# TADC Commercial Litigation Newsletter

***Fall 2015 Edition***
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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.*

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# Texas Supreme Court Decisions

## Kachina Pipeline Co. v. Lillis

*Opinion delivered June 12,, 2015*
*13-0596,* 58 Tex. Sup. J 1105

**Synopsis**

The Texas Supreme Court held that a natural-gas purchase agreement between a pipeline company and well operator did not entitle the pipeline company to deduct its costs of compression or extend the contract for five years pursuant to an option to match competitive pricing.

**Factual Background and Trial Court Proceedings:**

Kachina Pipeline Company ("Kachina"), entered into a gas purchase agreement (the "Agreement") with Michael Lillis. Under the Agreement, Lillis agreed to transfer gas to his wells into Kachina's gathering system, and Kachina would pay Lillis a percentage of the proceeds it obtained through resale to Davis Gas Processing ("Davis").

Lillis could only successfully deliver gas when delivery pressure on the delivery line was sufficient to overcome the pressure in Kachina's delivery system. The agreement addressed the parties' rights and responsibilities as to pressure: "neither party shall hereto be obligated to compress any gas [however] "if Buyer [Kachina] installs compression to effect delivery of Seller's [Lillis's] gas, Buyer will deduct from proceeds payable to Seller hereunder a value equal to Buyer's actual costs to install, repair, maintain and operate compression plus 20% of such costs to cover management, overhead and administration."

The Agreement also provided that it was effective for "an initial period" expiring May 2010. After May 2010, the Agreement was to continue month-to month, cancellable by either party upon thirty days notice. The Agreement further provided that in the event of cancellation, Kachina would have the option to continue to purchase Lillis's gas, so long as it offered a price for the gas that was sufficient to "yield the same economic benefit to [Lillis], as would be derived from [any] proposed third party offer."

Kachina bought, transported, and resold Lillis's gas in accordance with the Agreement and deducted from the proceeds a pro-rata portion of compressions costs it attributed to Lillis. In 2008, Lillis entered into an agreement with Davis to sell gas directly to Davis and constructed its own pipeline to deliver the gas. Around the same time period, Lillis objected to the compression fees Kachina charged Lillis, claiming that the fees deducted were not in accordance with the Agreement.

Lillis sued Kachina, alleging that the Agreement did not allow Kachina to charge Lillis for compression fees occurring after Lillis delivered gas to Kachina. Lillis also brought a fraud claim, asserting Kachina represented it would release him from the Agreement and that he built the new pipeline in reliance on that representation. Kachina counterclaimed, asserting Lillis had failed to provide proper notification of Davis's third-party offer to buy gas directly from Lillis and to offer Kachina the option to match Davis's offer.

Both parties moved for summary judgment on their claims. The trial court denied Lillis's motion for summary judgment and granted both of Kachina's, ordering that Lillis take nothing on his claims. The trial court declared that "Kachina 'has the right

under the 2005 Gas Purchase Agreement to deduct from [Lillis's] monthly net proceeds compression costs' and that Kachina 'duly exercised its option rights under the 2005 Gas Purchase Agreement so that the termination date of the Agreement has been extended to May 31, 2015.'"

**Court of Appeals:**

The Third Court of Appeals (Austin) reversed the trial court's decision. The court of appeals held that the Agreement unambiguously did not allow Kachina to charge for after-transfer compression costs. It also held that the option did not provide for a five-year extension as declared by the trail court.

Kachina sought review from the Texas Supreme Court.

**Texas Supreme Court's Holding:**

The Texas Supreme Court disagreed with the trial court and the Austin Court of Appeals.

In ascertaining whether the compression cost provisions in the Agreement provided for after-transfer compression costs, the Texas Supreme Court laid out the current standard for contract interpretation and ascertainment of ambiguity:

> "In construing a contract, a court must ascertain the true intentions of the parties as expressed in the writing itself." *Italian Cowboy*, 341 S.W.3d at 333. We may consider the facts and circumstances surrounding a contract, including "the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give context to the parties' transaction." *Americo Life, Inc. v. Myer*, 440 S.W.3d 18, 22 (Tex. 2014). But while evidence of circumstances can be used to "inform the contract text and render it capable of only one meaning," extrinsic evidence can be considered only to interpret an ambiguous writing, not to create ambiguity. *See, respectively, id.; Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 283 (Tex. 1996). "A contract is not ambiguous simply because the parties disagree over its meaning." *Dynegy*, 294 S.W.3d at 168. Rather, "[i]f a written contract is so worded that it can be given a definite or certain legal meaning, then it is not ambiguous." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (per curiam).
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> "When discerning the contracting parties' intent, courts must examine the entire agreement and give effect to each provision so that none is rendered meaningless." *Tawes*, 340 S.W.3d at 425. "We give contract terms their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning." *Dynegy*, 294 S.W.3d at 168. "Moreover, we have stated that a court should construe a contract from a utilitarian standpoint, bearing in mind the particular business activity sought to be served." *Lenape Res. Corp. v. Tenn. Gas Pipeline Co.*, 925 S.W.2d 565, 574 (Tex. 1996). "No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *Tawes*, 340 S.W.3d at 425 (quoting

> *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)).

Applying the stated rules of interpretation, the Texas Supreme Court found that the provision at issue "unambiguously allows Kachina to deduct only the costs of compression installed during the term of the Agreement if required to overcome the working pressure in Kachina's system."

The Texas Supreme Court reasoned:

> The Pressure paragraph recognizes transfer into Kachina's line depends on the producer's well's pressure being sufficient to overcome Kachina's working pressure, and it imposes the duty to maintain sufficient pressure on the producer. If a well fails to overcome Kachina's working pressure, the paragraph gives Kachina two options. It may do nothing, in which case the well will be released from the Agreement. Or it may elect to install compression so that the well can overcome the working pressure. If Kachina elects the latter, it has the right to deduct costs incurred.
>
> The contingent nature of that right is unavoidable—it arises only "[i]f [Kachina] installs compression to effect delivery." *See Solar Applications Eng'g, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 109 (Tex. 2010).

Turning to the option, the court described the provision as one requiring "Lillis to give Kachina notice of any purchase offer made by a third party" and giving Kachina "the option to 'continue the purchase of gas under the terms of [the] Agreement with such adjustments in the price hereunder as may be required to yield the same economic benefit to [Lillis], as would be derived from the proposed third party offer.'"

Rejecting Kachina's policy argument that the provision was breached, and that the size of Kachina's initial investment warranted a five-year extension of the contract, the Texas Supreme Court interpreted the contract in favor of Lillis, finding that Lillis had the right to terminate—and did terminate—the contract pursuant to the Agreement's one month cancellation provision.

## Plains Exploration & Production Co. v. Torch Energy Advisors, Inc.

*Opinion delivered June 12, 2015*
*13-0597, 58 Tex. Sup J. 1115*

**Synopsis**

The Texas Supreme Court found that excluded assets provisions in the contract between a purchaser and a seller of oil and gas leases were unambiguous and that the seller of the lease interests did not retain ownership of bonus proceeds withheld, and subsequently remitted, by the federal government.

**Factual Background and Trial Court Proceedings:**

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 (which succeeded to Ogle Petroleum's rights under the leases) 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 several causes of action, including claims for breach of contract and money had and received. Plains Resources answered and asserted several 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.

**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. According to the intermediate appellate court, Torch might have a viable equitable claim for money had and received if Plains Exploration failed to turn over an excluded asset, which depended on the meaning of ambiguous provisions in the contract.

The allegedly ambiguous provisions at issue involved provisions that excluded certain assets in the conveyance from Torch to Plains Exploration. Particularly at issue, were "categories of excluded intangible assets described generally as claims and causes of action 'arising' or 'attributable to periods of time' before the contract's stated effective date of October 1, 1995, and all revenue 'attributable' to the conveyed property for any period before the contract effective date."

Plains Exploration sought review from the Texas Supreme Court.

**Texas Supreme Court's Holding:**

The Texas Supreme Court held that the relevant excluded assets provisions in the contract between Torch Energy and Plains Resources were unambiguous and that Torch did not retain ownership of the rights to the restitution awards recovered from the federal government.

In coming to this conclusion, the Texas Supreme Court engaged in a complex

analysis of several provisions in the contract:

> 1. Sale and Purchase of the Properties. Subject to the terms and conditions and for the consideration herein set forth . . . [Torch] agrees to sell, assign, convey and deliver to [Plains], and [Plains] agrees to purchase and acquire . . . on October 1, 1995 (the "*Effective Date*"), all of the interest of [Torch] (unless otherwise noted) **[*18]** in and to the following properties, other than the Excluded Assets ("Properties"):
>
> 1.1. The Properties.
>
> 1.1.1. Oil and Gas Properties. All leasehold interests or operating rights in the oil and gas leases, other mineral interests and those fee simple interests described in Part I of the Exhibit (the "*Oil and Gas Properties*").
>
> . . . .
>
> 1.1.7. Contracts. All contracts and arrangements that directly relate to the Properties and the operation, pooling, unitization, gas balancing, production, storage, treatment, transportation, processing, purchase, sale, disposal or other disposition of Substances therefrom and any and all amendments, ratifications or extensions of the foregoing, to the extent that any of the foregoing relate to periods on or after the Effective Date (the "*Contracts*"), and all rights to make claims and receive proceeds under any insurance policy held by or on behalf of [Torch] in connection with the Properties for any claim that arises from the Effective Date through the Closing Date in connection with the Properties.[5]
>
> . . . .
>
> 1.2. Excluded Assets. As used herein, "*Excluded Assets*" means . . . (b) all claims and causes of action of [Torch] (i) arising from acts, omissions or events, **[*19]** or damage to or destruction of property, occurring prior to the Effective Date, (ii) arising under or with respect to any of the Contracts that are attributable to periods of time prior to the Effective Date (including claims for adjustments or refunds); . . . (g) all proceeds, income or revenues (and any security or other deposits made) attributable to (i) the Properties for any period prior to the Effective Date, or (ii) any Excluded Assets . . . .

Torch argued that section 1.2 reserved Torch's right to any future benefit of monies spent or actions taken pre-conveyance with respect to the leases, while the contract otherwise conveyed all future benefits to Plains Resources. Hence, Torch Energy was entitled to the restitution payments made by the federal government.

The Texas Supreme Court disagreed finding that the "arising from," "arising under or with respect to" and "attributable to" language in this provision required a finding that the terms unambiguously required a pre-effective (ripe) claim in order for Torch Energy to recover for pre-conveyance rights. Accordingly, because the claims to receive the bonuses back from the federal government were not ripe prior to the conveyance of the leases, Torch did not have a right to recover the proceeds of those bonuses.

The court also reasoned that the standard put forth by Torch Energy "would produce a result that is 'illogical, unreasonable, and inconsistent with the parties' expressed intent' and 'render a temporal division employed in the exclusion utterly meaningless.'"

Accordingly the Court found that because the proceeds from the bonuses were neither "attributable to" not "arising from of with respect to" pre-conveyance events, and were thus not excluded assets under section 1.2, Torch had no claim to the proceeds.

## Texas Supreme Court Oral Arguments

### Janvey v. Golf Channel, Inc.

*Oral argument set, Date to be determined*
*Case No. 15-0489*
Fifth Circuit Court of Appeals Opinion,
409 S.W. 3d 46

**Issues Considered:**

(1) Fifth Circuit certified the following question:

Considering the definition of "value" in section 24.004(a) of the Texas Business and Commerce Code, the definition of "reasonably equivalent value" in section 24.004(d) of the Texas Business and Commerce Code, and the comment in the Uniform Fraudulent Transfer Act stating that "value" is measured "from a creditor's viewpoint," what showing of "value" under TUFTA is sufficient for a transferee to prove the elements of the affirmative defense under section 24.009(a) of the Texas Business and Commerce Code?

### Fischer v. CTMI, LLC

*Oral argument occurred October 12, 2015*
*Case No. 13-0977*
Dallas Court of Appeals Opinion,
2015 Tex. App. LEXIS 5131

**Issues Considered:**

(1) Whether a material "adjustment provision" in an asset purchase contract constitutes an unenforceable agreement to agree.

(2) Whether the parties' partial performance of the enforceable obligations of the Asset Purchase Agreement constitutes performance sufficient to affect enforceability of an "adjustment provision."

## State Courts of Appeals

### DZM, Inc. v. Garren,

No. 14-14-00040-CV, 2015 Tex. App. LEXIS 5340 (Tex. App.—Houston [14th Dist.] May 28, 2015)

**Synopsis:**

Mere naked assertions of fair market value, even in the absence of controverting evidence, are legally insufficient to support a finding of damages in any amount. Because there was no evidence that the converted property at issue had any fair market value at the time of the alleged conversion, the proper course was to render a take-nothing judgment.

