one of the factual allegations is not supported by sufficient evidence. *E.g.*, *Katara v. D.E. Jones Commodities*, 835 F.2d 966, 971 (2nd Cir. 1987) (fraud finding based on two different factual allegations of fraud reversed because one of the allegations was not supported by sufficient evidence); *Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512, 518-19 (5th Cir. 1985) (fraud finding based on six different factual allegations reversed because one of the factual allegations was not supported by sufficient evidence); *see also Pan Eastern Explor. Co. v. Hufo Oils*, 855 F.2d 1106, 1124 (5th Cir. 1988) ("Our Court has recognized that even a single question in a special verdict involving alternative theories has the same troublesome characteristic [as a general verdict]: the reviewing court cannot tell which theory formed the basis of the jury's categorical answer.").

- Multiple liability theories combined in a single question, one of which is legally erroneous. *E.g.*, *Zaffuto v. City of Hammond*, 308 F.3d 485, 488-92 (5th Cir. 2002) (setting aside punitive damage award that necessarily rested on one of two alternative liability theories, one of which was legally erroneous); *Imperial Premium Finance v. Khoury*, 129 F.3d 347, 352-55 (5th Cir. 1998) (fraud finding based on alternative theories of affirmative misrepresentation and failure to disclose set aside because defendant owed no duty to disclose as a matter of law); *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 134 (1st Cir. 1997) (general verdict based on alternative theories set aside because one theory was erroneous); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1227-31 (10th Cir. 1996) (general verdict based on two theories of liability, one of which was subsequently invalidated by the Supreme Court, reversed); *Harwood v. Partredereit AF*, 944 F.2d 1187, 1193 (4th Cir. 1991) (general verdict based on two liability theories, one of which was improper, reversed); *Avins v. White*, 627 F.2d 637, 646 (3rd Cir. 1980) (general verdict in libel case based on three statements reversed where two of the three statements were not defamatory); *Asbill v. Housing Auth.*, 726 F.2d 1499, 1504 (10th Cir. 1984) (general verdict based on three liability theories, two of which were legally erroneous under the facts, reversed); *Morrissey v. National Maritime Union*, 544 F.2d 19, 25-27 (2nd Cir. 1976) (general verdict based on two liability theories reversed where one theory was not legally proper under these facts); *see E. I. du Pont de Nemours & Co. v. Berkley and Co.*, 620 F.2d 1247, 1257 (8th Cir. 1980) (stating the general rule).

- Multiple factual allegations combined in one question on one liability theory, where one of the allegations is not actionable. *E.g.*, *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 957 F.2d 1318, 1326 (6th Cir. 1992) (reversing an antitrust finding based on two alternative definitions of the relevant market, one of which was legally improper because there was no relevant market), *modified*, 11 F.3d 660, 667 (6th Cir. 1993); *Ward v. Succession of Freeman*, 854 F.2d 780, 790-93 (5th Cir. 1988) (reversing a finding of securities fraud based on 29 alleged violations of Rule 10b-5, several of which were legally

improper because they did not constitute securities fraud as a matter of law); *see also Pan Eastern Exploration Co.*, 855 F.2d at 1124 (special verdicts combining multiple issues suffer from the same problems as general verdicts).

- Multiple liability theories funneling into a subsequent combined question that is not supported by sufficient evidence on each theory. *Box v. Ferrellgas, Inc.*, 942 F.2d 942, 945 (5th Cir. 1991) (verdict based on three liability theories that funneled into a single proximate cause question reversed because there was evidence of proximate cause under only one of the liability theories).

- Multiple liability theories combined in a single question, coupled with a failure to instruct on a defensive theory raised against one theory of liability. *E.g.*, *Jones v. Miles*, 656 F.2d 103, 1106-08 (5th Cir. 1981) (reversing verdict based on three alternative liability theories where evidence supported affirmative defense instruction against one theory but trial court erroneously failed to submit instruction).

- Multiple instructions on affirmative defenses combined in a single question, one of which was legally improper or based on legally insufficient evidence. *E.g.*, *BAII Banking Corp. v. UPG, Inc.*, 985 F.2d 685, 704 (2nd Cir. 1993) (setting aside defense verdict and ordering new trial where jury's failure to find liability might have been based on any of several affirmative defense instructions, one of which was legally erroneous); *Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1298-1301 (10th Cir. 1989) (setting aside defense verdict and ordering new trial where one of two affirmative defense instructions was not supported by evidence and the jury failed to find liability in a general verdict); *Crist v. Dickson Welding, Inc.*, 957 F.2d 1281, 1286-88 (5th Cir. 1992) (setting aside defense verdict where three affirmative defenses were submitted in a single question, and the trial court erroneously failed to submit an instruction raised by the evidence and relevant to one of the defenses).

- Multiple liability theories combined in one question, one of which depends on evidence that was inadmissible. *E.g.*, *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1000-03 (3rd Cir. 1988) (general verdict based on two alternative liability theories reversed based on erroneous admission of hearsay testimony relevant to one theory); *Bone v. Refco, Inc.*, 774 F.2d 235, 242-43 (8th Cir. 1985) (general verdict including three elements of damages, one of which was based on a liability theory tainted by admission of parol evidence, reversed because it was impossible to know how much of the damage award was attributable to the erroneous theory); *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1039 (8th Cir. 1978) (one of four liability theories submitted in general verdict infected by erroneous admission of parol evidence).

- Lump-sum damage awards including an unrecoverable element of damages. *E.g.*, *Kassel v. Gannett Co.*, 875 F.2d 935, 950 (1st Cir. 1989) (inclusion of an unrecoverable element of damages in a lump-sum award required new trial).

- Commingled damage elements in one question resulting in excessive verdict. *E.g.*, *In re Air Crash Disaster*, 795 F.2d 120, 1236 (5th Cir. 1986) (new trial required on damages because general verdict did not make clear which elements resulted in excessive award); *Gill v. Rollins Protective Services Co.*, 722 F.2d 55, 58-59 (4th Cir. 1983) (general verdict on two liability theories, one of which was capped by a contractual limitation on damages, reversed); *but see Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1373 (9th Cir. 1987) ("Even if this is the procedure for a failure of proof as to a theory of liability, we conclude that a failure to prove one measure of damages need not be treated the same way. Proof of damages is governed by a less strict standard than proof of liability.").

- A single damage question predicated on affirmative answers to any of several alternative liability questions, one of which was legally erroneous. *E.g.*, *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1053 (8th Cir. 2000) (antitrust case based on three liability theories funneling into a single damage question reversed because one of the three liability theories was time-barred); *cf. Zaffuto v. City of Hammond*, 308 F.3d 485, 488-92 (5th Cir. 2002) (upholding actual damages where separate liability questions were submitted and actual damages were equally attributable to each theory); *Bingham v. Zolt*, 66 F.3d 553, 564 (2nd Cir. 1995) (same).

C. Presumed Harm and the Federal Preference for Special Verdicts.

The strong tradition of presumed harm in federal court is grounded in a basic difference between federal and state charge practice: Over the last generation, at precisely the same time Texas was moving to embrace broad-form submission, federal courts (notably the Fifth Circuit) were stating a preference for granulated submission.

For the last generation, Texas has strongly encouraged the use of broad-form submission. Before 1973, Texas had experienced decades of difficult experience with special-issue practice, in which each issue had to be submitted "distinctly and separately." *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 475, 240 S.W. 517, 522 (1922). In 1973, trial courts were given the discretion to follow special-issue practice or submit questions in broad form. *See Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 255 (Tex. 1974). Over the next decade, the Texas Supreme Court increasingly indicated its preference for broad-form submission and its frustration with the lingering vestiges of special-issue practice. *E.g.*, *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980); *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 924-25 (Tex. 1981); *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984); *Island Recreational Development Corp. v. Republic of Texas Sav. Ass'n*, 710 S.W.2d 551, 555 (Tex. 1986). Finally, in 1988 the Texas rules were amended to require broad-form submission "whenever feasible." TEX. R. CIV. P. 277. That command was construed to require broad-form submission in "every instance in which it is capable of being accomplished." *Texas Dep't of Human Resources v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990). This evolution from special-issue practice to broad-form submission inspired a generation of Texas lawyers and judges to embrace broad-form submission – and repudiate special issues – with a zeal that approached religious fervor.

