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

Morton v. Nguyen

Opinion Delivered August 23, 2013
12-0539, 2013 WL 4493799

Synopsis:

Reversing the Fourteenth Court of Appeals (Houston), the Texas Supreme Court held that the statutory right to rescind a contract for deed under TEX. PROP. CODE § 5.069 contemplates a mutual restitution of benefits among the parties to the deed.

Factual Background & Trial Court Proceedings:

Kevin Morton ("Morton"), as seller, and Hung and Karen Nguyen, as buyer, (the "Nguyens") entered into for a contract for deed to purchase a house. Pursuant to the contract, Morton agreed to extend credit to the Nguyens, and the Nguyens made payments under the contract for almost three years. Although Morton sent the Nguyens an annual statement documenting the interest paid and the balance remaining under the contract, the annual statement did not provide the Nguyens with all of the information required by section 5.077 of the Texas Property Code.

Approximately three years after the contract was executed, the Nguyens notified Morton that they were exercising their statutory right to cancel the contract under section 5.069 of the Texas Property Code. The Nguyen's demanded return of all thirty-four of their monthly payments, the down payment, and the taxes and insurance premiums they paid during the contract's term. In response, after ordering the Nguyens out of the house, Morton sued the Nguyens for breach of contract. The Nguyens counterclaimed, seeking monetary damages, rescission, and statutory damages under the Property Code, the Finance Code, and the Deceptive Trade Practices Act.

After trial, the trial court found that Morton failed to comply with various sections of the Texas Property Code by failing to make certain disclosures required in contract-for-deed transactions. The trial court awarded the Nguyens $63,693.47 for actual damages, which included all the payments the Nguyens made under the contract for deed, and rescinded the contract for deed as allowed under Subchapter D of the Texas Property Code. In calculating this part of the award, the trial court refused to offset the

amount the Nguyens recovered with the benefits the Nguyens received from living in the house for approximately three years. The Court also awarded $170,000 in damages for violation of section 5.077 of the Texas Property Code, $300 as the statutory remedy for Finance Code Violations, $10,000 for mental anguish damages, $67,020 in attorney's fees, and $696.74 in costs.

Both parties appealed to the Fourteenth Court of Appeals

Court of Appeals:

The Court of Appeals reversed the Trial Court's award for damages under section 5.077 of the Property Code and reversed the trial court's award for $300 under the Texas Finance Code. However, the court of appeals upheld the trial court's award for rescission and restitution under the Property Code, attorney's fees, and mental anguish damages. Morton appealed to the Texas Supreme Court contending that the court of appeals erred in (1) denying him the right to recover mutual restitution upon cancelling the contract for deed, (2) affirming the awards of attorney's fees and mental anguish damages.

Texas Supreme Court's Holding:

The Texas Supreme Court reversed the decision of the Fourteenth Court of Appeals, finding that allowing a buyer to recover all of the benefits bestowed by a contract for deed without also requiring the buyer to surrender the benefits received under the contract would result in a windfall inconsistent with the general nature of the Texas Property Code's cancellation-and-rescission remedy.

In support of its decision, the Court focused on the rescission language in the Texas Property Code, which provides that a buyer's remedy for failure to comply with the disclosures requirements is "to cancel and rescind the executor contract and receive a full refund of all payments made to the seller." *Citing* Texas Property Code, sections 5.069(d)(2), 5.070(b)(2), 5.072(e)(2), and 5.085(c)(2).. Examining this language, the Court found that the Texas Property Code's use of the term "rescind" was "a common name for the composite remedy of rescission and restitution" and that the Code's reference to rescission indicated a requirement that each party "restore property received from the other."

Accordingly, the Court found that the parties were entitled to mutual rescission and that Morton was entitled to an offset equal to the value the Nguyens received under the contract—in this case, the rental value attributable to occupation of the property.

Furthermore the Texas Supreme Court agreed with Morton that the Nguyen's were not entitled to attorney's fees and mental anguish damages. The court reasoned that because the court of appeals reversed the claim for liquidated damages under section 5.066 of the Texas Property Code and the Finance Code claims, the only causes of action that could have supported the court's award for attorney's fees and mental anguish, that the award for these two claims was improper.

Dissent:

Three justices joined in a dissenting opinion, criticizing the majority for improperly reading a restitution requirement into the Texas Property Code's utilization to the word "rescind." The dissenting justices reasoned that it was the Court's obligation to apply the statute as written, which allowed the buyers, unconditionally, "to receive a

full refund of all payments made by the seller." (emphasis in dissenting opinion).

McCalla v. Baker

Opinion Delivered August 23, 2013
12-0907, 2013 WL 4493899

Synopsis

Reversing the Tenth Court of Appeals (Waco), the Texas Supreme Court held that a settlement agreement containing an agreement to enter into a future contract was enforceable because the settlement agreement contained all the material terms of the future contract.

Factual Background and Trial Court Proceedings:

The McCallas entered into a lease agreement with the parties ("Baker) owning interest in 380 acres of land know as Baker's Campground. The lease agreement contained an option that allowed the McCallas to buy the land if Baker ever decided to sell the property. While the McCallas' lease with the Baker was ongoing, Baker leased the land to another party, the Davises. After finding out about the second lease to the Davises, the McCallas brought suit exercise their right to buy the land under their lease with Baker. After litigation and trial, but before a judgment was entered, the McCallas executed a settlement agreement with Baker resolving the parties' rights under the lease.

Pursuant to the settlement agreement, the parties agreed to release each other from any claims relating to the Davises' lease and the related lawsuit. The McCallas also agreed to purchase the 380 acres of land at issue in the litigation. However, the McCallas only became obligated under the settlement agreement to buy the land if the Davises' lease was subsequently found to become "null and void as a matter of law" in the pending litigation. Then, the McCallas would have 60 days to close on the purchase. The parties also agreed "to execute any documents that [were] reasonable and necessary to carry out the terms and provisions of the settlement agreement."

After the Davises' lease was declared by a court of law to be "unconscionable and unenforceable," the McCallas promptly sought to exercise their right to purchase the 380 acres of land pursuant to the settlement agreement. However, Baker's Campground declined to sell the property, instead bringing an action to void the settlement agreement. The trial court rendered partial summary judgment for the McCallas, finding that the settlement agreement was an enforceable contract. Baker appealed to the Tenth Court of Appeals (Waco).

Court of Appeals:

The court of appeals reversed and remanded to the trial court. The court of appeals found that because the settlement agreement's terms obligated the parties to enter into a future agreement to purchase the property, that the agreement was ambiguous and could potentially be interpreted as an "agreement to agree." Given the finding that the settlement agreement was ambiguous, the court of appeals held that the enforceability of the contract was a fact issue to be determined by the factfinder, and that a determination by summary judgment was therefore inappropriate. The McCallas sought review by the Texas Supreme Court.

Texas Supreme Court's Holding:

The Texas Supreme Court disagreed with the Tenth Court of Appeals regarding

whether the enforceability of the settlement agreement was an issue of fact.

The court opined that agreements to enter into future contracts are a question of law if all material terms of that future contract can be found in the agreement creating that future contract. *Citing Fort Worth Ind. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000). The court reasoned that "[a]fter all, the reason agreements to enter into future contracts are often unenforceable is that courts have no way to determine what terms would have been agreed to after negotiation" and that "[t]his concern is not present when the agreement to enter into a future contract already contains all the material terms of the future contract."

Examining the settlement agreement, the court noted that the agreement contained "a general release, a description of the real property to be sold, the timeline for closing the real property sale, the identities of the transferor and transferee of the real property, and the price of the property." Given that the settlement agreement conveyed all the material terms of the future contract to purchase the land, the Texas Supreme Court found that the future agreement was enforceable as a matter of law.

Nathan v. Whittington

Opinion Delivered August 30, 2013
12-0628, 2013 WL 4609233

Synopsis

Examining the trial court's dismissal of a suit between two business partners based upon section 24.010(a)(1) of the Texas Uniform Fraudulent Transfer Act (TUFTA), the Texas Supreme Court held that (1) section 24.010 of the TUFTA is a statute of repose and (2) section 16.064(a) of the Texas Civil Practice and Remedies Code only applies to suspend statutes of limitations, not statutes of repose.

Factual Background and Trial Court Proceedings:

Stephen Whittington (Whittington) filed suit in Nevada and eventually prevailed on his business claims against Evan Baergen (Baergen), his former business partner. To collect on damages, he subsequently filed a second lawsuit in Nevada against Baergen and Marc Nathan (Nathan), alleging that Baergen had fraudulently transferred assets to Nathan in violation of Nevada's Fraudulent Transfer Act. Whittington filed the second suit just under four years after the date he alleged the fraudulent transfer occurred. Six months after the second Nevada action was filed, the Nevada court held that it lacked personal jurisdiction over Nathan. Less than sixty days later, Whittington filed suit in Texas court, asserting claims against Nathan under the TUFTA.