**Overview:**

Defendant DZM, Inc. ("DZM") entered into a lease with a tenant for retail space in a shopping mall. The tenant operated a social club on the leased premises. Plaintiff Richie Garren leased various items of personal property to the owner of the social club—including poker tables, chairs, poker supplies, electronics, and decorations—for a sum of $1,000 per month. After the social club ceased paying rent to DZM and notified DZM that it was filing for bankruptcy, DZM locked the club out of the leased premises. Garren filed suit against DZM, alleging that DZM had converted his property by locking the social club out of the leased premises and refusing to return the property that Garren had leased for use in the social club.

At trial, Garren submitted receipts for most of the leased items that he alleged DZM had converted. Garren also submitted a list that he had created of the property purportedly converted. For each item, Garren listed the property's "fair market value" as either equal to its purchase price indicated on the receipt of purchase or, for items without a receipt, an estimated value based on its value at the time of purchase. Garren testified that the property's fair market value at the time of conversion was equal to the items' purchase price. Finding that DZM had converted Garren's property, the jury awarded Garren $12,500 in damages.

On appeal, DZM challenged the legal and factual sufficiency of the evidence of the fair market value of the property at the time of the conversion. While affirming the "property-owner rule" as an exception to the requirement that a witness establish his qualifications to opine on property value, the Court of Appeals noted that, even under this rule, the property owner's testimony must meet the other requirements for offering opinion testimony. The property-owner rule provides an exception only with respect to expert qualifications; the owner's valuation, like the opinion testimony of any other expert, still "may not be based solely on the owner's *ipse dixit*." The property owner must provide the factual basis on which his opinion rests. A "naked assertion of 'fair market value' is not sufficient."

The Court of Appeals found that Garren had failed to provide the factual basis for his opinion on the value of the converted property. Though Garren testified that he knew individuals in the poker business and had knowledge regarding auctions of used property, he did not explain *how* that knowledge influenced or supported his valuations. The only factual basis offered for the valuations—purchase receipts—was merely evidence of past purchase price of the items, to which Garren added his conclusory statements that either a particular sum was the fair market value on the date of conversion, or that the fair market value equaled the past purchase price. However, clear precedent from the Fourteenth Court of

Appeals holds that evidence of past purchase price alone is legally insufficient to support a finding as to the property's market value at a later date.

On appeal, Garren argued that, because DZM failed to present any evidence contesting the value of the converted property, the jury was required to accept his testimony regarding its fair market value. Garren relied upon the First Court of Appeals' opinion in *Burns v. Rochon* in support of this proposition. The Fourteenth Court of Appeals, however, had previously rejected the view taken in *Burns* (*see Lee v. Dykes*, 312 S.W.3d 191, 196 – 99 (Tex. App.—Houston [14th Dist.] 2010, *no pet.*), finding it to be contrary to clear authority from the Texas Supreme Court holding that purchase price alone is legally insufficient to establish the market value of property at a later date. The Court of Appeals argued that DZM's failure to offer controverting evidence of the property's value did not render sufficient the evidence offered by Garren, which was insufficient as a matter of law. Because Garren's "conclusory or speculative" statements did not provide adequate support for his opinion on the converted property's value, the Court of Appeals reversed and rendered a take-nothing judgment against Garren.

## Enzo Investments, LP v. White,

No. 14-13-00509-CV, 2015 Tex. App. LEXIS 5665 (Tex. App.—Houston [14th Dist.] June 4, 2015)

**Synopsis:**

A party seeking recovery of attorney's fees utilizing the "lodestar" method to establish the amount of its reasonable and necessary fees must provide evidence of the time expended on specific tasks to enable the fact finder's meaningful review of the fee application. Breach of contract damages are calculated with reference to the value of the promised benefit *on the date the benefit would have been received* had the contract not been breached.

**Overview:**

Bill White, a business broker, asserted a breach of contract claim against Enzo Investments, LP ("Enzo"), after Enzo cut White out of a deal White had presented to acquire a distressed railcar cleaning company.

In 2008, GalCo was insolvent and in default on a $6 million note held by Royal Bank and secured by real property owned by Ken Bigham, GalCo's owner. Bigham sought to avoid Royal Bank's foreclosure on his individual property by transferring GalCo's assets through a "friendly foreclosure" with a third party. To that end, White prepared a "Distressed Property Investment Proposal" to entice potential investors and, in May of 2008, began talks with one of the principals of Enzo. White refused to disclose GalCo's identity until Enzo signed the "Non-circumvention & business brokerage agreement" White prepared. After signing the brokerage agreement, Enzo decided to proceed with the acquisition of GalCo and executed a second agreement providing Enzo the exclusive right to participate in the venture to acquire GalCo's assets. The agreement further provided that GalCo's assets would be transferred to a new company, in which White would receive a 10% ownership interest in addition to a $150,000 brokerage fee.

On May 30, 2008, Enzo and GalCo signed a letter of intent containing the general terms and conditions under which a new entity to be formed by Enzo would acquire GalCo's assets. The letter of intent specified that the

newly-formed entity would operate "an environmental cleaning company similar to Galco," and provided a schedule for each step in the planned acquisition. Pursuant to this timeline, the newly formed company would foreclose on GalCo's assets in July or August of 2008.

However, Enzo breached its agreements with White and GalCo and began negotiating directly with Royal Bank. Although Enzo eventually acquired GalCo's assets, it did not do so through the "friendly foreclosure" proposed by White, and it refused to pay White either his $150,000 brokerage fee or 10% interest in the newly-formed company.

At trial, the jury found that Enzo breached its agreement with White and assessed damages of over $1.3 million against Enzo. The trial court, however, granted Enzo's motion for judgment notwithstanding the verdict, on the basis that White's business-valuation evidence used the wrong date, and no evidence was presented of the value of the promised 10% share of the new company at the time that White should have received it. The court reduced the damages assessed by the jury and awarded only White's promised $150,000 commission and attorney's fees.

On appeal, White contended that the trial court erred in failing to award him the full damages as assessed by the jury. In its cross-appeal, Enzo challenged the trial court's award of attorney's fees. The Court of Appeals agreed with the trial court that White had not introduced legally sufficient business-valuation evidence and affirmed the judgment in those respects. To determine when White "should have received" the ownership interest, the Court of Appeals analyzed when GalCo's assets would have been transferred to the new company if Enzo had not breached the contract. To that end, the Court of Appeals examined the schedule laid out in the letter of intent. The court concluded that, had Enzo adhered to the schedule, the new company would have acquired GalCo's assets and operations by the end of July or August 2008. Even accounting for delays, the court found that in no event would White have received his 10% ownership interest later than September 2008. At trial, however, White's expert had used valuation dates in November 2010. The Court of Appeals found this to be an improper basis for calculating damages owed, as such testimony was actually evidence of the value of "the benefit's benefits"—according to White's own expert, "[i]n 2010 we are seeing the results of the investors having equity." In the brokerage agreement, Enzo had not promised to provide White a return of capital, a distribution, or residual equity in 2010. In fact, the Court of Appeals noted, there was no promise that the company would even be in existence in 2010. Consequently, such business valuation evidence could not be used to calculate the value of the benefit White should have received. White should have received the ownership interest when the new company foreclosed on GalCo's assets. As the Court of Appeals explained, before that time, the new company was merely an empty shell that owned nothing; later, after it acquired the note from Royal Bank, it was a company that owned a GalCo liability, not a GalCo asset. Consequently, these were not proper points at which to measure the value of the promised ownership interest.

In addition, the Court of Appeals found that the evidence of White's attorney's fees was legally insufficient to support the full amount awarded. Two of White's attorneys had adequately segregated the number of hours they spent on various tasks to advance

White's breach of contract claim, for which attorney's fees were recoverable, from time spent to advance claims for which fees were not recoverable. However, the Court of Appeals concluded that White's third attorney failed to adequately segregate his fees. That attorney's affidavit lacked the specificity required to prove attorney's fees using the lodestar method, which requires that the party seeking recovery provide evidence of the time expended on specific tasks to enable the fact finder to meaningfully review the fee application. The attorney's fee affidavit of White's third attorney, however, merely listed general categories of work, without stating the amount of time spent on specific tasks.

The Court of Appeals concluded that the evidence in this case was legally sufficient to support a total fee award of $209,192.50—the sum of the amounts requested by the two attorneys who adequately segregated and supported their reasonable fees. This amount was $189,000 less than the amount awarded by the trial court. In response to the Court of Appeals' suggestion of remittitur, White timely filed a remittitur of that amount from the trial court award, and the Court of Appeals therefore modified the trial court's judgment to change the amount of attorney's fees awarded for work performed in the trial court to $209,192.50, affirming the trial court's judgment as modified.

## Leibovitz v. Sequoia Real Estate Holdings, L.P.,

No. 05-14-00125-CV, 2015 Tex. App. LEXIS 5512 (Tex. App.—Dallas [5th Dist.] May 29, 2015)

**Synopsis:**

By disclaiming reliance, a party to a contract may waive the right to assert fraud as an affirmative defense to any subsequent claim that the contract was breached. Based on the same principle, the Court of Appeals further found that, where certain factors weigh in favor of disclaimer, a contractual provision disclaiming economic duress may be enforceable.

**Overview:**

Sequoia Real Estate Holdings, L.P. ("Holdings"), operated by Donald Behunin, created real estate investment offerings, including one involving Sequoia Frankford Springs ("Frankford Springs"), an apartment complex in Dallas. In a Private Placement Memorandum, Holdings offered investors the opportunity to purchase tenancies in common in the Frankford Springs complex, promising a 6.5% annual return. Jeffrey Leibovitz formed the limited partnership Sequoia Frankford Springs 23, L.P. ("SFS 23") to purchase and hold his investment in Frankford Springs. In 2006, Behunin's investment entity Sequoia Frankford Springs, L.P. purchased the complex. Twenty-eight tenant-in-common investors (including Leibovitz, participating through SFS 23) paid cash, executed a nonrecourse note for $21,400,000, and granted the lender a deed of trust securing the note. According to the Private Placement Memorandum, the money and debt the investors provided was to be used to purchase the apartment complex, create certain reserves, and pay certain expenses as described in the Private Placement Memorandum.

The investors then signed a master lease agreement with Sequoia Frankford Springs LeaseCo ("LeaseCo") as Master Tenant. LeaseCo was to pay rent to the investors of $789,653 per year. This rent would provide a return of over 6.5% to the investors on their cash investment. LeaseCo, in turn, would manage the apartment complex

through its contractor, Sequoia Real Estate Management, L.P. ("Real Estate Management"), and sublease the units to individuals who would reside in the apartment complex. LeaseCo would pay Real Estate Management 4% of the gross revenues earned by the apartment complex. Behunin was the president of Holdings; the president, secretary, treasurer, and sole manager of LeaseCo's general partner; as well as the chief executive and chief financial officer of Real Estate Management.

After the acquisition of the apartment complex, however, the Frankford Springs received only a 4.64% return on investment, rather than the promised 6.5% annual return. After LeaseCo ceased making payments on the note in 2009, the lender accelerated the loan and the property was posted for foreclosure. After learning that the complex was facing foreclosure, some of the Frankford Springs investors, including Leibovitz, questioned Behunin regarding the management of the project and why the money generated by the property had not been used to pay the note. In response, Behunin sued Leibovitz and the other investors for libel and business disparagement.

Meanwhile, another group of Frankford Springs investors filed suit against Behunin and the Sequoia entities, alleging fraud and misrepresentation in the Private Placement Memorandum. After nearly a year of negotiations with the lender and among the parties to both lawsuits, the lender agreed to reinstate the loan, and the parties to both lawsuits and all investors and business entities involved in Frankford Springs entered into a settlement agreement. In addition to dismissing both pending lawsuits, the "Settlement and Mutual Release Agreement") (the "Agreement") contained a "Confidentiality and Non-Disparagement" provision, in which the parties agreed not to disclose the Agreement's terms and conditions, and to refrain from making "any derogatory, disparaging and/or untruthful statements about any other party to any person or entity." The Agreement provided that a violation of this provision would constitute a breach and would entitle the non-breaching party to immediate injunctive relief against further violations. Leibovitz signed the Agreement, both as manager of SFS 23 and in his individual capacity.

In addition to Frankford Springs, Holdings (under Behunin's management) was the sponsor of four other tenancy-in-common investment offerings in the Dallas area, each structured similarly to the Frankford Springs project. After signing the Agreement, Leibovitz learned that some of the funds from the initial cash investment in Frankford Springs were being used in ways Leibovitz believed were not disclosed in the Private Placement Memorandum. Leftover funds from Frankford Springs and the other four projects had been pooled in Holdings, which then loaned that money to the master tenants of the various properties, including the Frankford Springs LeaseCo, that needed funds to pay rent to the investors. Thus, many investors were paid rent from their own investment funds and with the investment funds from other properties managed by Behunin and the Sequoia entities, rather than from funds the property earned by leasing apartments to residents.

Leibovitz sent an e-mail to the brokers that had sold him the Frankford Springs investment, stating that, unless the brokers paid Leibovitz for the losses he sustained through the Frankford Springs investment, he intended to file complaints with FINRA and the SEC. Leibovitz also to send copies

of those complaints to all the investors in Holdings' other investment offerings.

