

**2007 Page Keeton Civil Litigation Conference**

**October 25-26, 2007  
Austin, Texas**

**An Update on Recent Developments  
in the Law of Damages**

**Thomas H. Cook, Jr.**

With special thanks to Shannon M. O'Malley, Esq., Todd M. Tippett, Esq.,  
and Delilah Banks for their assistance.

Thomas H. Cook, Jr.  
ZELLE, HOFMANN, VOELBEL,  
MASON & GETTE, L.L.P.  
1201 Main Street, Suite 3000  
Dallas, Texas 75218  
214-749-4245  
tcook@zelle.com

**TABLE OF CONTENTS**

1.	Actual/Compensatory Damages .....	1
2.	Attorneys' fees.....	4
3.	Causation & Evidence .....	10
4.	Contractual Limitations of Damages.....	11
5.	Default Judgments.....	13
6.	Exemplary/Punitive Damages.....	15
7.	Expert Witnesses.....	21
8.	Jury Charge .....	23
9.	Liquidated Damages.....	25
10.	Measure of Damages: Lost Profits .....	26
11.	Pre-judgment Interest.....	28
12.	Proportionate Responsibility.....	30
13.	Settlement Credit.....	35
14.	Special Damages .....	37
15.	Statutory Damage Caps .....	38

TABLE OF AUTHORITIES

**Allstate Indemnity Co. v. Hyman**,  
No. 06-05-00064-CV, 2006 WL 694014 (Tex. App. – Texarkana March 21, 2006,  
no pet.)..... 38

**Arismendez v. Nightingale Home Health Care, Inc.**,  
No. 06-40593, 2007 WL 2083710 (5th Cir. July 23, 2007) ..... 45

**Baker Botts, LLP v. Cailloux**,  
224 S.W.3d 723 (Tex. App.—San Antonio 2007, no pet.)..... 11

**Barker v. Eckman**,  
213 S.W.3d 306 (Tex. 2006), *reh’g denied*. ..... 4

**Borg-Warner Corp. v. Flores**,  
No. 05-0189, 2007 WL 1650574 (Tex. June 8, 2007) ..... 10

**Bossier Chrysler-Dodge II, Inc. v. Riley**,  
221 S.W.3d 749 (Tex. App.—Waco 2007, no pet.) ..... 43

**Brooks v. Goettl**,  
No. 05-CA-642, 2006 WL 3691000 (W.D. Tex. Dec. 12, 2006) ..... 28

**Chaparral Texas, LP v. W. Dale Morris, Inc.**,  
No H-06-2468, 2007 WL 2455295 (S.D. Tex. August 24, 2007) ..... 12

**Coppedge v. K.B.I., Inc.**,  
No. 9:05-CV-162, 2001 WL 1989840 (E.D. Tex. July 3, 2007) ..... 4

**Crites v. Collins**,  
215 S.W.3d 924 (Tex. App.—Dallas 2007, pet. filed)..... 9

**Dye v. Associates First Capital Corp. Cafeteria Plan**,  
No. 2:03-CV-289, 2006 WL 2612743 (E.D. Tex. Sept. 11, 2006) ..... 13

**E.E.O.C. v. Du Pont de Nemours & Co.**,  
480 F.3d 724 (5th Cir. 2007) ..... 20

**East Hill Marine, Inc. v. Rinker Boat, Co.**,  
No. 2-06-210, 2007 WL 1776086 (Tex. App. – Fort Worth June 21, 2007, pet. filed)  
..... 29