After the suit was filed in the Texas Court, Nathan moved for summary judgment, arguing that section 24.010(a)(1) of the TUFTA extinguished Whittington's right to recover. The trial Court agreed and granted Nathan's Motion for Summary Judgment.

Court of Appeals:

The Fourteenth Court of Appeals (Houston) reversed the trial court's decision. The majority held that section 16.064(a) of the Texas Civil Practice and Remedies Code suspended the operation of section 24.010(a)(1) of the TUFTA and allowed Whittington to file his suit within 60 days after the Nevada Court dismissed the second Nevada suit for lack of jurisdiction.

Texas Supreme Court's Holding:

The Texas Supreme Court reversed the Fourteenth Court of Appeals (Houston).

The Texas Supreme Court first examined the question of whether section 24.010 of the TUFTA is a statute of limitations or a statute of repose. The statute provides:

> a cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless the action is brought ... within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant.

The court first observed that "while statutes of limitations operate to procedurally bar the enforcement of a right, a statute or repose takes away the right altogether, taking away the substantive right to be free of liability after a specified time."

Noting that the section was entitled "Extinguishment of Cause of Action," the court reasoned that the statute "does not just procedurally bar an untimely claim, it substantively 'extinguishes' the cause of action." The court also pointed out that the commissioner's comments relating to section 9 of the Uniform Fraudulent Transfer Act, the section from which the section 24.010 of the TUFTA was adopted, explain that the sections purpose "is to make clear that lapse of the statutory periods prescribed by the section bars the right and not merely the remedy."

The court also observed that the commissioners' comments describing the statute were almost identical to the definition of a statute of repose under Texas law. *Citing Methodist Healthcare Sys. Of San Antonio, Ltd. v. Rankin*, 307 S.W.3d 283, 287 (Tex. 2010) ("[W]hile statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time.")

Accordingly, the court held that section 24.010 of the TUFTA was a statute of repose.

Having resolved that section 24.010 of the TUFTA is a statute of repose, the court next turned to the question of whether section 16.064(a) (the suspension statute) of the Texas Civil Practice and Remedies Code applies to statutes of repose.

After noting that the language of section 16.064(a) explicitly provides that it only applies to "statute[s] of limitations," the court found that the suspension statute did not operate to extend the time to file an action under the TUFTA.

Based upon this reasoning, the Texas Supreme Court reversed the Judgment of the Fourteenth Court of Appeals and reinstated the trial court's judgment of dismissing Whittington's TUFTA claims.

Practice Pointer(s):

Be wary of the fact that an absolute four-year statute of repose applies to claims filed under the Texas Uniform Fraudulent Transfer Act. Once those four years have expired, the claim under the Texas Uniform Transfer Act is extinguished as a matter of law.

Dynegy, Inc. v. Yates

Opinion Delivered August 30, 2013.
11-0541, 2013 WL 4608711

Synopsis

The Texas Supreme Court found that a company's oral promise to pay an attorney's fees incurred in defending one of the company's officers in a criminal action did not satisfy the statute of frauds under section 26.01 of the Texas Business and Commerce Code. The Texas Supreme Court further held that the attorney seeking fees had waived its argument under the main purpose exception to the statute of frauds because the attorney had failed in his burden to secure finding supporting his contention that the doctrine was applicable.

Factual Background and Trial Court Proceedings:

James Olis, one of Dynegy Inc.'s (Dynegy's) officers, was indicted on multiple counts of securities fraud, mail and wire fraud, and conspiracy arising out of work he performed while working at Dynegy. Dynegy's board of directors passed a resolution authorizing the advancement of proceeds to pay for Mr. Olis' defense, provided that Mr. Olis acted in good faith, in line with Dynegy's best interests, and in compliance with applicable law.

Mr. Olis hired Terry Yates, a criminal defense attorney, to defend him in the federal criminal investigation and the civil investigation being conducted by the Securities and Exchange Commission. Mr. Olis told Yates and his associate that Dynegy would be paying for his attorney's fees. Yates' associate subsequently called an attorney in Dynegy's legal department, who orally confirmed Dynegy's agreement to pay Yates attorney's fees.

Mr. Olis signed a written fee agreement with Yates under which Mr. Olis agreed that he would be responsible for paying Yates' attorney's fees. However, the fee agreement made no mention of Dynegy's oral agreement to pay Mr. Olis' attorney's fees.

Yates proceeded to defend Mr. Olis through trial, and Mr. Olis was ultimately convicted of securities fraud, mail and wire fraud, and conspiracy. Although, Dynegy paid Yates' first two invoices for attorney's fees, totaling $15,000 and $105,176 respectively, Dynegy refused to pay Yates' third and final invoice for $448,556. Although Dynegy's board initially escrowed the amount to pay the Yates' third invoice pursuant to board's resolution, the board subsequently refused to release the escrowed funds after concluding that Mr. Olis did not meet the "good faith" standard required by the board's resolution.

Yates filed claims for breach of contract and fraudulent inducement against Dynegy to recover his attorney's fees, alleging that Dynegy orally promised it would pay Mr. Olis' attorney's fees through trial. After trial, the jury found for Yates on both claims. After the trial court rendered judgment on behalf of Yates on his claim for fraudulent inducement, Dynegy filed a motion for judgment notwithstanding the verdict on its affirmative defense of statute of frauds. The trial court denied the motion, and Dynegy appealed.

Court of Appeals:

The Fourth Court of Appeals (San Antonio) upheld the trial court's decision and held that the main purpose doctrine rendered the statute of frauds inapplicable under the circumstances. Dynegy appealed to the Texas Supreme Court.

Texas Supreme Court's Holding:

The Texas Supreme Court reversed the decision of the Fourth Court of Appeals, finding that the statute of frauds under section 26.01 of the Texas Business and Commerce Code rendered Dynegy's agreement to pay Yates' attorney's fees unenforceable.

The court reasoned that the appellate court had incorrectly applied the burden applicable to demonstrating the main purpose doctrine. Particularly, the Texas Supreme Court explained that the court of appeals had incorrectly required Dynegy to demonstrate that the main purpose doctrine was inapplicable in assessing whether the statute of frauds was applicable. The Texas Supreme Court further explained that the court of appeals should have required Yates to demonstrate that the main purpose doctrine, an exception to the statute of frauds, was applicable, after Dynegy had demonstrated the applicability of the statute of frauds.

The Texas Supreme Court explained that the party asserting the statute of frauds as an affirmative defense had the initial burden to demonstrate that the alleged promise fell within the statute of frauds. The court further explained that once the party met its burden to demonstrate the applicability of the statute of frauds, the burden then shifted to the party seeking to prevent the enforcement of the statute of frauds to prove that the main purpose doctrine was applicable.

The Texas Supreme Court then explained that Dynegy had met its burden to demonstrate that its oral promise to pay Yates fell within the statute of frauds because "a promise by one person to answer for the debt . . . of another person" falls within the statute of frauds.

The Texas Supreme Court then turned to the question of whether Yates had met his burden to demonstrate the applicability of the main purpose doctrine. The court noted that in order to be prove the applicability of the main purpose doctrine exception to the statute of frauds, three elements must be met:

> The main purpose doctrine required Yates to prove: (1) Dynegy intended to create primary responsibility in itself to pay the debt; (2) there was consideration for the promise; and (3) the consideration given for the promise was primarily for Dynegy's own use and benefit—that is, the benefit it received was Dynegy's main purpose for making the promise.

The Court then found that because Yates had failed to procure favorable findings relating to the elements required to establish the applicability of the main purpose doctrine, that Yates had waived the issue.

Based on the foregoing, the Texas Supreme Court held that the statute of frauds rendered Dynegy's oral agreement to pay Mr. Olis' attorney's fees unenforceable.

Texas Supreme Court (Pending)

Exxon Mobil Corp. v. William T. Drennen

Oral argument scheduled November 6, 2013
Case 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 Requested October 1, 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.

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

Oral argument occurred September 10, 2013
Case No. 12-0251

Commercial Issue(s) Considered:

1. Whether a party waived its right to seek dismissal of another parties' claims concerning professional engineering services based upon that other party's failure to file a certificate of merit with its petition pursuant to section 150.002 of the Texas Civil Practices and Remedies Code.

Jaster v. Comet II Const., Inc.

Oral argument heard October 9, 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.

Allstate Insurance Co. v. Spellings

Oral argument scheduled December 3, 2013
Case No. 12-0824

Commercial Issue(s) Considered:

1. Whether the doctrine of equitable subrogation allows an insurer to settle a third-party claim against its insured and then subrogate to the rights of that third-party to recover against other negligent parties.

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.

Man Engines & Components, Inc. v. Shows

Oral argument occurred October 8, 2013
Case No. 12-0490

Commercial Issue(s) Considered:

1. Whether a buyer of a yacht "as-is" from a non-manufacturer seller may sue the manufacturer of the yacht for breach of the implied warranty of merchantability that allegedly occurred at the time the goods left the manufacturer's possession.