In response to Leibovitz's threat, Holdings filed the current lawsuit, seeking an injunction barring Leibovitz from filing a complaints with FINRA or the SEC and from communicating with other investors. The court granted summary judgment in favor of Holdings as to Leibovitz's fraud-based affirmative defenses. Holdings' breach of contract claim was tried before a jury, which found Leibovitz liable and determined that Holdings had sustained damages of $2,500. The trial court's judgment awarded Holdings $2,500 in damages against Leibovitz, and ordered Leibovitz and SFS 23 to pay attorney's fees of $200,000. The court imposed a permanent injunction prohibiting Leibovitz and SFS 23 from (1) disclosing the existence or terms of the Agreement; (2) communicating with any of the investors in Holdings' other investment offerings; and (3) asserting any claims related to the "dispute" as defined in the Agreement. The order noted, however, that the permanent injunction did *not* prohibit Leibovitz or SFS 23 from reporting a crime to law enforcement authorities or from providing testimony in response to an inquiry from any regulatory authority, provided that the inquiry was not initiated by Leibovitz or SFS 23. Leibovitz and SFS 23 appealed.

The Court of Appeals found that the trial court did not err in granting summary judgment for Holdings on Leibovitz's fraud-based affirmative defenses (fraudulent inducement, fraudulent concealment, and fraud by nondisclosure). The Texas Supreme Court has held that, where certain factors are met, parties may agree in a contract to waive any right to later assert fraud as a defense to breach of the contract, by expressly disclaiming reliance, an essential element to the fraud defense. *See Forest Oil Corp. v. McAllen*, 268 S.W.3d 511, 58 (Tex. 2008); *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 179 (Tex. 1997). The five factors most relevant to determining whether a waiver of reliance is enforceable to preclude a fraud defense are whether (1) the contract's terms were negotiated, rather than boilerplate, and specifically address the matter at issue in the subsequent dispute; (2) the party alleging fraud was represented by counsel during the contract's negotiation; (3) the contract was part of an arm's length transaction; (4) the parties were knowledgeable in business matters; and (5) the release and non-reliance language was clear. The Court of Appeals also considered a sixth factor, noted in *Forest Oil Corp.*: whether the agreement is a "once and for all" settlement.

In this case, all six considerations weighed in favor of enforcing the Agreement's disclaimer of reliance provision to preclude Leibovitz's fraud defenses. The Court of Appeals rejected the interpretation of the negotiation factor urged by Leibovitz. Relying on the Texas Supreme Court's *Forest Oil Corp.* opinion, the Court of Appeals explained that "the topic of the subsequent dispute" refers to the specific contract term being asserted against the party claiming fraud—not the factual allegations in the subsequent lawsuit. Leibovitz had not argued on appeal that the parties had failed to discuss the Agreement's release provision during negotiations. Thus, the parties had "specifically addressed the issue which has become the topic of the subsequent dispute." Accordingly, the Court of Appeals concluded that all six factors in this case weighed in favor of enforcing the disclaimer of reliance.

Leibovitz also argued that a special relationship between Holdings and the

investors resulted in a fiduciary duty to disclose material facts and information related to the investment. The court noted that, regardless of the factual basis for asserting fraud, such a claim would require that Leibovitz prove reliance, which he had disclaimed in the Agreement. There is no authority to suggest a disclaimer of reliance is not enforceable by a fiduciary against a party to whom the duty was owed.

The Court of Appeals also rejected Leibovitz's argument that he had signed the Agreement under economic duress, because Behunin and Holdings allegedly threatened to withhold payment of the mortgage and allow Frankford Springs to go into foreclosure unless all parties signed. Although economic duress is a valid defense to enforcement of a contract under Texas law, the defense requires (1) a threat to do something that the threatening party has no legal right to do; (2) some illegal exaction or some fraud or deception; and (3) the restraint is imminent and such as to destroy free agency without present means of protection. The Agreement contained a provision stating that "[t]he Parties and the Released Group acknowledge and agree that they enter into the Agreement voluntarily and without any duress or undue influence." In the absence of any case law addressing whether economic duress may be disclaimed in the contract, the Court of Appeals reasoned that, just as the element of reliance may be expressly waived in certain cases where it is clear that adequate due-process protections exist, "so also should the parties be allowed to include a term that the parties were not under duress when they signed it." The Court of Appeals found this conclusion to be consistent with the Texas Supreme Court's holding that, as a general matter, "[p]arties should be able to bargain for and execute a release barring all further dispute" (quoting *Schlumberger*, 959 S.W.2d 171, 179 (Tex. 1997)). The Court of Appeals held that, in a case that meets all the factors set forth in *Schlumberger* and *Forest Oil Corp.*, the parties may likewise disclaim economic duress.

The Court of Appeals also affirmed the trial court's order imposing a permanent injunction against SFS 23. Appellants did not dispute that Leibovitz performed or threatened to perform a wrongful act; Leibovitz admitted at trial that he breached the Agreement. The court found that the injunction, as imposed against SFS 23, was not overly broad under Texas Rule of Civil Procedure 683. Noting that limited partnerships such as SFS 23 act only through their general partners, and Leibovitz was the manager of the corporation that was SFS 23's general partner, the Court of Appeals found that the evidence did not show that Leibovitz's actions in breach of the Agreement were made solely on his own behalf and not on behalf of SFS 23. There was, however, sufficient evidence that the threatened wrongful act, if carried out, would significantly damage Holdings' reputation and require significant time and money to repair.

Finally, the Court of Appeals rejected the argument that the injunction constituted an illegal prior restraint on free speech. Most significantly, Leibovitz had agreed that any violation of the Agreement could be enforced through injunctive relief. On appeal, Leibovitz failed to cite any case finding an improper prior restraint on speech where the enjoined party had agreed in a written contract to a prior restriction on his speech (as Leibovitz had done in the Agreement) and that the restriction could be enforced through injunctive relief. The court concluded that the injunction was narrowly tailored and did nothing more than enforce the restraint on speech to which Leibovitz

had agreed. The Court of Appeals therefore affirmed the trial court's judgment in all respects.

## Greenville Automatic Gas Co. v. Automatic Propane Gas & Supply, LLC,

No. 05-13-01405-CV, 2015 Tex. App. LEXIS 5795 (Tex. App.—Dallas [5th Dist.] June 9, 2015)

**Synopsis:**

In a case arising out of non-competition and non-solicitation covenants in an employment agreement, the Fifth Court of Appeals held that permitting a jury to consider an affirmative defense not verified, as required by Texas Rule of Civil Procedure 93(7), constituted reversible error.

**Overview:**

Greenville Automatic Gas Co. ("Greenville") employed Steven Anderson as a route driver to deliver propane to Greenville customers. In 1996, after several months of working for Greenville, Anderson signed an employment agreement. According to Anderson, he signed a three-page agreement addressing only Greenville's calculation of overtime pay. Greenville argues that Anderson signed a nine-page employment agreement containing, inter alia, a covenant not to compete and a covenant not to solicit Greenville's customers. Only the nine-page version of the employment agreement was in evidence.

In 2011, Anderson resigned from Greenville and went to work for its competitor, Automatic Propane Gas and Supply, LLC ("Automatic"). Greenville sent letters to both Anderson and Automatic, invoking the covenants not to compete or solicit allegedly contained in Greenville's employment agreement with Anderson. In November of 2011, Anderson and Automatic (collectively, the "Appellees") sought a declaratory judgment regarding the parties rights and obligations pursuant to Anderson's employment agreement with Greenville. In their petition, Appellees took the position that the agreement's non-compete and non-solicitation provisions were unenforceable. Although the original petition purported to attach as "Exhibit A" a copy of the employment agreement, and cited this exhibit numerous times, the record did not include any such attachment.

Greenville filed an answer, asserting several counterclaims against Appellees, including breach of contract, business disparagement, tortious interference with contract, misappropriation of proprietary material and trade secrets, conspiracy to misappropriate proprietary information and trade secrets, and unfair competition. Greenville attached a nine-page copy of the disputed employment agreement to its answer. At the pleading deadline more than a year later, Appellees filed their first amended petition. The amended petition inserted a single additional sentence, stating that "Anderson disputes the execution and alleged contents of the agreement upon which Greenville has sued." The amended petition also removed any reference to an attached employment agreement or citations to Exhibit A; it did not include any affirmative or verified defenses.

Three months after filing the amended petition, Appellees attempted to file Anderson's verification of the amended petition. Greenville objected to the proposed verification as untimely and the trial court struck Anderson's proposed verification. The trial court granted Anderson and

Automatic's motion for summary judgment on all Greenville's tort counterclaims, but denied summary judgment on the breach of contract counterclaim, which was then tried to a jury. The trial court's judgment awarded attorney's fees to Anderson and Automatic and ordered the Greenville take nothing on its tort counterclaims. Greenville appealed.

The Court of Appeals found that the trial court had not abused its discretion in striking Appellees' proposed verification, as the verification would have amounted to an amended pleading to cure the pleading's deficiency under Rule 93. In the absence of a verified defense, Appellees' attack on the employment agreement lacked any proper basis in the pleadings. Verification would therefore have effectively added a new defense to the litigation after the pleading deadline and without seeking leave of the court, and was likely prejudicial on its face.

In the absence of the verified denial required by Rule 93(7), the nine-page employment agreement submitted by Greenville was admissible as fully proved, and the jury should never have been presented with the question regarding Anderson's agreement to its terms. The court rejected Appellees' argument that no verification was required because Anderson did not challenge that he had executed the signature page of the employment agreement—Anderson merely asserted that he had not done so when it was attached to the nine-page agreement that Greenville now presented. The court found that this position still entailed a challenge to the contractual relationship or its terms and, as such, required filing a verified denial of the employment agreement upon which Greenville's pleadings relied. By failing to do so, Appellees conclusively admitted the validity of the full nine-page employment agreement submitted by Greenville. In sum, "the terms of the Employment Agreement were settled by the absence of a verified denial of those terms."

The Court of Appeals affirmed the trial court's take-nothing judgment on Greenville's counterclaims for business disparagement, tortuous interference with contract, misappropriation of proprietary information and trade secrets, conspiracy to misappropriate proprietary information and trade secrets, and unfair competition. In all other respects, the Court of Appeals reversed the trial court's judgment and remanded the case to the trial court for further proceedings.

## Duncan v. Woodlawn Manufacturing, Ltd.,

No. 08-14-00025-CV, 2015 Tex. App. LEXIS 6085 (Tex. App.—El Paso [8th Dist.] June 17, 2015)

**Synopsis:**

A jury concluded that both Sandy Duncan and Woodlawn Manufacturing, Ltd. had breached the contract, but that Duncan was the first to do so. The jury declined to find that any damages resulted from the breach by Woodlawn, and the trial court entered a take-nothing judgment. Duncan appealed and the Eighth Court of Appeals affirmed.

**Overview:**

Sandy Duncan was President and CEO of Woodlawn Manufacturing, Ltd. ("Woodlawn"), a company that made custom machine parts for the defense industry at an East Texas facility. Duncan's employment contract required him to act in the best interests of the company and comply with all company policies, standards, and regulations. Subsections of the "termination for cause" provision in Duncan's employment contract described

conduct constituting cause for termination. The majority of these subsections specifically provided that the employee would be terminated only following 30 days written notice specifying the violation and opportunity to cure the same. Similarly, the employee handbook provided that no "drastic action" would be taken until the employee had been given an opportunity to correct the problem, "except in those cases where immediate discharge is called for by the very nature of the offense."

Woodlawn terminated Duncan for cause on October 8, 2010. Specifically, Duncan was informed that he was being terminated immediately because his actions were not furthering the best interests of the company; he had breached the trust between himself and Woodlawn's owners, Lone Star CRA Fund, LP ("Lone Star"); and he had placed the company at risk for potential sexual harassment claims. Lone Star had learned that Duncan had several sexual liaisons with subordinate employees (a fact which was generally known to other employees of the company). Lone Star and Woodlawn also contended that Duncan had a problem with alcohol, which had been noticed by coworkers, and which had led to an arrest for public intoxication in the spring of 2010. Although there was no evidence to indicate that Duncan had been drinking while at work, the employee handbook prohibited even the "[o]ff-site use, sale, or illegal involvement with drugs or alcohol in any manner which could cause adverse impact on community good-will toward the company…"

Duncan sued Woodlawn for breach of the employment contract. Both at trial and on appeal, Duncan argued that, even if Woodlawn's contentions were true, they were not valid contractual reasons for his termination because he was never given written notice and an opportunity to cure, as contemplated by the relevant subsections of the termination for cause provision. Although one subsection of the employment contract did allow termination without prior notice, that provision required that the Board of Managers (comprised of Lone Star's managing partner, Woodlawn's CFO, and Duncan) first make a determination that there had been gross negligence, fraud, or dishonesty. The Board of Managers had not made such a determination prior to Duncan's termination without notice.