By contrast, federal practice does not mirror this preference for broad-form submission. Federal Rule of Civil Procedure 49 grants judges the discretion to submit general verdicts, special verdicts, or general verdicts accompanied by special interrogatories. FED. R. CIV. P. 49. The federal courts – and especially the Fifth Circuit – never joined the groundswell in favor of broad-form submission that has animated Texas practice for the last generation. On the contrary, throughout this period the Fifth Circuit has championed the benefits of special verdicts.

Since the 1970s, the Fifth Circuit has expressed a strong preference for special verdicts. *E.g.*, *Guidry v. Kem Mfg. Co.*, 598 F.2d 402, 205 (5th Cir. 1979) ("The special verdict permitted by Rule 49(a) is a splendid device . . . for focusing the juror's attention on the disputed facts."); *Kendrick v. Illinois C.G.R. Co.*, 669 F.2d 341, 344 n.7 (5th Cir. 1982) (special verdict would have avoided problems of general verdict); *Walker v. Kansas City S. R. Co.*, 674 F.2d 1130, 1132 (5th Cir. 1982); *Garwood v. International Paper Co.*, 666 F.2d 217, 222 (5th Cir. 1982) ("Special verdicts greatly benefit an appellate court's review of jury findings."); *Ware v. Reed*, 709 F.2d 345, 355 (5th Cir. 1983) (special verdicts aid the appellate court).

In theory, special verdicts are designed to reduce confusion and uncertainty about the basis for a jury's verdict, promoting judicial efficiency by reducing the need to order new trials. *See* James W. Moore, 9 MOORE'S FEDERAL PRACTICE § 49.11[1][a] (3rd ed. 2004). Special verdicts are especially well-suited to multi-theory litigation "because they eliminate uncertainty as to whether the verdict was based wholly on an improper theory requiring a retrial of the case." 9 MOORE'S FEDERAL PRACTICE § 49.11[1][a] at 49-12 (citing cases).[2] When a special verdict is used and parts of the verdict are set aside on appeal, it may be possible to avoid reversing the entire judgment because the court can form a judgment based on the legally correct findings. *See, e.g.*, *Barton's Disposal Servs., Inc. v. Tiger Corp.*, 886 F.2d 1430, 1434 (5th Cir. 1989). According to the Fifth Circuit, this promise of judicial efficiency is one of the great benefits of special verdicts:

> A general verdict must ordinarily be reversed when one of two claims was improperly submitted to the jury since it is not possible to tell whether the verdict is based upon the erroneously submitted claim. However, when there is a special verdict finding for the plaintiff on both properly and improperly submitted claims, reversal is not required if the properly submitted ground is sufficient to support the jury's verdict.

Hay v. Irving, 893 F.2d 796, 799 (5th Cir. 1990); *cf. Albergo v. Reading Co.*, 372 F.2d 83, 86 (3rd Cir. 1966) ("A new trial in this case would be unnecessary if the court below had employed either of the procedures authorized by Rule 49 of the Federal Rules of Civil Procedure, 28 U.S.C.A., which were designed to encourage and facilitate the use of a special verdict, or, in the alternative, the general verdict accompanied by answers to specific interrogatories."); *but see* Elizabeth Thornburg, *The Power and the Process: Instructions and the Civil Jury*, 66 FORDHAM L. REV. 1837 (1998) (questioning assumptions about the efficiency of special verdicts).

---

[2] Special verdicts are particularly useful in areas where the law is unsettled. *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1520 (6th Cir. 1990); *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 n.6 (Tex. 1992) (same).

The Fifth Circuit has contrasted these perceived benefits of special verdicts with the challenges posed by general verdicts, in which "it is impossible to tell which theory of liability was adopted by the jury and the sufficiency of the evidence in support thereof." *Jones v. Miles*, 656 F.2d 103, 106 (5th Cir. 1981). That frustration echoes a famous criticism of general verdicts by Professor Edson Sunderland: "The general verdict is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi." Edson R. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 258 (1920). This same masking effect afflicts any jury finding based on multiple alternative theories – such as special interrogatories that combine multiple theories in a single question. For that reason, the Fifth Circuit has observed that "an interrogatory containing multiple issues is really no better than a general verdict," *Dougherty v. Continental Oil Co.*, 579 F.2d 954, 960 n.1 (5th Cir. 1978) (citing *Laguna Royalty Co. v. Marsh*, 350 F.2d 817, 823-24 (5th Cir. 1965)), *vacated on joint stipulation of the parties*, 591 F.2d 1206 (5th Cir. 1979), and it has "repeatedly urged the use of special interrogatories." *Moses v. Marathon Oil Co.*, 749 F.2d 262, 263 n.3 (5th Cir. 1985).

This Fifth Circuit law largely reflects the influence of former Chief Judge John R. Brown, who was a champion of special verdict practice. *See* John R. Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338 (1967); *see also Mixon v. Atlantic Coast Line R.R. Co.*, 370 F.2d 852, 862 (5th Cir. 1966) (Brown, J., concurring) (calling Rule 49 a "marvelous tool"). In other words, at the same time Texas was abandoning special issues in favor of broad form the federal courts – especially the Fifth Circuit – were moving in the opposite direction. Therefore, it should not be surprising that the federal courts have followed a strict rule of presumed harm; the presumed harm doctrine is inextricably linked to the federal preference for special verdicts. Judicial philosophy about the form of the jury charge goes hand-in-hand with judicial philosophy about harm analysis in multi-theory submission.

II. Harmless Error Analysis for Multi-Theory Submission in Federal Court.

Despite its strong tradition, the federal presumed harm doctrine is not without exceptions. Virtually every circuit recognizes some version of harmless error analysis when faced with error in a multi-theory submission. *See, e.g., Davis v. Rennie*, 264 F.3d 86, 104-10 (1st Cir. 2001); *Bruneau ex rel. Schofield v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 759 (2nd Cir. 1998); *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 120 (3rd Cir. 1999); *Harwood v. Partredereit AF*, 944 F.2d 1187, 1193 (4th Cir. 1991); *Braun v. Flynt*, 726 F.2d 245, 251 (5th Cir. 1984); *Collum v. Butler*, 421 F.2d 1257, 1260 (7th Cir. 1970); *E I DuPont de Nemours v. Berkley & Co.*, 620 F.2d 1247, 1258 n.8 (8th Cir. 1980); *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980); *Asbill v. Housing Auth.*, 726 F.2d 1499, 1504 (10th Cir. 1984). These tests take two basic forms: (1) the mainstream "reasonable certainty" approach; and (2) the Ninth Circuit approach.

The presumed harm rule arose in *Maryland v. Baldwin*, in an era before harmless error analysis became a prevalent part of federal appellate practice. During the twentieth century, changing judicial philosophies and the press of growing caseloads led the federal courts to place increasing reliance on the harmless error rule. *See, e.g.*, FED. R. CIV. P. 61 (harmless error rule); 28 U.S.C. § 2111 (harmless error statute). Over the last generation, federal courts have extended the harmless error principle to encompass errors in multi-theory submissions.

A. Development of the Mainstream "Reasonable Certainty" Test.

Ironically, despite its affection for special verdict practice, the Fifth Circuit was the first court to recognize a harmless error exception to the presumed harm rule of *Maryland v. Baldwin*. In *American Airlines, Inc. v. United States*, 418 F.2d 180 (5th Cir. 1969), the Fifth Circuit confronted a general verdict in a plane crash case involving 30 alternative theories of liability. The court found insufficient evidence to support one liability theory, but concluded that the other 29 theories were adequately supported by the evidence. In light of this overwhelming evidence, the court concluded that inclusion of a single unsupported theory was harmless. *Id.* at 195.