State Courts of Appeals

Levitz v. Sutton, 404 S.W.3d 798 (Tex. App.—Dallas June 3, 2013)

A brother brought claims against his sister for tortious interference, fraud, and breach of fiduciary duty, in connection with his assertion that their sibling's father, upon his death, had left a disproportionate portion of his estate to the sister. The trial court ordered the brother and sister to mediation, and a settlement was ultimately reached. The settlement was memorialized in a mediated settlement agreement ("MSA").

Approximately four months after the mediation, the sister filed a motion to set aside the MSA, claiming that her fibromyalgia triggered cognitive problems on the day of the mediation which, coupled with sleep deprivation and her medications, resulted in a lack of capacity to enter into the settlement agreement. The court ordered the sister to a psychiatrist for a mental evaluation. The psychiatrist found that the sister had the mental capacity to enter into the MSA on the day of the settlement negotiations.

The brother then amended his petition to include a claim for breach of contract and filed a motion to enforce the MSA, which was tried to the bench along with the sister's motion to set aside the MSA. The court found that the sister had the capacity to agree to the MSA, denied the sister's motion to set aside the MSA, and granted the brother's motion seeking enforcement (specific performance) of the MSA.

After the court granted the motion for enforcement, the brother filed a motion requesting that the court sever and transfer his breach of contract claim to Bowie County in conformance with a clause in the MSA that recited the MSA was "performable in Bowie County." The trial court granted the request. The sister then filed a motion for reconsideration, which was denied. The sister appealed to the Fifth Court of Appeals in Dallas.

The Fifth Court of Appeals reversed the trial court's decision to sever and transfer the brother's breach of contract claim. The court of appeals reasoned that the breach of contract claim could not be severed from the sister's mental capacity defense because "[t]he capacity to agree to the MSA and the alleged breach of the MSA are so interwoven that they involve the same facts and issues."

The appellate court also found that the trial court had erred in deciding to enforce the MSA and granting relief for specific performance in a summary trial proceeding. The court noted that "the law does not recognize the existence of any special summary proceeding for the enforcement of a written agreement, even one negotiated in the context of mediation . . . . Thus, the party seeking enforcement of an agreement for which consent has been withdrawn must bring an action for breach of contract." The court further noted that "[t]he fact that trial court severed and transferred the breach of contract claim is further indication that there was no adjudication of breach." Based on this reasoning, the court of appeals found that the trial court erred in awarding specific performance of the MSA.

Accordingly, the Fifth Court of appeals (1) overturned the trial court's award for specific performance and (2) remanded the action back to the trial court to "determine whether the entire case should be transferred to Bowie County or, if the court determines that the case should not be transferred to

Bowie County, for a determination on the merits of the breach of contract claim."

Challenger Gaming Solutions, Inc. v. Earp, 402 S.W.3d 290 (Tex. App.—Dallas May 15, 2013)

In 2007, Karen Earp and her husband obtained a loan from Challenger Gaming Solutions, Inc. and The Accent Group Inc. (collectively, "Challenger"). Subsequently, the Earps divorced. Under the divorce decree, Karen Earp's husband agreed to assume all of the couple's debts, and Ms. Earp was awarded all of the community assets.

Around the time of the divorce, the Earps defaulted on the Challenger Loan. Challenger brought suit, alleging that the divorce decree, *i.e.* transfer of all community assets to the Ms. Earp, violated the Uniform Fraudulent Transfer Act ("UFTA"). Challenger subsequently nonsuited Ms. Earp's ex-husband, because of its inability to secure service, and sought recovery only against Ms. Earp.

During the course of the proceedings, Ms. Earp moved to designate her husband as a responsible third party under section 33.003 of the Texas Civil Practice and Remedies Code. Over Challenger's objection, the trial court granted the motion and submitted a proportionate responsibility question to the jury.

At trial, the jury found in favor of Challenger and awarded $62,000 in damages. However, the jury apportioned fifty percent of the responsibility for the damages to Ms. Earp's ex-husband, and the trial court rendered judgment against Ms. Earp in the amount of $31,000. Challenger appealed to the Fifth Court of Appeals (Dallas), contending that the trial court improperly allowed the apportionment of damages under Chapter 33's proportionate responsibility statute.

The Fifth Court of Appeals agreed with Challenger and modified the trial court's judgment to reflect judgment against Ms. Earp in the amount of $62,000. The court of appeals noted that "[a]lthough the proportionate responsibility statute by its terms applies to 'any cause of action based on tort,' it has been found not to apply to statutory tort claims where the statute contains its own separate and conflicting allocation scheme." Applying this principle, the Court reasoned that the UFTA "does not lend itself to a fault allocation scheme" because it "provides several different forms of equitable relief designed to follow and reach assets."

In line with this reasoning, the court of appeals concluded that the proportionate responsibility statute conflicts with the liability scheme in the UFTA and that, therefore, "the proportionate responsibility statute does not apply to a UFTA claim."

Torch Energy Advisors, Inc. v. Plains Exploration & Production Co., 2013 WL 3095014 (Tex. App.—Houston [1st Dist.], June 20, 2013).

Ogle Petroleum obtained 23 oil and gas leases from the federal government. As part of the requirement to obtain the leases, Ogle Petroleum made payments to the federal government known as "bonuses." In July of 1994, Ogle Petroleum conveyed its full interests in the leases to Torch Energy Advisors Incorporated ("Torch Energy"). In 1994, Torch Energy conveyed a 50% interest in the Ogle Petroleum leases to Plains Exploration & Production Company ("Plains Exploration"). Subsequently, in

1996, Torch Energy conveyed the remaining 50% interest in the Ogle Petroleum leases to Plains Exploration. The contract affecting the 1996 conveyance, however, excluded from the conveyance certain rights and claims.

In separate litigation, it was found that the federal government had violated the Ogle Petroleum leases, and Plains Exploration was awarded over $83 million in restitution for the bonuses Ogle Exploration paid to procure the leases. After the award, Torch Energy informed Plains Exploration that it believed it was entitled to approximately half of the $83 million award under the terms of the 1996 contract conveying the interest in the leases from Torch Energy to Plains Exploration.

Plains Exploration rejected Torch Energy's position, and Torch Energy filed suit against Plains Exploration. In the lawsuit, Torch Energy asserted a number of causes of action, including claims for breach of contract and money had and received. Plains Resources answered and asserted several affirmative defenses.

Ultimately, the parties filed cross-motions for summary judgment. Plains Exploration argued that the existence of the contract prevented Torch Energy from recovering under any action other than the breach of contract, that the breach of contract action failed as a matter of law, and that the breach of contract action was barred by limitations. Torch Energy argued that it was entitled to summary judgment on its breach of contract claim and its other claims and that there was no evidence to support Plains Exploration's affirmative defenses.

The trial court granted Torch Energy's motion for summary judgment on Plains Explorations affirmative defenses of statute of limitations, laches, and unclean hands, but denied the remainder of Torch Energy's motion. The trial court also concluded that the economic-loss rule barred Torch energy's non-breach-of-contract claims and ruled against Torch Energy on its breach of contract claim, finding that the 1996 contract did not allow Torch Energy to recover any of the restitution awards Plains Exploration recovered from the government. Torch Energy appealed to the First Court of Appeals.

The First Court of Appeals affirmed the trial Court's judgment, finding that Torch Energy could not recover for breach of contract, but reversed the trial court's opinion concerning the economic loss rule's applicability to Torch Energy's (non-contractual) money had and received claim.

In support of its finding that Torch Energy could not recover under its breach of contract claim, the trial court reasoned no recovery could be had under either Torch Energy or Plains Exploration's theories. The court reasoned that under Plains Exploration's theory, the 1996 contract transferred the right to Plains Exploration to recover the bonuses from the government, which, if true, would prevent Torch Energy from recovering under its breach of contract claim. Congruently, the court reasoned if it were to entertain Torch Energy's theory, the interest to recover from the federal government is *excluded* from the contract. Thus, there could be no action for breach of contract because the right to recover the bonuses would not be governed by the contract.

Following this reasoning, the court of appeals likewise found that if the contract did not govern the right to recover the bonuses, then the economic loss rule could not apply. As such, the court of appeals

reasoned that the trial court erred in granting summary judgment precluding Torch's recovery under its money had and received claim.

Finally, the court of appeals turned to the question of whether the 1996 contract unambiguously transferred the rights to recover the government bonuses from Torch Energy to Plains Exploration. After examining the various provisions in the contract, the court of appeals determined that several provisions in the contract were patently ambiguous, thus requiring a determination by a factfinder as to those provisions' meanings.

Accordingly, the court of appeals (1) affirmed the trial court with respect to its ruling regarding Torch Energy's breach of contract claim, (2) reversed the trial court's judgment precluding recovery under Torch Energy's money had an received claim pursuant to the economic loss rule, and (3) remanded to the trial court for further proceedings.

