TADC Commercial Litigation Newsletter

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This newsletter is intended to summarize significant cases and issues impacting the commercial litigation practice area in the past six months.It is not a comprehensive digest of every case involving commercial litigation issues during that time period or a recitation of every holding in the cases discussed.This newsletter was not compiled for the purpose of offering legal advice.

Texas Supreme Court Decisions

In re Fisher

Opinion Delivered February 28, 2014
12-0163, 2014 WL 801160

Synopsis

The Texas Supreme Court found that a forum selection clause within an agreement relating to the acquisition of an oilfield services company was mandatory, arose from the acquisition transaction, and therefore, was applicable.

Factual Background and Trial Court Proceedings:

In May of 2007, Mike Richey sold his interest in Richey Oilfield Construction, Inc. ("Richey Oil") to Nighthawk Oilfield Services, Ltd. ("Nighthawk") for $33 million. To affect this transaction, the parties executed a Stock Purchase Agreement, a goodwill agreement (the "Goodwill Agreement"), and a Promissory Note (collectively the "Acquisition Agreements"). The transaction resulted in Richey Oil becoming a subsidiary of Nighthawk, with Richey remaining president of Richey Oil and becoming a limited partner in Nighthawk.

The Stock Purchase Agreement contained the following venue provision:

> *Jurisdiction;Service of Process.* Any proceeding arising out of or relating to this Agreement may be brought in the courts of the State of Texas, Tarrant County, or if it has or can acquire jurisdiction, in the United States District Court for the Northern District of Texas, and each of the parties irrevocably submits to the non-exclusive jurisdiction of each such court in any such proceeding, waives any objection it may now or hereafter have to venue or to convenience of forum, agrees that all claims in respect of the proceeding may be heard and determined in any such court and *agrees not to bring any proceeding arising out of or relating to this Agreement in any other court.* (Emphasis added)

The Goodwill Agreement contained the same venue provision as the Stock Purchase Agreement. Moreover the Promissory Note had a venue selection clause, which provided that "[Nighthawk] . . . irrevocably agrees that any legal proceedings in respect of this note . . . or other writing relating hereto shall be brought in the district courts of Tarrant County, Texas, or the United States District Court for the Northern District of Texas."

A month after Nighthawk purchased Richey Oil, Nighthawk made a $20 million "special distribution" to its partners. This distribution was contemplated in the Goodwill Agreement.

Six months after the distribution, Richey paid $1 million to Nighthawk at the request of Mark Fisher, Nighthawk's president. At the time, Fisher related that he was seeking similar contributions from all of the limited partners, the money would be treated as loans, and, six months later, the loans, plus 10%, would be paid back to Richey.

When Richey asked Fisher to repay the $1 million, Fisher refused, claiming that the money was a capital contribution, not a loan, for which Richey would receive preferred equity units. Richey was never repaid the $1 million.

In connection with the Acquisition Agreements, Nighthawk created a controlled disbursement account, so that Richey Oil could access Nighthawk's revolving line of credit. Richey was given check signing authority on this account, and Fisher authorized Richey to pay Richey Oil vendors on the account. However, when Richey began using the account, Bank of America rejected several of the checks Richey had written from the account. Several of the payees of the checks referred their returned checks to collection agencies, attorneys, and authorities, who sent demands threatening civil and criminal recourse. Nighthawk and Richey Oil subsequently declared bankruptcy.

Richey sued Fisher and another of Nighthawk's limited partners, Reece Boudreaux, in Wise County for various causes of action, including breach of fiduciary duty, fraud, and violations of the Texas Securities Act. Fisher and Boudreaux responded by moving the trial court to transfer venue to Tarrant County or dismiss the suit in line with the mandatory venue provisions in the Acquisition Agreements. Fisher and Boudreaux also argued that Richey lacked standing to recover because the claims Richey asserted belonged to Nighthawk and could only be brought by the Nighthawk trustee.

The trial court denied Fisher's and Boudreaux's motions. Fisher and Boudreaux sought mandamus in the Second Court of Appeals.

Court of Appeals:

The Second Court of Appeals (Fort Worth)denied mandamus relief and Fisher and Boudreaux sought relief in the Texas Supreme Court.

Texas Supreme Court's Holding:

The Texas Supreme Court refused to grant mandamus on the issue of standing, but granted mandamus relief regarding the trial court's application of the venue provisions.

With respect to the standing issue, the Texas Supreme Court acknowledged that while "a limited partner does not have standing to sue for injuries to the partnership, a partner that is "personally aggrieved" may bring claims for injuries he suffered directly. The Court noted that in this case, Richey had asserted that he made a $1 million payment to Nighthawk, alleged injury to his character, and claimed mental anguish.Given the character of these allegations, the Texas Supreme Court found that Richey had alleged injuries personal to him and had standing to bring the claims.

The Texas Supreme Court next examined whether the trial court had abused its discretion in failing to enforce the venue provisions in the Acquisition Agreements. With respect to this issue, the Court found that the trial court had abused its discretion and that the venue provisions were mandatory.

In support of this holding, the Court turned to Section 15.020 of the Texas Civil Practice and Remedies Code, which provides:

> (c) Notwithstanding any other provision of this title, an action arising from a major transaction may not be brought in a county if:
>
> > (1) the party bringing the action has agreed in writing that an action arising from the transaction may not be brought in that county, and the action may be brought in another county of this state or in another jurisdiction; or
> >
> > (2) *the party bringing the action has agreed in writing that an action arising from the transaction must be brought in another county of this state or in another jurisdiction*, and the action may be brought in that other county, under this section or otherwise, or in that other jurisdiction. (emphasis added)

The Court noted that a "major transaction" was defined in the code as a transaction (1) evidenced by a written agreement and (2) involving $1 million or more.

The Court first found that the venue provisions in the Acquisition Agreements were applicable because "Richey is seeking to recover . . . actions flowing directly from the acquisition and actions anticipated to flow from it." The Court rejected Richey's argument that his claims arose from Fisher and Boudreaux's post-acquisition conduct, and that the Acquisition Agreements' forum clause did not apply. The Court reasoned that "[l]iability for failure to pay [Richey]on the note must be determined by reference to those agreements."

The Court also addressed the issue that in order for Section 15.020(c)(2) to be applicable, a party must have "agreed in writing that an action arising from the transaction *must* be brought in another county." (emphasis added). In other words, Section 15.020 requires that the venue provision be mandatory in order for Section 15.020 to be operative. Analyzing this issue, the Court pointed out that each party had agreed to bring their claims in Tarrant County and "irrevocably . . . agree[d] not to bring any proceedings arising out of or relating to [the] Agreement in any other Court." Accordingly, the Court found that the venue provision was mandatory and that Section 15.020 was applicable.

Given the Court's finding that Section 15.020 was applicable, the Court held that the trial court had abused its discretion by failing to enforce the venue provision and directed the trial court grant the Motion to Transfer Venue.

<u>Practice Pointers</u>

1) Note the Texas Supreme Court's liberal application of the venue provision to events that occurred after the acquisition transaction was arguably completed. In order to avoid such a broad application of a

venue provision, it may be prudent to specify in later transactions that such transactions are not connected with a prior agreement.

FPL Energy, LLC v. TXU

Opinion Delivered March 21, 2014
11-0050, 2014 WL 1133329

Synopsis

Examining an action by an electric wholesaler against wind farm electrical generation facilities for the facilities' failure to deliver energy the wholesaler, the Texas Supreme Court held that (1) the contracts allocated the risk of transmission capacity to the facilities, and (2) the liquidated damages provisions in the contracts were unenforceable penalties.

Factual Background and Trial Court Proceedings:

TXU Electric ("TXU") found itself in three separate contracts with FPL Energy, LLC and its subsidiaries ("FPL"), whereby FPL agreed to sell TXU renewable energy credits ("RECs") and renewable electric energy used to produce those credits. TXU subsequently assigned the contracts to TXU Portfolio Management Company, L.P. ("TXUPM").

For approximately four years, FPL failed to produce the electricity and RECs required by the three contracts. As a result, TXUPM filed suit seeking damages for FPL's breach of the contracts. FPL counterclaimed, arguing that it could not perform its contractual obligations because the ERCOT grid did not provide sufficient capacity to allow FPL to transmit the amount of energy required under the contracts. FPL also argued that the liquidated damages provisions in the contracts were unenforceable.

Both parties filed motions for summary judgment seeking (1) to define whose burden it was to provide transmission capacity under the contracts and (2) whether the liquidated damages provisions in the contracts were enforceable. Examining these issues, the trial court found that (1) the contracts unambiguously required TXUPM to provide all transmission services, including transmission capacity, to FPL and (2) the liquidated damages provisions in the contracts were unenforceable and void because a liquidated damages amount of $50 per REC was not a realistic forecast of damages.

At trial, the jury awarded TXUPM $8.9 million in compensatory damages for FPL's failure to deliver renewable energy and determined that FPL should take nothing on its claims related to TXUPM's failure to provide transmission capacity. Subsequently, the trial court reduced the judgment and found that TXUPM should take nothing because TXUPM had covered its loss from another provider.

Court of Appeals:

The Fifth Court of Appeals (Dallas)affirmed the trial court's decision regarding the take nothing judgment for damages, but reversed regarding the issues relating to the declaratory relief action. Particularly, the court of appeals held that (1) the contracts did not require TXUPM to provide transmission capacity and (2) the liquidated damages provisions in the contracts were enforceable because the damages were difficult to estimate and FPL could not meet its burden to show that the $50 rate was disproportionate to TXUPM's actual damages.

FPL petitioned the Texas Supreme Court, seeking review of (1) whether TXUPM was responsible for ensuring transmission capacity, 2) whether the liquidated damages provisions apply to a failure to deliver electricity and (3) whether the liquidated damages provisions were enforceable.

Texas Supreme Court's Holding:

The Texas Supreme Court reversed in part the decision of the Fifth Court of Appeals (Dallas).

The Texas Supreme Court first examined the question of whether TXUPM was responsible for ensuring transmission capacity. The Court answered this question in the negative.

In coming to this conclusion, the Texas Supreme Court examined the transmission capacity clause, which provided as follows:

> TXU Electric shall provide, by purchasing or arranging for, all services, including without limitation Transmission Services, Ancillary Services, any control area services, line losses except for line losses on [FPL's] side of the Delivery Point, and transaction fees, necessary to deliver Net Energy to TXU Electric's load from the Renewable Resource Facility throughout the Contract Term ("Required Transmission Services").

After its examination of this provision, the Texas Supreme Court determined that the transmission capacity clause did not apply under the circumstances. Instead, the Court found that the "Uncontrollable Force" provisions in the contracts governed circumstances concerning lack of transmission capacity on the ERCOT grid. The Uncontrollable Force provisions placed the risk of circumstancesfalling under their purview on FPL. Consequently, the Court determined that the contract allocated the risk of inadequate transmission capacity to FPL.

The Texas Supreme Court next examined the scope and enforceability of the Liquidated Damages provision in the contract. The provision, which the parties agreed was unambiguous, provided as follows:

> If there is a Net Deficiency for a year . . . [FPL] shall pay [TXUPM] a Deficiency Payment equal to the product of (i) the difference in MWh between (a) the Net Deficiency, and (b) the MWh of Transferred RECs, times (ii) the Deficiency Rate. The Deficiency Payment is intended to be liquidated damages and not a penalty.

The contract defined the Deficiency Rate as $50 per Megawatt Hour (MWh).

With respect to the scope of the clause, the Court determined that the liquidated damages claims only applied to REC deficiencies. The Court reasoned that differential treatment of RECs and electricity throughout the contract supported this interpretation.

When examining the enforceability of the liquidated damages provision, the Court first noted that "[t]he basic principle underlying contract damages is compensation for losses sustained and no more . . . we will not enforce punitive contractual damages provisions." The Court stated the test for enforcing contractual damages provisions:

> In *Phillips v. Phillips*, we acknowledged this principle and restated the two indispensable findings a court must make to enforce contractual damages provisions: (1) "the harm caused by the breach is incapable or difficult of estimation [at the time of contracting]," and (2) "the amount of liquidated damages called for is a reasonable forecast of just compensation [at the time of contracting]." 820 S.W.2d 785, 788 (Tex.1991) (citing *Rio Grande Valley Sugar Growers, Inc. v. Campesi*, 592 S.W.2d 340, 342 n. 2 (Tex.1979))

The Court further explained that a liquidated damages provision may be unreasonable if the "actual damages incurred were much less than the amount contracted for." (citing *Phillips*, 820 S.W.2d at 78).

Upon evaluation of the first prong of the test—whether the harm caused by the breach was incapable or difficult to estimate—the Court agreed with TXUPM that the damages for RECs were difficult to estimate at the time of contracting. The Court reasoned that, at the time of contracting, the marketplace for RECs was uncertain, and TXUPM could not identify a specific time, and thus a spot price, for any specific REC deficiency.

When evaluating the second prong of the test—the reasonableness of the damages forecast—the Court noted that, on its face, the liquidated damages provision appeared to reasonably forecast damages. However, the Court nonetheless determined that the liquidated damages provision was unreasonable. In support of its conclusion, the Court reasoned that actual damages only equaled $6,160,000, while application of the liquidated damages provision could lead to damages in excess of $29 million. Taking this into account, the Court found that the liquidated damages provision operated with no rational relationship to the actual damages sustained in the case, and therefore, was an unenforceable penalty provision.

Accordingly, the Court partially reversed the decision of the court of appeals, finding that FPL may owe damages for its breach, but that the liquidated damages provisions were an unenforceable penalty.

Long v. Castle Texas Production Ltd. Partnership

Opinion Delivered March 28, 2014
11-0161, 2014 WL 1258167

Synopsis:

Reversing the Twelfth Court of Appeals (Tyler), the Texas Supreme Court held that, if a judgment is rendered, and then a remand results in multiple subsequent trial court judgments, postjudgment interest accrues from the date of the *final*judgment, rather than the date of the original, erroneous judgment.