The next year, in *Collum v Butler*, 421 F.2d 1257 (7th Cir. 1970), the Seventh Circuit decided a civil rights case involving claims of police brutality. In addition to the physical abuse, the jury was also instructed to consider the police officers' failure to allow the plaintiff to contact his family or call an attorney. The court held these instructions should not have been included in the single liability question, but it did not hesitate to find their inclusion harmless:

> To permit other issues which occupied positions of such relative insignificance in the trial to be treated now as so important as to make their submission to the jury prejudicial would not serve the interest of justice. Error must be viewed with respect to its relative effect on the results of trial. In our considered opinion, the results of the present trial would not have been substantially affected if these issues had not been submitted to the jury.

Id. at 1260.

The next case in line, *Gardner v. General Motors Corp.*, 507 F.2d 525 (10th Cir. 1974), was a product liability case involving multiple theories of liability. The Tenth Circuit expressed skepticism about the viability of a marketing defect theory (based on a duty to warn) for which the evidence was "scant but reaching minimal adequacy." *Id.* at 529. But despite its misgivings, the court had no reservations about upholding the general verdict based on the design defect and breach of warranty allegations, concluding that these valid liability theories were sufficient to "overwhelm any potential error." *Id.*

With these cases sewing the seeds of a harmless error rule for multi-theory submissions, Judge Henry Friendly of the Second Circuit became the first federal judge to place the decisions into an orderly context. In *Morrissey v. National Maritime Union*, 544 F.2d 19 (2nd Cir. 1976), Judge Friendly cited *Collum*, *Gardner*, and his opinion in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2nd Cir. 1967) as "a few recent cases" in which courts had "disregarded the error [of multi-theory submissions infected with an invalid theory] when the appellate court was fairly convinced that the jury proceeded only on the sound ground." *Id.* at 27.[3]

---

[3] *Roginsky* did not technically involve a multi-theory submission; the trial court had submitted separate questions concerning negligence and fraud. On appeal, however, the defendant argued that the fraud claim should never have been submitted to the jury and contended that the erroneous admission of evidence relevant only to the fraud claim tainted the jury's consideration of the negligence claim – a complaint that is similar to the multi-theory problem. Judge Friendly entertained the argument, but concluded that there was such strong evidence of negligence the jury "could not have been significantly influenced" by the fraud evidence. *Id.* at 837.

Although he acknowledged the potential merit of a harmless error rule, Judge Friendly took pains to emphasize that this newly-minted rule should be kept "within rather strict bounds." *Id.* Because he was unable to say with confidence that the jury's verdict had been based on a proper theory of liability, Judge Friendly declined to apply the exception in *Morrissey*. *Id.*

Judge Friendly's opinion in *Morrissey* gave a doctrinal shape to this harmless error rule, and other courts soon followed it. *See Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1038-39 (8th Cir. 1978) (quoting *Morrissey*); *Simko v. C&C Marine Maintenance Co.*, 594 F.2d 960, 967 (3rd Cir. 1979) (same). By 1980, the idea had gained enough credibility that the Eighth Circuit could confidently cite it as a mainstream rule. *See E.I. Du Pont de Nemours v. Berkley & Co.*, 620 F.2d 1247, 1257 n.8 (8th Cir. 1980) ("A new trial will not result where it is reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it."). Four years later, in *Braun v. Flynt*, 731 F.2d 1205 (5th Cir. 1984), the Fifth Circuit adopted the "reasonable certainty" test as its own:

> When two claims have been submitted to the jury, whether on a general verdict or, as here, in a single interrogatory, a new trial may be required if one of the claims was submitted erroneously. . . . On the other hand, a general verdict can be upheld, even when a claim erroneously has been submitted "where it is reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it."

Id. at 1206 (citing *Berkley*, *Collum*, and *Gardner*).

The Second Circuit recently traced the "reasonable certainty" test back to the leading decision on harmless error in criminal appeals: *Kotteakos v. United States,* 328 U.S. 750 (1946). *See Bruneau ex rel. Schofield v. South Kortright Central School District*, 163 F.3d 749, 759-60 (2nd Cir. 1998) (discussing *Kotteakos*). *Kotteakos* held that appellate courts should consider "what effect the error had or *reasonably may be taken to have had* upon the jury's decision." *Kotteakos*, 328 U.S. at 764 (emphasis added). "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress." *Id.* at 764-65.

The "reasonable certainty" formulation of the harmless error rule has since been adopted by other circuits. *See, e.g., Harwood v. Partredereit AF*, 944 F.2d 1187, 1193 (4th Cir. 1991); *Davis v. Rennie*, 264 F.3d 86, 105 (1st Cir. 2001); *Asbill v. Housing Auth.*, 726 F.2d 1499, 1504 (10th Cir. 1984).[4] It represents the mainstream rule in federal court.

---

[4] The Tenth Circuit "reluctantly" departed from the *Asbill* rule in *Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1300 (10th Cir. 1989), because it considered itself bound by two factually indistinguishable opinions that had required new trials without considering the possibility of harmless error. *See id.* at 1298-1301. A subsequent case construed *Farrell* as modifying the harmless error rule in the Tenth Circuit to require "absolute certainty" that the invalid theory did not affect the jury's verdict. *See Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1229 (10th Cir. 1996); *see also id.* at 1233-35 (Brorby, J., dissenting) (noting confusion in the cases).

B. Criteria for Harmless Error Under the "Reasonable Certainty" Test.

Federal courts have not articulated specific standards to guide their application of the reasonable certainty test, but a review of the cases reveals common denominators that explain whether error in a multi-theory submission is harmful or harmless.

1. Factors making it reasonably certain that error was harmless.

There are two common denominators in cases where the reasonable certainty exception is met and the error is held to be harmless: (1) there is little or no evidence of the invalid theory, and (2) there is some additional corroborating factor, such as jury arguments or separate findings, to give the court confidence that the jury based its verdict on a valid theory.

In *Braun*, for example, the Fifth Circuit found the reasonable certainty exception satisfied because there was "little if any evidence presented at trial" regarding the invalid theory and the "entire focus" of the plaintiff's case was on a valid theory of liability. *Braun*, 731 F.2d at 1206. Other federal courts have focused on the same criteria. *See Davis v. Rennie*, 264 F.3d 86, 109 (1st Cir. 2001) (same); *Eastern Trading Co. v. Refco, Inc.*, 229 F.3d 617, 622 (7th Cir. 2000) (same); *Buhrmaster v. Overnite Transportation Co.*, 61 F.3d 461, 463-64 (6th Cir. 1995) (same); *see also Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1298 (10th Cir. 1989) (where entire trial focused on valid theories and defective theory was not discussed in opening or closing argument, "it appears highly unlikely that the jury's verdict was affected by the [invalid] instruction").[5]

It is tempting to find harmless error anytime the defect in question is a lack of evidence. As a matter of theory, there are powerful reasons to argue that the presumed harm rule should not apply to cases involving a mere insufficiency of evidence. *See* pp. 23-25, *infra*. Without more, however, that exception would swallow the rule. By definition, such an exception would apply in *every* case where one theory is submitted without evidence and other theories in the same multi-theory question are supported by evidence. Some courts have embraced that conclusion, *see, e.g., Eastern Trading Co. v. Refco, Inc.*, 229 F.3d 617, 622 (7th Cir. 2000) (Posner. J), but it is difficult to square with *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 77-78 (1907), where the Supreme Court reversed a general verdict based on a deficiency in the evidence. Thus, federal courts typically demand something more to invoke the reasonable certainty exception.