**EMCC, Inc. v. Johnson**,  
No. 10-05-002-CV, 2006 WL 3028062 (Tex. App. –Waco Oct. 25, 2006, no pet.). 14

**Equistar Chemicals, L.P. v. Dresser-Rand Co.**,  
No. 04-0121, 2007 WL 1299161 (Tex. May 4, 2007) ..... 25

**F.F.P. Operating Partners, L.P. v. Duenez**,  
50 Tex. Sup. Ct. J. 764, 2007 WL 1376357 (Tex. May 11, 2007) ..... 32

**Gilcrease v. Garlock, Inc.**,  
211 S.W.3d 448 (Tex. App.—El Paso 2006, no pet.)..... 37

<b><i>Haden v. David J. Sacks, P.C.,</i></b> 222 S.W.3d 580 (Tex. App.—Houston [1st Dist.] 2007, no pet.) .....	2
<b><i>Intercontinental Group Partnership v. KB Home Lone Star L.P.,</i></b> No. 13-06-617, 2007 WL 2389492 (Tex. App. – Corpus Christi Aug. 23, 2007, no pet. h.).....	10
<b><i>ISG State Operations, Inc. v. Nat’l Heritage Ins. Co.,</i></b> No. 11-05-00359-CV, 2007 WL 2274885 (Tex. App—Eastland Aug 9, 2007, no pet. h.).....	30
<b><i>Jackson v. Axelrad,</i></b> 221 S.W.3d 650 (Tex. 2007) .....	34
<b><i>Kozak v. Medtronic, Inc.,</i></b> No. H-03-4400, 2007 WL 788163 (S.D. Tex. Mar. 14, 2007) .....	22
<b><i>Mills v. Fletcher,</i></b> No. 04-06-00345-CV, 2007 WL 1423883 (Tex. App.—San Antonio May 16, 2007, no pet.).....	3
<b><i>Morris v. Morris,</i></b> No. 13-05-00297-CV, 2007 WL 2128882 (Tex. App.—Corpus Christi July 26, 2007, no pet.).....	26
<b><i>Murphy v. Am. Rice, Inc.,</i></b> No. 01-03-01357-CV, 2007 WL 766016 (Tex. App.—Houston [1st Dist.] Mar. 9, 2007, no pet.).....	42
<b><i>Nathan A. Watson Co. v. Employers Mut. Cas. Co.,</i></b> 218 S.W.3d 797 (Tex. App.—Fort Worth 2007, no pet.) .....	8
<b><i>Pac. Employers Ins. Co. v. Torres,</i></b> 174 S.W.3d 344 (Tex. App.—El Paso 2005, no pet.).....	7
<b><i>Philip Morris USA v. Williams,</i></b> 127 S. Ct. 1057 (2007).....	17
<b><i>Phillips v. Bramlett,</i></b> No. 07-05-0456-CV, 2007 WL 836871 (Tex. App.—Amarillo Mar. 19, 2007, no pet.) .....	44
<b><i>Pilgrim’s Pride Corp. v. Cernat,</i></b> 205 S.W.3d 110 (Tex. App. – Texarkana 2006, pet. denied) .....	34
<b><i>Pittman v. General Nutrition Corp.,</i></b> No. 04-3174, 2007 WL 951638 (S.D. Tex. Mar. 28, 2007).....	23
<b><i>Pochucha v. Galbraith Engineering Consultants,</i></b> No. 04-07-00119, 2007 WL 2608367 (Tex. App. –San Antonio Sept. 12, 2007, no pet. h.).....	36
<b><i>Poliner v. Tex. Health Sys.,</i></b> 239 F.R.D. 468 (N.D. Tex. 2006) .....	41

<b>Rivera v. United States,</b> No. SA-05-CV-0101, 2007 WL 1113034 (W.D. Tex. Mar. 7, 2007).....	41
<b>SAP Trading, Inc. v. Sohani,</b> No. 14-06-00641, 2007 WL 1599719 (Tex. App—Houston [14th Dist.] June 5, 2007, no pet.).....	31
<b>State Farm Mutual Automobile Insurance Co. v. Norris,</b> 216 S.W.3d 819 (Tex. 2006) .....	30
<b>State v. Bristol Hotel Asset Co.,</b> No. 04-06-00150, 2007 WL 2042793 (Tex. App. – San Antonio July 18, 2007, no pet.).....	24
<b>Sunbelt Services, Inc. v. Grove Temporary Service, Inc.,</b> No. 05-05-01090-CV, 2006 WL 2130144 (Tex. App. – Dallas Aug. 1, 2006, no pet.) .....	27
<b>Texas Mutual Insurance Co. v. Ray Ferguson Interests, Inc.,</b> No. 01-02-00807-CV, 2006 WL 648834 (Tex. App.—Houston [1st Dist.] July 28, 2006, pet. denied) .....	39
<b>Thomas v. Martinez,</b> 217 S.W.3d 680 (Tex. App.—Dallas 2007, no pet.) .....	16
<b>Thomas v. State,</b> No. 13-04-573-CV, 2007 WL 1452251 (Tex. App.—Corpus Christi May 17, 2007, no pet.).....	1
<b>Tony Gullo Motors I, L.P. v. Chapa,</b> 212 S.W.3d 299 (Tex. 2006), <i>reh’g denied</i> .....	6, 7, 19
<b>Varner v. Cardenas,</b> 218 S.W.3d 68 (Tex. 2007), <i>reh’g denied</i> .....	7
<b>Davenport v. Scheble,</b> 201 S.W.3d 188 (Tex. App.—Dallas 2006, no pet.) .....	21