Factual Background &Prior Proceedings:

Castle Texas Production Limited Partnership ("Castle") operated gas wells in which several trusts (the "Trusts") had an interest. The Trusts sued castle for breach of the joint operating agreement between the parties, and Castle counterclaimed for amounts owed on joint interest billings. Castle subsequently prevailed on its counterclaim at trial.

In its first judgment, entered in 2001, the trial court awarded Castle prejudgment interest in the amount of $73,998.90, but did not specify its method of calculation. On appeal, the Tyler Court of Appeals held that the prejudgment interest should have been calculated pursuant to the parties' joint operating agreement, which had provisions governing the payment of interest. The court of appeals remanded the case to the trial court to recalculate the prejudgment interest on that basis.

Upon remand, in 2005, the trial court found that additional evidence was required in order to properly recalculate prejudgment interest. Castle sought writs of mandamus and prohibition seeking to overturn the trial court's finding, arguing there was no need for additional evidence. However, the Tyler Court of Appeals denied the writs.

In 2009, Castle again moved for judgment on the record, which the trial court again denied and set the matter on its trial docket. In response, Castle waived its claim for prejudgment interest. That same day, the trial court awarded Castle postjudgment interest from the date of the original, 2001 judgment.

Court of Appeals:

The Tyler Court of Appeals affirmed, holding that "a party that *ultimately* prevails is entitled to postjudgment interest from the date the original judgment was rendered, irrespective of whether the original judgment was erroneous, because that is the date upon which the trial court should have rendered the correct judgment." The Supreme Court granted the Trusts petition for review on the issue of whether postjudgment interest should have been calculated from the date of the original judgment in 2001 or the final judgment, after remand, in 2009.

Texas Supreme Court's Holding:

The Texas Supreme Court reversed the Twelfth Court of Appeals (Tyler).

To address the issue, the Texas Supreme Court turned to section 304.005 of the Texas Finance Code, which provides that "postjudgment interest on a money judgment of a court in this state accrues during the period beginning on the date the judgment is rendered and ending on the date the judgment is satisfied." The key issue, as the Court noted, was the meaning of the term "judgment" as defined by section 304.005, a term not defined in the Texas Finance Code.

Citing its opinion in *American Paper Stock Co. v. Howard*, 528 S.W.2d 576, 577 (Tex. 1975) and *Logan v. Mullis*, 686 S.W.2d 605, 609, the Court noted that "this statutory reference to "judgment" is to "the judgment of the trial court" and that "only one final judgment shall be rendered in any cause except where otherwise specially provided by law." The Court thus reasoned that it must therefore assess what constitutes a final judgment in order to ascertain the point at which the postjudgment interest began accruing.

The Court observed that judgment is final for the purpose of appeal (finality test) "if it disposes of all pending parties and claims in the record, except as necessary to carry out a decree." Applying this standard, the court reasoned that a judgment that disposes of all parties and claims begins the appellate deadlines will normally be considered final for the purposes determining the accrual date for postjudgment interest. The Court noted, however, that if an appellate court then reverses the final judgment and remands for further proceedings, than the erroneous trial judgment is no longer final because that judgment no longer operates to dispose of all parties and claims. More specifically, the Court found that postjudgment interest should accrue from the point of a subsequent trial court judgment in cases where the trial court must reopen the record and render a subsequent judgment.

Applying this principle to the case at hand, the Court found that 2009 was the date from which the postjudgment interest began to accrue. The Court reasoned that because the trial court found that it needed additional evidence after the 2005 remand, the trial court did not possess a sufficient record on which to render a correct judgment in 2001. Instead, the Court reasoned that it wasn't until 2009, when Castle amended its pleadings to waive the prejudgment interest claim, that the trial court possessed a sufficient record on which to render a correct judgment.

In coming to this conclusion, the Texas Supreme Court overruled two court of appeals decisions, *State Department of Highways and Public Transportation v. City of Timpson*, 795 S.W.2d 24 (Tex. App.—Tyler 1990, writ denied) and *D.C. Hall and Gamma Group v. Transatlantic Reinsurance Co.*, 365 S.W.3d 469 (Tex. App.—Dallas 2012, no pet.), both of which involved findings that postjudgment interest should be calculated from the date of the original erroneous, trial court judgment (despite a trial court's subsequent reopening of the record and judgment).

Practice Pointers

1) Beware of the danger of losing a post judgment interest award upon a reopening of the record after a lengthy appeal. Such an outcome may preclude your client from recovering interest on court costs, attorney's fees, and prejudgment interest.

Crosstex Energy Services, L.P. v. Pro Plus, Inc.

Opinion Delivered March 28, 2014
12-0251, 2014 WL 1258307

Synopsis

Examining a dispute between a pipeline service provider and an engineering firm for damages relating to a fire at a compression station, the Texas Supreme Court found that (1) good cause did not exist for the trial court to grant an extension of time for a pipeline service provider to file a statutorily required certificate of merit, (2) the engineering firm did not waive its right to seek dismissal of the action based upon the service provider's failure to file a certificate of merit with the original petition under Tex. Civ. Prac. & Rem. Code § 150.002, and (3) the engineering firm's agreement to extend expert designation dates did not serve to extend the deadline for filing a certificate of merit.

Factual Background and Trial Court Proceedings:

Crosstex Energy Services, L.P. ("Crosstex") hired Pro Plus, Inc. ("Pro Plus"), a registered professional engineering firm, to construct the Godley Compression Station. On November 15, 2008, a control valve gasket at the station failed, caused a gas leaked, which ignited and caused a massive fire. The resulting fire caused $10 million in property damage. On April 14, 2010, Crosstex filed suit, asserting causes of action for negligence, negligent misrepresentation, breach of implied and express warranty, and breach of contract.

On December 2, 2010, after the statute of limitations had run, Pro Plus moved to dismiss Crosstex's claims for failure to attach a certificate of merit to its original petition as required by Section 150.002(c) of the Texas Civil Practice and Remedies Code. Crosstex responded to the motion by arguing that Pro Plus had waived its right to dismissal through its conduct, and that the conduct constituted "good cause" for an extension under section 150.002. The trial court denied the motion to dismiss and granted Crosstex's request for an extension.Prop Plus appealed the order.

Court of Appeals:

Upon appeal, the First Court of Appeals (Houston)overturned the trial court's ruling, holding that (1) it had jurisdiction to hear the interlocutory appeal, (2) the trial court abused its discretion by granting the extension without good cause; and (3) Pro Plus did not waive its right to dismissal.

The Texas Supreme Court granted Crosstex's Petition for Review.

Texas Supreme Court's Holding:

The Texas Supreme Court affirmed the decision of the First Court of Appeals (Houston).

The Texas Supreme Court first determined that the court of appeals had jurisdiction to hear the interlocutory appeal. The Texas Supreme Court noted that section 150.002(f) explicitly provides that "an order granting or denying a motion for dismissal is immediately appealable as an interlocutory order." Moreover, the Court specifically found that courts (including the Texas Supreme Court) had come to similar conclusions when examining the Medical Liability Act, which contains similar provisions.

The Court next examined whether the trial court had abused its discretion in finding there was a "good cause" under Section 150.002(c) to extend the deadline for Crosstex to file a certificate of merit. In its analysis Texas Supreme Court examined 150.002(c), which provides:

> (c) The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party licensed architect, licensed professional engineer, registered landscape architect, or registered professional land surveyor could not be prepared. In such cases, the plaintiff shall have 30 days after the filing of the complaint to supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for *good cause*, extend such time as it shall determine justice requires. (emphasis added).

Examining this section, the Texas Supreme Court found that the trial court had abused its discretion in finding "good cause" as the term is used in the last sentence of the section. The Court reasoned that the last sentence of Section 150.002 was not "untethered" from the remainder of the text and that "the sentence must be read in the context of the entire subsection." Applying this reasoning, the Texas Supreme Court determined that the "good cause" section was contingent upon "(1) filing within ten days of the expiration of the limitations period; and (2) alleging that such time constraints prevented the preparation of an affidavit." Given that Crosstex filed suit outside of the 10-day window, the Court found that Crosstex could not avail itself of the protection afforded by the "good cause" exception.

Next, the Texas Supreme Court turned to the question of whether Pro Plus had waived its right to move for dismissal under section 150.002(e). The Court observed that this issue really consisted of two questions: "(1) can a defendant waive the right to obtain dismissal under section 150.002(e); and (2) if so, did Pro Plus waive this right."

With respect to the first question, *i.e.* whether a defendant may waive its right to obtain dismissal under 150.002(e), the Court found that the requirement for filing a certificate of merit was not jurisdictional in nature and therefore, could be waived.

Despite the possibility of waiver, the Court nonetheless found that Pro Plus had not waived its right to seek dismissal under the statute. The Court first rejected Crosstex's arguments that Pro Plus had waived its right by substantially invoking the judicial process (*e.g.* participating in discovery, filing an answer, joining continuance and docket control orders, etc.).
The Court reasoned that Crosstex had offered some support for its waiver claim but had fallen short of "clearly demonstrating" an intent to waive the right to dismiss under subsection 150.002(e).

Moreover, the Court rejected Crosstex's argument that Pro Plus waived its right to dismissal in failing to file a special exception under Rule 90 of the Texas Rules of Civil Procedure. The Court reasoned that Rule 90 was inapplicable because Rule 90 relates to defects in pleadings, and that a party's failure to file a certificate of merit was not a defect in pleadings that could be cured by amendment.

Finally, the Court rejected Crosstex's argument that the parties' Rule 11 agreement extending expert deadlines operated to postpone the filing requirement of the certificate of merit, finding that the scope of the extension contemplated by the Rule 11 agreement did not encompass the deadline for filing the certificate of merit.

Accordingly, the Texas Supreme Court held: (1) the court of appeals did not err in asserting jurisdiction over this interlocutory appeal; (2) Crosstex did not file suit within 10 days of the running of limitations and thus could not claim the protection for the good cause extension found in section 150.002(c); (3) a defendant, through his conduct, may waive the right to seek dismissal under section 150.002(e); and (4) Pro Plus' conduct did not constitute such a waiver.

Long v. Griffin

Opinion Delivered April 25, 2014
11-1021, 2014 WL 1643721

Synopsis

In connection with a dispute filed by the Investors in gas wells against operators for specific performance, breach of contract, and declaratory judgment, the Supreme Court found that an affidavit supporting a fee application generally stated categories, of fees but did not include any evidence stating the requisite specificity to satisfy a finding of entitlement to attorney's fees under the lodestar method.

Factual Background and Trial Court Proceedings:

Robert M. Griffin, Robert M. Griffin, Jr., Marvin and Marie Ogilvie, and Charles Conrad (collectively the "Griffins") sued Larry T. Long, L. Allan Long, and B. Virginia Long in their capacities as trustees of multiple trusts (collectively the "Long Trusts"). The claims essentially involved the Long Trusts failure to assign working interests to the Griffins in certain of the Long Trusts' oil and gas ventures.

In 2001, the Griffins' attorney filed an affidavit supporting the Griffins' request for attorney's fees. The affidavit indicated that the Griffins' attorneys spent 644.5 hours working on the suit, which amounted to a total fee in the amount of $100,000. The affidavit segregated the time spent on each claim, with 30% being spent on the assignment claim. However, the affidavit also indicated that the assignment issue was inextricably entwined with all claims, upon which the Griffins' attorneys spent 95% of their time.

After a bench trial in 2003, the trial court entered rulings on behalf of the Griffins and awarded $35,000.00 in attorney's fees. The Twelfth Court of Appeals (Tyler) modified the judgment in multiple respects and then affirmed the trial court's judgment. The Texas Supreme Court reversed the court of appeals judgment in part and remanded to the trial court to determine the attorney fee award.

On remand, in 2009, the trial court again considered the affidavit and awarded $30,000 in attorney's fees, with post-judgment interest accruing from the date of that final judgment in 2009.

Court of Appeals:

On appeal, the court of appeals found sufficient evidence supporting the attorney's fees award but modified the judgment to accrue interest from the original erroneous, trial court judgment in 2003.

The Long Trusts petition the Texas Supreme Court, arguing that (1) no legally sufficient evidence supports the amount of the attorney fee award and (2) post-judgment interest should accrue from the final judgment in 2009.

Texas Supreme Court's Holding:

The Texas Supreme Court reversed the decision of the Twelfth Court of Appeals (Tyler), finding that the Griffins, electing to prove fees via the lodestar method, did not provide the trial court with legally sufficient evidence to calculate a reasonable fee.

The Court reasoned that the affidavit supporting the Griffins' request for attorney's fees "only offers generalities" and that "no evidence accompanied the affidavit to inform the trial court [of] the time spent on specific tasks."

Citing its decisions in *El Apple I, Ltd. V. Olivas*, 370 S.W.3d 757 (Tex. 2012) and City of Laredo v. Montano, 414 S.W.3d 731 (Tex. 2013), the Court determined that "without any evidence of the time spent on specific tasks, the trial court had insufficient information to meaningfully review the fee request." However, the Court offered that the "attorneys may reconstruct their work to provide the trial court with sufficient information to allow the court to make a meaningful review of the fee application.

Practice Pointers

1) Look to the *El Apple* and *Montano* cases cited in the above analysis for a more detailed description of properly calculating attorney's fees under the lodestar method.

2) The Court did not hear the issue regarding the calculation of post-judgment interest. For insight in this issue, see the other *Long* opinion, discussed on Pages6–8 of this Newsletter.

Waste Management of Texas, Inc. v. Texas Disposal Systems Landfill, Inc.