In some cases, the evidence supporting a valid theory of liability dwarfs an invalid theory so overwhelmingly that the appellate court can safely conclude that any error was harmless. *E.g., Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 121 (3rd Cir. 1999) (finding error harmless because evidence supporting valid theory was overwhelming and corroborated by physical evidence); *American Airlines, Inc. v. United States*, 418 F.2d 180, 195 (5th Cir. 1969) (finding insufficient proof to support one theory in a general verdict encompassing 30 alternative liability theories harmless). But these cases are rare; courts usually require some other indication of the basis for the verdict as a condition of the reasonable certainty exception.

---

[5] Notwithstanding this observation, the Tenth Circuit felt constrained to reverse in *Farrell* because it could not say with "absolute certainty" that the error was harmless. *See* n.4, *supra*. The "absolute certainty" test is questionable, and it certainly varies from the "reasonable certainty" exception applied by most circuits.

In *Braun*, for example, the Fifth Circuit emphasized that a special interrogatory had been submitted to the jury concerning a specific element of the valid liability theory – an element not required by the invalid theory. *Braun*, 731 F.2d at 1206. Because the jury found in favor of the plaintiff on that element, the Fifth Circuit found it likely that the jury had based its liability and damages findings on the valid theory. *Id.* Consequently, the court exercised its own judgment and concluded it was reasonably certain that the verdict was based on a valid liability theory. *Id.*; *see also Brochu v. Ortho Pharmaceutical Corp.*, 642 F.2d 652, 662 (1st Cir. 1981) (finding invalid liability theory harmless because the valid theory was a subset of the invalid theory and "it was a case where all roads led to Rome").

Similarly, in *Davis* the First Circuit took comfort from the fact that the trial judge had responded to a jury note during deliberations by focusing the jury's attention on the valid theory. *Davis*, 264 F.3d at 110. That clarifying instruction, coupled with the lack of evidence or argument concerning the defective theory, made the court reasonably certain that the verdict had been based on the valid theory. *Id.*

Thus, advocates urging courts to apply the reasonable certainty exception must look for corroborating factors to inspire confidence that the jury based its verdict on a valid theory. Absent such corroborating factors, courts will not invoke the reasonable certainty exception. *See, e.g., Rutherford v. Harris County*, 197 F.3d 173, 185 (5th Cir. 1999) (impossible to apply reasonable certainty exception where court had nothing but a general verdict that commingled valid and invalid theories); *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 854 (5th Cir. 1989) (elements of liability theories were different and it was impossible for the court to draw any confidence from the verdict); *Ward v. Succession of Freeman*, 854 F.2d 780, 790 (5th Cir. 1988) (finding error harmful because the court of appeals could not distinguish among potential grounds for verdict); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1230-31 (10th Cir. 1996) (because most of the evidence was relevant to both valid and invalid theories, impossible to discern basis for verdict). Because the presumed harm rule creates a rebuttable presumption that error in a multi-theory submission was harmful, appellees have the burden to identify some corroborating factor that rebuts the presumption and proves the error was harmless.

2. Factors making it more likely that error was harmful.

The reported cases identify several circumstances that confirm the presumption of harm. In these cases, it is difficult – if not impossible – to satisfy the reasonable certainty exception. Advocates seeking to reverse judgments based on errors in multi-theory submissions should look for these factors to demonstrate that the error was harmful.

If a major part of the plaintiff's proof or trial strategy is devoted to the invalid theory, then the error is harmful. *E.g., Fleet Nat. Bank v. Anchor Media Tele., Inc.*, 45 F.3d 546, 555 (1st Cir. 1995); *Kassel v. Gannett Co.*, 875 F.2d 935, 950 (1st Cir. 1989); *Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512, 519 n.9 (5th Cir. 1985); *Morrissey v. National Maritime Union*, 544 F.2d 19, 27 (2nd Cir. 1976). For example, in *Woods v. Sammisa Co.*, 873 F.2d 842 (5th Cir. 1989), the court found harm from a theory that "was strenuously litigated by both sides, and occupies a major portion of the court's instructions to the jury." *Id.* at 853-54.

If counsel focuses on the defective theory in argument, the error is ordinarily harmful. *See, e.g., Fleet Nat. Bank v. Anchor Media Television, Inc.*, 45 F.3d 546, 555 (1st Cir. 1995); *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1039 (8th Cir. 1978); *Morrissey v. National Maritime Union*, 544 F.2d 19, 27 (2nd Cir. 1976).

If the evidence on the valid theory was hotly contested, the appellate court cannot be reasonably certain that the jury based its verdict on that theory, as opposed to an invalid theory. *E.g., Box v. Ferrellgas, Inc.*, 942 F.2d 942, 945 (5th Cir. 1991) (disjunctive submissions allowed jury to find liability on any of three alternative theories even though there was only evidence of proximate cause as to one theory, and the defendant contested proximate cause on that theory); *Asbill v. Housing Auth.*, 726 F.2d 1499, 1504 (10th Cir. 1984) (finding error harmful because the jury's verdict could be supported on a valid theory "only by the jury's finding in [plaintiff's] favor of two extremely 'close' factual questions").

In technical cases requiring complex proof, there is greater risk that a jury will become confused and adopt an invalid theory. *Box v. Ferrellgas, Inc.*, 942 F.2d 942, 945 (5th Cir. 1991); *see also Ward v. Succession of Freeman*, 854 F.2d 780, 790-93 (5th Cir. 1988) (reversing a finding of securities fraud based on 29 alleged violations of Rule 10b-5 where the court had no way to know which charges formed the basis of the verdict); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1230-31 (10th Cir. 1996) (because most of the evidence at trial was relevant to both the valid and invalid theory, it was impossible to discern the basis for the verdict).

When the error is a legal mistake in the jury instructions, rather than a defect in proof, courts are less likely to find the error harmless because it is impossible to know whether the jury relied on the invalid instruction. *E.g., Crist v. Dickson Welding, Inc.*, 857 F.2d 1281, 1286-88 (5th Cir. 1992) (setting aside defense verdict based on a legal error in a defensive question without seriously considering harmless error analysis); *Imperial Premium Finance v. Khoury*, 129 F.3d 347, 352-55 (5th Cir. 1998) (setting aside a fraud finding based on legal error in one fraud theory because "we cannot be 'reasonably certain' that the jury's verdict in this case was based on a sustainable theory of fraud, rather than on a legally invalid and hence erroneously submitted theory").

If the jury makes any finding that is predicated on its acceptance of the defective theory, the error cannot be harmless. *E.g., Jones v. Miles*, 656 F.2d 103, 1106, 107-08 (5th Cir. 1981) (defective fraud theory in multi-theory case harmful because the jury awarded punitive damages, which could only be based on the invalid fraud theory, "so the jury verdict must have been based on the common law fraud charge, at least in part").

Finally, the jury's actions may provide "smoking gun" evidence that the error is harmful. If a jury sends a note focusing on a defective instruction, error is especially likely to be harmful. *E.g., Box v. Ferrellgas, Inc.*, 942 F.2d 942, 945 (5th Cir. 1991) (jury note inquired whether jury had to find negligence on all three theories, or just one); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56 (2nd Cir. 1980) (jury sent notes inquiring about the defective theory during jury deliberations); *Morrissey v. National Maritime Union*, 544 F.2d 19, 27 (2nd Cir. 1976) (defective instruction was re-read twice to jury during deliberations in response to jury notes).

C. The Ninth Circuit Approach.

As is so often the case, the Ninth Circuit has its own version of the harmless error rule. Rather than applying traditional harmless error analysis under Rule 61, the Ninth Circuit views its rule as a matter of "discretion" for the appellate court. According to the architect of the rule, former Circuit Judge (now Justice) Anthony Kennedy:

> Where more than one theory of recovery has been submitted to the jury in a civil case, and where on appeal it is claimed that as to one of the theories there was a lack of evidential support or an error of law in submitting the theory to the jury, the reviewing court has discretion to construe a general verdict as attributable to another theory if it was supported by substantial evidence and was submitted to the jury free from error.

Traver v. Meshriy, 627 F.2d 934, 938 (9th Cir. 1980).