General Capital Group Beteligungsberatung GMBH v. AT&T, 2013 WL 3929972 (Tex. App.–Dallas, July 31, 2013)

Synopsis: **Fraud in Contract**

In 2009, General Capital proposed to broker a merger between AT&T and T-Mobile, for which General Capital would receive a contingent, success fee. AT&T did not proceed at that time, but renewed efforts in 2011, only to abandon the deal due to Department of Justice opposition. General Capital sued AT&T alleging an oral contract. The trial court granted AT&T a summary judgment and General capital appealed contending it had viable fraud and quantum meruit claims.

With respect to the fraud claim, the court, after setting forth the 6 elements of fraud, noted that: "[R]ecovery for fraud requires proof that the defendant's alleged false representation caused the plaintiff injury." As the AT&T abandoned the deal, General Capital had no "success" from which to claim its fee. So, even if AT&T made misrepresentation at the inception of the deal or in refusing to acknowledge the existence of a contract, these misrepresentations did not cause General Capital's injury. The court rejected General Capital's argument that the harm should be measured at the time of the fraud, not years later when the deal failed. In doing so, the court distinguished General Capital's cited authority of *Carlton Energy Group v. Phillips*, 369 S.W.3d 433, 454 (Tex. App.–Houston [1st Dist.] 2012, pet. granted) in part because it was a tortuous interference case. *Id.* at p. 2.

On the quantum meruit claim, the court explained that "An essential element of any claim for recovery in quantum meruit is that the plaintiff must expect to be compensated for the services rendered. (Citations omitted.) The defendant must have the same expectation." *Id.* at p. 4. Quoting General Capital's summary judgment evidence, an affidavit, the court found that General Capital acknowledged that it expected payment only if the deal were successful.

Practice Pointer: Do not ignore your opponent's (or, for that matter, your own) pleadings. Mine them for admissions. In affirming the summary judgment on both counts, the court cited AT&T's arguments with apparent approval that General Capital's own pleadings defeated each of its claims.

Westergren v. National Property Holdings, L.P., 2013 WL 4857689 (Tex. App.–Houston [14 Dist.], June 20, 2013, pet. filed)

Synopsis: **Principal, Release of Claims, Fraud, Adequate Consideration, Merger Clause, Partial Performance Exception to Statute of Frauds, Benefit of Bargain Damages still available with Partial Performance, Segregating Attorneys' Fees, One Satisfaction Rule, Differentiating Releases from Indemnity**

This case (a split decision) involved a complicated land deal with several purchase options, an underlying litigation between Westergren and the original landowner and two other purchase option holders, a mediated settlement with a Mediation Settlement Agreement ("MSA") paid by NPH/the Plank Brothers (defendants in this case) but not entered by Russell Plank individually, an eventual oral partnership agreement between Westergren and NPH/Planks (as the written agreement was never signed) and a partial payment on the oral partnership agreement by NPH/Planks in return for a release from Westergren, and a jury's finding that a NPH/Planks procured the Westergren's release of claims for further payment by fraud was supported by substantial evidence.

Westergren testified that the NPH/Planks did not disclose that the document they asked Westergren to sign was a release, that the NPH/Planks knew the Westergren was ignorant of that fact and did not have an equal opportunity to discover it because he did not have his reading glasses, that the NPH/Planks told Westergren that the release was only a receipt, that NPH/Planks had their attorney draft the release, but that NPH/Planks did not present the release to Westergren's attorney.

Westergren obtained a favorable verdict on his breach of contract and fraud claims while the jury found against NPH/Planks on its breach of contract counterclaim. However, the trial court granted NPH/Planks JNOV (raising defenses of agent for a disclosed principal, release, lack of consideration, original contracted was merged and superseded, statute of frauds, waiver, prior material breach, and quasi-estoppel) without stating a reason taking away Westergren's findings, denied NPH/Planks' request for entry of judgment on the counterclaim, and granted NPH/Planks their costs. Both sides appealed.

On the merits, the court ruled:

(1) the agency defense did not preclude consultant's individual liability as Russell Plank functioned in multiple capacities, including for himself (stating: "[a]n agent is not precluded from binding himself on a contract where he has pledged his own personal responsibility in addition to that of his principal. *See Nagle v. Duncan*, 570 S.W.2d 116, 117 (Tex. Civ. App.–Houston [1st Dist.] 1978, writ dism'd)." See *Westergren* at p. 8);

(2) the release did not cover claims against Russell Plank as he was not a party to it nor was he referenced/described in it;

(3) the evidence supported finding that consultant procured release by fraud (citing authorities and saying: "*Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990) ('Under Texas law, a release is a contract and is subject to avoidance, on grounds such as fraud or mistake, just like any other contract.'); *see also Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex.1986) (explaining that silence is

equivalent to false representation where circumstances impose duty to speak and one deliberately remains silent); *Solutioneers Consulting, Ltd. v. Gulf Greyhound Partners, Ltd.*, 237 S.W.3d 379, 385 (Tex. App.–Houston [14th Dist.] 2007, no pet.) ('Fraud by omission is a subcategory of fraud because an omission or non-disclosure may be as misleading as a positive misrepresentation of fact when a party has a duty to disclose.')" See *Westergren* at p. 11);

(4) the evidence supported a finding that the contract was supported by adequate consideration (explaining "Generally, a contract must be supported by consideration to be enforceable. *McLernon v. Dynegy, Inc.*, 347 S.W.3d 315, 335 (Tex. App.–Houston [14th Dist.] 2011, no pet.) (citing *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 659 (Tex. 2006)). Consideration consists of either a benefit to the promisor or a detriment to the promisee. *See Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 496 (Tex.1991). It is a present exchange bargained for in return for a promise. *Id.* It may consist of some right, interest, or profit, or benefit that accrues to one party, or, alternatively, of some forbearance, loss or responsibility that is undertaken or incurred by the other party. *Angelou v. African Overseas Union*, 33 S.W.3d 269, 280 (Tex. App.–Houston [14th Dist.] 2000, no pet.)." See *Westergren* at p. 13);

(5) Russell Plank's oral agreement did not merge into and, thereby, become superseded by the MSA as Russell Plank was not a party to the MSA (saying: "A 'merger clause' is a contractual provision mandating that the written terms of the contract may not be varied by prior agreements because all such agreements have been merged into the new document. *IKON Office Solutions, Inc. v. Eifert*, 125 S.W.3d 113, 125 & n. 6 (Tex. App.–Houston [14th Dist.] 2003, pet. denied) (concluding statements that document "constitutes the entire agreement concerning the subject matter hereof' and 'supercedes prior ... agreements' were merger clauses). 'A merger occurs when the same parties to an earlier agreement later enter into a written integrated agreement covering the same subject matter.' *Superior Laminate & Supply, Inc. v. Formica Corp.*, 93 S.W.3d 445, 448–49 (Tex. App.–Houston [14th Dist.] 2002, pet. denied) (citing *Fish v. Tandy Corp.*, 948 S.W.2d 886, 898 (Tex. App.–Fort Worth 1997, writ denied)) See *Westergren* at p. 14);

(6) the oral agreement was within partial-performance exception to statute of frauds as Russell Plank's actions were "unequivocally referable" to the oral agreement (concluding: "Partial performance is an exception to the statute of frauds. *Exxon*, 82 S.W.3d at 439. Under the partial-performance exception, an agreement that does not satisfy the statute of frauds but that has been partially performed may be enforced if denying enforcement would itself amount to a virtual fraud. *Id.* … However, the acts constituting partial performance must be 'unequivocally referable to the agreement and corroborative of the fact that a contract actually was made.' *Id.* 'Actions relied on to establish the partial-performance exception to the statute of frauds must be such as could have been done with no other design than to fulfill the particular agreement sought to be enforced; otherwise, they do not tend to prove the existence of the parol agreement relied on by the plaintiff.' *Bookout v. Bookout*, 165 S.W.3d 904, 907–08 (Tex. App.–Texarkana 2005, no pet.) (citing *Exxon*, 82 S.W.3d at 439). The party claiming a partial-performance exception to the statute of frauds generally must secure a jury finding.