Opinion Delivered May 9, 2014
12-0522, 2014 WL 1258307

Synopsis

Reviewing a dispute between two waste management companies, the Texas Supreme Court found (1) a corporation may recover reputation damages, (2) a corporation's reputation damages are non-economic damages for purposes of assessing the statutory cap on exemplary damages, (3) the evidence was legally insufficient to support an award for reputation damages, and (4) the evidence was sufficient to support an award for remediation costs and punitive damages.

Factual Background and Trial Court Proceedings:

In 1996, Waste Management of Texas, Inc. ("WMT") and Texas Disposal Systems Landfill, Inc. ("TDS") submitted competing bids to perform waste-disposal and landfill-services companies. In early 1997, WMT anonymously published a community "Action Alert" memorandum, which was distributed to environmental community leaders in Austin, including several Austin City Council members. The Alert claimed that TDS' landfill was less environmentally sensitive than it actually was and as compared to other area landfills.

TDS sued WMT for defamation, tortuous interference with an existing or prospective contract, and business disparagement. TDS alleged economic damages caused by delay in the execution of waste disposal contracts and sought compensatory damages, punitive damages, and injunctive relief.

After TDS filed suit, WMT published multiple additional communications, questioning whether TDS was violating zoning ordinances, permits, and listing reasons why TDS should not be considered for the Austin contracts. TDS amended its petition to include these additional publications and added antitrust claims against WMT for its "attempt to monopolize."

After motions for summary judgment were filed and heard, the Court dismissed all of TDS's claims except for the defamation claim.

At trial, TDS requested an instruction of defamation *per se* and the related issue of presumed damages, but the trial court declined to issue the instruction. After trial, TDS appealed, asserting that the jury should have been instructed regarding defamation *per se*. In this first appeal, the Third Court of Appeals (Austin) reversed the trial court, holding that the trial court erred by refusing to include a question about defamation *per se* in the charge.

In the next trial, the court charged the jury on defamation *per se*and related instructions on presumed damages. The jury returned a verdict in favor of TDS, awarding it $450,592,03 for reasonable and necessary expenses, $5 million for injury to reputation, and $20 million as exemplary damages based on the jury's finding that WMT had published defamatory statements with malice.

WMT appealed the judgment.

Court of Appeals:

The First Court of Appeals (Austin) affirmed the judgment of the trial court.

The parties then filed cross-petitions in the Texas Supreme Court. In connection with those petitions, the Texas Supreme Court was called upon to examine (1) whether a corporation may recover reputation damages, (2) whether such a recovery is a non-economic injury for purposes of the statutory cap on exemplary damages on the pre-2003 version of the Civil Practice and Remedies Code, (3) whether the evidence was legally sufficient to support an award for damages.

Texas Supreme Court's Holding:

The Texas Supreme Court partially affirmed and reversed the decision of the Third Court of Appeals (Houston).

As its first point, the Texas Supreme Court found that a corporation may recover reputation damages. In support of thisholding, the Court turned to its 1943 decision in *Bell Publishing Co. v. Garrett Engineering Co.*, 170 S.W.2d 197, 199–200 (1943), wherein the Court found that a corporation could recover damages in connection with being libeled. The Court "decline[d] to apply [its] defamation jurisprudence any differently when statements amount to per se defamation." Accordingly, the Court determined that a corporation "can sue for defamation per se just like flesh-and-blood individuals."

The Court next addressed TDS's argument that the trial court erred in categorizing the jury's award for injury to reputation as economic damages instead of non-economic damages, leading to an improper calculation of punitive damages. In addressing this argument, the Texas Supreme Court turned to Section 41.008(b), which governs the exemplary damages cap:

Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:

> (1) (A) two times the amount of economic damages; plus
>
> (B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or
>
> (2) $200,000.38

Given the above-quoted language, the Texas Supreme Court acknowledged that the maximum amount of exemplary damages depended upon whether the $5 million award for injury to reputation damages was classified as economic or non-economic.

In order to answer this question, the Court turned to the legislature's definition of "economic damages" in Section 41.001 of the Texas Civil Practices and Remedies Code (added in 2003 amendment), which provides that "economic damages" means "compensatory damages intended to compensate a claimant for actual or pecuniary loss."

Applying this definition, the Court found that injury to reputation was not a "pecuniary loss." The Court determined that injury to reputation was more akin to losses affecting one's person, such as pain, humiliation, bodily harm, or emotional distress. Further, the Court noted that cases treat an individual's reputation damages as non-economic in nature. The Court also noted that the Second & Third Restatements classified injury to reputation in defamation *per se* cases as non pecuniary in nature.

After finding that the court of appeals was correct in classifying that injury to reputation damages are non-economic damages, the Texas Supreme Court next determined that the $5 million injury to reputation damages award was nonetheless unrecoverable because the evidence was legally insufficient to render such an award.

The Court reasoned that although the evidence was legally sufficient regarding the issue of whether WMT published the Alert with knowledge of the falsities it contained, the evidence was insufficient to demonstrate that TDS had incurred damages to its reputation. In support of this reasoning, the Court noted that the only evidence presented by TDS to support its claim for reputational damages "only depict[ed] comparisons of the growth (or decline) of local landfill services businesses. They [did] not reveal any quantity of damages to TDS's reputation."

On the other hand, the Court found that there was sufficient evidence to uphold the $450,592.03 award for remediation costs. The court reasoned that as a result of the Alert, TDS was required to incur costs from consultants, supported by invoices, in order to handle the fallout from the Alert.

Given that the award of actual damages awarded by the jury was reduced in connection with the Court's analysis, the Texas Supreme Court directed the trial court to adjust the award for punitive damages, pre-judgment interest, and post-judgment interest in accordance with its findings.

Texas Supreme Court (Pending)

Martin K. Eby Construction Co. v. LAN/STV

Oral argument occurred October 8, 2013
Case No. 11-0810

Commercial Issue(s) Considered:

1. Whether a contractor preparing construction plans for the Dallas Area Rapid Transit system has derivative governmental immunity from suit.

2. Assuming issue #1 is granted in the negative, whether the economic loss rule applies to bar a negligent misrepresentation claim by a contractor against a third party design professional on the construction project.

Jaster v. Comet II Const., Inc.

Oral argument heardOctober9, 2013
Case No. 12-0804

Commercial Issue(s) Considered:

1. Whether third-party plaintiffs and cross-claimants to a dispute regarding a homeowner's claims for damages arising from the improper design and construction of a house foundation are required to file certificates of merit as a "plaintiff" under section 150.002 of the Texas Civil Practices and Remedies Code.

Exxon Mobil Corp. v. William T. Drennen

Oral argument occurred November 6,2013Case No. 12-0621

Commercial Issue(s) Considered:

1. Whether provisions in an employment agreement allowing an employer to cancel incentive awards of employees who engage in detrimental activity are unenforceable covenants not to compete.

2. Whether Texas has a materially greater interest than New York in the determination of the covenant's enforceability, rendering Texas law applicable, despite the agreement's New York choice-of-law provision.

Zachry Construction Corp. v. Port of Houston Authority of Harris County

Oral argument occurred November 6, 2013
Case No. 12-0772

Commercial Issue(s) Considered:

1. Whether Texas law recognizes common-law exceptions to no-damage-for-delay clauses when a party engages in acts constituting arbitrary and capricious conduct, active interference, bad faith, or fraud.

2. Whether a partial lien release unambiguously released liquidated damages claims.

Houston Unlimited, Inc. Metal Processing v. Mel Acres Ranch

Oral argument heardDecember 5, 2013
Case No. 13-0084

Commercial Issue(s) Considered:

1. Whether a landowner may recover lost market value due to stigma even if the contamination of the property was only temporary and remediated.

2. Whether the jury must find permanent injury before awarding damages due to stigma.

3. Whether the real estate appraisal evidence was legally sufficient to support the stigma damages award.

HMC Hotel Properties II Ltd. Partnership v. Keystone-Texas Property Holding Corp.

Oral argument heardFebruary 4, 2014
Case No. 12-0289

Commercial Issue(s) Considered:

1. In a case involving tortuous interference with a contract to sell land and title-slander in connection with the sale, the issue is whether the record contains legally sufficient evidence of (a) a false statement, (b) legal malice (on which exemplary damages were awarded), and (c) causation.

American Star Energy and Minerals Corp. v. Stowers

Oral argument date pending
Case No. 13-0484

Commercial Issue(s) Considered:

1. Whether limitations on a suit against general partners for a judgment debt of a general partnership begins to run at the time of judgment or when the action accrued.

State Courts of Appeals

*Daybreak Express, Inc. v. Lexington Insurance Co.,*417 S.W. 3d 634 (Tex. App.—Houston [14th Dist.] 2013)

Synopsis: **Carmack Amendment Pre-empted State Law Attorneys' Fees Claim in Subrogation Case**

Lexington Insurance sued Daybreak Express (the shipper) in this subrogation action in connection with property damage that occurred during the interstate shipment of electronic equipment owned by Burr Computer. Burr initially sought recovery from Daybreak Express, but a dispute arose as to whether the two parties had reached a settlement agreement. Burr then turned to Supor (the trucking company), which was insured by Lexington, and these parties reached a settlement for $87,500 with Lexington becoming Burr's subrogee.

In turn, Lexington sued Daybreak Express and plead causes of action for breach of contract (Daybreak's alleged failure to honor a settlement agreement with Burr), indemnity, contribution, unjust enrichment, and, eventually, the Carmack Amendment. The trial court awarded Lexington $87,500.00 plus attorney's fees (given that this case was removed, remanded, and, after trial went to the Texas Supreme Court [resulting in two separate opinions], attorneys' fees for Lexington were likely to have been far more than the actual damages). The Texas Supreme Court's second opinion remanded the case to the court of appeals. (We discuss the Texas Supreme Court holding in this case in the TADC Commercial Law Newsletter Spring 2013 Edition at 8). Despite Daybreak Express's arguments to the contrary, the court of appeals found the remand limited solely to the attorneys' fees issue.

Citing prior federal and Texas cases, the Houston Court of Appeals found that preemption (which applied impliedly as the scope of the federal law indicated that Congress intended to exclusively occupythe field) under the Carmack Amendment includes claims for attorney's fees under state law. 417 S.W. 3d at 638-639.

*D.R. Horton-Texas, Ltd. v. Savannah Properties Associates, L.P.,*416 S.W. 3d 217,(Tex. App.—Fort Worth 2013, no pet.)

Synopsis: **Contracts, Releases, and Parol Evidence**

This caseinvolvedthe secondlawsuit between several real estate developers. The Savannah parties entered into two separate contracts to sell the D.R. Horton parties 1,600 residential lots in Denton, Texas. Each side claimed the other breached the contracts and filed claims and counter-claims, *i.e.* the "first lawsuit." The parties settled the first lawsuit and executed a settlement agreement merging the two contracts and then amending the merged contract. The D.R. Horton parties gave the Savannah parties a release of all claims.

The D. R. Horton parties then brought the "second lawsuit." Therein, the trial court granted Savannah's motion for summary judgment on its affirmative defenses of release, *res judicata*, novation, and limitations, and by granting Savannah's no-evidence motion for summary judgment on D.R. Horton's and DRHI's breach of contract, breach of warranty, negligence, and fraudulent inducement claims.Finding the release defense dispositive, the Fort

Worth Court of Appeals began with that motion for summary judgment.

"A release is … a contract in which one party agrees that a legal right or obligation owed by the other party is surrendered. It is subject to the normal rules of contract construction … . A release extinguishes a claim or cause of action and is an absolute bar to any right of action on the released matter. [T]he releasing instrument must "mention" the claim to be released. Claims not clearly within the subject matter of the release are not discharged, even if those claims exist when the release is executed. It is not necessary, however, for the parties to anticipate and explicitly identify every potential cause of action relating to the subject matter of the release. Although releases include claims existing at the time of execution, they may also include unknown claims and damages that develop in the future." 416 S.W. 3d at 226 (internal citations omitted). As it is a contract, the release's "language is to be given its plain grammatical meaning unless doing so would defeat the parties' intent. In determining intent, we must look to the contract, not what the parties allegedly meant. An unambiguous contract will be enforced as written. Parol evidence may not be introduced to create an ambiguity or to alter the intent of the parties as expressed in the instrument." 416 S.W. 3d at 226 (internal citations omitted).

The subject release clearly and unambiguously included claims related to the amended contract, which was specifically identified in the releasing language (a point the D. R. Horton parties did not dispute). The D. R. Horton parties cited to the immediately succeeding paragraph, which contained certain specified reserved rights and obligations under the amended contract. However, the specific Savannah party involved in the appeal was not a party to the amended contract, having been succeeded by an affiliated company. Therefore, the D.R. Horton parties preserved no claims against it.

The D. R. Horton parties offered an affidavit from their in-house counsel who negotiated and helped draft the release. The Fort Worth Court of Appeals deemed the attorney's affidavit to be parol evidence that cannot be properly considered to change the written terms of a release. To the extent that this parol evidence contradicts the plain meaning of the settlement agreement, the evidence is incompetent to change the agreement's unambiguous language. Accordingly, the Fort Worth Court of Appeals affirmed the trial court's judgment.

<u>Practice pointer no. 1</u>: If you file a motion for continuance based on the need for additional discovery, be specific about what discovery you need, who you need to depose, what you expect the discovery to show (nature and materiality), efforts you have made to acquire the necessary information (prior discovery), and that you have been diligent.

<u>Practice pointer no. 2</u>: A plaintiff cannot amend his petition without leave of court after the date of the defendant's motion for summary judgment hearing/submission. The trial court does not err in failing to consider such an amended petition. So, new claims added to the amended petition for the express purpose of defeating your MSJ/NEMSJ can be ignored by the trial court and judgment entered.