In deciding whether to exercise its "discretion," the Ninth Circuit considers four factors: (1) the potential for jury confusion that may have resulted from submission of the invalid theory; (2) whether the appellant's defensive theories apply to the theory upon which the verdict is being sustained, giving the appellate court confidence that they must have been considered by the jury; (3) the strength of the evidence supporting the theory that is relied upon to sustain the verdict; and (4) the extent to which the same disputed issues of fact apply to the various legal theories. *Id.* at 938-39; *see also Counts v. Burlington N. R.R.*, 952 F.2d 1136, 1140 (9th Cir. 1991) (applying this analysis); *Roberts v. College of the Desert*, 870 F.2d 1411, 1417 (9th Cir. 1988) (same); *Benigni v. City of Hemet*, 879 F.2d 473, 477-78 (9th Cir. 1988) (same).

As a normative legal doctrine about how appellate courts *should* review alleged errors in multi-theory submissions, the *Traver* rule is very questionable, and no other court has adopted it. As a descriptive summary of the circumstances in which errors may be harmless under Rule 61, however, the four *Traver* categories are consistent with the reasoning of other federal courts and they are appropriate benchmarks for conventional harm analysis. Appellate practitioners should read the Ninth Circuit cases with that perspective in mind – but practitioners and courts should be wary of embracing the Ninth Circuit's "discretionary" model for harm analysis.

There is little precedent for the unusual notion that an appellate court has the "discretion" to construe a general verdict as attributable to any one of multiple theories in a single question, and the factors identified in *Traver* are not supported by any citation of authority. *Id.* at 938-39. Not surprisingly, *Traver* has been vigorously criticized. *See Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 789-92 (9th Cir. 1990) (Kozinski, J., dissenting) (criticizing the *Traver* approach and contending that "the exceptions have now submerged the rule"); *Knapp v. Ernst & Whitney*, 90 F.3d 1431, 1439 (9th Cir. 1996) ("This narrow exception has been the target of vigorous and persuasive criticism."). The Ninth Circuit's unusual rule creates a circuit split on the question of harm analysis in multi-theory submission:

> The discretionary Ninth Circuit rule is completely incompatible with the Supreme Court's unqualified rule requiring reversal of general verdicts in civil cases involving error, and with the rule applied in every circuit which has addressed the issue. At some point, the Supreme Court should intervene and articulate a clear standard to guide the lower courts' implementation of this fundamental rule of federal procedure.

David M. Alexrad & Loren H. Kraus, *The Federal General Verdict Rule: Conflict in the Courts of Appeal*, FEDERAL LAWYER 43, 43 (June 1996). Appellate practitioners in federal court may wish to preserve this issue as a potential basis for certiorari in the Supreme Court.

D. Evaluating Criticisms of the Harmless Error Principle.

The principle of harmless error analysis for error in multi-theory submissions has become well-entrenched in federal jurisprudence over the last generation – but not without controversy. A few federal judges have criticized their colleagues for applying a harmless error rule in the face of controlling Supreme Court precedent – even going so far as to claim that harmless error analysis is not the majority approach. *See Hurley*, 174 F.3d at 136-37 (Cowen, J., dissenting); *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 789-92 (9th Cir. 1990) (Kozinski, J., dissenting); *see also* Ryan Phair, *Appellate Review of Mult-Claim General Verdicts: The Life and Premature Death of the Baldwin Principle*, 4 J. APP. PRAC. & PROC. 89 (2002) (criticizing the harmless error rule as a violation of Supreme Court precedent). But most courts reject that absolutist approach. As the Tenth Circuit put it, the Supreme Court's precedent "does not paint with as broad a brush as appears from the language quoted. As with all errors committed at trial, a litmus test for reversal is whether the appellant was thereby unjustly prejudiced." *Asbill*, 726 F.2d at 1504 (citing FED. R. CIV. P. 61); *accord Hurley*, 174 F.3d at 121 (quoting *Asbill* with approval).

The development of a harmless error test is consistent with the deferential approach taken by federal courts to charge error generally. For example, the Fifth Circuit will find error only if the charge "'as a whole leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.'" *Bender v. Brumley*, 1 F.3d 271, 276 (5th Cir. 1993) (citation omitted); *accord F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1318 (5th Cir. 1994). Even then, the Fifth Circuit "will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case." *Mijalis*, 15 F.3d at 1318; *Bender*, 1 F.3d at 276-77. As the Fifth Circuit has explained, errors in the charge often prove harmless in hindsight: "Inaccurate statements that prove in retrospect to have been demonstrably irrelevant are just that – irrelevant and inconsequential errors – not unusual attendants to long and hard fought trials." *Bolton v. Tesoro Petroleum Corp.*, 871 F.2d 1266, 1273 (5th Cir. 1989). That same philosophy is apparent in one of the first cases to pioneer harmless error analysis in multi-theory submissions: "To permit . . . issues which occupied positions of . . . relative insignificance in the trial to be treated now as so important as to make their submission to the jury prejudicial would not serve the interest of justice." *Collum v. Butler*, 421 F.2d 1257, 1260 (7th Cir. 1970); *accord Braun v. Flynt*, 731 F.2d 1205, 1206 (5th Cir. 1984) (quoting *Collum*). Thus, the harmless error approach is perfectly consistent with the prevailing federal philosophy about charge error.

Likewise, the harmless error approach is fully consistent with the mandate of Rule 61, which instructs the federal courts to "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." FED. R. CIV. P. 61; *see also* 28 U.S.C. § 2111 (harmless error statute). The presumed harm rule of *Maryland v. Baldwin* is an artifact of an era before Rule 61 was promulgated, and before harmless error analysis became a prevalent part of American appellate practice. Although it is true that the Supreme Court has never acknowledged the possibility of a harmless error exception (and we must concede that it had the chance to do so in *Halecki* and *Sunkist*, both of which were decided after the promulgation of Rule 61 in 1937), there is little reason to believe errors in multi-theory submissions should be treated as exceptions to the general rule of harmless error analysis in federal court.

For this reason, it is a mistake to read the Supreme Court cases as a rule of *per se* harm, requiring reversal any time *any* error – of *any* magnitude – afflicts *any* multi-theory submission. Properly construed against the background of Rule 61, *Baldwin* and its progeny simply erect a prima facie showing of harm, which is subject to a showing that the error was in fact harmless. Critics of that approach would prefer a mechanical rule that eliminates any room for judgment in individual cases, in the name of honoring Supreme Court precedent, but that rule is not realistic. As the Supreme Court has said of harmless error analysis, "the discrimination it requires is one of judgment transcending confinement by formula or precise rule." *Kotteakos*, 328 U.S. at 761. Distinguishing harmful from harmless errors is part of the art of appellate judging; it would be absurd if that duty were denied to appellate judges based on some mechanical rule:

> That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully. Judgment, the play of impression and conviction along with intelligence, varies with judges and also with circumstance. What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another. . . . The task is not simple, although the admonition is. Neither is it impossible. By its very nature no standard of perfection can be attained. But one of fair approximation can be achieved. Essentially the matter is one for experience to work out. For, as with all lines which must be drawn between positive and negative fields of law, the precise border may be indistinct, but case by case determination of particular points adds up in time to discernible direction.

Id. at 761-62. It would be unwise to adopt a wooden rule of *per se* harm that deprived courts of their traditional duty to gauge whether an error is harmful or harmless on a case-by-case basis.

Every rule about "reversible error" involves a policy judgment balancing the interest in maximizing efficiency and minimizing new trials against the interest in accurate decisionmaking. Legal systems can justifiably choose to prefer one interest over the other as a background rule – for example, adopting a rule of presumed harm to maximize the interest in accurate fact-finding, or adopting the two-issue rule to maximize the interest in judicial efficiency – but there is no reason for an absolute rule that eliminates any ability to alter the balance in an individual case. The reasonable certainty test for harmless error in multi-theory submissions fairly balances the competing policies of judicial efficiency and accuracy, and it is sound law.