The jury considered four liability questions and found that (1) Woodlawn failed to comply with its employment agreement with Duncan; (2) Duncan also failed to comply with the employment agreement; (3) Duncan's breach occurred prior to Woodlawn's; and (4) Woodlawn's breach was excused by Duncan's breach, thus indicating its conclusion that Duncan's breach was "material" (the jury had been instructed that Woodlawn would be excused by Duncan's "previous failure to comply with a material obligation" of the agreement). The jury also declined to find that Duncan had suffered any damages. The court entered a take nothing judgment in favor of Woodlawn and Duncan appealed.

Because a material breach excuses the other party's further performance (as held by the Texas Supreme Court in *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 198 (Tex. 2004)), the Court of Appeals noted that the question in such cases is often a matter of which party's breach occurred first. The jury in this case had concluded that Duncan was first to breach the employment contract, and that Duncan's breach was material, excusing Woodlawn's performance with respect to the 30 days written notice requirement. On appeal, the court considered whether there

existed factually sufficient evidence of Duncan's material breach to support the jury's findings.

The Court of Appeals acknowledged that "notice and cure" clauses, like those in Duncan's employment agreement, are common and are generally enforceable as valid contract terms (citing *Ogden v. Gibraltar Savings Association*, 640 S.W.2d 232, 233 (Tex. 1982)). On appeal, Duncan relied upon a line of cases, including the Fifth Court of Appeals' decision in *Cheung-Loon, LLC v. Ceragon, Inc.*, 392 S.W.3d 738 (Tex.App.—Dallas 2012, *no pet.*), requiring strict adherence to such "notice and cure" clauses. Duncan argued that, absent proper notice of a claimed breach, and allowance of an opportunity for the breaching property to cure, the other party cannot terminate the contract. Woodlawn cited another line of cases, following *Olin Corp. v. Central Industries, Inc.*, 576 F.2d 642 (5th Cir. 1978) (applying Miss. law), to support its contention that certain "vital" breaches, which fundamentally undermine the essential purpose of an agreement, justify immediate termination despite a notice and cure provision. Woodlawn argued that a breach such as Duncan's, which Woodlawn alleged had irreparably impaired the trust between it and a high level manager, operated to unwind the entire agreement, including the notice and cure periods of the termination clause.

The Court of Appeals concluded that, "even if Texas recognizes a 'vital' breach as some distinct common law defense, it would not apply here." In this case, the parties had "spoken comprehensively" on the various ways in which Duncan's employment by Woodlawn could come to an end and, where parties speak comprehensively on a subject, Texas law holds that the parties likely intended to exclude any outside gap fillers (citing *Americo Life, Inc. v. Myer*, 440 S.W.3d 18, 24 - 25 (Tex. 2004).) For that reason, the Court of Appeals did not have authority to add contractual terms to the employment agreement that the parties themselves did not intend. Whether this new category were termed "vital breach or something else," the Court of Appeals concluded that adding such a category would frustrate the intent of the parties as expressed in their agreement. Moreover, the Court of Appeals noted that "injecting the idea of a 'vital breach' into a contract that already comprehensively addresses reasons for termination would only add uncertainty to the parties' dealings. What is egregious enough to constitute a vital breach for one jury or court, might vary with another."

The Court of Appeals further concluded that there was sufficient evidence in the case to support the view that providing notice as required by the notice and cure provisions would have been futile, and Texas law does not require the performance of a futile act (*DiGiuseppe v. Lawler*, 269 S.W.3d 588, 594–95 (Tex. 2008)). The court found sufficient evidence of both the breaches that Woodlawn alleged, as well as evidence that such breaches were of a type that could not have been cured. Specifically, the court cited deposition testimony indicating that Lone Star did not believe there was anything that could be done by Duncan within thirty days to cure Duncan's "lack of integrity" or his "breach of trust." Lone Star believed that Duncan's efforts to hide the issues of his alcoholism and sexual relationships with subordinates (including paying a former employee with whom he had such a relationship to prevent her filing a sexual harassment claim, and failing to inform Lone Star of his arrest for public intoxication) "completely" broke their trust with him.

Furthermore, under Texas law, corporate officers and directors owe a strict fiduciary obligation to their corporation (citing *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 576 – 77 (Tex. 1963)), and "[i]t is beyond dispute that the trust and confidence a company has in a chief executive officer is material to the parties' relationship," in part because a company may be held vicariously liable for the acts of a vice-principal, such as the CEO. Thus, the Court of Appeals concluded that the actions of a CEO, which touch upon a corporate officer's fiduciary duties of extreme candor, unselfishness, and good faith, would "undoubtedly" be material. Because Duncan's breaches were material as a matter of law, the court rejected Duncan's complaint regarding the jury instruction, finding that further guidance on the criteria for determining materiality of a breach would not have aided the jury in this case.

Based on these findings, the Court of Appeals held that the trial court did not err in finding that the claimed breaches were material or, even if in error, such error did not result in an improper judgment. Having affirmed the trial court's judgment with respect to liability, the Court of Appeals did not address Duncan's challenges to the jury's zero damages awards.

# BP Oil Pipeline Co. v. Plains Pipeline, L.P.,

No. 14-13-00352-CV, 2015 Tex. App. LEXIS 6658 (Tex. App.—Houston [14th Dist.] June 30, 2015)

**Synopsis:**

Pursuant to the unambiguous language of a purchase agreement regarding the parties' indemnity obligations, pipeline buyer was not obligated to indemnify the seller to the extent the buyer demonstrated that the losses for which indemnity was sought resulted from, related to, or arose out of the gross negligence or willful misconduct of the company. However, because the evidence in the case did not address whether the losses for which indemnity was sought did, in fact, stem from the company's gross negligence, the buyer had not met its burden of proof.

**Overview:**

Gulf and Mississippi River Transportation Company, Ltd. ("G&M") owned a 25% undivided fee interest in a 5.19 acre tract in Louisiana. In 1960, G&M and the other owners of the tract granted a right-of-way servitude to Gulf Refining Company ("Gulf") for the purpose of constructing and operating a pumping station to be used for a pipeline. The servitude expired in 1980. Although Gulf filed an expropriation suit against the tract's owners, the suit lapsed for lack of prosecution. In 1986, Gulf's corporate successor, Chevron Pipeline Company ("Chevron") sold its pipeline system, including the pumping station, to Sohio Pipeline Company ("Sohio"), the corporate predecessor of BP Oil Pipeline Company ("BP"). Two years later, Chevron acquired an undivided 1.5% fee interest in the tract and transferred it to Sohio. In 2006, BP and the defendant/appellee in this case, Plains Pipeline, L.P. ("Plains") executed a purchase agreement in which BP sold the pipeline system, including the pumping station, to Plains.

In 2009, G&M and Plains entered into an agreement in which G&M granted Plains a servitude for the pumping station, and settled with Plains regarding Plains' alleged wrongful use of the pumping station from 2006 through 2009. The following year, G&M sued BP and Chevron in Louisiana federal court, asserting an accounting claim against BP and others (the "Louisiana

Claim"). In the Louisiana Claim, G&M alleged that, because BP is a co-owner of a small undivided interest in the tract, BP's use of the pumping station for its sole economic benefit obligated BP to account to G&M for the revenues and profits that BP gained through operating the pumping station.

BP sought indemnity from Plains for the Louisiana Claim, pursuant to the indemnity obligations contained in the 2006 purchase agreement, in which it sold the pipeline system and pumping station to Plains. When Plains rejected BP's indemnification demand, BP sued Plains for breach of the purchase agreement's indemnity obligations and sought a declaratory judgment that Plains was obligated to indemnify BP with respect to the Louisiana Claim.

Plains moved for summary judgment on BP's claims, arguing that (1) BP was not entitled to indemnity for an obligation specifically allocated to BP under the purchase agreement, and (2) the purchase agreement did not apply to losses arising from BP's own gross negligence or willful misconduct. The trial court granted Plains' motion for summary judgment and dismissed all of BP's claims with prejudice, declaring that Plains had no duty to indemnify BP for damages assessed with respect to the Louisiana Claim. BP appealed.

Both parties agreed that the provisions of the purchase agreement were unambiguous. However, BP argued that the Louisiana Claim falls under the plain language of the agreement's indemnity obligations. On the other hand, Plains took the position that the Louisiana Claim remains BP's sole obligation as a pre-closing expense under the plain language of the purchase agreement's "Expense Provision," which stated:

> Unless otherwise provided by the Parties in writing, all utility, accounts payable for goods and services, rent payments and similar expenses attributable to the Pipeline Assets for any period of time on or prior to the Closing Date, regardless of when due or payable, shall be the sole obligation of the Seller Group and the Seller Group shall promptly pay, or if paid by [Plains], promptly reimburse [Plains] for and hold [Plains] harmless from and against same. Subject to the terms of this Purchase Agreement, unless otherwise provided by the Parties in writing, all utility, accounts payable for goods and services, rent payments and similar expenses attributable to the Pipeline Assets for any periods of time subsequent to the Closing Date, regardless of when due or payable, shall be the sole obligation of [Plains] and [Plains] shall promptly pay, or if paid by the Seller Group, promptly reimburse the Seller Group for and hold the Seller Group harmless from and against same.

Finding the terms to be unambiguous, the Court of Appeals concluded that the Louisiana Claim did not seek "rent payments" or "similar expenses." The Louisiana Claim was therefore not a pre-closing expense that would be the sole obligation of BP under the Expense Provision.

The Court of Appeals next examined whether Plains owed indemnification to BP under section 10.1, the purchase agreement's general indemnification provision, which stated, in relevant part:

(a) Subject to the provisions of this ARTICLE X…, from and after the Closing, [BP] agrees to indemnify and hold harmless [Plains]… from and against any and all of [Plains'] Losses… claims, actions, suits and other proceedings… which [Plains] demonstrates resulted from, relate to or arise out of the following: …

(iv) [BP's] gross negligence or willful misconduct (whether sole, passive, active or concurrent) in the construction, operation, maintenance, repair, expansion or management of the Purchased Pipeline Systems; or

(v) [BP's] gross negligence or willful misconduct (whether sole, passive, active or concurrent) in the ownership or use of the Purchased Pipeline Systems other than with respect to the construction, operation, maintenance, repair, expansion or management of the Purchased Pipeline Systems…

Except, in each case, to the extent that [BP] demonstrates such Losses resulted from, relate to or arise out of the gross negligence or willful misconduct of [Plains or Plains' Affiliated Companies] or its or their officers, directors, agents and employees.

(b) Subject to the provisions of this ARTICLE X, from and after the Closing, [Plains] agrees to indemnify and hold harmless [BP]… from and against any and all Losses…, claims, actions, suits and other proceedings… which result from, relate to or arise out of the following:

…

(iii) [BP'S] NEGLIGENCE (WHETHER SOLE, PASSIVE, ACTIVE OR CONCURRENT) OR OTHER LEGAL FAULT (INCLUDING BUT NOT LIMITED TO STRICT LIABILITY0 IN THE CONSTRUCTION, OPERATION, MAINTENANCE, REPAIR, EXPANSION OR MANAGEMENT OF THE PURCHASED PIPELINE SYSTEMS;

(iv) [BP'S] NEGLIGENCE (WHETHER SOLE, PASSIVE, ACTIVE OR CONCURRENT) OR OTHER LEGAL FAULT (INCLUDING BUT NOT LIMITED TO STRICT LIABILITY) IN THE OWNERSHIP OR USE OF THE PURCHASED PIPELINE SYSTEMS OTHER THAN WITH RESPECT TO THE CONSTRUCTION, OPERATION, MAINTENANCE, REPAIR, EXPANSION OR MANAGEMENT OF THE PURCHASED PIPELINE SYSTEMS (WHICH MATTERS SHALL BE GOVERNED BY SECTION 10.1(b)(iii) ABOVE); or

(v) any Assumed Liability not governed by Section 10.1(b)(iii) or Section 10.1(b)(iv) above;

Except, in each case, to the extent that [Plains] demonstrates that such Losses resulted from, relate to or arise out of the gross negligence or willful misconduct of the Seller Group or its officers, directors, agents and employees.

After review of the relevant terms, definitions, and attached schedules of the

purchase agreement, the Court of Appeals concluded that the language of the purchase agreement regarding the parties' indemnity obligations was unambiguous. Section 10.1(b) laid out the general indemnification obligations in the form of a single, long sentence that included a final clause containing an exclusion. This exclusionary final clause of section 10.1(b) contained an exclusion of certain matters from the scope of Plains' indemnity under section 10.1(b): "except, in each case, to the extent that [Plains] demonstrates such Losses resulted from, relate to or arise out of the gross negligence or willful misconduct of the Seller Group or its officers, directors, agents and employees." Interpreting this "clear text," the Court of Appeals concluded that Plains was not obligated to indemnify BP under section 10.1(b) to the extent that Plains demonstrated that the losses for which BP sought indemnity resulted from, related to, or arose out of the gross negligence or willful misconduct of the Seller Group (which included BP), its officers, directors, agents, and employees.