***Ellman v. JC General Contractors**,*419 S.W. 3d 516(Tex. App.—El Paso 2013, no pet.).

Synopsis: **Arbitration waived by defendant's delay, invoking judicial process, and prejudicing plaintiff.**

Dr. Ellman hired JC Contractors to build the shell for his clinic in El Paso. This resulted in the parties entering the "shell contract." Shortly thereafter, JC General entered a Standard Form Agreement ("SFA") with the owner and design builder. Construction began and eventually disputes arose over payment and completion of construction. JC General filed suit. Appellants answered, counterclaimed, and sought arbitration under the SFA. No one disputed that the SFA contained an arbitration provision. The lone issue was whether the arbitration provision had been waived.

The El Paso Court of Appeals recognized that: "A party waives a right to arbitration by substantially invoking the judicial process to the other party's detriment or prejudice. Prejudice within the context of waiver relates to the inherent unfairness resulting from a party's attempt to have it both ways by switching between litigation and arbitration to their own advantage. Thus, prejudice refers to the inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue. JC had the burden to establish that Appellants substantially invoked the judicial process to JC's prejudice. Due to the strong presumption against waiver of arbitration, this hurdle is a high one." 419 S.W. 3d at 519

The determination is a case-by-case determination and the El Paso Court of Appeals noted the wide variety of factors considered by the courts (the so-called *Perry Homes* Factors), including:

• whether the party who pursued arbitration was the plaintiff or the defendant;

• how long the party who pursued arbitration delayed before seeking arbitration;

• when the party who pursued arbitration learned of the arbitration clause's existence;

• how much the pretrial activity related to the merits rather than arbitrability or jurisdiction;

• how much time and expense has been incurred in litigation;

• whether the party who pursued arbitration sought or opposed arbitration earlier in the case;

• whether the party who pursued arbitration filed affirmative claims or dispositive motions;

• how much discovery has been conducted and who initiated the discovery;

• whether the discovery sought would be useful in arbitration;

• what discovery would be unavailable in arbitration;

• whether activity in court would be duplicated in arbitration;

• when the case was to be tried; and

• whether the party who pursued arbitration sought judgment on the merits.

419 S.W. 3d at 519-520

The El Paso Court of Appeals found that the Defendant had not filed the motion to compel arbitration until 36 months after the suit had been filed and only 3 months prior to trial, which had been re-set a couple of times by then. It further found that the Defendant had substantially invoked the judicial process by raising affirmative claims for relief by virtue of a counterclaim, conducting discovery on the merits initiated by Defendant, including 155 requests for production, request for disclosure, 30 interrogatories, and noticing and taking 6 depositions, and filing a summary judgment. Finally, the El Paso Court of Appeals found that Defendant waited to make its demand for arbitration until after Plaintiff had revealed its trial strategy in the form of filing trial and fact expert witness lists and noted that the prejudice lied in the form of considerable delay, expense, and damage to Plaintiff's legal position.

Crisp Analytical Lab, L.L.C. v. Jakalam Properties, Ltd., 422 S.W. 3d 85 (Tex. App.—Dallas 2014, pet. filed)

Synopsis: **Contract price not necessary as essential term in oral contract**

Jakalam buys and renovates properties. At one such property, its general contractor hired an environmental company to take samples and, in turn the environmental company hired Crisp to test the samples for the presence of asbestos. Crisp mistakenly reported that the samples contained asbestos. Jakalam shut down the project, consulted an attorney for what to do next, and, on the advice of counsel, hired an abatement company, which discovered that Crisp had made a mistake. On re-analysis, Crisp admitted to the error. Jakalam claimed that Crisp agreed to "make Jakalam whole." Crisp contended that it merely agreed to consider costs allegedly incurred and pay what was legitimate, but Crisp denied use of the term "make whole" and further denied even knowing what that term would mean. Jakalam submitted its initial set of bills, noting that it did not have all of them, and Crisp paid the initial set of bills in full. Crisp objected to paying all of the second set of costs in full and, instead sent a partial payment (approximately a third of the nearly $10,000 submitted) with a release. Jakalam did not cash the check nor sign the release; rather, it brought this suit. The jury found a breach of contract (to make Jakalam whole), awarded a mere $513.00 in damages, and awarded nearly $50,000 in attorneys' fees.

Crisp appealed raising three points: (1) there was no enforceable contract as the essential terms were not sufficiently defined, (2), if there was, there was no evidence of a breach by Crisp, and (3) the court should not have awarded Jakalam's attorneys' fees. On the first issue, the Dallas Court of Appeals stated: "Whether a particular agreement is an enforceable contract is a question of law reviewed *de novo*. To be enforceable, a contract must define its essential terms with sufficient detail to allow a court to determine the obligations of the parties. 'Essential terms' of a contract may include time of performance, price to be paid, work to be done, service to be rendered, or property to be transferred. When an agreement leaves essential terms open for future negotiation, it is not binding upon the parties and merely constitutes an agreement to agree. However, parties may agree on some terms sufficient to create a contract, leaving other provisions for later negotiation. The parties must have a "meeting of the minds" and must communicate consent to the terms of the agreement. The determination of a meeting of the minds is based on an objective standard of what the parties said and did rather than their subjective state of mind."

422 S.W. 3d at 89 (internal citations omitted).

The Court noted that the agreement was not vague and open ended, but confined to reimbursing Jakalam for the costs incurred due to Crisp's mistake. At the time of the oral agreement, the parties discussed a range of costs (per Crisp $10,000-$12,000 and per Jakalam $12,000-$20,000). The Dallas Court of Appeals further noted: "While the amount to be paid may be an essential term of a contract, 'the failure to specify a price does not necessarily render the contract so indefinite as to be unenforceable.'" *Id.* at 90 (internal citation omitted). At the time of entering the oral agreement, Jakalam did not have the bills with which to have an exact amount and Crisp did not voice an objection to the lack of a specific amount.

The Court rejected Crisp's argument that, in lieu of a specific amount, as an essential term the oral agreement would need a method for determining the reasonable cost. Indeed, the Dallas Court of Appeals explained: "[w]e conclude "the contract was about as definite and certain as the parties could have made it under the circumstances and it was sufficiently definite and certain to furnish a basis for arriving with reasonable certainty at the minimum damages."*Id.* (internal citation omitted). Further, the Court distinguished the case law presented by Crisp requiring a specific amount as an essential term, such as cases involving loans of money (which it contrasted with contracts for providing services) and a divorce contract requiring one spouse pay the other "as much as possible."

The Dallas Court of Appeals, relying on the Restatement (Second) of Contracts §34(2) 1981, that partial performance may remove uncertainty and establish the existence of a contract. Here, Crisp partially performed.

On the second issue (no evidence of breach), the Court determined the issue depended on whether Crisp properly tendered the second payment. The Dallas Court concluded that Crisp did not properly tender payment, explaining: "'Tender' is an unconditional offer by a debtor to pay a sum of money not less than the amount due on the obligation. As a general rule, a tender of payment must include everything to which the creditor is entitled; any less sum is ineffectual. Further, the very definition of 'tender' does not allow for the possibility of conditional offers."*Id.* at 91-2 (internal citation omitted). Crisp's offer of payment in exchange for a release was conditional and, therefore, not a tender. Thus, Crisp breached the oral agreement to make Jakalam whole.

On the final issue (award of attorneys' fees), the Dallas Court of Appeals was unphased by the differential between (1) the amount "tendered" and the amount of damages awarded (the "tender" was 7 times greater than the amount awarded leading to the rejected argument of whether Jakalam really prevailed as required by Texas Civil Practice & Remedies Code §38.001), (2) the amount in damages sought compared to the amount actually awarded (sought 20 time more and leading to the Court's explanation that what matters is not how much is sought, but that something is recovered), and (3) as well as the differential between the amount of damages and the attorneys' fees (almost 100 time more in fees, although the relative reasonableness in what was awarded in fees compared to damages does not appear to have been raised).

<u>Practice pointer no. 1</u>: Keep this case handy in the event someone tries to claim that an indemnity agreement to make a party whole is void due to the lack of either specific damages or a means of determining same.

Practice pointer no. 2: Keep this case handy next time a settlement offer vastly exceeds the amount awarded and when the attorneys' fees greatly exceed the damages awarded.

Practice pointer no. 3: If the award of attorneys' fees greatly exceeds the damages, raise an issue, even in post-trial motions, regarding the relative reasonableness. See our discussion of *Reyelts v. Cross*, 2013 WL 3870285 (N.D. Tex. 2013) in the TADC Commercial Law Newsletter Fall 2013 edition at 27-28. In these types of cases, an objection to the overall reasonableness of the attorneys' fees may be your best argument.

Wolf Hollow I, L.P. v. El Paso Marketing, L.P., 409 S. W. 3d 879 (Tex.App.—Houston. [14 Dist.] petition for review filed)

Synopsis: **Energy and Utilities - Indemnity provision in contract did not release power plant operator's claim against natural gas supplier for poor-quality gas.**

This case is on remand from a decision by the Texas Supreme Court, which held that, while the replacement power damages were consequential damages barred by the consequential damages waiver provision of the contract, another provision specifically exempted them from the consequential damages waiver provision. (For a more in depth analysis of these decisions, see TADC Commercial Law Newsletters, 2013 Spring & Fall Editions). Thus, the only claims at issue are whether Wolf Hollow is entitled to replacement power damages under the contract. The trial court granted a summary judgment on these claims.

Wolf Hollow owned a natural gas burning power plant. El Paso supplied the natural gas through an Enterprise pipeline. Wolf Hollow had a Supply Agreement with El Paso and a Transportation Agreement with Enterprise, Wolf Hollow's interest in the latter assigned to El Paso. In 2006 and 2007, Wolf Hollow experienced four supply interruptions and also complained about poor quality natural gas caused by a contaminant. In response to El Paso's declaratory judgment action, Wolf Hollow asserted it right to damages for having paid for replacement power made necessary by the interruptions and contaminated gas.

After reciting a litany of rules governing contract construction in Section III. (409 S.W. 3d at 885), the Houston Court of Appeals began by construing the Supply Agreement's *Force Majeure* provision finding that a proposed interpretation that would render the provision meaningless would violate the rules of construction requiring that every provision have some effect and further explaining that the word "provided" is commonly used to express "a qualification, limitation, condition, or an exception respecting the scope and operation of words previously used." Based on its construction the Houston Court of Appeals found that El Paso's non-deliveries were excused by the *Force Majeure* provision

The Houston Court of Appeals also addressed whether Wolf Hollow had effectively waived or released its past, present, or future claims in the First Amendment to the Supply Agreement, which expressly released El Paso from its failure to meet the quality requirements as stated in "attached letters", which concerned quality issues for 2004 deliveries, although the claims at issue dealt with quality issues in 2006. Citing cases narrowly construing the subject matter of a release, the Houston

Court of Appeals found that the future claims must relate to the 2004 deliveries, not simply any future claim between the parties. 409 S.W. 3d at 891

Finally, the Houston Court of Appeals refuted El Paso's argument that Wolf Hollow's indemnity of El Paso extinguished the quality claims. The indemnity provision in the Supply Agreement required each party to indemnify the other for damages arising from any act or accident occurring while title to the gas was vested in the indemnifying party. However, the Houston Court of Appeals noted that indemnity agreements generally do not apply to claims between the parties, the provision contained no typical release language (such as "release", "discharge", or "relinquish"), and did not identify a claim to be released, but instead related to third-party claims.

Palla v. Bio-One, Inc., 2014 WL 1008072 (Tex. App.—Dallas2014)

Synopsis: **Proper Measure of Tortious Interference damages**

Palla had a Commission Agreement with Bio-One to market its organic fertilizer replacement products in Turkey, Bulgaria, Europe, and the United States. Palla helped Bio-One establish a relationship Transtrade through its employee, Arapoglu.The two "established a joint effort to leverage" Arapoglu's contacts in Turkey and Bulgaria with contacts maintained by Palla in Romania, Europe, and the Middle East. Bio-One and Palla agreed that he would receive a commission for sales in Turkey and Bulgaria made through Transtrade. Arapoglu later severed ties with Palla, who later learned that this severance was done in order to cut him out of the Transtrade/Bio-One payment structure and that, though sales had been made, he had not received his commission from Bio-One.

Palla then brought suit against Bio-One for breach of contract and against Arapoglu and Transtrade for tortious interference with a contract. The case was tried before a jury, which determined that Bio-One breached the contract,the damages related to the breach of contract claim against Bio-One were $278,718.28, that Transtrade/Arapoglu intentionally interfered, and the damages related to the tortious interference with a contract claim against Transtrade and Arapoglu were $100,000. Both Bio-One and Palla filed post-trial motions to disregard the jury's answer to Question No. 4 (awarding $100,000 tortious interference damages), the trial court entered judgment for Palla jointly and severally against all three defendants for $100,000 and against Bio-One for $178,718.28. Palla appealed arguing that all three defendants should be jointly and severally liable for the full amount of the judgment.

The Dallas Court of Appeals began its analysis by citing the general rule for tortious interference damages: "'The basic measure of actual damages for tortious interference with contract is the same as the measure of damages for breach of the contract interfered with, to put the plaintiff in the same economic position he would have been in had the contract interfered with been actually performed.'"2014 WL 1008072 at *3 (internal citations omitted). However, it then recognized that exceptions existed, including: "'Although breach of the interfered-with contract is probably the most common measure of damage, tortious interference does not limit the damage for the tort to that alone.''Damages for tortious interference with contract are necessarily limited to damages proximately caused by the act of interference and do not extend to any other breach of the contract that the contracting party happened to commit.'[A]mounts for breach of contract and tortious interference were the same because defendant admitted the only contractual breach at issue was caused by the interference." *Id.* So, the issue was whether there was sufficient evidence to support the jury's differentiation in the amounts of damages.