Id. at 908 (citing *Barbouti v. Munden*, 866 S.W.2d 288, 295 (Tex. App.–Houston [14th Dist.] 1993, writ denied))." See *Westergren* at p. 15);

(7) the partial-performance exception to statute of frauds did not preclude benefit-of-the-bargain damages as not only did Russell Plank partially perform, but Westergren fully performed (holding: "When there is full performance by one party and partial performance by the other party, the contract no longer falls under the statute of frauds and may be enforced in law (and not simply as a matter of equity). Thus, Westergren can obtain his benefit-of-the-bargain damages. *See Davis v. Insurtek, Inc.*, No. 05–09–01029–CV, 2010 WL 5395668, at *4 n. 3 (Tex. App.–Dallas Dec. 30, 2010, no pet.) (mem. op.) (noting fundamental difference between principles of full and part performance, and that full performance by one party takes case out of statute of frauds entirely). When one party fully performs a contract, the statute-of-frauds defense is unavailable to the second party if he knowingly accepts the benefits and partially performs. *Sheffield v. Gibson*, 14–06–00483–CV, 2008 WL 190049, at *2 (Tex. App.–Houston [14th Dist.] Jan. 22, 2008, no pet.) (mem. op); *Parks v. Landfill Mktg. Consultants, Inc.*, No. 14–02–01243–CV, 2004 WL 1351545, at *5 (Tex. App.–Houston [14th Dist.] June 17, 2004, pet. denied) (mem. op.); *see also Machann v. Machann*, 269 S.W.2d 826, 828 (Tex. App.–Waco 1954, writ ref'd n.r.e.) ('Where a contract is executed on one side and nothing remains but the payment of the consideration, this may be recovered notwithstanding the Statute of Frauds.'). See *Westergren* at p. 18);

(8) Westergren failed to show that segregation of attorney fees attributable to tort and contract claims was not required and, therefore, remand was required for a new trial on Westergren's attorneys' fees (succinctly providing this dissertation: "Generally, a party seeking attorney's fees must segregate fees incurred in connection with a claim that allows their recovery from fees incurred in connection with claims for which no such recovery is allowed. *CA Partners v. Spears*, 274 S.W.3d 51, 81 (Tex. App.–Houston [14th Dist.] 2008, pet. denied). Texas courts recognize an exception to this general rule. *Id.* (citing *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 311 (Tex. 2006)). When discrete legal services advance both recoverable and unrecoverable claims, attorneys are not required to segregate fees to recover the total amount covering all claims. *Id.* (citing *Chapa*, 212 S.W.3d at 313). In this situation, the claims are said to be "intertwined," and the mere fact that attorney's fees are incurred in advancing both recoverable and unrecoverable claims does not render those fees unrecoverable. *Id.* (citing *Chapa*, 212 S.W.3d at 313–14). But if any attorney's fees relate solely to a claim for which fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. *Id.* at 82 (citing *Chapa*, 212 S.W.3d at 313). '[T]he evidence of the amount of recoverable attorney's fees is sufficiently segregated if, for example, the attorney testifies that a given percentage of the drafting time would have been necessary even if the claim for which attorney's fees are not recoverable had not been asserted.' *Id.* (citation omitted). The party seeking to recover attorney's fees carries the burden of demonstrating that fee segregation is not required. *Id.*" See *Westergren* at p. 20. Further, the court noted: "[T]he Texas Supreme Court expressly has held "[i]ntertwined *facts* do not make tort fees recoverable." *Id.* at 83 (quoting *Chapa*, 212 S.W.3d at 313). Instead, the focus is whether the legal work performed pertains solely to

claims for which attorney's fees are unrecoverable. *Id.* (citing *7979 Airport Garage, L.L.C. v. Dollar Rent A Car Sys., Inc.*, 245 S.W.3d 488, 509 (Tex. App.–Houston [14th Dist.] 2007, pet. denied)). This does not mean examining the work product as a whole, but rather parsing it into component tasks. *Id.* (citing *7979 Airport Garage*, 245 S.W.3d at 509)." *See Westergren* at p. 20.);

(9) the One Satisfaction Rule court need not consider Westergren's appellate issues concerning his tort claims (noting that all of Westergren's damages were the same and reasoning: "Under the one-satisfaction rule, a claimant is entitled to only one recovery for any damages suffered. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex.2000) (citing *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 7 (Tex.1991)). The rule applies when different parties commit the same act or when different acts cause the same injury. *Id.* ' " There can be but one recovery for one injury, and the fact that ... there may be more than one theory of liability[ ] does not modify this rule." ' *Chapa*, 212 S.W.3d at 303 (quoting *Stewart Title Guar. Co.*, 822 S.W.2d at 8)). See *Westergren* at p. 21.); and

(10) neither the MSA nor the Release contained a covenant not to sue or indemnity language and, therefore, Westergen did not breach either agreement by bringing suit (the court differentiating said: "A release of claims operates to discharge the released parties from these claims and to extinguish these claims against the released parties as effectively as would a prior judgment between the parties. *See El Paso Natural Gas Co. v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309, 314 n. 15 (Tex.1999); *Dresser Indus. v. Page Petroleum*, 853 S.W.2d 505, 508 (Tex.1993); *Lehmann v. Har–Con Corp.*, 76 S.W.3d 555, 565 (Tex. App.–Houston [14th Dist.] 2002, no pet.). Therefore, a release of a claim is an absolute bar to any right of action by the releasing party on the claim, and a release is an affirmative defense in a lawsuit in which the releasing party asserts a released claim. *See Dresser Indus.*, 853 S.W.2d at 508; *Lehmann*, 76 S.W.3d at 565. On the other hand, an indemnity is a promise to safeguard or hold harmless the indemnitee against either existing or future liability. *See Dresser Indus.*, 853 S.W.2d at 508; *Lehmann*, 76 S.W.3d at 565. Unlike a release, which discharges a released claim, an indemnity creates a potential cause of action in the indemnitee against the indemnitor. *See Dresser Indus.*, 853 S.W.2d at 508; *Lehmann*, 76 S.W.3d at 565." See *Westergren* at p. 21.).

In a heavily annotated dissent, Justice Frost takes issue with every one of the majority's rulings and argues that the majority opinion is in conflict with Texas Supreme Court and fellow court of appeals decisions.

Practice Pointer No. 1 Be sure to get all of your grounds for JNOV into your motion. If you raise the point for the first time at the hearing ask for a continuance, seek leave to amend your motion, and re-set the hearing. Alternatively, if you are relying on your argument at the hearing (which may violate Rule 301 which appears to contemplate a written motion) be sure that the hearing is on the record, transcribed, and made part of the appellate record. Here, the court of appeals refused to consider NPH/Planks argument that partial performance is an equitable doctrine under which a party may recover only reliance damages for breach of contract and, conversely, benefit of the bargain damages are not available. The court of appeals said that NPH/Planks raised this defense for the first time on appeal.

Practice Pointer No.2 Segregate your attorneys' fees and then present some testimony as to some amount that is for claims for which fees are not recoverable. "Parse" through your bill and find "component tasks" that are solely attributable to the non-fee recoverable claim and remove them. Then, testify that you removed them from your request for fees.

Bob Montgomery Chevrolet, Inc. v. Dent Zone Companies, 2013 WL 4813508 (Tex. App.–Dallas 2013)

Synopsis: **Internet document was not incorporated by reference in application for dealership to be certified repair center (and, therefore, no forum selection clause to give Texas courts jurisdiction)**

Bob Montgomery, a car dealership in Kentucky with insufficient minimum contacts in Texas, appealed the denial of its special appearance. The principal issue was whether a written contract could incorporate by reference additional terms and conditions posted on Dent Zone's website. One of terms at issue was a forum selection clause.

The court described the one page application and the two page Internet document as follows:

> The application also stated, "Additional benefits, qualifications and details of the PDR LINX Service Program are available for your review at our website: http: // www.linxmanager.com/pdf/CRCTer msConditions.pdf." The website consisted of a two-page document (the internet document) listing terms and conditions for the PDR Linx Service Program agreement, including what Dent Zone asserted was a minimum six-month contractual term, a choice-of-law provision making Texas law applicable to the agreement, and a forum-selection clause stating that any suit between the parties would be heard in Dallas County, Texas.

Bob Montgomery at p. 1. (Substantial portions of the application and Internet document are quoted in Footnotes No. 1 and 2 of the opinion.)

After recognizing that signed documents may adopt unsigned documents by reference, which then become part of the contract, the court looked specifically at the language necessary to adopt. First, the court noted:

> The language used to refer to the incorporated document is not important as long as the signed document "plainly refers" to the incorporated document. *Id.; In re C & H News Co.*, 133 S.W.3d 642, 645 (Tex. App.–Corpus Christi 2003, orig. proceeding).

Bob Montgomery at p. 1. That said, apparently not just any offhand reference will do. The court continued:

> Plainly referring to a document requires more than merely mentioning the document. [Citation omitted.] The language in the signed document must show the parties intended for the other document to become part of the agreement. [Citation omitted.] ("[I]n order to uphold the validity of terms incorporated by reference, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms")); [Citation omitted.] ("For an incorporation by

> reference to be effective, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms.").

Id. The further court explained: "[T]he requirement for such a showing is supported by the general principle of contract law that reference to a document for a particular purpose incorporates that document only for the specified purpose." *Id.* at p. 6.

The court concluded by finding that:

> The language, "Additional benefits, qualifications and details of the PDR LINX Service program are available for your review at our website: http://www.linxmanager.com/pdf/CRCTermsConditions.pdf" does not state the internet document is incorporated by reference into the parties' agreement, does not plainly refer to additional terms and conditions in the internet document as becoming part of the parties' agreement, and does not otherwise suggest that the parties intended for the internet document to become part of their agreement. Instead, this language indicates that the internet document contained informative material only, not binding terms and conditions intended to be part of the parties' contract.