Although Plains' alleged that BP's conduct which gave rise to the Louisiana Claim rose to the level of gross negligence or willful misconduct, the Court of Appeals disagreed. In the Louisiana Claim complaints submitted with Plains' summary judgment motion, G&S did not allege that BP engaged in conduct constituting either gross negligence or willful misconduct. G&S merely alleged that BP used and operated the pumping station without any legal right to do so, without any authorization or permission from G&S, and that, absent such authorization, BP's conduct constituted a trespass. Because the summary judgment evidence did not show that G&S had ever alleged that BP engaged in conduct constituting gross negligence or willful misconduct, the Court of Appeals declined to address the significance, if any, that such an allegation would have had in the instant indemnity dispute.

Accordingly, the Court of Appeals concluded that the summary judgment evidence in the record simply failed to address whether the losses for which BP sought indemnity resulted from, related to, or arose out of BP's gross negligence. Plains did not satisfy its burden to prove as a matter of law that BP's losses for which it sought indemnity did result from or relate to such gross negligence or willful misconduct.

## Davis-Lynch, Inc. v. Asgard Technologies, LLC,

No. 14–13–01112–CV, 2015 WL 3988232 (Tex. App.—Houston [14th Dist.] June 30, 2015, no pet. h.)

**Synopsis:**

There was no general duty for a staffing agency to perform a criminal background check when the staffing agency's client transferred an employee from a position that did not foreseeably create a risk of harm to others to one that did give rise to such a risk unless the staffing agency had knowledge of the transfer.

**Overview:**

A staffing company, Asgard Technologies, LLC ("Asgard") placed an employee as a receptionist at Davis–Lynch, Inc ("DLI"), an oilfield manufacturing company. DLI subsequently promoted the employee who eventually became DLI's head of accounting. DLI ultimately discovered, however, that the employee had embezzled over $15 million while in the accounting department and that her criminal history included a deferred adjudication for misdemeanor theft as well as a conviction

for misdemeanor theft. As a result, DLI brought various claims against Asgard, including for negligent hiring and retention. The trial court granted Asgard's traditional motion for summary judgment against these claims.

Among other issues on appeal, DLI contended that Asgard was negligent in hiring and retaining the employee it provided for DLI in failing to perform a criminal background check. 2015 WL 3988232 at *9. In analyzing DLI's complaint on appeal, the Fourteenth Court of Appeals surveyed the following cases regarding imposition of a general duty to seek or obtain criminal records of employees: *Wise v. Complete Staffing Servs., Inc.*, 56 S.W.3d 900 (Tex. App.—Texarkana 2001, no pet.) (holding that a temporary worker provided by staffing agency as an unskilled laborer at Ms. Baird's Bakery did not injure the plaintiff as a result of incompetence or unfitness for the job, but by an intervening criminal act and the staffing company had no duty to check the criminal histories of its employees unless directly related to the duties of the job at hand); *Guidry v. National Freight, Inc.*, 944 S.W.2d 807 (Tex. App.—Austin 1997, no writ.) (sexual assault of a third party by truck driver was un unforeseeable "bad act" and the employer did not have a duty to investigate non-vehicular criminal background); *Arrington's Estate v. Fields*, 578 S.W.2d 173, 178 (Tex. Civ. App.—Tyler 1979, writ ref'd) (employer found liable for negligently hiring a security guard with an extensive criminal record since it was foreseeable that a customer might be harmed by an armed employee performing a hazardous job). 2015 WL 3988232 at *9. The key inquiry drawn from these cases was whether the temporary worker was placed in a situation that foreseeably created a risk of harm to others because of his or her employment duties. *Id*.

Applying this inquiry to the case at hand, the Fourteenth Court of Appeals held that the embezzlement scheme by the employee was a clearly intervening criminal act. *Id*. at *10. The court noted, however, that is could not lightly be said that the employee's criminal history was unrelated to the duties of the job "at hand" at the time the "bad acts" occurred." *Id*. Past embezzlement was patently relevant for the job duties of a person serving as head of accounting. *Id*. The remarkable feature of the case was DLI's promotion of the employee provided by Asgard from receptionist to head of accounting. *Id*. Had the employee remained in the position she was placed by Asgard, she would not have been in a situation that foreseeably created a risk of harm to others because of her employment duties. *Id*. Given this distinguishing "twist," the court ultimately concluded that Asgard had no duty to perform a criminal background check because the facts did not indicate that Asgard knew or should have known that, because of its act of hiring and placing the employee without performing a background check, the crime (or one similar in nature) might occur. *Id*. Accordingly, the trial court did not err with respect to granting summary judgment in favor of Asgard against DLI's negligent hiring claim. *Id*.

Interestingly, DLI's claim for negligent retention did not suffer the same fate. *Id*. The Fourteenth Court of Appeals held that Asgard's post-hiring, undisclosed knowledge of the employee's criminal theft history, combined with Asgard's post-hiring knowledge that the employee had been transferred to DLI's accounting department, raised a fact question as to the foreseeability of the employee's embezzlement. *Id*. Therefore, the court concluded that the trial

court erred in granting summary judgment in Asgard's favor as to DLI's negligent retention claim. *Id.*

## Nussbaum v. Builders Bank,

No. 02-14-00304-CV, 2015 WL 4043348, (Tex. App.—Fort Worth [2nd Dist.] July 2, 2015, no pet. h.)

**Synopsis:**

Lender's default judgment against a guarantor was attributable to or mixed with guarantor's fault or negligence, and thus the guarantor could not obtain relief when he failed to provide a written designation of current address after changing addresses.

**Overview:**

Barry Naussbaum signed a guaranty agreement guaranteeing repayment of a $4,526,871.00 loan made by Builders Bank to Meadowbrook 8B Limited Partnership ("Borrower"). The guaranty agreement included a provision that notices and service of process concerning the guaranty would be mailed to Nussbaum by certified or registered mail at a specified address. Although Nussbaum contractually agreed to service of process by certified or registered mail at the address specified in the guaranty agreement, he subsequently moved from that address and failed to provide, per the terms of the guaranty, written designation to Builders Bank of an updated address for notice and service of process. Borrower subsequently defaulted on the loan, ultimately resulting in Builders Bank suing Nussbaum for breach of the guaranty agreement. Builders Bank sent all notices required under the guaranty, including notice of default of the underlying loan, to Nussbaum at the address designated in the guaranty. Builders Bank obtained a default judgment after Nussbaum failed to answer.

Nussbaum timely filed a bill or review proceeding challenging the default judgment and also filed a traditional motion for summary judgment in the bill or review proceeding, claiming the summary judgment evidence conclusively established that he was not properly served with process. Builders Bank filed a cross-motion for summary judgment, arguing that the summary judgment evidence conclusively established Nussbaum's own fault or negligence as at least a partial cause of entry of default judgment in the underlying suit, negating the third bill of review element requiring that judgment was rendered unmixed with any fault or negligence of petitioner. The trial court granted Builders Bank's cross motion.

The Fort Worth Court of Appeals held that the parties to the guaranty were free to agree to the contractual provision specifically designating an address for notices and services of process and the need for written designations for updated addresses. 2015 WL 4043348 at *5. To the extent Nussbaum failed to receive notice of service of process concerning Builders Bank's suit against him for breach of the guaranty agreement he had signed, such failure was the result of a self-inflicted wound based on his own fault or negligence in failing to provide to Builders Bank a written designation of a current address for service. *Id.* Accordingly, the trial court's summary judgment for Builders Bank was upheld.

## RSL–3B–IL, Ltd. v. The Prudential Insurance Company of America,

No. 01-14-00482-CV, 2015 WL 4141454 (Tex. App.—Houston [1st Dist.] July 9, 2015, no pet. h.)

**Synopsis:**

The applicant seeking approval of a factoring agreement bears the burden of proffering evidence to support the findings necessary to approve the agreement and to obtain an order that comports with statutory requirements.

**Overview:**

Erica Adegoke ("Annuit") entered into two judicially approved factoring agreements with two different factoring companies following accepting a structured settlement to resolve her personal injury claim against a tort defendant. The first agreement occurred in early 2003 with Settlement Capital Corporation ("SCC") and the second, encompassing the residual monthly payment Adegoke retained after subtracting the amount owed to SCC, later that year with Rapid Settlements, which assigned it to RSL-3B-IL ("RSL"). Pursuant to the Structured Settlement Protection Act ("SSPA"), the factoring companies each procured approval of their factoring agreements with a transfer order. The first order approved the SCC agreement issued in January 2003 and directed the annuity issuer, Prudential, to deliver certain monthly structured settlement payments to SCC. While the structured settlement payments sold to SCC and RSL do not overlap, the second order, approving the RSL agreement and issued in November 2003, directed Prudential to deliver parts of the same payments to RSL.

After receiving notice of the second transfer order, Prudential suspended the assigned payments, contending that the two orders created conflicting obligations. RSL subsequently sued Prudential for breach of contract and sought declaratory relief, asserting its rights as Adegoke's assignee under the factoring agreement. Prudential answered and interpleaded the funds at issue. The trial court granted Prudential's motion for directed verdict on RSL's breach of contract claim.

Among other issues on appeal, RSL challenged the trial court's directed verdict on its breach of contract claim. 2015 WL 4141454 at *4. RSL based its breach of contract claim on its contention that Adegoke, as third party beneficiary of the annuity contract, retained the rights to sell the unassigned portions of her annuity payments to RSL through the transfer agreement and that Prudential's failure to make those payments as directed constituted a breach of that contract. *Id*. The First Court of Appeals affirmed RSL's contention that Adegoke has the right to sell unassigned payments from her structured payment, but asserted that RSL's recitation of that right did not answer the salient issue before the court which was whether the second transfer order ---directing Prudential, and not the first factoring company, "to deliver and make payable" to RSL the "portion of the [assigned] monthly annuity payments" remaining after subtraction of SCC's share—actually effected a transfer. *Id*. at * 5. In the litany of cases cited by RSL reciting the general rule that an annuitant has the right to sell unassigned payments, the annuity issuer's obligation remained the same under both the original and later transfer orders with the only change coming in the form of altered servicing agreement terms. *Id*. In the present case, however, the second transfer order required Prudential to remit a portion of certain periodic payments to RSL even though the first order required Prudential to send the entirety of each of the same periodic payments to SCC, the original factoring company, who then bore the responsibility for remitting payment to Adegoke. *Id*. As a consequence, the First

Court of Appeals observed that the evidence conclusively proved that Prudential owed no payment obligation to Adegoke when she entered into the RSL transfer agreement. *Id*. Because the second transfer order did not effectively transfer to RSL Adegoke's remaining interest in the specified periodic payments, RSL was not a "transferee" and thus, Prudential was not liable to RSL. *Id*. Accordingly, the directed verdict on RSL's breach of contract claim was upheld. *Id*.

The First Court of Appeals dismissed RSL's contention that fault for the second order should fall on Prudential because it was aware of the first order's terms and, as an interested party in the proceedings for approval of the second factoring agreement, should have intervened and called attention to the discrepancy. *Id*. The Structured Settlement Protection Act has no provision imposing such a responsibility and the First Court of Appeals refused to read one into the statute in light of its provisions designed to minimize additional cost to the annuity issuer from factoring transactions. *Id*. Instead, as the applicant seeking judicial approval of the factoring agreement, the court held that RSL bore the responsibility of proffering evidence to support the findings necessary to approve the agreement and obtain a statutorily compliant order. *Id*.

## Hsin–Chi–Su v. Vantage Drilling Company

No. 14-14-00461-CV, 2015 WL 4249265 (Tex. App.—Houston [14th Dist.] July 14, 2015, no pet. h.)

**Synopsis:**

A wholly owned business entity is deemed aware of alleged fraud and breach of fiduciary duty claims resulting in its acquisition of property, holding such property in trust, when the entity's sole owner, director, and officer is responsible for the underlying claims.

Vantage Drilling Company ("Vantage") sued Hsin-Chi-Su aka Nobu Su ("Su") to recover Vantage shares held by Su's wholly owned affiliate, F3 Capital, on the grounds that the stock was acquired via Su's fraud and breach of fiduciary duties. Su, acting individually and through F3 Capital and other affiliates, entered into a series of transactions with Vantage. Vantage, in reliance on representations made by Su, closed these transactions and, at Su's direction, paid consideration including warrants to Vantage common stock to Su's wholly owned, solely controlled affiliate F3 Capital. As a part of the transaction history, Su eventually became a Director on Vantage's Board of Directors. While serving as a Vantage Director, Su breached his fiduciary duties to Vantage by not complying with his obligations under the contracts and frustrating Vantage's ability to obtain financing for other transactions in an attempt to retain his Vantage stock holdings and obtain additional cash and other benefits.

After a complicated procedural history involving both federal and state court proceedings, the trial court entered a temporary injunction precluding F3 Capital's owner, Su, from disposing of, or otherwise encumbering Vantage shares received as a result of Su's efforts pending final judgment.