With regard to the evidence, the Dallas Court of Appeals was hamstrung as the record did not contain a transcript of the trial. Therefore, the Court was left to consider the possibility that the damages were not coextensive. In this, the Court was aided by Palla's own pleadings, which also sought an accounting to determine commissions owed, which would have also determined if the commissions arose from the "established joint effort" or otherwise. However, an accounting did not appear to have been conducted. This would seem to suggest the amount could be different from the amount owed by Bio-One for the overall breach. Therefore, the Dallas Court of Appeals, on the record available, could not find error and affirmed the trial court's judgment.

Practice pointer No. 1: Err on the side of having everything recorded, motions for summary judgment possibly excluded. This may irritate some judges, but they are not the ones who have to establish the sufficiency (or lack thereof) of evidence on appeal. And, if you did get the trial recorded and are arguing sufficiency issues, pay to get a complete record. If you win, it will be reimbursed as court costs, assuming the other side is solvent.

Practice pointer No. 2: In Footnote No. 2, the Dallas Court of Appeals seems to suggest that Palla could have obtained an instruction that breach of contract and tortious interference damages are the same. Alternatively, Palla should have requested only one damages issue for both theories of liability. However, because Palla requested separate damages issues and no instruction, the invited error doctrine precluded analysis of whether the charge was erroneous. So, it you do not believe the damages are different, only submit one damages issue and request the instruction that the damages are the same.

Foundation Assessment, Inc. v. O'Connor, 2014 WL 880501 (Tex. App.—Fort Worth 2014)

Synopsis: **TCPRC § 150.002 dismissal for failure to file a certificate of merit not waived by 22 month delay in filing motion to dismiss**

O'Connor owned rental property in Fort Worth and hired Perma Pier to perform certain foundation repairs to the property. Perma Pier retained Foundation Assessment to provide the initial and final engineering reports, both of which indicated that Foundation Assessment's engineer, Choudhury, had performed a personal inspection.

O'Connor subsequently sued Perma Pier, Foundation Assessment, and Choudhury, generally alleging against all defendants breach of contract, negligence, gross negligence, fraud, breach of express warranty, breach of implied warranty, violations of the deceptive trade practices act, civil conspiracy, and violations of the occupations code. Specifically as to Foundation Assessment and Choudhury (appellants), O'Connor alleged claims for fraud and civil conspiracy based on allegedly false statements it entered in its engineering reports.

Appellants answered and litigated the case for the next 22 months and only then filed a motion to dismiss the case pursuant to Texas Civil Practices and Remedies Code §150.002 because O'Connor did not file a certificate of merit along with her original petition. The trial court found waiver and denied appellants' motion to dismiss.

The Fort Worth Court of Appeals began its analysis by examining whether appellants waived their right to file their motion to dismiss by waiting 22 months to do so. It recited the standard saying: "'Waiver is 'an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right.' Waiver is ordinarily a question of fact but becomes a question of law when the facts are admitted or clearly established. Because waiver is largely based on intent, there can be no waiver of a right unless a litigant says or does something inconsistent with an intent to rely on such right. Thus, silence by a litigant traditionally does not constitute waiver, but waiver can be established if 'the defendant's silence or inaction shows an intent to yield the right to dismissal.'" 2014 WL 880501 at *3

The Fort Worth Court of Appeals noted that waiver of the §150.002 right of dismissal has been addressed by appellate courts on six occasions since 2005 and, of the two most recent cases, petition for review was granted in one and pending in the other as of the date of the decision. [Note: See *Crosstex Energy Services L.P. v. Pro Plus Inc.* in the Texas Supreme Court section above at Pages 8–10 in which the Texas Supreme Court found no waiver.] In the five prior opinions, the Fort Worth Court of Appeals noted that only one found waiver and that in a case in which the defendant substantially invoked the judicial process, conducted extensive discovery over three and a half years, participated in mediation, filed both traditional and no-evidence motions for summary judgment, and did not move to dismiss until 5 days prior to trial. In the present case, the appellants participated in discovery initiated by the other parties, but they conducted little discovery of their own. Accordingly, the Fort Worth Court of Appeals found this case to be more analogous to the other four in which waiver was not found.

The court found that the language in § 150.002 did not impose a deadline by which a defendant must file its motion to dismiss. The court compared this section with two other statutes in which the legislature specifically imposed deadlines on some dismissal rights. Specifically, the Fort Worth Court of Appeals compared"Tex. Civ. Prac. & Rem.Code Ann. § 150.002,with § 27.003(b) (West Supp. 2013) (providing a statutory sixty-day deadline to file a motion to dismiss in an anti-SLAPP case),and§ 74.351(a) (West Supp. 2013) (requiring that a healthcare-liability-claims defendant file objections to the sufficiency of a plaintiff's expert report within twenty-one days after service)."2014 WL 880501 at *4. The court then determined that based on a strict interpretation of § 150.002, appellants did not waive their right to seek dismissal based on O'Connor's failure to file a certificate of merit.

The Fort Worth Court of Appealsalso found that § 150.002 applied and O'Connor's petition needed to be accompanied by a certificate of merit. Section 150.002 requires a certificate of merit in any action for damages arising out of the provision of professional services by a licensed professional engineer. The question, the court found, was whether appellants' act of providing engineering reports constituted the provision of professional services. The court, supported by two other cases involving alleged misrepresentations by a professional engineer, found that appellants' alleged acts were in fact made as part of their providing engineering reports, and consequently arose out of the provision of professional services.2014 WL 880501 at *6.

Finally, the appellate court analyzed O'Connor's laches argument, which the court assumed, without deciding that she could use in a § 150.002 case. The court noted that the two essential elements of laches are (1) an unreasonable delay by one having legal or equitable rights in asserting those rights and (2) a good faith change of position by another to her detriment because of the delay. *Id.* Although O'Connor made arguments in her response to appellants' motion to dismiss alleging that she had suffered prejudice, she did not show that she detrimentally changed her position in reliance on appellants' delay in asserting their dismissal rights. Thus, O'Connor's laches argument failed. The case was reversed and remanded.

Fleming & Associates, L.L.P v. Barton, 2014 WL 783772 (Tex. App.—Houston [14th Dist.] 2014, petition for review filed)

***Synopsis:* (1) Assigning Joint Venture expenses/losses, (2) Transferring rights to partnership revenue as opposed to partnership interest, and (3) No Chap. 38 Attorneys' Fees against LLP**

Lawyers Johnson and Barton (J&B) formed a joint venture to sign up and refer Fen-Phen cases to Fleming & Associate (F&A) under a letter agreement (the Contract) dated February 6, 2002, covering 224 existing clients and the anticipated future clients (eventually approximately 1,500 additional clients). By October 16, 2006, F&A had resolved most of the cases and sent J&B a letter (the October 16 Letter) with a distribution statement for J&B's portion of the fees and deductions for certain client non-reimbursable expenses. J&B disputed the deduction of expenses, contending these were not permitted by the Contract. Cases settled after October 16, 2006, resulted in further disputes about fees and expenses. On November 4, 2008, Johnson entered a Profits Interest Transfer Agreement (PITA) with F&A, effectively selling his share of the J&B fees to F&A. Six months later, Johnson withdrew from J&B. Barton filed suit for breach of contract and promissory estoppel and sought attorneys' fees under Chapter 38. F&A counterclaimed breach of contract, promissory estoppel, declaratory relief and attorneys' fees under Chapters 37 and 38. Fleming answered and verifiably denied that he was liable in his individual capacity.

The parties filed countervailing motions for summary judgment. Barton argued that the Contract was unambiguous and expressly provided that F&A would cover expenses. F&A argued that it had entered into a joint venture with J&B and, as such, the expenses would be shared. The trial court granted Barton's motion on breach of contract, denied his motion for attorneys' fees, and denied F&A's motion. F&A then moved for summary judgment seeking a reduction or extinguishment of 45% of any liability to J&B as, under the PITA, it had purchased that share from Johnson. The trial court denied this motion. Later, F&A moved for summary judgment on Barton's claim for attorneys' fees based on the plain language of §38.001, which provides a plaintiff may recover attorneys' fees from an individual or corporation and F&A, a limited liability partnership, was neither. The trial court denied this motion. Barton later moved for summary judgment on damages recoverable under the breach and the trial court granted the motion awarding $2,330,492. (In a separate summary judgment, the court awarded Barton another $305,998 for fees and expenses.) Finally, Barton moved for summary judgment seeking to hold Fleming personally liable and Fleming flied a cross-motion on the same issue with the trial court ruling in Fleming favor. The attorneys' fees issues was the sole issue presented to a jury, which found that Barton had incurred reasonable and necessary attorneys' fees in the amount of $790,947.00.

Both Barton and F&A appealed. Barton claimed that Fleming should be liable individually. F&A contended the court erred in entering summary judgment on breach of the contract, denying the request to reduce or extinguish pursuant to the PITA, and awarding attorneys' fees. The 14th Court of Appeals reversed in part (on the attorneys' fees issue) and affirmed the remainder.

The court acknowledged that the present version of the Texas Business Organization Code §152.202 implies that a joint venture splits both profits and losses in proportionate shares, the court found that the Contract by its express terms created a joint venture between F&A and J&B only as to future cases. Further, the court noted: "Moreover, contrary to F & A's arguments in its summary judgment motion, a joint venture is governed by the same rules as a partnership. In most cases, a partnership agreement governs the relationship of the partners. The Texas Revised Partnership Act, in effect at the time F & A and J & B entered into the Contract, provided that an agreement to share losses by the owners of a business was not necessary to create a partnership. (citing Tex.Rev.Civ. Stat. Ann. art. 6132b–2.03(c)). Thus the mere fact that F & A agreed to 'be responsible for all future litigation costs' does not render the Barton Group's suggested interpretation of the Contract 'legally incorrect because it is totally at odds with Texas statutory and common law on joint venture.'" 2014 WL 783772 at *8 (internal citations generally omitted). Finally, the court agreed with Barton that F&A had failed to prove that the common expenses were incurred for the J&B approximately 1,750 clients; rather, these were common expenses for all of F&S's over 8,000 clients. The Contract did not provide for sharing such pro-rated expenses. Thus, the trial court had properly entered summary judgment on liability for breach of contract.

With respect to the effect of the PITA, the court noted that "A partnership is an entity distinct from its partners. Tex. Bus. Orgs.Code Ann. § 152.056. Partnership property is not property of the partners. *Id.* § 152.101. A partner does not have an interest in partnership property. *Id.* A partner's 'partnership interest' includes the partner's share of profits and losses or similar items and the right to receive distributions. *Id.* § 1.002(68). This term does not include the partner's right to participate in management. *Id.* A partner may transfer all or part of his partnership interest. *Id.* § 152.401. 'A transferee of a partner's partnership interest is entitled to receive, to the extent transferred, distributions to which the transferor otherwise would be entitled.' *Id.* § 152.404(a)." 2014 WL 783772 at *10. However, contrary to F&A's assertion that Johnson transferred his partnership interest in J&B, the 14th Court of Appeals found that F&A did not, as a matter of law, prove the PITA transferred an interest in the partnership; rather, the PITA merely transferred a required Johnson to convey any profits he might recover from J&B. F&A's only recourse is against Johnson, the party with whom F&A contracted in the PITA.

Therefore, F&A was not entitled to a reduction or extinguishment.

On the issue of Fleming's personal liability, Barton asserted that Fleming signed an addendum to the Contract without declaring his representative capacity and, thereby, became individually liable. The 14th Court of Appeals found that Fleming was entitled to application of the general rule: "Generally, an agent for a disclosed principal is not personally liable on contracts that he signs for the principal." 2014 WL 783772 at *12. The court further explained: "An agent may be liable if he substitutes himself for the principal, or if he consents to liability in addition to the principal. This consent may be express or can arise from the circumstances. At the time that Fleming signed this addendum, the Barton Group was aware that he was acting as an agent for F & A. [E]xplaining that attorney for disclosed client is not liable on a contract unless there is an express or implied agreement for 'specially imposing personal liability.' We see nothing in this addendum that would alter the fact that Fleming was acting as an agent for a disclosed principal." *Id.* Accordingly, the 14th Court of Appeals affirmed the trial court's denial of Fleming's personal liability.

With regard to attorneys' fees, the 14th Court of Appeals noted that the parties agreed that only Chapter 38 provided a possible recovery. Thus, the issue was whether a limited liability partnership was an individual or corporation as contemplated by § 38.001. This section provides that a "person" may recover attorneys' fees from an "individual" or a "corporation;" however, Chapter 38 does not define these terms. The Texas Civil Practice & Remedies Code (TCPRC) provides in § 1.002 that, except as otherwise provided on the TCPRC, the Code Construction Act (CCA) will apply. The CCA defines "person," but it does not define either "individual" or corporation. So, the ordinary meanings of the undefined terms should be applied and F&A is neither an individual nor corporation within the ordinary meanings of those terms. Further, the court noted that: "The predecessor statute, article 2226 of the Texas Revised Civil Statutes, provided that 'any person, corporation, partnership, or other legal entity' could recover fees from a 'person or corporation.' When the Legislature re-codified article 2226 into Chapter 38 of the Texas Civil Practice and Remedies Code, it intended no substantive change. Indeed, the revisor's note indicates that the term 'person' was changed to 'individual' primarily to avoid application of the Code Construction Act's definition of 'person,' which could potentially subject governmental entities to liability. *Id.* at 73–74. 'But general statements by the Legislature that "no substantive change in the law is intended" must be considered with the clear, specific language used' in section 38.001. '[W]hen, as here, specific provisions of a "nonsubstantive" codification and the code as a whole are direct, unambiguous, and cannot be reconciled with prior law, the codification rather than the prior, repealed statute must be given effect.' Thus, under the plain language of section 38.001(8), a person may not recover attorney's fees against a partnership. [H]olding that TCPRC section 38.001(8) authorizing recovery of attorney's fees against 'individual or corporation' does not provide for award of attorney's fees against limited partnership. Without any other authority for the award of attorney's fees to the Barton Group in this case, we conclude that the trial court erred in making such an award." 2014 WL 783772 at *14 (internal citations and footnotes omitted). Accordingly, the 14th Court of Appeals modified the trial court's judgment to remove the award of attorneys' fees.