III. Preservation of Complaints About Broad-Form Errors in Federal Court.

One of the simmering questions in Texas appellate practice today is what a party must do to preserve a *Casteel-Harris County* complaint. Must a party object specifically to the form of a broad-form submission and point out that it will prevent the appellate court from reviewing the accuracy of the verdict on appeal, or is it sufficient simply to object to the defect in the question, without any request for special verdicts? There are powerful arguments for either alternative, and the issue is not yet settled in Texas. Surprisingly, it is not settled in federal court, either.

As a general rule, preservation of complaints about the jury charge is governed by Federal Rule of Civil Procedure 51: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." FED. R. CIV. P. 51; *Russell v. Plano Bank & Trust*, 130 F.3d 715, 719 (5th Cir. 1997).

To preserve a charge complaint under that rule, it is not enough that *some* objection was made at trial; the complaint on appeal must be the same one that was asserted in the trial court, and the grounds must have been sufficiently specific that they gave the trial judge fair notice of the complaint and an opportunity to correct the error. *See, e.g., Crist v. Dickson Welding, Inc.*, 857 F.2d 1281, 1286 (5th Cir. 1992). The Fifth Circuit demands "strict application of Rule 51," requiring that "the trial court was adequately informed" and was "fully aware of the substance of the objections." *Russell*, 130 F.3d at 720. As Judge Higginbotham recently explained the rule:

> Rule 51 holds litigants to a difficult standard of error preservation for good reason. It requires that objections be brought before the trial judge for a possible remedy at the trial court level, saving judicial resources.

Taita Chemical Co. v. Westlake Styrene, 351 F.3d 663, 668 (5th Cir. 2003).

Although complaints about the substance of the charge are more common, the same rules generally apply to complaints about form. *E.g., Barton's Disposal Servs., Inc. v. Tiger Corp.*, 886 F.2d 1430, 1434 (5th Cir. 1989); *McConney v. Houston*, 863 F.2d 1180, 1183-84 (5th Cir. 1989); *Latuso v. Uniroyal, Inc.*, 783 F.2d 1241, 1243 (5th Cir. 1986); *J.C. Motor Lines, Inc. v. Trailways Bus System*, 689 F.2d 599, 603 (5th Cir. 1982); *Stancill v. McKenzie Tank Lines, Inc.*, 497 F.2d 529, 535 (5th Cir. 1974); *see also Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 511 F.2d 839, 845 (4th Cir. 1975); *Neely v. Club Med Mgmt. Servs.*, 63 F.3d 166, 200 (3rd Cir. 1995). Thus, one might expect that precise objections to the form of the charge would be required to preserve a complaint about error in multi-theory submissions. But it is not self-evident whether complaints that an error in a multi-theory submission fatally infected the entire charge are separate assertions of *error* (which must be preserved separately), or simply demonstrations of *harm* (which need not be preserved).

Put another way, is the real complaint a challenge to the substance of the jury charge (preserved under Rule 51), for which the harm analysis requires no further preservation, or is it a challenge to the form (preserved under Rule 49), which requires a separate, specific objection? The answer is unsettled – which is unsettling for appellate lawyers.

Judge Thomas Gee once called this preservation issue "a close and difficult question," *Pan Eastern Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1124 (5th Cir. 1988), and it has not grown any easier with time. Federal decisions are relatively rare, and they are divided.

One line of federal cases suggests a complaint about error in a multi-theory submission is a complaint about the form of the charge, and that precise complaint must be preserved at trial. *See Davis v. Rennie*, 264 F.3d 86, 106-07 (1st Cir. 2001) (discussing cases); *Kossman v. Northeast Ill. Regional Commuter R.R.*, 211 F.3d 1031, 1037 (7th Cir. 2000) (defendant's failure to request special verdict allows court to uphold verdict on any theory supported in the record); *Mitsubishi Elec. Corp. v. Ampex Corp.*, 190 F.3d 1300, 1304 (Fed. Cir. 1999) (holding appellant waived any complaint by failing to request special verdicts); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1231 (10th Cir. 1996) (same) (citing *Union Pac. R.R. v. Lumbert*, 401 F.2d 699 (10th Cir. 1968)); *Landes Const. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1373-74 (9th Cir. 1987); *General Ind. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 801 (8th Cir. 1987) (antitrust case in which one damage question was predicated on two alternative liability theories but defendant failed to object to the form of the charge, so the court did not consider allegations of error in one liability theory); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1054 (8th Cir. 2000) (discussing *General Industries*). The Tenth Circuit was a leader on this issue, holding years ago that when a party fails to object to a general verdict, the verdict may be upheld "where there is substantial evidence supporting any ground of recovery in favor of an appellee." *Union Pac. R.R. Co. v. Lumbert*, 401 F.2d 699, 701 (10th Cir. 1968); *Anixter*, 77 F.3d at 1233-34 (Brorby, J., dissenting) (citing cases applying this rule).

More recently, Judge Alex Kozinski has drawn a bright-line rule governing preservation of complaints about error in multi-theory submissions:

> Litigants like [appellant] who wish to challenge the sufficiency of the evidence as to some, but not all, specifications of negligence must present an appropriate record for review by asking the jury to make separate factual determinations as to each specification. Any other rule would unnecessarily jeopardize jury verdicts that are otherwise fully supported by the record on the mere theoretical possibility that the jury based its decision on unsupported specifications. We will not allow litigants to play procedural brinksmanship with the jury system and take advantage of uncertainties they could well have avoided.

McCord v. Maguire, 873 F.2d 1271, 1274, *amended by* 885 F.2d 650 (9th Cir. 1989).

Likewise, Judge Richard Posner has hinted strongly that he would reach the same result, observing in dictum that a defendant who fails to request special interrogatories in the face of an invalid multi-theory submission has "only itself to blame for its inability to demonstrate" harm. *Eastern Trading Co. v. Refco, Inc.*, 229 F.3d 617, 622 (7th Cir. 2000). Thus, there is a strong body of federal authority supporting the view that a separate, specific objection must be made to the form of the charge in order to preserve a complaint about error in a multi-theory question.

On the other hand, another line of federal cases has reviewed multi-theory submissions asserting that error infected one theory without requiring a separate objection to the form of the charge or a request for special verdicts. *See, e.g., Lattimore v. Polaroid Corp.*, 99 F.3d 456, 468 (1st Cir. 1996); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1056 n.15 (11th Cir. 1994) ("The failure to object to a proposed verdict format does not waive the right to object to the sufficiency of the evidence."); *Counts v. Burlington N. R.R.*, 952 F.2d 1136, 1140 (9th Cir. 1991) (holding the failure to request a special verdict "does not affect the appealability of this issue"); *Anixter v. Home-Stake Production Co.*, 77 F.3d 1215, 1228-32 (10th Cir. 1996) (holding error based on intervening change in law preserved by post-trial brief despite absence of any objection to the substance of the instruction or the form of the charge); *Doherty v. American Motors Corp.*, 728 F.2d 334, 344 (6th Cir. 1984) (holding error preserved by motion for directed verdict challenging sufficiency of evidence on one theory, even though neither party had requested special interrogatories or special verdicts) (citing *Avins v. White,* 627 F.2d 637 (3d Cir. 1980)); *Asbill v. Housing Auth.*, 726 F.2d 1499, 1502 n.3 (10th Cir. 1984) (holding error preserved where there was neither objection to form of verdict nor objection to the invalid theories submitted in the charge, but legal objections had been overruled previously and the need for further objection was excused under the futility exception to Rule 51). In addition, many of the reported decisions do not even discuss preservation, leaving the impression that these courts would not require a separate objection to the form of the charge as long as the substantive defect in the instruction or the evidence had been preserved.