## 1. ACTUAL/COMPENSATORY DAMAGES

**Thomas v. State**, No. 13-04-573-CV, 2007 WL 1452251 (Tex. App.—Corpus Christi May 17, 2007, no pet.).

*The two year statute of limitations for DTPA claims applies to actual damages but not to restitution claims.*

The Consumer Protection Division of the Attorney General’s Office sued the Thomases for violation of the Notary Public Act and the Deceptive Trade Practices Act. The State alleged that the Thomases “offered immigration services through their business to persons who purchased their services.”

The jury found that the Thomases acquired \$469,416.50 by engaging in an unlawful act or practice. Accordingly, the jury assessed penalties of \$20,000.00 to each defendant and granted the State \$22,000.00 in attorneys’ fees for each defendant. The trial court rendered judgment for the State and, in addition to the penalties and attorneys’ fees, ordered permanent injunctive relief and restitution.

The Thomases appealed the judgment, alleging that the trial court erred in ordering restitution for claims accruing more than two years before the action was filed.

As an issue of first impression, the court looked at whether “the two-year limitation in section 17.47(d) applies only to actual damages, and not to restitution.” The Thomases argued that the term “damages” includes restitution, citing *Schien v. Stromboe*.<sup>1</sup> The appellate court found this argument unpersuasive, concluding that *Schien* did not stand for the proposition that “restitution” and “damages” are the same in every context. Therefore, the two year statute of limitations did not apply to restitution. Accordingly, the appellate court ruled that the trial court did not err in ordering restitution for damages accruing more than two years prior to the commencement of this litigation.

**Haden v. David J. Sacks, P.C.**, 222 S.W.3d 580 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

*Defendant could not recover attorneys’ fees as actual damages because his claim did not fall within any of the exceptions to the general bar on recovery of attorneys’ fees as actual damages.*

Haden hired Sacks to represent him in an appeal from an adverse judgment in a commercial landlord-tenant dispute. After the appeal, Sacks sent Haden a demand letter demanding payment in full. Haden alleged fabrication and misstatements in the bill. Sacks filed suit against Haden for “suit on sworn account,” claiming that Haden had accepted Sack’s services and was bound to pay the law firm. Sacks also sued on the theories of breach of contract, quantum meruit, and DTPA violations for counterclaims against the law firm. In response, Haden answered the petition and brought

---

<sup>1</sup> *Schein v. Stromboe*, 102 S.W.3d 675 (Tex. 2002).

counterclaims against Sacks for fraud, DTPA violations, unconscionable course of action, breach of contract, and breach of fiduciary duty.

The trial court rendered a take-nothing summary judgment in favor of Sacks' firm on Haden's claims for unconscionable action, fraud, and DTPA violations; and on Haden's counterclaims for breach of fiduciary duty and breach of contract. Ruling that the law firm was entitled to attorneys' fees for pursuing the breach of contract claim, the trial court rendered an interlocutory summary judgment in favor of the law firm for breach of contract for \$30,314.38 plus interest. And, in final judgment, the trial court awarded the law firm an additional \$75,877.50 in attorneys' fees incurred in pursuing the contract claim, with contingent fees totaling \$45,000 for appeals to an intermediate appellate court and for seeking a petition for review in the Supreme Court. Haden challenged this judgment, and the law firm prevailed once again and recovered a judgment for \$90,000 in additional attorneys' fees. Haden appealed.