Practice pointer no. 1: We should have all been referring attorneys in the Fen-Phen litigation. Fleming sent Johnson and Barton $8,329,308.12 in undisputed referral fees plus another $345,108.01 for advertising expenses. The firms were fighting about the remaining $2,352,473.91 in client non-reimbursable expenses. The total exceeded $11 million.

Practice pointer no. 2: The 14th Court of Appeals website indicates that only the appellant, F&A, filed a motion for rehearing. It was denied on April 17, 2014. Watch for a petition for review.

Practice pointer no. 3: Although courts have routinely awarded attorneys' fees against partnerships (see Barton's briefing cited in Footnote No. 17), an objection should be raised if plaintiff seeks recovery of attorneys' fees from anything other than an individual or corporation as those terms are commonly defined.

Gator Apple, LLC v. Apple Texas Restaurants, Inc., 2014 WL 1008067 (Tex. App.—Dallas 2014)

Synopsis:**Choice of law provision in franchise agreement applied to the both determine the construction and the performance of the entire agreement, Kansas law on liquidated damages was not a violation of the Texas'**

Two Applebee's franchisees were fighting over employees who left the Texas franchisee (Apple Texas) to work for the Florida franchisee (Gator Apple) without consent (letter of release) and in violation of the standard franchise agreements, to which each franchisee were third-party beneficiaries. The standard franchise agreement had a choice of law provision (Kansas) and a non-compete clause, which, in turn, had a liquidated damages provision for violations.

"The trial court partially granted Apple Texas's motion for summary judgment, concluding that Kansas law governed whether (1) the liquidated damages provision of the franchise agreement is enforceable; (2) the franchise agreement is a valid and enforceable contract; and (3) Apple Texas is a third-party beneficiary of the franchise agreement. The trial court allowed additional discovery before ruling on the remaining issues in the case. After Gator Apple submitted additional briefing and evidence, the trial court entered a final judgment awarding Apple Texas $1,259,172, attorney's fees of $110,000, pre-and post-judgment interest, and contingent attorney's fees on appeal." 2014 WL 1008067 at *5.

Gator Apple raised several choice of law issues. First, **GatorApple** argued that the choice of law "provision was narrowly written to require the application of Kansas law to the construction of the franchise agreement and to questions relating to the construction of the franchise agreement, but not to questions relating to the validity of the franchise agreement, performance or lack of performance under the franchise agreement, or the liquidated damages provision." 2014 WL 1008067 at *6. However, the Dallas Court of Appeals noted that "The stated purpose of the choice-of-law provision was to provide certainty to franchisees in different states that the terms and conditions in all agreements with Applebee's would be "uniformly interpreted." Rejecting the argument, the Dallas Court of Appeals concluding that "Allowing questions relating to whether the franchise agreement, or similar agreements entered into by Applebee's with other franchisees, had been breached and the remedy for any breach to be decided based on the various laws of different states would defeat the parties' intent that all agreements between Applebee's and its franchisees be uniformly interpreted." *Id.* Thus, Kansas law applied.

Gator Apple next argued that Kansas law pertaining to liquidated damages was in conflict with the fundamental policy of Texas. The Dallas Court of Appeals applied Texas choice of law to determine if the franchise agreement's liquidated damages provision violated Texas' fundamental policy. It began by quoting heavily from the *DeSantis* case:

> Generally, parties may resolve uncertainty as to which jurisdiction's laws will govern their performance under a multi-jurisdictional contract by including a choice-of-law provision in the agreement. However, "the parties' freedom to choose what jurisdiction's law will apply to their agreement cannot be unlimited." Specifically, parties "cannot require that their contract be governed by the law of a jurisdiction which has no relation whatever to them or their agreement," and "they cannot by agreement thwart or offend the public policy of the state the law of which ought otherwise to apply." However, "application of the law of another state is not contrary to the fundamental policy of the forum merely because it leads to a different result than would obtain under the forum's law." "Moreover, the fact that the law of another state is materially different from the law of this state does not itself establish that application of the other state's law would offend the fundamental policy of **Texas**."

2014 WL 1008067 at *7 (internal citations omitted).The court then looked to the RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 186-188 (1971) to determine whether the issue was one upon which the parties can select the law to apply.

> Examples of issues that cannot be resolved by contractual choice-of-law provisions include capacity, enforceability, formalities, and validity. *See id.*§ 187 cmt. d; *DeSantis,* 793 S.W.2d at 678. Issues that can be resolved by agreement include construction, conditions precedent and subsequent, and performance. *See* RESTATEMENT § 187 cmt. c.
>
> Gator Apple argues that the liquidated damages provision in this case is not enforceable under Texas law. Whether a contract is enforceable is not an issue that Applebee's and Gator Apple could have resolved by explicit agreement. *See DeSantis,* 793 S.W.2d at 678 (issue of enforceability of non-compete provision in contract not one parties could resolve by explicit agreement);

2014 WL 1008067 at *7-8. Thus, the Dallas Court of Appeals was forced to determine whether under the two part test created by Section 187(2) of the Restatement the liquidated damages provision was enforceable. Given that Applebee's (the franchisor) was headquartered in Kansas at the time and certain of its obligations under the franchise agreement were to be performed there, the court concluded that Kansas had a substantial relationship to the parties and the transaction, thereby satisfying the first part of the test. The second part of the test has three prongs all of which must be satisfied to find the provision violates Texas' fundamental policy; however, the court determined that it need only look to the prong requiring that another state have a more significant relationship (the factors set forth in Section 188 of the Restatement) to the transaction than the state contractually selected. The court found no state with a more significant relationship to the contract than Kansas. Finding that the contract at issue was the one between Applebee's and Gator Apple, which had no relationship with Texas, the Dallas Court of Appeals rejected Gator Apple's argument that the court should consider Texas' relationship to the Apple Texas employees saying: "'contracts should be governed by the law the parties had in mind when the contract was made,' and we have found no authority for the proposition that the choice-of-law analysis should be based on facts existing at the time of the breach that did not exist when the contract was executed." 2014 WL 1008067 at *9 (internal citation omitted). Thus, Kansas law applied to determine enforceability of the liquidated damages provision.

Finally, the Dallas Court of Appeals held that the trial court did not err by determining that Kansas law applied to the breach of contract claim and to a liquidated damages provision in the franchise agreement setting damages at three times an employee's annual salary. Further, under Kansas law, Gator Apple failed to meet its burden of establishing the liquidated damages provision in section 22 was a penalty. Therefore, trial court's judgment was affirmed.

<u>Practice Pointer:</u> Enforceability of a liquidated damages clause requires a thorough choice of law analysis as set forth above.

Hunter Bldgs. & Mfg., L.P. v. MBI Global, L.L.C.,2014 WL 1258017 (Tex. App.—Houston [14th Dist.] 2014)

Synopsis: **Legally insufficient evidence to prove misappropriation of trade secrets caused plaintiff's lost profits**

In this misappropriation of trade secrets and breach of fiduciary duty case, MBI claimed that two former executives, each of whom had signed a Non-Competition and Trade Secrets Agreement, went into business competing directly with MBI. (One even remained on MBI's parent's board of directors.) MBI claimed that it lost millions in business due to the client contact lists and trade secrets taken by the two former executives.

The trial court granted a summary judgment that the non-competition agreement were invalid and unenforceable. No party appealed this ruling.

Upon trial, the jury returned a verdictfinding (1) each of the two former executives failed to comply with the fiduciary duty he owed to MBI; (2) their new employer related entities ("new employer") knowingly participated in the breaches of fiduciary duty; (3) the former executives and their new employer misappropriated MBI's trade secrets; (4) plaintiff suffered $4.4 million in past-lost-profits damagesthat were proximately caused by either a breach of fiduciary duty or misappropriation trade secrets; (5) none of the defendants were part of a conspiracy regarding the breach of fiduciary duty or misappropriation of trade secrets; and (6) the percentage of responsibility attributable to each former executivewas zero percent.

MBI did not challenge the verdict and, instead, sought entry of judgment, but argued the each former executive should be jointly and severally liable with the corporate defendants despite the jury's findings. The defendants moved the trial court to disregard all finding adverse to them.The trial court rendered judgment that MBI recover $4.4 millionjointly and severally from all defendants (new employer and the two former executives.

In order to find the two former executives jointly and severally liable, the trial court had to disregard the jury's answer to Question No. 12 on the former executives' proportionate responsibility. However, MBI neither moved to disregard the jury's answer to Question No. 12 on the former executives' proportionate responsibility nor did it appeal the verdict. Therefore, the only ground to disregard the jury's answer to Question No. 12 was if the finding or answer was immaterial, *i.e.* (1) it should not have been submitted, (2) it was properly submitted but has been rendered immaterial by other findings, (3) its answer can be found elsewhere in the verdict, (4) its answer cannot alter the effect of the verdict, or (5) a finding beyond the province of the jury, such as a question of law, may be deemed immaterial. The 14th Court of Appeals concluded that the answer to Question No. 12 was not immaterial. Chapter 33 Proportionate Responsibility applies to misappropriation of trade secrets case. So, the question was properly submitted. MBI argued that the jury's finding that the new employer knowingly participated in the breach of fiduciary duty resulted in common law joint and several liability, similar to a conspiracy finding, obviating the need for Question No. 12 (a finding that would not have been known at the time of submission, hence the need to submit Question No. 12). The court further noted:

> Texas courts have indicated that, under Texas common law, if a third party knowingly participates in a defendant's breach of a fiduciary duty owed to a plaintiff, the third party is jointly liable with the defendant for damages to the plaintiff proximately caused by this breach of fiduciary duty, and the plaintiff has the same equitable remedies against the defendant and the third party based upon this breach. The parties have not cited, and research has not revealed, any Texas case in which the court addresses (1) the distinction between civil conspiracy and knowing participation in a breach of fiduciary duty, or (2) the issue of whether a knowing-participation finding, by itself, makes the party breaching his fiduciary duty liable for damages caused by the party who knowingly participated in the breach of fiduciary duty.

2014 WL 1258017 at *4 (internal citations omitted). (Based on the court's ruling, these two issues are still unresolved.)

However, the 14th Court of Appeals observed that the liability issues (the executives' breach of fiduciary duties and the employers knowing participation) did not link the executives' conduct to MBI's damages nor did the damages question link its findings to the executives' conduct. So, Question No. 12 was the only question attempting to link the executives' conduct and damages (and the jury found no such link), making Question No. 12 material. Indeed, only Question No. 5 (the new employer's liability for misappropriation of trade secrets) linked conduct to damages. Thus, the trial court erred by disregarding the answer to Question No. 12.

Next, the 14th Court of Appeals addressed the evidence supporting the jury's finding that the new employer's misappropriation of trade secrets caused MBI to suffer $4.4 million in lost profits. The court found that MBI's damages expert's (Spilker's) lost profits calculation was too broad. The expert's findings did not specifically address how the defendant's alleged misappropriation of trade secrets caused lost revenue.

> Spilker did not testify as to whether any defendant's misappropriation or use of Global's trade secrets caused Global any damage or any lost profits. Indeed, Spilker did not opine as to the lost profits caused by any conduct of any defendant. In fact, throughout his entire testimony Spilker never once uttered the term "trade secret" or "trade secrets." Spilker did not testify regarding any calculation of lost profits caused by any defendant's alleged misappropriation or use of Global's trade secrets. Spilker did indicate in his testimony that, but for the acts of the defendants alleged in Global's petition, Global's gross sales revenue would have been $20 million in 2009, $25 million in 2010, and $25 million in 2011.[17] But, as discussed below, this testimony does not address any lost revenue caused by the Defendants' alleged misappropriation of Global's trade secrets.

2014 WL 1258017 at *8. Unfortunately, there was a disconnect between Spilker's "acts in the petition" and the jury's specific findings limited to misappropriation of trade secrets. The court noted that:

> Significantly, the Defendants' allegedly actionable conduct, as set forth in Global's petition, included competing against Global, soliciting Global's customers, and soliciting Global's employees. Yet, as reflected in the jury charge, in a damages claim based on misappropriation of trade secrets, the plaintiff seeks to recover damages caused by the defendant's use of the trade secrets. Thus, if one or more of the Defendants competed aggressively with Global, or solicited Global's customers or employees, without using Global's trade secrets, then profits lost as a result of such conduct were not caused by the Defendants' misappropriation of Global's trade secrets. Thus, Spilker's opinion as to what Global's gross sales revenue would have been, but for the acts of the Defendants alleged in Global's petition, is based in part on acts that are not actionable under a claim for misappropriation of trade secrets. Spilker's opinion does not address what Global's gross sales revenue would have been, but for the Defendants' alleged misappropriation of Global's trade secrets. …
>
> Nonetheless, Spilker did not connect his calculation of lost profits to any defendant's alleged misappropriation of trade secrets.

Id. at 8-9.Finally, the court concluded:

> Spilker's calculation of lost profits was not tied in any way to the portion, if any, of the lost profits

> which may have been caused by the Defendants' alleged misappropriation of Global's trade secrets, but instead extended globally to all of the Defendants' allegedly actionable conduct. … Under the applicable standard of review and on this record, Spilker's testimony is legally insufficient to support a finding that the Corporate Defendants' misappropriation of trade secrets proximately caused Global to sustain lost-profits damages in the past.

Id. at 9.

Practice pointer no. 1: Be sure that your liability jury questions are adequately linked to your damages questions. If necessary, hire an appellate attorney to attend trial and assign the appellate attorney the task of preparing a winning charge.

Practice pointer no. 2: Prepare your proposed charge before your expert gives his report and make sure that he adequately covers the issues.