The Fifth Circuit does not appear to require separate objections to the form of the verdict. In *Jones v. Miles*, 656 F.2d 103 (5th Cir. 1981), the Fifth Circuit noted the appellants had failed to complain about the use of a general verdict or request a special verdict at trial, concluding that "they have waived their right to raise this point on appeal." *Id.* at 106 n.2. But at the same time, the court observed that the appellants had preserved their complaint about the underlying error, *id.* at 106, and reversed the judgment on that basis. *Id.*; *see also Crist v. Dickson Welding, Inc.*, 857 F.2d 1281, 1286-87 (5th Cir. 1992) (error preserved by objection to a substantive defect in the charge during the charge conference). *Jones* and *Crist* appear to stand for the proposition that the Fifth Circuit requires parties to preserve only complaints about the substantive defect, not complaints about the form of the charge. That approach is consistent with the prediction made by Judge Gee in the *Pan Eastern* case:

> It seems that in the case of a potentially ambiguous general verdict all the complaining party must do to protect his rights is to object to the charge and the submission *vel non* of the questionable theory or theories; probably he need not object to the *ambiguity* inherent in its submission, as the ambiguity arises from the nature of general verdicts and no party has a right to a particular *kind* of verdict, general or special.

Pan Eastern, 855 F.2d at 1124.

Judge Gee was not forced to decide this "close and difficult" question in *Pan Eastern*, *id.*, and the Fifth Circuit has never addressed it directly. Thus, the prudent appellate practitioner will object both to the substance of any invalid theory and to the form of the charge. In future cases, appellate practitioners might find it fruitful to litigate this question in the Fifth Circuit.

IV. Four Areas for Future Development in State Practice.

A century of federal experience with the presumed harm rule for multi-theory submission offers valuable lessons for courts and practitioners developing the presumed harm rule in Texas. *First*, Texas courts and practitioners should look to the federal experience for assistance in developing a harmless error exception to the presumed harm rule of *Casteel* and *Harris County*. *Second*, Texas courts and practitioners should look to the federal experience in confronting the difficult problem of preservation in this area, which is a cutting-edge issue in Texas practice. *Third*, the federal cases offer a variety of potential applications for the presumed harm argument, which practitioners can use to their advantage. *Finally*, Texas courts and practitioners have the opportunity to take part in an ongoing debate about application of the presumed harm rule to errors based on the sufficiency of the evidence – a debate which was opened, but was not closed, by the decision of the Texas Supreme Court in *Harris County*.

A. Texas Should Consider a Harmless Error Rule.

In *Casteel* and *Harris County*, Texas took the first steps into a new era of presumed harm. But the journey will not be complete until Texas adopts a harmless error rule that complements the background rule and permits an appropriate balance between the value of judicial efficiency and the value of accuracy. As discussed above, there are valid reasons for the Texas courts to move away from their fealty to broad-form submission in the interest of maximizing accuracy, and the presumed harm rule accomplishes that purpose. But there is no legitimate reason for a *per se* rule of harm that deprives courts of their traditional power to determine whether error was harmless on a case-by-case basis, especially when it is reasonably certain that the verdict was based on a valid legal theory with sufficient evidentiary support. Texas practitioners should seek opportunities to advocate a harmless error rule in appropriate cases, and Texas courts should look to the federal experience for guidance as they nurture the Texas rule into maturity.

B. Texas Should Look to the Federal Experience for Guidance in Developing Preservation Rules.

This paper does not pretend to offer a definite answer to the "close and difficult question" of how complaints about error in multi-theory submissions should be preserved. As noted above, there are persuasive arguments on both sides, and any jurisprudential debate that has pitted such distinguished judges as Thomas Gee, Richard Posner, and Alex Kozinski against each other cannot be simple to resolve. But the question cannot be avoided. When called upon to answer it, Texas courts and practitioners should look to the federal experience for guidance.

C. Texas Should Look to the Federal Experience for Guidance in Finding New Applications of the Presumed Harm Rule.

The presumed harm rule of *Casteel* and *Harris County* is a work in progress; future cases will create new opportunities to expand the rule or limit it. As Texas appellate practitioners explore the frontiers of this doctrine, they should look to the federal experience for guidance. This paper offers a wealth of potential applications, *see* pp. 4-7, *supra*, including one area that presents an obvious opportunity for future development.

Texas practitioners should consider applying the presumed harm rule to cases in which one theory in a multi-theory submission is tainted by the admission of inadmissible evidence. That case has not arisen in the Texas Supreme Court; *Casteel* involved legal error in the charge, and *Harris County* involved insufficient evidence in one part of a lump-sum damage question. Lest we forget, however, the genesis of the presumed harm doctrine was a case about admission of inadmissible evidence tainting one theory in a multi-theory submission. *Maryland v. Baldwin*, 112 U.S. 490, 493-94 (1884) ("If, therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given.").

That case would take the presumed harm rule outside the limited context of charge error. In that scenario, the language of the charge is legally correct and there is evidence to support it, but an admissibility error taints one theory in the multi-theory question. That is not charge error, in the traditional sense, but a case of harmful error in the admission evidence within the meaning of Evidence Rule 103 and Rule 44.1(a)(2) of the Rules of Appellate Procedure – it is an error that prevents the proper presentation of the merits to the appellate court. Because it is impossible to know whether the jury based its verdict on a theory that was tainted by inadmissible evidence, the error might be deemed harmful. Under those circumstances, according to the Eighth Circuit, "there is no material distinction between a situation . . . in which one of several theories of liability should not have been submitted to a jury at all, and a situation, like that here, in which one of several theories of liability is not sustainable because of an erroneous and prejudicial admission of evidence. The essential inquiry in either case is whether the appellate court is fairly convinced that the jury proceeded on a sound basis." *Mueller v. Hubbard Milling Co.*, 573 F.2d 1029, 1039 (8th Cir. 1978) (reversing general verdict because one of four liability theories was tainted by erroneous admission of parol evidence); *see also Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1000-03 (3rd Cir. 1988) (general verdict based on two alternative liability theories reversed based on erroneous admission of hearsay relevant to one theory); *Bone v. Refco, Inc.*, 774 F.2d 235, 242-43 (8th Cir. 1985) (general verdict reversed because one theory was tainted by inadmissible evidence). Obviously, any such prima facie showing should be subject to rebuttal, in a case-by-case determination of whether the error was, in fact, harmful.

Texas courts should be careful, moreover, not to take the principle to ridiculous extremes. In *Rutherford v. Harris County*, 197 F.3d 173 (5th Cir. 1999), a Title VII case, the Fifth Circuit reviewed various allegations of disparate treatment in the plaintiff's *testimony* and found that no reasonable jury could have found them discriminatory. *Id.* at 184-85. But the Court recognized that at least one allegation of disparate treatment was not supported by evidence. *Id.* at 185 n.12. The jury interrogatory inquired generally whether the plaintiff had proved disparate treatment, without any reference to any particular factual allegations. *See id.* at 185 ("The court did not instruct the jury to address each individual basis for Rutherford's disparate treatment claim."). Writing for the Court, District Judge Sidney Fitzwater concluded that this situation falls within the general rule of presumed harm and ordered a new trial based on nothing more than the fact that certain allegations made by the plaintiff *in her testimony* – without objection – were invalid. Respectfully, that rule is unsound. *Rutherford* has not been followed by any court on this point, and it should be disavowed. Application of the presumed harm rule to inadmissible evidence should be limited to cases in which there is a timely objection to admissibility of the evidence and the invalid theory is specifically identified in the jury instructions.

D. Texas Should Join the Debate Over the *Griffin* Rule and Application of the Presumed Harm Rule to Sufficiency Challenges.

Finally, Texas courts and practitioners should seize the opportunity to join an ongoing debate over whether there is a meaningful difference between legal errors and sufficiency errors, for purposes of the presumed harm rule. This issue was raised by the dissent in *Harris County*, but the decision in that case does not definitively answer the question for future cases in Texas.

Theoretically, there is a difference between a mistake of law in a multi-theory question and a mere defect in proof. Because the jury is presumed to follow the trial court's instructions, there are good reasons to presume that the jury could be misled by a legally incorrect instruction. *See, e.g., Douglas v. Dyn McDermott Petroleum Op. Co.*, 163 F.3d 223, 235 (5th Cir. 1998) (discussing the rule that a jury is presumed to follow the instructions).