The court further found that the doctrine of ratification, did not apply to this case, explaining:

> The doctrine of ratification is not applicable in this appeal. Montgomery does not dispute on appeal that the parties had a legally binding contract or argue that any contract was voidable. *See Thomson Oil Royalty*, 351 S.W.3d at 165. Instead, the issue is whether the internet document was part of the contract. As discussed above, the internet document was not incorporated by reference. We conclude the doctrine of ratification does not apply. *See Barrand*, 214 S.W.3d at 146.

Bob Montgomery at p. 12. For similar reasons, the court found that estoppel did not apply either. *Id* at p. 13.

Practice Pointers To incorporate documents by reference to a contract, a drafter should specifically state that particular documents are "incorporated herein by reference and made a part of this agreement."

Mathis v. DCR Mortgage III Sub I L.L.C., 389 S.W. 3d 494 (Tex. App.–El Paso 2012, no pet.)

Synopsis: **Conflict between simultaneously executed note and deed of trust of whether notice of acceleration was waived created fact issue.**

Mathis owned a laser printing business in Austin and, in 2000, bought a 20,000 square foot building to accommodate it. The purchase was secured through an SBA program, which required a private first mortgage for 50% and an SBA affiliate second mortgage for 40%.

The first mortgage was initially held by Norwest, which merged into Wells Fargo, which then sold the note to DCR. The note had an acceleration clause and a waiver of notice clause. However, the deed of trust, executed the same day, required notice and a chance to cure.

By 2003, Mathis' business was having financial trouble, and Mathis and began paying the loans late. By 2007, once DCR had acquired the note, Mathis's payments were sporadic and, when paid, months behind. Until 2009, all late payments were made and accepted by Norwest, Wells Fargo, and then DCR. There was a factual dispute over whether notice was given in 2007. (DCR claimed to have sent notice in 2007, but both Mathis and, later in another exchange, his attorney denied that their copies of the letters attached the referenced documents.) DCR demanded a forbearance agreement several times during 2007 and 2008, but none was entered. Mathis claims to have first received notice of DCR's intent to foreclose from DCR's correspondence forwarded to Mathis by the secondary lienholder.

The trial court, after a bench trial, rendered judgment, determining that a promissory note had been accelerated and that the holder was entitled to foreclose the deed of trust lien.

On appeal, Mathis conceded that the notes waiver provision was clear and unequivocal as required by law; however, if the note and the deed are read as a single instrument, no such clear and unequivocal statement exists and the waiver is ineffective. The court of appeals agreed.

The court of appeals confirmed that the maker of a note may waive notice of acceleration:

> It is clear that the holder of a note must ordinarily give notice to the maker of the holder's intent to accelerate the time for payment as well as notice of acceleration. *Shumway*, 801 S.W.2d at 892; *Ogden v. Gibraltar Savs. Ass'n,* 640 S.W.2d 232, 233–34 (Tex. 1982); *Parker v. Frost National Bank of San Antonio*, 852 S.W.2d 741, 744 (Tex. App.–Austin 1993, writ dism'd by agr.). It is also well settled that the maker may waive his right to notice of intent to accelerate and notice of acceleration. *Shumway*, 801 S.W.2d at 893; *Phillips v. Allums*, 882 S.W.2d 71, 73–74 (Tex. App.–Houston [14th Dist.] 1994, writ denied). Such waivers are effective if they are contained in *either* a note or a deed of trust. *Parker*, 852 S.W.2d at 744; *see also Mercer*, 715 S.W.2d at 699; *Chapa v. Herbster*, 653 S.W.2d 594, 601 (Tex. App.–Tyler 1983, no writ), *overruled on other grounds by Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890 (Tex.1991). The reasoning behind this rule is that to require that every instrument executed in conjunction with a promissory note contain the necessary language would be "unnecessarily duplicative." *See Dolci v. Askew*, No. 04–95–00867–CV, 1997 WL 428560, at *2 (Tex. App.–San Antonio, July 30, 1997)(not designated for publication), *citing Parker*, 852 S.W.2d at 744.
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> Regardless of whether the waiver appears in the note or the deed of trust, the waiver must be "clear and unequivocal." *See Dolci*, 1997 WL 428560, at *2, *citing Shumway*, 801 S.W.2d at 893. A waiver is clear and unequivocal if it states specifically and separately the rights surrendered. *Shumway*, 801 S.W.2d at 893.

Mathis, 389 S.W. 3d at 505. Mathis relied heavily on the *Dolci* opinion, which had an almost identical provision in its deed of

trust, and, as a result, the San Antonio Court of Appeals, reading the two documents as a single instrument, could not conclude that the otherwise clear and unequivocal language of the note was free from ambiguity. *Id.* at 506-507. Beginning with a quote from *Dolci*, the *Mathis* court explained:

> The court then reiterated the general rule that, "[i]f a reasonable doubt exists as to the meaning of terms used in an acceleration clause, preference should be given to that construction which will avoid forfeiture and prevent acceleration of maturity." *Id.* (internal quotations omitted), *quoting Prunell v. Follett*, 555 S.W.2d 761, 764 (Tex. App.–Houston [14th Dist.] 1977, no writ). Thus, the waiver was ineffective because it was not clear and unequivocal. *Id.*
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> Here, the note and the deed of trust must be construed together because they were executed by the same parties on the same day, they pertain to the same real property, each document references the other, and the deed of trust is identified as the security for the note. *Adams v. First National Bank of Bells/Savoy*, 154 S.W.3d 859, 868 (Tex. App.–Dallas 2005, no pet.), *citing The Cadle Co. v. Butler*, 951 S.W.2d 901, 909 (Tex. App.–Corpus Christi 1997, no pet.). The rules of interpretation that apply to contracts also apply to notes and deeds of trust. *Starcrest Trust v. Berry*, 926 S.W.2d 343, 352 (Tex. App.–Austin 1996, no writ); *see also Sonny Arnold, Inc. v. Sentry Savings Assoc.*, 633 S.W.2d 811, 815 (Tex.1982)(a mortgage is governed by the same rules of interpretation that apply to contracts); *Edlund v. Bounds*, 842 S.W.2d 719, 726 (Tex. App.–Dallas 1992, writ denied)("It is well established in Texas that the rules of construction governing contracts are applicable to notes, and a note must be constructed as a whole.").
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> . . .
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> Under the Supreme Court's holding in *Shumway*, the waiver language in the note would be considered a "clear and unequivocal" waiver of both notice of intent to accelerate and notice of acceleration. If the deed of trust were silent on the issue, the waiver would be valid and enforceable. But the deed of trust is not silent. Acceleration is not favored in the law. *Mastin v. Mastin*, 70 S.W.3d 148, 154 (Tex. App.–San Antonio 2001, no pet.); *see also Burns v. Stanton*, 286 S.W.3d 657, 661 (Tex. App.–Texarkana 2009, pet. denied)(noting that "[B]ecause acceleration of a debt is viewed as a harsh remedy, ... any such clause will be strictly construed"). In fact, under Texas law, we apply strict scrutiny to acceleration provisions, and if any reasonable doubt exists as to the parties' intent, we resolve such doubt against acceleration.

Accordingly, the *Mathis* court reversed and remanded (for final computations and disbursement) finding that the deed of trust creates a reasonable doubt as to whether the parties clearly and unequivocally intended to waive notice of default and time to cure, which amounts to notice of intent to accelerate. As DCR did not give adequate notice of intent to accelerate, the attempted acceleration was ineffective. The trial court

was to render judgment according to the appellate court's rulings.

Practice Pointer Double check your paperwork. Here, if DCR could have shown it sent a valid notice of intent to accelerate, Mathis would not have been successful. Likewise, if the deed had either been silent on notice and cure or if it had included a waiver of notice as well, DCR could have prevailed. If in doubt, it is probably safer to issue a notice.

Federal Courts

Mailing and Shipping Systems, Inc. v. Neopost USA, Inc., 2013 WL 1314392 (W.D. Tex. 2013)

Synopsis: **Under Texas law, appointment letter from supplier to dealer was written "agreement" within meaning of dealer policy manual despite a lack of signature by the plaintiff. Additionally, the duty of good faith and fair dealing did not apply to the contract.**

For 24 years, a "dealership agreement" governed business relations between M&S and Neopost and M&S authorized M&S to sell, install, and maintain Neopost's postage meters and mailing machines within a designated territory in Texas and New Mexico. The parties did not dispute the facts, only the application of law. Specifically, the parties disputed the meaning and effect of the dealership agreement's language relating to the length of the pre-termination period of notice required and the alleged "exclusivity" of M&S's former territory. They also disagreed as to the applicability and effect of the duty of good faith and fair dealing under Texas law.

> *"[T]*he dealership agreement were never memorialized in a single unified document, but rather arose through a course of dealing and a variety of documents, correspondence, and 'dealer policy manuals' that changed hands between the parties regularly during their long business relationship."
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> *Mailing and Shipping* at *1. The various documents conflicted over the amount of notice required to terminate and over the exclusivity of territories (requiring Neopost to stop the encroachment by other dealers). Neopost sought summary judgment on the two breach of contract and the breach of the duty of good faith and fair dealing claims. The court found no breach of contract and granted summary judgment on these two counts.