Practice pointer no. 3: If you have multiple theories of liability (multiple types of misconduct), you may need to breakdown your damages and link certain amounts to certain conduct. If Spilker had found x lost profits and attributed ½(x) to misappropriation and the other ½(x) to breach of fiduciary duty, MBI might have been able to hold part of the verdict.

Practice pointer no. 4: The text and footnotes of the opinion suggest that MBI should have raised certain issues in post-judgment motions, such as disregarding the jury's findings to Question No. 12 and raising its plead equitable remedies. If sustained, the judgment might have been defensible on appeal. If denied, MBI would have preserved possible grounds for error.

Velvet Snout, LLC v. Sharp, 2014 WL 636734 (Tex. App.—El Paso 2014)

Synopsis: **Contract causation of damages**

Velvet Snout, a dog grooming and boarding facility, hired Sharp Floors to install a rubber floor. Shortly after installation, the floor developed problems. Sharp Floors made the initial repairs. The parties differ on whether Velvet Snout brought the additional problems to Sharp Floors attention; however, Velvet Snout eventually paid a third-party to make some of the necessary floor and wall repairs, while others remained at the time of trial.

After a bench trial, the trial court entered a take nothing judgment on the appellant's breach of contract and fraud claims. Velvet Snout doggedly fought for a favorable result and appealed contending that the court had legally insufficient evidence to find a lack of breach and a lack of damages.

At trial, Velvet Snout attempted to rely on certain deemed admission. However, the El Paso Court of Appeals found the requests to be sweepingly broad and an attempt to preclude a presentation on the merits. The court noted that such requests cannot be deemed admitted and will not support a judgment.

> Requests for admission were "never intended to be used as a demand upon a plaintiff or defendant to admit that he had no cause of action or ground of defense." When a party relies on merit-preclusive deemed admissions, "due process concerns may arise."

2014 WL 636734 at *1. On the legal sufficiency issues, the El Paso Court of Appeals cited the standard breach of contract law:

> The four elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach. The last element encompasses a causation requirement. Specifically, the evidence must show that the damages are the "natural, probable, and foreseeable consequence" of the defendant's conduct. "The absence of this causal connection between the alleged breach and the alleged damages will preclude recovery."

2014 WL 636734 at *2 (internal citations omitted). In refusing to find a breach, the trial court ignored Velvet Snout's two expert witnesses (one of whom relied on a third expert witness's report), both of whom testified that the installation was substandard, and despite Sharp Flooring not calling an expert of its own. The El Paso Court of Appeals simply concluded that other evidence had been presented supporting the negative findings and allowing a reasonable factfinder to disregard Velvet Snout's experts.

Sharp Flooring did not dispute that something had gone wrong with the rubber flooring, but it questions how and why the rubber flooring failed. This evidence focused on the various means of installation (heat welding versus chemical welding with the former being the only acceptable method for areas subjected to significant amounts of water) and the subsequent third-party repairs. Sharp Flooring claims it described the different installation methods, the appropriateness for the expected conditions, and the cost differential ($15,000 more for the heat welding). Velvet Snout's owner elected chemical welding, although she denied that cost was discussed and claimed that she relied entirely on Sharp Flooring's fraudulent assurances of the chemical welding process's appropriateness.

Velvet Snout also denied that there had been excessive amounts of water. Even one of Velvet Snout's experts conceded that there was a lot of water present under the flooring during her inspection. Further, Sharp Flooring presented evidence that the third-party repairs made the situation worse. Velvet Snout had not disclosed the repair history to its experts and, as a result, they were unable to say who was responsible for the shoddy work. Accordingly, there was sufficient evidence to support the lack of causation finding.

<u>Practice pointer no. 1</u>: This case collects many of the cases finding that case preclusive requests for admission are improper and provides a strong basis for objecting to same.

<u>Practice pointer no. 2</u>: We often focus on what information we provide to our experts (often because we do not want to incur the cost of the expert reviewing reams of unnecessary information just so he can say he read "everything"); however, we need to also be careful what we do not disclose to them. Do your best to avoid your expert being ambushed with salient facts.

H2O Solutions, Ltd. v. PM Realty Group, LP, 2014 WL 576262 (Tex. App.—Houston [1st Dist.] 2014, motion for rehearing en banc filed)

Synopsis: **Judicial admission established contract with third party, not defendant; business records affidavit authenticated the contract despite affiant not knowing who originally drafted the contract; fraud in the inducement requires justifiable reliance; quantum meruit fails in the face of a valid contract.**

H2O Solutions (H2O) provides remediation services and, after Hurricane Ike, it contracted with PM Realty (PM), a property management company, to provide generators for and to dry and dehumidify certain of PM's properties. H2O and PM agreed to the essential terms of the contract, including scope and price, and the properties insurance carriers later approved. This was followed by an e-mail from H2O to PM with an attached Authorization to Perform Services. PM orally authorized the work described in the e-mail, but could not print the form in order to execute it. PM promised to execute the form and requested that H2) begin service immediately due to deteriorating condition of the properties. Despite not having an executed form, H2O began work. After the original scope was completed, one property was inspected by an industrial hygienist who recommended, and PM approved, additional work. After the inspection, PM presented H2O with Limited Scope Service Agreements (LSSA)(one for each property) and advised H2O that the LSSA was a mere formality required to get H2O paid. H2O executed the LSSAs (later claiming no Purchase Orders (PO) were attached at the time of execution). The LSSAs reflect that PM was a mere agent for the property owners and, as such, assumed no liability for payment. After PM failed to pay the invoices, H2O filed mechanic's and materialman's liens on the properties, the affidavits for which acknowledged that PM was an agent for the named owner.

H2O Solutionssued the property owners, PM, and PM's general partner for breach of contract, quantum meruit, and fraud seeking approximately $800,000 in damages (the amount of the invoices for work performed on the properties).H2O moved for summary judgment and averred that it had a contract with the property owner. H2O and the property owner settled for $380,000. H2O released the property owner from all obligations owing under the LSSA. (PM was not a release.) The property owner assigned it claim for coverage from its insurance carrier for reimbursement of payment for work performed and H2O eventually recovered an additional $200,000 from the insurance carrier.

After the settlement, H2O amended its petition and alleged that it signed 2 separate contracts with PM, was unaware of PM's status until after executing the LSSA's, the LSSA's were unenforceable as they lacked consideration and failed for non-compliance with their terms. PM responded by asserting that no enforceable contract existed as the parties did not agree on essential terms, such as pricing, and no oral contract existed as it was premised on the promise to make a future contract.PM also asserted that the LSSAs, which H2O had acknowledged as valid and enforceable, superseded any oral promise to pay and had an integration clause merging all prior dealings into the LSSAs. Further, the existence of a written contract invalidated any claim for quantum meruit and promissory estoppel. Finally, PM argued that the fraud claims were based on oral representations that were contradicted by the express terms of the LSSAs and, thus, could not support fraudulent inducement. Notably, PM's summary judgment proof included LSSAs with POs attached and the POs contained descriptions of services, which included the original work completed before the execution of the LSSAs. H2O objected to the authenticity of the POs. PM also introduced the release, to which H2O objected on grounds of TRE 408. H2O also asserted that the LSSAs integration clause did not affect the prior contracts between H2O and PM as the LSSAs were strictly between H2O and the property owner.

The trial court rendered summary judgment in favor of PM. H2O Solutions contends on appeal that (1) the trial court erred in rendering summary judgment because PM failed to conclusively establish its right to judgment as a matter of law; (2) the trial court erred in relying on a written agreement between the parties that was not a valid contract and that only addressed future work to be performed; (3) a material fact issue exists concerning which agreement is the operative agreement between the parties; (4) the trial court erroneously failed to strike a document that was not properly authenticated; and (5) the trial court prematurely rendered summary judgment on its quantum meruit, fraud, and negligent misrepresentation claims. PM responds that H2O Solutions seeks to recover from it under a contract or in quantum meruit, but that H2O Solutions judicially admitted that it performed the work at issue in this dispute pursuant to a different contract with different parties, under which H2O Solutions recovered a settlement award for the same work performed, precluding it from recovering damages from PM Realty.2014 WL 576262 at *1.

The 1st Court of Appeals began by addressing in detail PM's argument that H2O had judicially admitted that its work was performed under a contract (LSSAs) with the property owner (B&R), not PM.

> We therefore conclude that the statements in Burk's affidavits that H2O Solutions performed the work at the Properties pursuant to written contracts with the B & R Entities constitute judicial admissions. *See Khan, 371 S.W.3d at 357.* As such, these admissions prohibited H2O Solutions from asserting that a different contract with a different party governed the work that it had performed at the Properties. *See Wolf*, 44 S.W.3d at 568 (holding that judicial admissions bar party from later disputing admitted fact). H2O Solutions' judicial admissions establish that it performed the work at the Properties pursuant to a contract with the B & R Entities, not pursuant to a contract with PM Realty. Thus, the trial court correctly concluded that PM Realty had conclusively established that it did not have a valid contract with H2O Solutions. As a result, PM Realty conclusively established that H2O Solutions could not recover from it in contract, and the trial court correctly rendered summary judgment in favor of PM Realty on H2O Solutions' breach of contract claim.*See Triton 88, L.P. v. Star Elec., L.L.C., 411 S.W.3d 42, 56 (Tex.App.-Houston [1st Dist.] 2013, no pet.)* (stating that, to prevail on breach of contract claim, plaintiff must prove, among other elements, existence of valid contract).
>
> We overrule H2O Solutions' first, second, and third issues.

2014 WL 576262 at *13. The 1st Court of Appeals next addressed the authenticity issue surrounding PM's introduction of the LSSAs and accompanying POs, which were tendered with a business records affidavit over H2O's objection that the affiant had testified that she did not know who had originally prepared the documents. The court overruled this point of error noting that:

> Rule 902(10)(b), which provides an example of an affidavit that a person may use to authenticate a business record, does not require the affiant to identify the particular person who originally created the business record in order to satisfy the authentication predicate.

2014 WL 576262 at *14. After these two rulings, all that were left were H2O's quantum meruit and fraud claims. The 1st Court of Appeals rejected the quantum meruit claim citing case law for the proposition that: "A party generally cannot recover under quantum meruit when there is a valid contract covering the services or materials furnished." *Id.* at *16.

With regard to fraud, H2O argued that PM committed fraud by "'inducing H2O into signing the LSSAs by misrepresentations and subsequent forgery of Purchase Orders to complete the LSSA contracts.'" *Id.* However, the 1st Court of Appeals did not find a material fact issue on justifiable reliance on any alleged misrepresentation after stating the standard:

> One of the elements that a plaintiff must prove to establish a fraudulent inducement claim is that it actually and justifiably relied on the alleged misrepresentations to suffer injury. "That is, with a fraudulent inducement claim, the elements of fraud must be established as they relate to an agreement between the parties." Reliance upon an oral representation that is directly contradicted by the express, unambiguous terms of a written agreement between the parties is not justified as a matter of law.
>
> [W]e again note that the "prevailing rule" is that "a party who enters into a written contract while relying on a contrary oral agreement does so at its peril and is not rewarded with a claim for fraudulent inducement when the other party seeks to invoke its rights under the contract."

2014 WL 576262 at *16 (internal citations omitted). Accordingly, the trial court's judgment was affirmed.

Practice pointer: Good case on evidentiary issues of judicial admission and the low threshold for upholding authentication of a business records affidavit. However, see Footnote No. 6 for the difference between authentication and admissibility, which the court points out are separate issues and the latter was not raised.

Neal Autoplex, Inc. v. Franklin, 2014 WL 465298 (Tex. App.—El Paso 2014)

Synopsis: **Texas Finance Code Cash Price Violation**

The undisputed facts show that the Franklins bought a car from Neal Suzuki. The sticker price on the label in the window was $16,464.00, but the financing agreement included a $6,000 charge variously described as a processing fee or discount fee. In a bench trial, the trial court found a cash price violation. Neal Suzuki appealed arguing that there was no or factually insufficient evidence to support the findings of fact as the Franklins we well aware of the total purchase price listed in the contract and that the dealership had not made a profit on the sale. The El Paso Court of Appeals stated the applicable standard:

> Under the Texas Finance Code, a "cash price" violation occurs when a retail seller establishes a cash price for a vehicle and sells the vehicle for more than that established price. The "cash price" of a vehicle is defined as "the price at which the retail seller offers in the ordinary course of business to sell for cash the goods or services that are subject to the transaction." "The underlying purpose of a cause of action for a cash price violation is to prevent a dealership from charging a finance customer more than a cash customer for the same vehicle."

2014 WL 465298 at *3 (internal citations omitted). Then, the court rejected Neal Suzuki's arguments explaining:

> This ignores the fact that, even assuming the Franklins were fully aware of and agreed to the increased price, the cash price of the vehicle is not defined as the price ultimately agreed upon or stated in the contract. Rather, the cash price of the Franklins' vehicle is the price Appellant offered to all customers in the ordinary course of business to all customers.

Id. (internal citations omitted).

In re Platinum Energy Solutions, Inc., 420 S.W. 3d 342 (Tex. App.—Houston [14th Dist.] 2014

Synopsis: **Texas Business Organizations Code §21.556 controls over §21.562(a) in this specific context involving the scope of permissible discovery in connection with a foreign corporation's motion to dismiss a derivative action.**

Platinum is a Nevada corporation providing oil field services. Minority shareholders filed a derivative action. After investigation and at the recommendation of a Special Litigation Committee, Platinum moved to dismiss the derivative action. The minority shareholders sought discovery regarding the Special Litigation Committee's work. Platinum objected to the discovery, the minority shareholders filed a motion to compel, and Platinum moved for protective order. The trial court granted the motion to compel, denied the motion for protection, and overruled the objections. This mandamus followed.

The principal issue was which section of the Texas Business Organizations Code controlled, §21.556 or §21.562(a). The 14th Court of Appeals recognized the conflict.