Haden challenged the trial court's no-evidence summary judgment on Haden's counterclaims against the law firm for breach of the DTPA, fraud, breach of the fiduciary duty, and breach of contract. Haden attempted to use the attorneys' fees and expenses incurred to defend the law firm's claim for breach of contract to substantiate the actual damages element of his counterclaims.

The appellate court looked first to the general rule in Texas that attorneys' fees are ordinarily not recoverable as actual damages in and of themselves. The court noted that there are two exceptions to this general rule: 1. "when a party must sue a third party because of a defendant's tort," and 2. "when the defendant has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." The appellate court concluded that Haden did not fit either of these exceptions, and therefore, was not able to claim attorneys' fees as actual damages in the counterclaims against Sacks. Accordingly, the appellate court affirmed the judgment of the trial court in rendering a no-evidence summary judgment on Haden's counterclaims for breach of the DTPA, fraud, breach of fiduciary duty, and breach of contract.

***Mills v. Fletcher***, No. 04-06-00345-CV, 2007 WL 1423883 (Tex. App.—San Antonio May 16, 2007, no pet.).

*Section 41.0105 of the Texas Civil Practice and Remedies Code ("Evidence Relating to Amount of Economic Damages") limits a plaintiff from recovering medical or health care expenses that have been adjusted or written off by the medical provider.*

Fletcher brought a personal injury lawsuit against Mills. The jury awarded Fletcher \$1,551.00 in past medical expenses. Mills appealed the judgment arguing that § 41.0105 of the Texas Civil Practice and Remedies Code required that Fletcher's award be reduced because his medical providers accepted lesser amounts for their services from his health insurance company and effectively "wrote off" the balance due from Fletcher.

Section 41.0105, “Evidence Relating to Amount of Economic Damages,” provides the following:

*In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.<sup>2</sup>*

Mills argued that “incurred” in this section means “to become liable to pay.” So, because the amounts were written off by the medical providers, Fletcher would never have to pay the amounts that were written off and therefore, he did not incur them. Fletcher argued that “actually incurred” refers to expenses that have been charged but not paid and that Mills’ reading of § 41.0105 would violate the collateral source rule.

The appellate court acknowledged a difference between “incurred” and “actually incurred.” Looking at the phrasing of the statute, the appellate court noted that the Legislature chose to refer to “incurred” a second time and modified the word “incurred” with the word “actually.” The court determined that the Legislature intended to limit expenses simply “incurred” by modifying “incurred” with the word “actually” and using the phrase “in addition to any other limitation under law.” The court concluded that “‘medical or healthcare expenses incurred’ refers to the ‘big circle’ of expenses incurred at the time of the initial visit with the healthcare provider,” and “‘actually incurred refers to the ‘smaller circle’ of expenses incurred after an adjustment of the healthcare provider’s bill.” Accordingly, the appellate court held that § 41.0105 limits a plaintiff from recovering medical or health care expenses that have been adjusted or “written off.”

***Coppedge v. K.B.I., Inc.***, No. 9:05-CV-162, 2001 WL 1989840 (E.D. Tex. July 3, 2007).

*Plaintiff is entitled to present the full amount of medical expenses that were charged by his medical care providers, and therefore “incurred” by the defendant to the jury. Section 41.0105 (limiting a plaintiff from recovering medical or health care expenses that have been adjusted or written off) only applied to post-trial adjustments by the trial court.*

Parents’ minor child was injured while practicing skeet shooting using a 12-gauge, over-and-under, Charles Daly Superior Hunter AE-MC shotgun. Parents sued K.B.I., Inc. as the manufacturer of the gun. KBI asked the court to prohibit Parents from introducing evidence of medical expenses unless they were actually paid or incurred and to allow KBI to introduce evidence showing amounts which were actually paid or incurred by Parents, in accordance with § 41.0105 of the Texas Civil Practice and Remedies Code.