A central issue considered by the Fourteenth Court of Appeals in assessing Su's challenge to the trial court's injunction was whether Vantage had a probable right to recover shares held by Su's wholly owned affiliate, F3 Capital. 2015 WL 4249265 at *12. On appeal, Su maintained that, irrespective of his own actions and the potential for

imposition of equitable remedies of disgorgement or constructive trust against him personally, Vantage did not and could not prove a probable right to recover Vantage shares held by F3 Capital because, unlike Su himself, F3 Capital was never a Vantage fiduciary. *Id.* at *12-13. Accordingly, in Su's estimation, the trial court's finding that if Vantage obtained a judgment against Su, it could also be entitled to recover shares via equitable relief against F3 Capital or other transferees of the shares was in error. *Id.* at *13.

Citing authority that when property subject to a constructive trust is transferred, the recipient of the property takes title to the property subject to the trust if the recipient has notice of the existence of the trust at the time of the transfer, the Fourteenth Court of Appeals, found that F3 Capital was aware of the alleged fraud and breach of fiduciary duties resulting in its acquisition of the shares considering that Su was F3 Capital's sole owner, director, and officer. *Id.* Therefore, F3 Capital could not make the incredulous claim that it was an unsuspecting, innocent transferee of property subject to a constructive trust. *Id.* As a consequence, the court found that Su had not shown Vantage would be foreclosed from recovering shares held by F3 Capital in constructive trust by adding F3 Capital to the suit or bringing a subsequent enforcement action in the event of a probable judgment against Su. *Id.*

The significance of Su serving as the sole owner, director, and officer of F3 Capital was also made clear in the court's indication that an order for a constructive trust over, or disgorgement of, the shares held by F3 Capital would dovetail with the Texas Turnover Statue. Under the Texas Turnover Statute, to aid in enforcement of a judgment, a court may "order the judgment debtor to turn over nonexempt property that is in the debtor's possession or is subject to the debtor's control." Tex. Civ. Prac. & Rem. Code Ann. § 31.002(b)(1) (West 2015). *Id.* Because Su served as the sole, owner, director, and office of F3 Capital, the Fourteenth Court of Appeals held that the shares were subject to Su's control under the statute. *Id.* Based on these two rationales, Vantage established a probable right to recover the Vantage shares held by F3 Capital. *Id.*

## Couchman v. Cardona,

No. 01-14-01000-CV, 2015 Tex. App. LEXIS 7634 (Tex. App.—Houston [1st Dist.] July 23, 2015)

**Synopsis:**

At issue in this appeal was whether a party that fails to file a certificate of merit in compliance with Texas Civil Practice and Remedies Code § 150.002 may non-suit that case before it is dismissed and file a second, new lawsuit in which a certificate of merit is properly served with the original petition. As detailed below, the Houston First Court of Appeals affirmed the trial court holding that the certificate of merit must be filed in the pending action and consideration of whether or not a certificate of merit was filed in a previous lawsuit (even if based on same facts and claims) is unwarranted.

**Overview:**

Elizabeth Cardona ("Cardona") filed a lawsuit against two defendants Toby Paul Couchman ("Couchman") and Pro-Surv for damages incurred based on an allegedly incorrect land survey. Cardona, who was in the process of buying real property in 2012 and needed title insurance, hired Pro-Surv to conduct a survey of the real property. Pro-Surv thereafter provided Cardona with a

land survey conducted by Couchman which indicated that the real property at issue was not in the flood plain. After Cardona purchased the property, Couchman and Pro-Surv sent a second land survey to the City of Houston which revealed that the real property at issue was in fact, within the flood plain. Following receipt of the second land survey indicating that the property was in the flood plain, the City of Houston denied Cardona's request for permits to perform construction on the property she purchased.

Cardona thereafter filed a lawsuit against Couchman and Pro-Surv in June 2014. Cardona, however, failed to file a certificate of merit pursuant to Tex. Civ. Prac. & Rem. Code § 150.002 with her Petition and Couchman and Pro-Surv moved to dismiss on such grounds. In May 2014 Cardona non-suited her petition (before the Motion to Dismiss was ruled upon) and filed another lawsuit a month later alleging the same causes of action against Couchman and Pro-Surv and served a certificate of merit.

On appeal, Couchman and Pro-Surv asserted that the trial court abused its discretion in failing to dismiss Cardona's second filed lawsuit. Couchman and Pro-Surv argued that Cardona's failure to file a certificate of merit in her "first filed petition" (i.e. the July 2014 petition which was non-suited) in compliance with Tex. Civ. Prac. & Rem. Code § 150.002's requirement that any action "arising out of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit [certificate of merit] of a third party…registered professional land surveyor" prevents Cardona from ever being able to satisfy the statutes requirements.

In rejecting Couchman and Pro-Surv's argument, the court of appeals held that the "statute provides…that in an action brought by the plaintiff, the affidavit—known as the certificate of merit—must be filed with the petition *in that action*…[and] [t]he statute does not extend the limitation to any subsequently-filed case." Accordingly, the court of appeals, after confirming that Cardona's certificate of merit filed in the second lawsuit was adequate, held that Cardona complied with the statutory requirements set forth in Tex Civ. Prac. & Rem. Code § 150.002.

## Min v. H & S Crane Sales, Inc.,

No. 14-14-00270-CV, 2015 Tex. App. LEXIS 7893 (Tex. App.—Houston [14th Dist.] July 30, 2015)

**Synopsis:**

The court held payments made on a reversed judgment to the wrong parties do not qualify as payments under a revised order on remand—even if the full amount of money the trial court originally ordered paid to the wrong parties satisfied the judgment order.

**Overview:**

Following a trial on the merits between Brian P. Min, Federal Offshore, Inc., and Min Transcontinental, Inc. (collectively "Min") and H&S Crane Sales, Inc. ("H&S") regarding a dispute related to a leased crane, the trial court ordered Min to pay H&S $595,000. However, as a result of a dispute between H&S's current and former counsel, the trial court divided up the judgment, ordering Min to pay (a) the Hodge Law Firm [former attorney for H&S] $241,119.13, (b) the Galveston County District Clerk for $119,000 to the benefit of H&S and Charles Kaufmann [new attorney for H&S], and (c) H&S for $234,880.87. Prior to the

expiration of the trial court's plenary power, Min's insurance company issued three checks and mailed them as directed by the trial court's order.

H&S filed a notice of appeal challenging the trial court's final judgment. On appeal, the court reversed the trial court's order insofar as it awarded damages to the Hodge Law Firm and to Charles Kaufmann—as they were not parties to the lawsuit—and rendered judgment in the amount of $595,000 in favor of H&S. On remand, the trial court conducted two separate hearings wherein it was discovered that all three checks had been issued (one of which was to the Hodge Law Firm) and no money remained in the registry of the court (as it was disbursed to Charles Kaufmann based on the court's prior order). The trial court, in enforcing the court of appeals opinion on remand, held that H&S was entitled to a new judgment in the amount of $595,000—despite the fact that Min's insurer had already issued check totaling $595,000 as previously ordered by the trial court.

On appeal, Min argued that because it had already issued checks for the $595,000 based on the original judgment, the trial court erred when it entered a second order for the full amount of $595,000 in favor of H&S. The court of appeals, however, found Min's argument "flawed because the trial court's amended final judgment was reversed by this Court on the ground that it incorrectly awarded money to H&S's attorneys…who were not parties." The court held that Min's argument that it fully satisfied the $595,000.00 judgment through payments made on a reversed judgment "must be rejected."

Further, the court held that Min failed to show that H&S would receive double recovery if the trial court's new order was enforced. The court pointed to the following facts (1) Min failed to show that money sent directly to H&S's former attorney or placed in the registry of the court resulted in payment to H&S; and (2) Min failed to show that H&S ever cashed the $234,880.87 check issued to H&S following the now reversed order entered by the court. As such, the court held that Min failed to establish that it fully paid the $595,000.00 judgment in favor of H&S, and that the trial court did not abuse its discretion in ordering Min to pay H&S the full amount of the judgment.

## Becker-White v. Goodrum,

No. 14-13-01000-CV, 2015 Tex. App. LEXIS 7907 (Tex. App.—Houston [14th Dist.] July 30, 2015)

**Synopsis:**

The issues presented in this appeal include (1) whether a sworn account affidavit satisfied Tex. R. Civ. P. 185's requirements, and (2) whether unsworn allegations made in response to a suit on sworn account are sufficient to prove that the other party's sworn account affidavit failed to comply with Tex. R. Civ. P. 185's requirements. The court held that an affidavit which complies with the elements set forth in Tex. R. Civ. P. 185 is sufficient to support a suit on sworn account claim which is uncontroverted by sworn affidavit. Additionally, the court held that unsworn allegations made in response to a suit on sworn account are insufficient to establish a sworn account affidavit fails to comply with Tex. R. Civ. P. 185's requirements.

**Overview:**

C. Greg Goodrum ("Goodrum") filed a lawsuit against his former clients Lori Becker-White and Carol Gould ("Becker-

White") seeking to recover unpaid attorney's fees following Goodrum's representation of Becker-White in two prior lawsuits. Among the many causes of action alleged by Goodrum, he sought to recover his unpaid attorney's fees by utilizing the sworn account procedure set forth in Tex. R. Civ. P. 185. Becker-White failed to file a sworn denial in response to Goodrum's suit on sworn account cause of action. Following a bench trial, the court awarded Goodrum $16,084.82 in unpaid attorney's fees.

On appeal, Becker-White claimed that Goodrum's sworn affidavit filed in support of his suit on sworn account claim failed to meet the requirements of Tex. R. Civ. P. 185. In rejecting Becker-White's argument, the court detailed that Goodrum invoked the procedure set forth in Tex. R. Civ. P. 185 when he filed his original petition asserting a suit on sworn account claim and attached to that petition an affidavit in compliance with Rule 185, executed in front of an officer authorized to administer oaths, which set forth that Goodrum's claim for $16,084.82 was (a) within his personal knowledge, (b) just and true, (c) that the amount is due, and (d) that all just and lawful offsets, payments, and credits had been accounted for. Goodrum also included with the affidavit an itemized statement of the account, including deductions of more than $25,000 in payments made by Becker-White.

Becker-White argued that Goodrum failed to account for more than $20,000 in additional payments they claim to have made to Goodrum. However, as detailed by the court, "an unsworn allegation by [Becker-White] that they made additional payments not reflected in Goodrum's affidavit does not mean that Goodrum failed to comply with Rule 185's requirements." Instead, the court held that Goodrum's affidavit in support of his suit on sworn account claim met all the requirements set forth in Tex. R. Civ. P. 185 and overruled Becker-White's appeal to the contrary.

## Brenham Oil & Gas, Inc. v. TGS-NOPEC Geophysical Co.,

Nos. 01-13-00349-CV & 01-13-00610-CV, 2015 Tex. App. LEXIS 7953 (Tex. App.—Houston [1st Dist.] July 30, 2015, no pet. history)

**Synopsis:**

General personal jurisdiction is not established as to a parent company by the activities of subsidiaries that are separate corporate entities, unless the subsidiary is an "alter ego" of the parent, and normal parent-subsidiary interactions are equally insufficient. In analyzing specific personal jurisdiction, the focus must be on whether the facts that will be adduced to support the pled cause of action arise from contacts or activities in the forum state.

**Overview:**

Brenham, a Texas corporation headquartered near Houston, sought to enter a hydrocarbon production-sharing agreement with the Republic of Togo. Brenham's CEO met with Togo's Energy Minister and its Director of Hydrocarbons regarding such an agreement. Prior to the meeting, the Togolese officials liaised with a London-based employee of TGS a geophysical company with its operational office in Houston, Texas and to whom the Togolese government had licensed seismic data for the purpose of marketing it to exploration companies to discuss Brenham. The TGS employee did not recommend that Brenham be considered for a petroleum exploration permit, owing to its lack of experience and small size. Ultimately, the

Togolese government entered into a production agreement with ENI S.P.A., an Italian oil and gas company, one of the companies TGS had targeted as a potential suitor.

Brenham filed suit against TGS in Harris County, Texas for tortuous interference with its prospective business relations with Togo. Brenham also filed suit against ENI, alleging that it knowingly assisted or encouraged TGS's tortuous acts. ENI filed a special appearance contesting personal jurisdiction, which was granted by the trial court. TGS filed a motion to dismiss based on forum non conveniens, which was also granted. Brenham appealed both rulings.