> Tension exists between sections 21.566 and 21.562; the former section applies Chapter 21's discovery limits to "domestic or foreign" corporations, while the latter section omits Chapter 21's discovery limits from the list of statutory provisions applicable to foreign corporations in this context. Commentators have noted this tension. *See* Todd A. Murray & Lyndon F. Bittle, *Emerging Issues Raised by Derivative Shareholder Actions Involving Foreign*

> *Corporations Headquartered in Texas: Making Sense of the Interaction between Texas Procedures and Substantive Law*, 39 Tex. Tech. L.Rev. 1, 26–27 (2006) ("level of uncertainty" exists because section 21.556 refers to "a domestic or foreign corporation" seeking to dismiss a derivative proceeding, while section 21.562 refers to application of laws to "foreign corporations").

420 S. W. 3d at 347-348. After performing a statutory construction analysis, the 14th Court of appeals stated:

> We conclude that section 21.556 controls here because it is more specific. Section 21.556 is more specific because it addresses the narrower topic of discovery in a proceeding on a motion to dismiss the derivative action, while section 21.562(a) addresses the more general topic of selecting the law applicable to foreign corporations. See Tex. Gov't Code Ann. § 311.026(b) (special provision prevails over general provision where they irreconcilably conflict).

420 S. W. 3d at 348-349. In doing so, the court rejected the minority shareholders' contention that "Delaware law should control the scope of discovery in this context because Texas courts must apply the internal affairs doctrine to foreign-filing entities." *Id.* at 349.

Peterson, Goldman & Villani, Inc. v. Ancor Holdings, L.P., 2013 WL 6699695 (Tex. App.—El Paso 2013, petition for review filed)

Synopsis: **Suit against Members of LLC/LP on guaranty agreement (not barred by res judicata or limitations)**

A limited liability company (LLC) signed a guaranty agreement. It then merged into a similarly named limited partnership (LP) and the LLC thus went out of existence. Peterson, Goldman & Villani (PGV) owned the guaranty, obtained a judgment (Dallas County suit) in 2008 against the LLC on the guaranty, and, in this lawsuit (the later filed Tarrant Court suit), tried to hold the LP and its members liable to satisfy the judgment. The trial court granted the LP and members summary judgment (raising *res judicata*, judicial estoppel, and limitations among others) and this appeal ensued.

On the issue of *res judicata*, the LP contended that PGV brought or could have brought the same claims against the LLC in the Dallas County suit, in which PGV had moved to modify the judgment to make the LP a judgment debtor based on misnomer after learning of the LP/LLC merger provision providing the LP assumed all liabilities of the LLC (a motion that was denied and affirmed on appeal, although focusing on the fact that the two entities were separate and distinct and the LP had not been served). Accordingly, the LP argued that issue of which entity owed the debt was settled in the Dallas County suit and could not be re-litigated. However, the El Paso Court of Appeals found that LP had not shown that it was a party to the underlying case. Indeed, the LP took the opposite position. Therefore, the court sustained PGV's first point of error.

PGV also contended that the LP was judicially stopped from asserting limitations. The El Paso Court of Appeals summarized the jurisprudence on judicial estoppel as follows:

> "The doctrine of judicial estoppel 'precludes a party from adopting a position inconsistent with one that it maintained successfully in an earlier proceeding.'" As "a rule of procedure based on justice and sound public policy [,] ... [i]ts essential function 'is to prevent the use of intentional self-contradiction as a means of obtaining unfair advantage.'" For the doctrine to apply, the following elements must be present: (1) a sworn, inconsistent statement made in a previous judicial proceeding; (2) the party who made the statement successfully maintained the previous position; (3) the previous statement was not made inadvertently or by mistake, fraud, or duress; and (4) the statement was deliberate, clear, and unequivocal.

2013 WL 6699695at *3.Because the LP and its partners profited in this action by asserting a position contrary to that asserted in a prior action in support of their argument that the LP is not liable under the guaranty, they are judicially estopped from asserting limitations as an affirmative defense.

PGV failed to address the other grounds for summary judgment on the tort claims. Therefore, the El Paso Court of Appeals reversed and remanded the trial court's judgment in favor of the LP on the declaratory judgment and contract claims, but otherwise affirmed the summary judgment on the tort claims.

In re Archer Directional Drilling Services LLC, 2013 WL 6730095 (Tex. App.—San Antonio 2013, petition denied)

Synopsis: **DTPA and Dominant Jurisdiction**

Note: This supersedes the opinion rendered on November 20, 2013, found at 2013 WL 6118474. JB Oil, a well operator, hired Archer to drill a well in Dimmitt County. Problems quickly ensued, drilling ceased, and invoices went partially unpaid.

On October 18, 2012, JB Oil sent Archer a letter advising of potential claims for breach of contract, negligence, and violations of the DTPA and of its intent to pursue those claims if not resolved in 60 days (a classic DTPA demand letter per TB&CC §17.505(a)). Archer admits receiving the DTPA demand letter that very day. Archer responded by filing suit in Harris County on November 21, 2012. After the expiration of the 60 days, JB Oil eventually filed suit in Dimmitt County on December 26, 2012. Archer answered with a motion to transfer venue and plea in abatement asserting Harris County had dominant jurisdiction.

In February 2013, the Harris County court denied JB Oil's motion to transfer and motion to dismiss, the court set the case for trial in January 2014, and the parties proceeded with discovery in the Harris County suit through the 2013. In September 2013, the Dimmitt County court scheduled the trial for December 2013 and denied Archer's motion to transfer and plea in abatement finding that Archer was guilty of inequitable conduct and acting in bad faith. Archer sought mandamus.

The San Antonio Court of Appeals acknowledged the principle of dominant jurisdiction saying:

> "As a general rule, when cases involving the same subject matter are brought in different courts, the court with the first-filed case has dominant jurisdiction, and the other case should be abated." To succeed on a motion to abate in a second-filed suit to allow a court with dominant jurisdiction to proceed, a movant must establish (1) a suit in another county was commenced first; (2) the first suit remains pending; (3) the first suit does include, or could be amended to include, all of the parties; and (4) the controversies are the same or the first suit could be amended to include all of the claims.
>
> …
>
> In *Wyatt,* the Supreme Court recognized three exceptions to the "first-filed" rule of dominant jurisdiction: (1) an inability to bring all parties before the court in the first suit; (2) a lack of intent to diligently prosecute the first-filed suit; and (3) conduct by a party that estops it from asserting prior active jurisdiction.

2013 WL 6730095 at *2 (internal citations omitted).JB Oil conceded that Archer had met the standard; however, JB Oil argued an exception (i.e. inequitable conduct) based on Archer jumping the 60 day DTPA notice period, requesting declaratory relief in Harris County that was little more than re-stating its DTPA defenses, and refusing the JB's conditional offer to pay the balance to create a pretextual breach of contract claim.

Addressing each of JB Oil's arguments in order, the San Antonio Court of Appeals could find nothing in the DTPA or its jurisprudence preventing Archer from filing its own suit during the notice period. The San Antonio Court of Appeals concluded:

> We conclude Archer's availing itself of its Constitutional right to access the courts to remedy an alleged injury does not constitute the "inequitable conduct" required for an exception to the general "first-filed" rule. *See*TEX. CONST. art. I, § 13.

2013 WL 6730095 at *3. With respect to the declaratory relief, the San Antonio Court of Appeals noted that Archer had also asserted breach of contract claims that were separate and apart from the DTPA "defenses" and found:

> Archer's request to have the court interpret the contract as part of its suit for breach does not constitute the "inequitable conduct" required for an exception to the general "first-filed" rule. *See MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 668–69 (Tex.2009) (declining to extend the bar against declarations of non-liability to contract cases).

Id. Finally, the San Antonio Court of Appeals observed that the offer to pay came six months after Archer filed suit in Harris County and was far from an unconditional tender.

> JB's conditional tender in May 2013 cannot, as a matter of law, render Archer's decision to file suit in November 2012—which also sought recovery of additional damages and declaratory relief—"inequitable conduct."

Id. Therefore, the San Antonio Court of Appeals conditionally granted Archer's mandamus and instructed the Dimmitt County court to abate its proceedings.

Practice pointer: Although a demand letter is a pre-requisite, a party could file suit and then seek abatement in order to avoid alerting the opposing party to a potential race to the courthouse in different venues.

Federal Appellate

Serna v. Law Office of Joseph Onwuteaka, P.C., 732 F. 3d 440 (5th Cir. 2013)

Synopsis: **Violation of venue provision of Fair Debt Collection Practice Act (FDCPA) did not occur until debtor was notified of suit.**

In this case, the debt collection agency seeking to collect on a $2,600 note filed suit on July 6, 2010, in a Harris County Justice of the Peace Court. Serna neither resided nor signed the note in Harris County, a venue requirement of the FDCPA causing a violation of the act. At the time, he lived in Bexar County. Serna was served on August 14, 2010. He did not answer and a default was entered. Serna filed his FDCPA suit in federal court on August 12, 2011, but sought *in forma pauperis* and did not pay the filing fee. The application was denied on August 15, 2010, and he re-filed the suit on August 18, 2011, with the requisite filing fee. (FRCP 6(d) gives the plaintiff an additional three days to re-file after denial of an *in forma pauperis* application.)

The FDCPA has a one year statute of limitation from the date of violation. Thus, if the violation occurred on filing the debt collection suit, the limitations would bar the suit. If the violation occurred on notice (here service of citation), then the suit was timely. The district court opted for the former.

The majority (there was a dissent) of the 5th Circuit panel found that, when interpreting the phrase "bring such action," a violation of the fair venue provision of Fair Debt Collection Practice Act did not occur until the debt-collection suit was filed and the alleged debtor was notified (served) of the suit. In doing so, the majority resolved a conflict between at least two district courts, adopted reasoning from another circuit interpreting like language in other consumer protection acts and Texas courts interpreting Texas statutes, relied on statute of limitations jurisprudence requiring the plaintiff to experience harm before the cause of action accrues, and analyzing the statutory history and purpose. The decision noted that the 10th Circuit similarly interpreted requirements for bring suit under another section of the FDCPA. The majority concluded that Serna did not suffer any injury until he became aware of a debt-collection suit and was forced to respond in a distant forum.

Metroplexcore, L.L.C. v. Parsons Transportation, Inc., 743 F. 3d 964 (5th Cir. 2014)

Synopsis: **Joint Venture and Promissory Estoppel**

Harris County Metro hired Parsons, a general contractor, to design, build, and operate a transit system. The initial bid included MetroPlexCore (MPC), an environmental engineering firm, as part of the team. Parsons did not get the bid, but Parsons, with a new set of subcontractors, eventually replaced the original general contractor when it ran into problems with Phase II of the project. MPC demanded a share of the profits claiming the original bid was a joint venture as Parsons agreed that MPC would "participate in that contract to a minimum 10% level." However, MPC produced no document showing it was a joint venture with Parsons in Phase II, while Parsons produced such a document for its other collaborators (a document that did not mention MPC).

The 5th Circuit recognized that:

> In Texas, "[a] joint venture has four elements: (1) a community of interest in the venture, (2) an agreement to share profits, (3) an agreement to share losses, and (4) a mutual right of control or management of the enterprise. Generally, a joint venture is governed by the rules applicable to partnerships." "The principal distinction between a joint venture and a partnership is that a joint venture is usually limited to one particular enterprise. As a general rule, a joint venture is governed by the same rules as a partnership, and vice versa." TEX. BUS. ORG.CODE § 152.051(b) ("[A]n association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether: (1) the persons intend to create a partnership; or (2) the association is called a 'partnership,' 'joint venture,' or other name.").

743 F. 3d at 972-973 (internal citations omitted). As far as the alleged joint venture, MPC showed a community of interest. However, the "10% level" only related to phase one and was not necessarily specific to profits. Therefore, MPC did not prove a partnership. MPC did not even argue that it agreed to share losses not did it allege a mutual right to control. Therefore, the evidence did not support a joint venture.

With respect to quantum meruit, the 5th Circuit recognized that this cause of action permits recovery only when no contract exists. Likewise, partners or joint venturers generally cannot recover under this theory. Here, MPC's efforts were not merely to benefit Parsons, but to benefit MPC's own financial interests. Therefore, there is no unjust enrichment of Parsons from MPC's activities.

MPC was more successful on its promissory estoppel point of error. The 5th Circuit recited the standard:

> Under Texas law, "[t]he requisites of promissory estoppel are: (1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment." "The function of the doctrine of promissory estoppel is ... defensive in that it estops a promisor from denying the enforceability of the promise." In sum, "[w]here a promisee acts to his detriment in reasonable reliance upon an otherwise unenforceable promise, ... the disappointed party may have a substantial and compelling claim for relief.... 'A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.' " The burden of proving all the essential elements of promissory estoppel is on the party asserting the doctrine. "In a claim for promissory estoppel, only reliance damages are allowed." Reliance damages seek to put the injured party

> in the position that he or she would have been in had he not relied on the promise. Such damages "includ[e] expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed."

743 F. 3d at 977-978 (internal citations omitted). The 5th Circuit found a fact issue precluding summary judgment on the promissory estoppel claim. The court cited a record "replete" with "specific 'reassurances'" by Parson's agent to MPC leading up to Phase II. Such reassurances could lead to reasonable reliance. Also, the 5th Circuit found sufficient proof to the other elements requiring remand to the trial court for further proceeding on the promissory estoppel claim.

Finally, the 5th Circuit rejected Parsons' argument that MPC's promissory estoppel claim was barred by the statute of frauds. The court drew a distinction between a promissory estoppel claim raised as a defense to a seeking to enforce an oral agreement to enter a contract, in which case the putative contract must meet statute of frauds. Here, MPC was asserting a separate cause of action for promissory estoppel and seeking its reliance damages.