Under Texas law, the appointment letter from a supplier to a dealer was a written "agreement" within the meaning of the dealer policy manual's provision that allowed the parties to agree to a shorter time frame as an exception (i.e. "except as otherwise provided in a written agreement with the Dealer") to the manual's 90-day notice requirement for the supplier's termination of the dealership. Thus, the letter's 30-day termination notice requirement applied. Specifically, the court explained:

> The term, "agreement," as used in the 2011 Dealer Policy Manual's exception to the ninety-day notice period, does have a "definite or certain legal meaning." *See Kelley–Coppedge, Inc.*, 980 S.W.2d at 464. As explained by the Texas Supreme Court, "an 'agreement' refers to a

'manifestation of mutual assent on the part of two or more persons.' " *Martin v. Martin*, 326 S.W.3d 741, 746 (Tex.2010) (quoting the Restatement (Second) of Contracts § 3 (1981)); *see also Chen v. Highland Capital Mgmt., L.P.*, No. 3:10–CV–1039, 2012 WL 5935602, at *2 (N.D. Tex. Nov. 27, 2012); *Lopez v. Kempthorne*, No. H–07–1534, 2010 WL 4639046, at *4 (S.D. Tex. Nov. 5, 2010).

Because the Appointment Letter issued in 1988 did constitute a "manifestation of mutual assent," it was therefore an "agreement." *See Martin*, 326 S.W.3d at 746. Defendant's predecessor issued the Appointment Letter in order "to confirm" that the parties' "mutually beneficial relationship" had commenced. *See* Appointment Letter. Defendant's predecessor demonstrated its own assent through the regional manager's signature, and acknowledged Plaintiff's assent with the following language: "We are pleased that your company will be representing us and we appreciate your confidence in our products." *See id.* This letter therefore constitutes a written manifestation of mutual assent under Texas law, even though it lacks Plaintiff's signature. *See Mid–Continent Cas. Co. v. Global Enercom Mgmt., Inc.*, 323 S.W.3d 151, 157 (Tex.2010) (citing *Simmons & Simmons Constr. Co. v. Rea*, 155 Tex. 353, 286 S.W.2d 415, 418 (1955)); *see also In re Bunzl USA, Inc.*, 155 S.W.3d 202, 210 (Tex.App.2004) ("[A] proper signature is by no means the only way a party can manifest assent to a contract.") (internal citations omitted); *ABB Kraftwerke AG v. Brownsville Barge & Crane*, 115 S.W.3d 287, 293 (Tex.App.2003) ("[S]ignatures are not a required factor in the making of a valid contract.").

> … Plaintiff's assent to the Appointment Letter's terms is confirmed by Plaintiff's own subsequent "actions and conduct"[3] over the life of the dealership agreement. *See R.R. Mgmt. Co. v. CFS La. Midstream Co.*, 428 F.3d 214, 222 (5th Cir.2005); *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609 (Tex.1972); *KW Constr. v. Stephens & Sons Concrete Contractors, Inc.*, 165 S.W.3d 874, 885 (Tex.App.2005). Indeed, Plaintiff itself emphasizes this proposition in seeking to invoke the benefits of the dealership agreement.
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> *Mailing and Shipping* at *6-7. The court found no language in the contract obligating Neopost to prevent its other dealers from encroaching on M&S's territory.

Finally, the court found no grounds for subjecting Neopost to a duty of good faith and fair dealing under the contract reciting standard good faith law:

> In Texas, "[a] common-law duty of good faith and fair dealing does not exist in all contractual relationships." *See Subaru of Am. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 225 (Tex.2002) (citing *Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 418 (Tex.1995)). In particular, the Texas Supreme Court has explicitly "declined to

extend this common-law duty to all franchise agreements ....” *Id.* (citing *Crim Truck & Tractor Co. v. Navistar Int’l Transp. Corp.,* 823 S.W.2d 591, 595–96 (Tex.1992)). However, the duty of good faith and fair dealing imposed by statute under § 1.304 of the Texas Business and Commerce Code may apply to a “distributorship agreement” where the sale of goods is “the dominant factor or essence” in such a contract. *See Cont’l Casing Corp. v. Siderca Corp.,* 38 S.W.3d 782, 787 (Tex.App.2001); *see also Graybar Electr. Co., Inc. v. LEM & Assocs., L.L.C.,* 252 S.W.3d 536, 542 (Tex.App.2008); *Tarrant Cnty. Hosp. Dist. v. GE Auto. Servs., Inc.,* 156 S.W.3d 885, 893 (Tex.App.2005).

Even assuming without deciding, however, that the parties’ dealership agreement is subject to the duty of good faith and fair dealing under Texas law, this Court finds that Plaintiff has asserted no grounds for a violation of this duty. The Texas Supreme Court has held that “[i] n the absence of a specific duty or obligation [in the contract] to which the good-faith standard could be tied, [the duty of good faith] will not support [a plaintiff’s] claim for damages.” *N. Natural Gas Co. v. Conoco, Inc.,* 986 S.W.2d 603, 606–07 (Tex.1998). In other words, the “duty of good faith and fair dealing is aimed at making effective the agreement’s promises.” *Fetter v. Wells Fargo Bank Tex., N.A.,* 110 S.W.3d 683, 689 (Tex.App.2003) (quoting *Adolph Coors Co. v. Rodriguez,* 780 S.W.2d 477, 482 (Tex.App.1989)). Under Texas law, this duty therefore “defines other duties which grow out of specific contract terms and obligations.” *Mega Dev. v. FSLIC,* 983 F.2d 232, 1993 WL 4696, at *2 (5th Cir.1993) (quoting *Adolph Coors Co.,* 780 S.W.2d at 482). However, other than those obligations arising from the terms of the contract itself, the duty of good faith “does not create any new obligations.” *John Wood Grp. USA, Inc. v. ICO, Inc.,* 26 S.W.3d 12, 22 (Tex.App.2000). In *Northern Natural Gas,* for example, the duty of good faith did not require the defendant to refrain from canceling certain gas purchase contracts, since the contracts did not by their own terms obligate the defendant to continue its business relationship with the plaintiff. *N. Natural Gas Co.,* 986 S.W.2d at 606–07.

Mailing and Shipping at *9-10.

Kruse v. Bank of New York Mellon, 2013 WL 1294088 (N.D. Tex. 2013)

Synopsis: **Claim under Texas Debt Collection Act (TDCA) against defendants arising out of alleged oral promise to postpone foreclosure sale was barred by statute of frauds.**

The Kruses fell behind on their home mortgage and the bank initiated foreclosure proceeding. The Kruses claim they contacted the bank about a loan modification and were told the foreclosure would be postponed. However, the district court found that the Kruses claim under the Texas Debt Collection Act (TDCA) against a mortgage loan servicer and other bank defendants arising out of the servicer's alleged oral promise to postpone an impending sale was barred by the statute of frauds. The statute of

frauds required that any agreement for a loan exceeding $50,000 be in writing. Specifically, the district court cited:

> Under Texas law, the statute of frauds makes any unwritten agreement for a loan in excess of $50,000 unenforceable. TEX. BUS. & COM. CODE § 26.02(b). "An agreement to delay foreclosure falls under § 26.02(b)." *Milton v. U.S. Bank Nat. Ass'n,* 4:10–CV–538, 2012 WL 1969935, at *3 (E.D. Tex. May 31, 2012), *affirmed* 12–40742, 2013 WL 264561 (5th Cir. Jan. 18, 2013). "Parties to a written contract that is within the provisions of the statute of frauds may not by mere oral agreement alter one or more of the terms of that contract." *Ellen v. F.H. Partners, LLC,* 03–09–00310–CV, 2010 WL 4909973 (Tex. App.–Austin Dec. 1, 2010, no pet.) (internal quotations omitted) (quoting *Dracopoulas v. Rachal,* 411 S.W.2d 719, 721 (Tex.1967)).

Kruse at *3 The district court noted that only three prior cases addressed whether the statute of frauds applies to TDCA claims, two holding applicability and one holding it inapplicable. Therefore, the district court resorted to analysis of the analogous Texas consumer protection statute (i.e. the DTPA). Citing a single DTPA case applying and enforcing the statute of frauds, the district court also noted that:

> However, a DTPA claim may survive despite the statute of frauds if there is "a factual misrepresentation independent of the alleged unenforceable agreement." *McClure v. Duggan,* 674 F. Supp. 211, 224 (N.D.Tex.1987); *see James W. Paulsen, Lenders and the Texas DTPA: A Step Back from the Brink,* 48 SMU L. Rev. 487, 566 (1995).