First, Brenham argued that the Texas court had both general and specific personal jurisdiction over ENI. With respect to general jurisdiction, Brenham sought to establish that ENI had continuous and systematic contacts with the State of Texas through ENI's indirect American subsidiaries, which maintained offices in Houston. In support, Brenham identified a trip taken by ENI executives to an industry conference in Houston, numerous ENI employee trips to Texas to advise ENI's subsidiaries, and ENI's active role in negotiating a lease of Houston office space for a subsidiary. But, the court found that the trip by executives to meet with other oil companies was not determinative of whether ENI was "essentially at home in Texas." Further, it found the visits by ENI employees insufficient because when these individuals were advising ENI's Texas subsidiaries on the trips they were directed, controlled, and paid by the subsidiary. Finally, the court noted that a parent corporation's "normal" or "routine" interactions with its subsidiaries, outside an alter ego theory, would not alone suffice to subject the parent to personal jurisdiction. In this case, there was no evidence that ENI's interactions with its Texas subsidiaries exceeded a "normal" or "routine" relationship and Brenham did not allege that any of the American subsidiaries were an "alter ego" of ENI. Based on an affidavit submitted by ENI, the court held that ENI's contacts with Texas were not sufficiently continuous and systematic to subject it to general jurisdiction in the state.

With respect to specific jurisdiction, Brenham argued that ENI's negotiation with Texas-based TGS employees for the purchase of the relevant seismic data necessitated a jurisdictional finding in its favor. The court disagreed, recognizing that to exercise specific jurisdiction a cause of action must arise from or relate to contacts or activities in the forum state. As such, the facts that will be the focus of the trial must be identified and their connection to a party's contacts and activities in the forum state must be analyzed. Here, Brenham alleged that ENI aided and encouraged TGS to malign Brenham. The court found that ENI's negotiations with TGS for the seismic data had nothing to do with this allegation against ENI; thus, such contacts or activities could not support an exercise of specific jurisdiction over ENI. The court affirmed the trial court's dismissal of Brenham's claims against ENI.

Second, Brenham argued that the trial court erred in granting TGS's motion to dismiss based on forum non conveniens. To establish forum non conveniens, a movant must show that the proposed alternative forum is available and adequate, and then the court must weight the private- and public-interest factors to determine whether dismissal is appropriate. The court found that Togo was an "available" forum because the dispute and the necessary parties could come within its jurisdiction. In making this

determination, the court weighed the credibility of affidavits issued by competing experts on Togolese law. The court also determined that Togo was an "adequate" forum as Brenham failed to submit evidence to overcome the presumption that the substantive law of the foreign forum is "adequate."

Public-interest factors were then reviewed, including (1) the relative ease of access to sources of proof; (2) the availability of compulsory process; (3) the possibility to view the premises, if appropriate; (4) the enforceability of a judgment once obtained; and (5) all of the practical problems that make trial easy, expeditious, and inexpensive. The court gave significant consideration to TGS's argument that the testimony of the Togolese officials with whom Brenham communicated would be vital to its defense. Togo is not a signatory to the Hague Convention on the Taking of Evidence Abroad and the officials would decline to submit to U.S. jurisdiction. It also reviewed the private-interest factors, including (1) the administrative difficulties when litigation is redirected to busy forums instead of being handled at its origin, (2) the burden of jury duty on a community with no relation to the litigation, (3) local interests in having localized controversies decided at home, and (4) avoiding conflicts-of-laws issues. Ultimately, the court found that the private- and public-interest factors weighed in favor of dismissal, carful to give great deference to the trial court's findings. The judgment of the trial court was affirmed.

**Practice Pointer:**

This is a great case to start your personal jurisdiction (general and specific) as well as forum non conveniens research.

# S.C. Maxwell Family Partnership, Ltd. v. Kent,

No. 01-15-00245-CV, 2015 Tex. App. LEXIS 8149 (Tex. App.—Houston [1st Dist.] Aug. 4, 2015, no pet. history)

**Synopsis:**

A party seeking to compel arbitration has the burden to prove the existence of an agreement to arbitrate. This burden is impossible to meet if the party seeking to compel arbitration also alleges that no contract ever formed due to a lack of consideration.

**Overview:**

The S.C. Maxwell Family Partnership ("Family Partnership") purportedly entered into a partnership agreement with Thomas and Nancy Kent to split ownership of a self storage facility in Brenham, Texas. The agreement contained an arbitration provision. The Kents thereafter received a letter from the Family Partnership contending that the partnership agreement was invalid.

The Kents filed an action seeking a declaration that the agreement was valid. The Family Partnership answered the suit attacking the formation and the validity of the agreement, asserting defenses of fraud, fraud in the inducement, failure of consideration, and lack of consideration. The Family Partnership then filed a motion to compel arbitration, which was denied. The ruling was appealed.

On appeal, the court recognized that where the very existence of a contract containing an arbitration provision is called into question, the courts have the authority and responsibility to decide the matter. In contrast, where the validity of a contract

containing an arbitration provision is challenged, the arbitrator is the proper moderator of the dispute. Here, the Family Partnership challenged both the existence of the agreement, by pleading lack of consideration, and the validity of the agreement, by pleading fraud. Because the formation of the agreement was challenged, it was proper for the court, and not the arbitrator, to have decided the issue.

The court then examined whether the claim belonged in arbitration. It noted that the Family Partnership bore the burden of proving the existence of an agreement to arbitrate. However, the Family Partnership's challenge to the formation of the agreement was incompatible with its burden of proof. It could not at the same time claim that the agreement never came into existence and also claim that the arbitration provision in the agreement was enforceable. The trial court's order denying the motion to compel arbitration was affirmed.

**Practice Pointer:**

Before filing an answer with affirmative defenses, decide which is more important: going to arbitration or trying to establish that the contract never came into existence.

## Jennings, Hackler & Partners, Inc. v. North Texas Municipal Water District,

No. 05-14-01043-CV, 2015 Tex. App. LEXIS 8028 (Tex. App.—Dallas July 30, 2015, reh'g denied)

**Synopsis:**

Direct claims against a licensed or registered professional require a certificate of merit from a similarly licensed and situated professional when the claim arises out of the provision of professional services. Vicarious claims can require a different result. In such claims, a certificate of merit will be required from a professional that is licensed and knowledgeable in the same area of practice of the professional from which the vicarious liability arises. Thus, it is possible that the affiant may not have the same license and qualifications as the party being sued for vicarious liability but still be in compliance with Chapter 150 of the Civil Practice and Remedies Code.

**Overview:**

The North Texas Municipal Water District ("Water District") hired Jennings, Hackler & Partners, Inc. ("Jennings"), an architecture firm, to provide architectural and engineering services for the purpose of designing an environmental services building. Jennings hired TurkWorks Engineering, LLC ("TurkWorks") to provide mechanical engineering services. Once completed, the building had issues, principally stemming from the design and installation of the air conditioning and heating systems. The Water District filed suit against Jennings and TurkWorks.

The Water District's original petition included and affidavit from Gregory Schrober, a professional engineer, who opined that TurkWorks failed to exercise reasonable care when it designed the building's HVAC system. Jennings filed a motion to dismiss under Texas Civil Practice and Remedies Code section 150.002, arguing that the Water District failed to comply with the Code because it did not include an affidavit from a licensed architect in support of its allegations against Jennings. The Water District's second amended petition asserted claims against Jennings for breach of contract, negligence, and negligent

hiring and retention of TurkWorks. As to the negligence allegation, the Water District averred that Jennings was independently negligent and also vicariously liable for the negligence of TurkWroks.

The issue on appeal was whether the Water District had to file a separate affidavit from a licensed architect in support of its direct and vicarious claims against Jennings. Section 150.002(a) requires the filing of a certificate of merit in any action for "damages arising out of the provision of professional services by a licensed or registered professional." The court determined that a claim arises out of the provision of professional services if the claim implicates a professional's education, training, and experience in applying special knowledge or judgment. After reviewing the Water District's direct claims against Jennings, it determined that the direct allegations were subject to Chapter 150. The court then reviewed the Schrober affidavit and determined that it was inadequate to meet the requirements of Chapter 150, as Schrober did not hold the same professional license as Jennings (an architect) and was not knowledgeable in the same area of practice. The appellate court, then, found that the trial court abused its discretion in denying Jennings's motion to dismiss as to the direct claims. The matter was remanded on this point.

The appellate court did not, however, reverse the trial court as to the vicarious claims. It found that the provider of the professional services at issue with respect to the vicarious claims was TurkWorks, not Jennings. Therefore, Schrober's affidavit was adequate to meet the requirements of Chapter 150. Both Schrober and TurkWorks were professional engineers with expertise in the same areas of practice.

## Baeza v. Hector's Tire & Wrecker Service,

No. 08-14-00186-CV, 2015 Tex. App. LEXIS 8108 (Tex. App.—El Paso July 31, 2015, modified by agreement)

**Synopsis:**

To establish the affirmative defense of accord and satisfaction, either at common law or under the Texas Business and Commerce Code, the movant must present evidence that the reduced-sum payment was tendered with a clear and unmistakable communication that the payment was being made in complete satisfaction of the underlying obligation.

**Overview:**

Baeza owned a trucking company that had contracts to move materials from a plant to locations designated by its customers. To help keep up with the contractual demands, Baeza entered an oral contract with Hector Garcia, of Hector's Tire and Wrecker Service, to assist by providing additional hauling services. After picking up a load of material, Hector was to provide the load ticket to Baeza, who would then pay Hector for the load, less a five percent commission. A dispute arose, and Hector hired an attorney to send a demand letter to Baeza seeking $15,042.55. Baeza never responded, but eventually sent Hector two checks totaling $6,020.41, which Hector cashed.

Hector filed suit against Baeza requesting the difference between the requested amount in the demand letter and the amount Baeza tendered, or an additional $9,900.25. Baeza answered the lawsuit denying Hector's claims and also raising the affirmative defense of accord and satisfaction. After a bench trial, the court entered judgment in

Hector's favor and awarded him $9,900.25 together with prejudgment interest and attorneys fees. Baeza appealed, claiming that the trial court erred in finding that the facts of the case did not meet the requirements of an accord and satisfaction defense and that the evidence was legally and factually insufficient to support the damage award.

The appellate court reviewed the trial court's holding related to Baeza's affirmative defense under both the common law and statutory accord and satisfaction theories. At common law, the moving party is required to establish (1) the existence of a dispute (2) that the parties "specifically and intentionally agreed" that the tendering and acceptance of the reduced sum would discharge the underlying obligation that formed the basis of the dispute, and (3) that the reduced sum was tendered with an "unmistakable communication" that the amount was being tendered upon the condition that it would satisfy the underlying obligation.

While the first element was clearly met, the appellate court determined that there was no evidence that Hector ever agreed to accept a reduced sum to discharge the original obligation. Further, the court concluded that there was no "unmistakable communication" regarding the partial payment to suggest that it would satisfy the underlying obligation. The two checks issued by Baeza after receipt of the demand letter were unaccompanied by a cover letter and the notation lines were blank. The court noted that the mere acceptance of a tendered check is insufficient to establish this element.

The court then turned to the statutory defense of accord and satisfaction. Texas Business and Commerce Code section 3.311 provides that a person may discharge a debt when: (1) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (2) the amount of the claim was unliquidated or subject to a bona fide dispute, and (3) the claimant obtained payment of the instrument. The court found that element two was established, as there was a bona fide dispute, but found that the trial court erred in disallowing testimony from Baeza's bookkeeper regarding her intent when she sent the checks to Hector. As element one requires "good faith" intent, the bookkeeper should have been allowed to testify. But the error was harmless, as Baeza could not establish the remainder of the defense. As at common law, the statutory defense includes a requirement that the non-moving party clearly be made aware that the tender was intended to discharge a debt prior to its acceptance. Baeza could not establish this requirement, as neither the checks nor any accompanying written communication contained a conspicuous statement to this effect. Moreover, there was no evidence that any such clear communication was made a reasonable time prior to Hector's cashing of the checks. The appellate court affirmed the trial court's holding that the evidence did not establish the defense of accord and satisfaction as a matter of law.

The remaining appellate issue centered on the damage award. There was extreme confusion regarding the load tickets and invoices underlying the damage calculation at trial. Ultimately, the appellate court determined that the damage award was calculated incorrectly, as it was based on Hector's sworn account. The appellate court remanded the case for a new trial on the issue of damages. Conversely, the court stated what it believed to be the correct amount of damages and suggested a remititur to bring the award in line with the evidence. It gave the appellant the

opportunity to accept the remititur in lieu of an additional trial.

**Follow up:**

Baez timely filed a consent to the suggestion of remititur and asked the appellate court to modify the trial court's judgment accordingly. The appellate court did so on August 7, 2015, modifying the judgment by reducing the actual damages to $7,284.86.

# Crews v. DKASI Corp.,

No. 05-14-00544-CV, 2015 Tex. App. LEXIS 4006 (Tex. App.—Dallas April 21, 2015, no pet.)

**Synopsis:**

Parties could not back out of a Rule 11 agreement whose material terms were discussed in emails which were then attached to a letter filed with the court as a Rule 11 agreement. Recasting an affirmative defense as a declaratory judgment counterclaim will not allow a party to seek recovery of attorneys' fees that would otherwise be unavailable as damages.

**Overview:**

Appellants Hal Crews and Debra Leitch were fifty percent shareholders in DKASI Corporation and filed a shareholder oppression lawsuit against appellees Debra and David Holley and ASI Gymnastics, Inc. The Holleys offered to buy Crews and Leitch out of the business venture to settle the claims. The parties negotiated through their counsel, with multiple offers and counter offers made during the negotiations. After agreement as to the core terms, counsel for the Holleys sent a letter to the court filed as a Rule 11 agreement with the email exchanges regarding the buy-out negotiations attached.