By contrast, there is less reason to presume that a jury would base its answer on a theory without any factual support, especially not when other theories are supported by the evidence. Indeed, given the presumption that the jury will follow its instructions – including the standard instruction on the burden of proof – there is a fair argument that a jury should be presumed to overlook factually unsupported theories in favor of theories that are supported by the evidence. "The jury will conclude for itself that there is insufficient evidence to support an application of the instruction, and thus reject it as 'mere surplusage.'" *Buhrmaster v. Overnite Transport. Co.*, 61 F.3d 461, 463-64 (6th Cir. 1995) (citations omitted); *Davis v. Rennie*, 264 F.3d 86, 100-10 (1st Cir. 2001) (quoting *Buhrmaster*). Based on that distinction, one might conclude that, provided there is sufficient evidence to support the jury's finding on any theory submitted in a multi-theory question, the appellate court should presume that theory was the basis for the affirmative finding and ignore theories that were not supported by the evidence. *Id.*

Justice Scalia adopted this approach for criminal convictions in *Griffin v. United States*, 502 U.S. 46 (1992). In a thorough opinion, Justice Scalia reviewed the common-law tradition governing multi-count criminal convictions and drew a distinction between legal errors and mere defects in the evidence; the former infects a multi-count conviction and requires it to be set aside, while the latter does not. *Id.* at 49-59. As Justice Scalia explained the difference:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law – whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence.

Id. at 59.

The Supreme Court has not yet considered whether the *Griffin* rule applies to civil cases. Relying on *Griffin*, however, Judge Richard Posner has taken that step:

> [A theory without evidentiary support] should be excluded from the case altogether by a grant of partial summary judgment or by a partial directed verdict. Letting the jury consider it is just an invitation to jury lawlessness. But it doesn't follow from this that the jury's verdict must be set aside. The invitation isn't always taken. It cannot just be *assumed* that the jury *must* have been confused and therefore that the verdict is tainted, unreliable. It's not as if, here, the judge had failed to give an instruction to which [appellant] was entitled, or had given an erroneous instruction. This is just a case of surplusage, where the only danger is confusion, and reversal requires a showing that the jury *probably* was confused.

Eastern Trading Co. v. Refco, Inc., 229 F.3d 617, 621-22 (7th Cir. 2000) (emphasis in original) (citing cases). Judge Posner contrasts legal errors, like the erroneous jury instruction in *Sunkist*, with mere complaints about the sufficiency of the evidence:

> It is different when, as in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30, 82 S. Ct. 1130, 8 L.Ed.2d 305 (1962), the jury is instructed on an erroneous theory of liability and there is no basis for determining whether it relied on that theory. Since the jury is to take the law as the judge instructs it, however erroneous the instruction is, an erroneous theory of liability supported by the facts is quite likely to commend itself to the jury. The presumption is reversed when, as in this case, the jury is instructed on a theory (here of defense, but that is immaterial) for which there is no evidence and which probably, therefore, it rejected.

Id.

Judge Posner's philosophy appears to be consistent with the prevailing approach in the Seventh Circuit, which holds that a general verdict may be upheld if there is sufficient evidence to support any theory in a multi-theory submission. *See, e.g., McGrath v. Zenith Radio Corp.*, 651 F.2d 458, 464 (7th Cir. 1981); *Cross v. Ryan*, 124 F.2d 883, 887 (7th Cir. 1941). However, that was not the traditional approach, as Judge Alex Kozinski has declared in no uncertain terms. *See Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 790 (9th Cir. 1990) (Kozinski, J., dissenting) ("The Seventh Circuit, for reasons of its own, has adopted a maverick rule precisely the opposite of that repeatedly announced by the Supreme Court.").

Judge Posner's reasoning has a great deal of persuasive force, but it fails to account for *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 77-78 (1907), in which the Supreme Court reversed a general verdict on the basis of insufficient evidence to support three of the eight allegations of negligence. The Supreme Court has not addressed whether the *Wilmington* rule survived the enactment of Rule 61 and its decision in *Griffin*. Based on the logic of *Griffin*, however, it is hard to understand why the same rule should not apply to a civil case; if anything, one might expect courts to find harmless error more readily in civil cases than in criminal cases, out of respect for constitutional interests. This is a fertile area for future development.

The federal courts are divided about whether the *Griffin* rule applies to civil cases. Contrary to Judge Posner's reasoning, the Sixth Circuit refuses to extend *Griffin* to civil cases. *See, e.g., Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660, 667 (6th Cir. 1993). By contrast, the Fifth Circuit appears to hold that the *Griffin* rule applies equally to civil cases. *See Walther v. Lone Star Gas Co.*, 952 F.2d 119, 126 (5th Cir. 1992) (applying the *Griffin* rule in a civil case to find factually unsupported jury instruction harmless error), *opinion on rehearing*, 977 F.2d 161, 162 (5th Cir. 1992) ("Jurors are well equipped to analyze the evidence and reach a decision despite the availability of a factually unsupported theory in the jury instructions."); *Prestenbach v. Rains*, 4 F.3d 358, 361 n.2 (5th Cir. 1993) ("a jury verdict may be sustained even though not all the theories on which it was submitted had sufficient evidentiary support"); *Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567, 577 n.8 (5th Cir. 2001) (citing *Walther* for the proposition that the *Griffin* rule applies to civil cases). Although it has not explicitly overruled its earlier decisions applying the presumed harm rule to cases involving insufficient evidence, *see* pp. 4-5, *supra*, the Fifth Circuit appears to apply the *Griffin* rule to civil cases.

In *Harris County*, the Texas Supreme Court declined to adopt the *Griffin* approach for civil cases involving insufficient evidence on the ground that *Griffin* is limited to criminal cases. As Chief Justice Phillips explained, "the United States Supreme Court itself has acknowledged that a different reversible error analysis applies in civil cases." *Harris County*, 96 S.W.3d at 234 (relying on *Baldwin, Wilmington, Sunkist, and Halecki*). *Harris County* did not directly grapple with the logic of Judge Posner and Justice Scalia's opinions distinguishing between legal error and insufficient evidence, nor did it consider the possibility that *Wilmington* could be obsolete – and it did not address the recent line of Fifth Circuit authority applying *Griffin* to civil cases. The Texas Supreme Court cannot be faulted for refusing to predict the future of federal law, especially since that future is far from certain. But it remains an open question whether the Supreme Court will follow *Griffin* or *Wilmington* in civil cases involving insufficient evidence, and as a result, the premise of the *Harris County* decision may prove to be mistaken. Therefore, Texas courts and appellate practitioners should directly address the rationale for the *Griffin* rule – particularly the logic of Justice Scalia, Judge Posner, and the more recent Fifth Circuit opinions – in developing the Texas version of the presumed harm rule.

Finally, it is important to recognize that the essential insight of *Griffin* – that jurors are less likely to be confused and misled by a defect in the proof than a legal error in the charge – can be reconciled with the background rule of *Harris County* by adopting a harmless error rule. As discussed above, federal courts are most likely to find errors in multi-theory submissions harmless when there is little or no evidence concerning the invalid theory and there is some other corroborating factor to provide reasonable certainty that the verdict was based on a valid theory. *See* pp. 12-13, *supra*. A harmless error exception would preserve the prima facie harm rule of *Casteel* and *Harris County* as the background rule, while still preserving the ability of courts to find the error harmless in appropriate cases. That rule would strike an appropriate balance between the legitimate objectives of both *Harris County* and *Griffin*.

The cross-pollination between state and federal court is always a fertile source of new ideas for appellate practitioners, and that is especially true in the case of the presumed harm rule. As the contours of the new Texas approach begin taking shape in case-by-case developments, Texas courts and appellate practitioners will be well-served to draw on the federal experience.