Kruse at *3. Turning generally to Texas law, the district court determined that:

> "a plaintiff may not recover tort for claims arising out of an unenforceable contract under the statute of frauds." *Hugh Symons Group v. Motorola, Inc.,* 292 F.3d 466, 470 (5th Cir.2002) (citing *Haase v. Glazner,* 62 S.W.3d 795, 797 (Tex.2001)). "To the extent, however, that a plaintiff's fraud claim seeks out-of-pocket damages incurred by relying upon a defendant's misrepresentations, those damages are not part of the benefit of any bargain between the parties. They therefore might be recoverable without contravening the statute of frauds." *Id.* (citing *Haase,* 62 S.W.3d at 799–800).

Kruse at *4. The district court then held that the Kruses were essentially attempting to enforce an oral agreement that would have altered terms of the loan. Furthermore, the Kruses did not allege that they suffered damages outside the alleged unenforceable agreement.

Reyelts v. Cross, 2013WL3870285 (N.D. Tex. 2013)

Synopsis: **Mental anguish damages were awarded to homeowners following roof contractor's violation of state and federal trade practices acts. The court also discussed whether the DTPA allows treble or quadruple damages for knowing and intentional conduct. Finally, the court discusses segregation of attorneys' fees and refuses to do so.**

The district court had previously entered a default judgment against the defendants and the only remaining *issues were damages and* attorneys' fees. Therefore, the district court accepted the plaintiffs' pleadings as true. After a hail storm, defendants approached the plaintiff, a 69 year old retired first grade teacher with no expertise ion roof repairs or insurance claims, seeking to repair the plaintiffs' home's roof, which was covered by plaintiffs' homeowner's insurance, and the agreement purported to limit defendants' compensation to the insurance payments plus deductible and cost of upgrades. An award of mental anguish damages to an elderly homeowner couple was appropriate, under the Fair Debt Collection Practices Act (FDCPA), the Texas Debt Collections Practices Act (FDCPA), and the Texas Deceptive Trade Practices Act (DTPA), in the amount of $30,000, for actual damages suffered, and an additional $42,000 under the treble damages provisions, following knowing and unconscionable violations of the Acts by a roofing contractor, its owner, and its retained debt collector, where the defendants' conduct had caused the homeowners a high degree of mental pain and distress. Specifically, the district court recited:

> As to mental anguish damages, a plaintiff may recover actual damages for mental anguish under the FDCPA, 15 U.S.C. § 1692k(a) (1); the TDCPA, TEX. FIN. CODE § 392.403(a)(2); and the DTPA,[4] TEX BUS. & COM. CODE 17.50(b)(1). *See Browne v. Portfolio Recovery Assocs., Inc.*, No. H–11–02869, 2013 WL 871966, at *5 (S.D. Tex. Mar.7, 2013) ("Actual damages [recoverable under the FDCPA] include not only out-of-pocket expenses, but also damages for personal humiliation, embarrassment, mental anguish, and emotional distress."); *Monroe v. Frank*, 936 S.W.2d 654, 661 (Tex. App.–Dallas 1996, writ dism'd w.o.j.). To recover such damages, the Plaintiffs must introduce direct evidence of the nature, duration, and severity of the mental anguish, thus establishing a substantial disruption in the Plaintiffs' daily routine. *See Bullock v. Abbott & Ross Credit Services, L.L.C.*, No. A–09–413–LY, 2009 WL 4598330, at *3 (W.D. Tex., Dec.3, 2009); *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 54 (Tex.1997); *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex.1995). The evidence must show a "high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger." *Jabri v. Alsayyed*, 145 S.W.3d 660, 669 (Tex. App.–Houston [14th Dist.] 2004, no pet.). There must also be proof that the knowing, unconscionable action or course of action was a producing cause of the mental anguish. *Jabri*, 145 S.W.3d at 669 (citing *Latham v. Castillo*, 972 S.W.2d 66, 69 (Tex.1998)).
>
> *Reyelts at *8.*

The defendants' conduct had caused:

> (1) her to feel devastated, scared, upset, angry, afraid, and embarrassed; (2) her and Gerald to have trouble sleeping; (3) her to have physical problems, including colitis exacerbation and stomach pain; (4) her to increase her dosage of Prozac medication; (5) her and Gerald to cancel a planned wedding anniversary trip; (6) her and Gerald

> to contribute less money than they wanted to their son's wedding; (7) with the filing of suit, Beatriz had become very afraid, angry, humiliated, and scared; (8) that she cries more, worries about spending money, has recently seen a doctor for stress and been prescribed medication for anxiety, and has had to come out of retirement and go back to work as a result of the Defendants' actions; and (9) Gerald to become worried, upset, angry, and embarrassed.

Reyelts at *8. This was deemed adequate proof of mental anguish and awarded Beatriz $25,000 and Gerald $5,000 for past mental anguish, but none to either for future mental anguish.

In Footnote 3, the district court analyzes whether the Texas Supreme Court meant to allow a quadruple multiplier of damages for knowing and intentional violations based on dicta in *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 304 (Tex.2006). The district court noted that prior decisions had expressly limited the total recovery to three time actual damages citing *Jim Walter Homes, Inc. v. Valencia*, 690 S.W.2d 239, 241 (Tex.1985), which interpreted the 1979 version of the DTPA. The district court reasoned:

> Since the court's decision in *Chapa*, there is a lack of consistency in the district and appellate courts in Texas in whether to apply the quadruple multiplier suggested in *Chapa* in claims under the DTPA. *Compare Bossier Chrysler–Dodge II, Inc. v. Riley*, 221 S.W.3d 749, 752 (Tex. App.–Waco 2007, pet. denied) and *Lin v. Metro Allied Ins. Agency*, 305 S.W.3d 1, 3–4 (Tex. App.–Houston [1st Dist.] 2007 (mem. op.), *rev'd per curiam on other grounds*, 304 S.W.3d 830 (Tex.2009), *with Texas Mut. Ins. Co. v. Morris*, 287 S.W.3d 401, 434 (Tex. App.–Houston [14th Dist.] 2009), *rev'd per curiam on other grounds*, 383 S.W.3d 146 (Tex.2012) *and Ramsey v. Spray*, No. 2–08–129–CV, 2009 WL 5064539, at *1 (Tex. App.–Fort Worth Dec. 23, 2009, pet. denied). After reviewing the cases, the Court concludes that it cannot rely on the dicta in *Chapa* to find that a quadruple multiplier is allowed under the provisions set forth in section 17.50(b)(1). The Court is not convinced that the Texas Supreme Court, if squarely presented with the issue, would rule that section 17.50(b)(1) allows for a quadruple multiplier of economic and mental anguish damages. Instead, the Court, relying on the case precedent in *Valencia* and its progeny and the language in section 17.50(b)(1), concludes that section 17.50(b)(1) only allows for the adding of up to two times the original economic and mental anguish awards for a total of a triple multiplier.

The court then analyzed the plaintiff's application for $259,560 in attorneys' fees in light of the defendants three objection first refusing to segregate work done on claims related to the insurance carrier explaining:

> Such billing entries and work performed by The Fillmore Law Firm share a "common core of facts" with Plaintiffs' claims against Defendants in the present case, and the Court declines to sift through the voluminous entries to try to parse out

> the pre-suit entries and work performed by The Fillmore Law Firm in this regard. *See La. Power & Light Co. v. Kellstrom,* 50 F.3d 319, 327 (5th Cir.1995)

Reyelts at *11. Defendants next argued that the fees should be, to the extent possible, segregated between the defendants. The court rejected this argument and sided with plaintiffs saying:

> In this case, Plaintiffs have segregated their claim for attorneys' fees for services provided before the Cross Defendants' letter of January 27, 2012, such that all attorneys' fees sought by Plaintiffs prior to that date are sought only as to the Lon Smith Defendants. All fees after that date are claimed by Plaintiffs against all Defendants as being so "interrelated" as to not require segregation. *See Navigant Consulting, Inc. v. Wilkinson,* 508 F.3d 277, 298 (5th Cir.2007) (citing *Stewart Title Guar. Co. v. Sterling,* 822 S.W.2d 1, 11 (Tex.1991)). The Court agrees with Plaintiffs on this issue.

Reyelts at *12. However, the third objection was a charm for defendants who objected to the total fees as unreasonable and excessive, even thought they did not object to the amount of time spent on any single entry or to the rates charged by the plaintiffs' attorneys ($400 per hour for partners, $200 per hour for the associate, and $120 per hour for the paralegal on a claim with arguably $15,000 in dispute). The district court relented and reduced the fees by 25% after recognizing:

> the "strong presumption" that the lodestar amount is reasonable, and it should only be those "rare circumstances" in which the lodestar does not adequately reflect a reasonable fee. *See Perdue v. Kenny A.,* 559 U.S. 542, 130 S.Ct. 1662, 1672–73, 176 L.Ed.2d 494 (2010). However, in the present case, the totality of the circumstances and the nature of the claims ultimately presented cause the Court to conclude that the total attorneys' fees amount sought by Plaintiff is excessive.

Reyelts, at *12.

Practice Pointer: Assuming both courts accurately represented the law, segregation arguments may be stronger in state court relying on Texas law than in federal court relying on federal law. See the discussion of Westergren point no. 8 above.