Just over a month later, the Holleys filed a motion to enforce the Rule 11 agreement after a disagreement between the parties as to how the business should be valued. Crews and Leitch filed a motion to clarify the Rule 11, or in the alternative, to declare it void. The Holley's motion was granted, which led to Crews's and Leitch's shares of the business being appraised for $334,661.50, after a credit for jointly-owned real property was applied. The Holleys deposited this amount into the registry of the court and then filed a supplemental counterclaim seeking a declaration that Crews and Leitch could no longer maintain their shareholder derivative lawsuit as they were no longer shareholders. They also sought recovery of their attorneys' fees. After both parties moved for summary judgment, the trial court entered judgment that Crews and Leitch take nothing on their shareholder oppression lawsuit and awarded the Holleys $133,840.00 in attorneys fees as damages associated with their declaratory judgment action. Crews and Leitch appealed.

On appeal, Crews and Leitch argued, among other things, that the Rule 11 agreement was unenforceable because it lacked essential terms, that the electronically generated signature block at the bottom of the exchanged emails did not meet the Rule 11 signature requirement, that the agreement was ambiguous, and that the trial court abused its discretion when awarding attorneys' fees.

The appellate court found that the Rule 11 agreement did not fail for lack of an essential term. Crews and Leitch argued that the agreement failed to include any agreement on payment, financing, and preservation of claims. But the court determined that Crews and Leitch failed to

preserve an argument related to their preservation of claims argument. In analyzing the issue of payment and financing, the court found that the email exchanges between the parties were sufficient to identify the essential terms, all of which were incorporated in the Rule 11 agreement.

Crews and Leitch also argued that the papers filed with the court did not constitute an enforceable Rule 11 agreement, as the signature requirement of the Rule was not met. However, the court determined that Crews and Leitch waived this argument by not preserving it in earlier briefing and argument. The court also determined that the Rule 11 agreement was not ambiguous. Thus, the judgment of the trial court was essentially sound.

Nevertheless, the court reversed the trial court's award of attorneys' fees. The fee award was based on the Holleys' declaratory judgment counterclaim. The court determined that the declaratory judgment counterclaim was nothing more than a recasting of one of the Holleys' affirmative defenses, which didn't truly seek any additional affirmative relief. The court noted that a party may not artfully plead an affirmative defense in the form of a declaratory judgment counterclaim in order to seek attorneys' fees where none would be otherwise available.

## Mikob Properties, Inc. v. Joachim,

2015 WL 2394117 (Tex. App.—Dallas 2015)
2015 Tex. App. LEXIS 5091

**Synopsis:**

Breach of contract and fraud case involving interpretation of a settlement agreement/release. Antecedent rule was not controlling. There was no evidence of justifiable reliance.

**Overview:**

The parties in the case, appellant K&K Group and appellee IRC Group, were involved in four underlying cases referred to by the court as the (1) Brokerage Case, (2) Libel Litigation, (3) Hilcom Suit, and (4) Current Lawsuit. The Brokerage Case and the Libel Litigation preceded the Hilcom Suit and were settled by a Rule 11 Agreement entered on the very day that K&K Group was served with IRC Group's petition in the Hilcom Suit. The formal settlement agreement was not executed until two weeks later. The formal settlement agreement specifically named the Brokerage Case and the Libel Litigation, which were defined terms, but was silent regarding the Hilcom Suit. The court noted that all parties were represented by counsel in these three cases and during the drafting and negotiation of the formal settlement agreement.

The Hilcom Suit rocked along for almost two years before K&K Group asserted that IRC Group was breaching the formal settlement agreement by pursuing the Hilcom Suit. When IRC Group did not desist, K&K Group brought the Underlying Lawsuit. In a directed verdict, the trial court found, among other things, that (1) the formal settlement agreement unambiguously did not release the Hilcom Suit, (2) K&K Group failed to present evidence of justifiable reliance to support a fraud claim, and (3) IRC Group was entitled to $15,000 in attorneys' fees under the declaratory judgment statute. The appellate court affirmed on all issues.

With regard to the formal settlement agreement, he Dallas Court of Appeals rejected K&K Group's interpretation:

> Under that canon of contract and statutory construction, "relative and qualifying words, phrases, and clauses are to be applied to words and phrases immediately preceding, and are not to be construed as extending to or including others more remote." Further, "modifiers are intended to refer to the words closest to them in [a] sentence."

However, the court found no such isolation; instead, the court noted that the phrase "cause of action" was in a string of synonyms that thrice referenced the Brokerage Litigation and Libel Litigation and gave no indication that "cause of action" extended to a lawsuit not expressly mentioned. Further, taken as a whole, the formal settlement agreement evinced the parties' intention to limit the release to the Brokerage Litigation and Libel Litigation. Indeed, the formal settlement agreement's first numbered paragraph identified the scope of the release and limited it to the Brokerage Litigation and Libel Litigation.

Fraud requires justifiable reliance. The Dallas Court of Appeals noted that the parties were sophisticated business people represented by counsel engaged in multiple adversarial proceeding all of whom negotiated extensively and at arms length and, in doing so, signed a document that represented and warranted that they read and understood the terms of the formal settlement agreement. Under these circumstances, K&K Group was obligated to protect its own interests, is charged with knowledge of all the facts, and whose failure to use due diligence is not excused by mere confidence in the honesty and integrity of the other party. Finally, to the extent they relied on oral promises that were contrary to the unambiguous terms of the parties' written agreement, their reliance was unjustified as a matter of law.

In affirming the award of attorneys' fees to IRC Group, the Dallas Court of Appeals distinguished *MBM Financial Corp. v. Woodlands Op. Co., 292 S.W.3d 660, 669 (Tex. 2009).* While acknowledging that a plaintiff cannot merely tack on a declaratory judgment action to a mature breach of contract claim for the purpose of obtaining fees when the breach of contract suit fails, the court noted that IRC Group sought attorneys' fees for both pursuing its own <u>and defending against K&K Group's declaratory judgment</u>. Thus, IRC Group was entitled attorneys' fees.

Note: On October 12, 2015, the Texas Supreme Court granted Mikob Properties' second TRAP 53.7(f) motion to extend time to file a petition for review making the petition for review due on October 21, 2015.

**<u>Practice Pointer:</u>**

Specifically plead all contractual paragraphs upon which you may rely as an independent ground for your claim or defense. Here, after losing the interpretation argument, K&K Group tried to establish breaches under 5 other paragraphs of the formal settlement agreement. The appellate court reused to consider them as they had not been plead nor raised in the summary judgment papers.

## White Point Minerals Inc. v. Swantner,

464 S.W. 3d 884 (Tex. App.—Corpus Christi, 2015, no pet. hist.)

**<u>Synopsis:</u>**

Only present stockholders of a corporation have standing to pursue claims for corporate books and records under Texas Business Organization Code § 21.218.

**Overview:**

Swantner was a stockholder in White Point Oil & Gas Company ("O&G"). In November 2012, O&G's board announced the intent to merge with White Point Minerals, Inc. ("Minerals") by stockholder vote on November 28, 2012 at a called stockholders' meeting. Swantner made several requests for corporate records before that date and O&G partially responded. Swantner did not appear and vote nor did he submit a proxy. The merger passed. As of December 1, 2012, eligible O&G stockholders got Minerals' stock and ineligible O&G stockholders—ones that did not sign the shareholder agreement—like Swantner, got bought out. Swantner made additional requests for corporate records after December 1, 2012. O&G, noting that Swantner was no longer a stockholder, refused to provide the records requested after December 1, 2012.

In a case of apparent first impression, the Corpus Christi Court of Appeals held:

> the statutory rights addressed in *section 21.218* apply solely to a record or beneficial shareholder of a corporation at the time the demand is made or action is filed.

464 S.W. 3d at 889. The court then looked to Swantner's live pleading to determine whether the demand at issue was made while he was a stockholder. The only referenced demand was made on December 6, 2012, after he had been bought out. However, as the facts suggested earlier requests might still be unanswered and as the issue was one of standing, the court remanded the matter to allow Swantner a chance to amend his pleadings to cure the jurisdictional (standing) issue.

## Federal Appellate

## McCaig v. Wells Fargo Bank (Texas), N.A.,

788 F. 463 (5th Cir. 2015)

**Synopsis:**

Finding that the economic loss rule did not apply, the court affirmed mental anguish damages and attorneys' fees in this Texas Debt Collection Act case.

**Overview:**

The McCaig's obtained a jury verdict against Wells Fargo for violations of several subsections of the Texas Debt Collection Act ("TDCA"). Mr. McCaig's mother bought a house and financed it through Wells Fargo. When she passed away, the McCaigs took over paying the note, but it fell into default. Wells Fargo entered into a Forbearance and Settlement Agreement ("Agreement") with the McCaigs agreeing not to foreclose or impose fees as long as the McCaigs kept up with payments, which they did. Unfortunately, Wells Fargo's computer system would not recognize the Agreement and repeatedly issued default notices threatening imposition of fees and foreclosure.

The majority and dissent agreed that the McCaigs had standing to pursue a cause of action under the TDCA saying that the statute was broadly written to afford recovery to anyone who has sustained actual damages (in this case mental anguish) as a result of violations. The majority and dissent also expressly rejected Wells Fargo's

arguments that the McCaigs had no standing as they were not obligors on the underlying note, had no personal liability for the defaulted loan, Mrs. McCaigs' claims were derivative or as bystander of her husband's, and were not the "target" of prohibited conduct.

At this point, the majority and dissent diverged. The majority, relying on the Texas Supreme Court decisions in *Formosa Plastics* and *Chapman Custom Homes*, concluded that the McCaigs stated a cause of action in tort, as Wells Fargo, by violating the TDCA, breached a duty independent of the contract allowing the McCaigs to avoid the economic loss rule and collect mental anguish damages. In other words, the TDCA provided an "independent source" of duties separate and apart from the contract.

Note: The Court denied Wells Fargo's Motion for Rehearing and Motion for Rehearing En Banc on August 17, 2015, and issued its mandate on August 25, 2015.

**Practice Pointer: No. 1**

The majority suggested that Texas Financial Code § 392.401 provides a defense where "the action complained of resulted from a bona fide error that occurred notwithstanding the use of reasonable procedures adopted to avoid the error." Wells Fargo did not plead or prove this "defense." However, the dissent noted that research did not uncover a single relevant case. If this is indeed an affirmative defense, consider pleading and proving the same.

## Comar Marine Corp. v. Raider Marine Logistics L.L.C.,

792 F. 3d 564 (5th Cir. 2015)

**Synopsis:**

Applying Restatement (Second) of Contracts § 356, the termination fee (liquidated damages) in contract was an unenforceable penalty.

**Overview:**

While this was a case involving a maritime contract to manage three vessels and, therefore, arguably governed by maritime law, the 5th Circuit decided the liquidated damages provision for a termination fee under *Restatement (Second) of Contracts § 356*, which is same standard applied by Texas courts. *See generally Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 664 (Tex. 2005) and *FPL Energy, LLC v. TXU Portfolio Mgmt. Co., L.P.*, 426 S.W.3d 59, 71 (Tex. 2014).

Under the management agreement, Comar was to manage each of the vessels for the payment of a management fee equal to the greater of $3,000 or 10% of the gross income per vessel for the month. The contract also provided for Comar to receive a termination fee in the event the owners prematurely terminated the contract. In a bench trial, the district court found that the owners prematurely terminated and breached the contract, awarded the sum of $3,000 per vessel per month through the end date of the contract, but declared the termination fee to be unenforceable as a penalty. The 5th Circuit affirmed.

The 5th Circuit recognized that whether a liquidated damages provision is a penalty is a matter of law with the burden falling on the party seeking to invalidate it. The court applied the two prong test in *Restatement (Second) of Contracts § 356*, *comment b,* to determine whether the amount fixed is so unreasonably large as to be a penalty. The first factor is whether the amount in the provision approximates the actual loss or the

loss anticipated at the time of entering the contract, even though it may not approximate the actual loss. The second factor is the difficulty of proof of loss. The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty, the easier it is to show that the amount fixed is reasonable.

Here, the contract provided a formula for calculating the termination fee at the average gross daily hire for those days actually worked from the inception of the agreement and multiplying that rate times the number of days remaining time 50%, which amounted to $537,246.86. Unfortunately, Comar offered no evidence that this termination fee approximated actual losses. The 5th Circuit conceded that the 50% discount appeared to be a reasonable approximation of the vessels' utilization rate, but deferred to the trial court's finding that the termination fee was penal as most of the management fee went to pay vessel expenses and only a small portion was profit and the termination fee discount rate did not take the reduction in expenses into account.

Note: The Court denied Wells Fargo's Motion for Rehearing En Banc on August 5, 2015, and issued its mandate on August 13, 2015.

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