The court noted that although the statute may prohibit recovery of medical expenses that have been written off, it does not on its face prohibit the introduction of

---

<sup>2</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105 (Vernon Supp. 2006) (emphasis added by court).

the full amount of medical bills into evidence. The court cited *Mills v. Fletcher*<sup>3</sup> as holding that “section 41.0105 limited a plaintiff from *recovering* medical or health care expenses that have been adjusted or ‘written off’ by a health care provider.” KBI failed to cite any authority that Parents should only be allowed to introduce into evidence amounts that were actually paid or incurred. Accordingly, the district court concluded that § 41.0105 applies only to the Parents’ recovery and not to the medical records’ admissibility. Therefore, the court found that Parents were entitled to present the full amount of medical expenses charged by the medical care providers.

## 2. ATTORNEYS’ FEES

***Barker v. Eckman***, 213 S.W.3d 306 (Tex. 2006), *reh’g denied*.

*Unless an appellate court is “reasonably certain that the jury was not influenced by the erroneous amount of damages it considered,” the issue of attorneys’ fees should be retried when damages are significantly reduced on appeal.*

In this breach of bailment case, the Barkers boarded and provided other services for Brahman bulls. Eckman owned an interest in two bulls and the semen of a third that were boarded at the Barkers’ business, Brushy Creek. Eckman agreed that the Barkers would board the bulls, and collect, store, and sell the bulls’ semen and then distribute the proceeds of the sales according to Eckman’s interest. When one of the bulls’ co-owners filed for bankruptcy, the disclosures suggested to Eckman that the Barkers breached the sales agreement.

The trial court submitted the case to the jury, which returned a verdict for Eckman with damages in the amount of \$111,983.58, and attorneys’ fees in the amount of \$222,000 with additional fees of \$22,500 for appeal. The Barkers appealed. The court of appeals held that Eckman’s claims for each breach accrued at the time of the breach and therefore most of his claims were barred by the statute of limitations. Accordingly, the court of appeals reduced Eckman’s award to \$16,180.14, but did not reduce the attorneys’ fees. Both parties appealed.

The Texas Supreme Court considered whether the Barkers were entitled to have the case remanded for a new trial on Eckman’s attorneys’ fees in light of the reduction of Eckman’s compensatory damages. When analyzing the attorneys’ fees claim, the jury was asked to look to the following factors:

- (a) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
- (b) the fee customarily charged in the locality for similar legal services;

---

<sup>3</sup> *Mills v. Fletcher*, No. 04-06-00345-CV, 2007 WL 1423883 (Tex. App.—San Antonio May 16, 2007, no pet.) (emphasis added by court).

- (c) the amount of money involved in the case and the results obtained;
- (d) the experience, reputation, and ability of the lawyers performing the services;
- (e) whether the fee is fixed or contingent on results obtained;
- (f) the time limitations imposed by the client or the circumstances;
- (g) the nature and length of the professional relationship with the client.

Because the jury was asked to consider the “results obtained” in the suit in calculating attorneys’ fees, and the “results obtained” were exponentially reduced on appeal, the Court concluded that the jury was erroneously influenced by the amount of damages it considered. The Court warned, however, that “not every appellate adjustment to the damages which a jury considered as ‘results obtained’ when making attorneys’ fees findings will require reversal. In this case, however, considering both the absolute value of the difference between the erroneous and correct amounts of damages, and the fact that the correct damages were one-seventh of the erroneous damages, we are not reasonably certain that the jury was not significantly affected by the error.”

The court then analyzed two possible remedies. The first suggestion was to remand the case to the court of appeals with instructions that the court perform a factual sufficiency review based on the correct damages amount. The court declined this remedy because this would effectively require the court of appeals to substitute its judgment for that of the jury. The second suggestion was to remand the case to the court of appeals and direct the court of appeals to use a “presumptive proportionality” construct for suggesting a remittitur of attorneys’ fees. The presumption would be that an attorneys’ fees award is to be reduced in proportion to any reduction in the award of actual damages. The court also declined to adopt this remedy because it would impose a presumption that the jury awarded attorneys’ fees on some proportionality basis to actual damages when they were not instructed to do so.

Given its rejection of other remedies, the Court concluded that the case must be remanded to the trial court for a new trial as to attorneys’ fees.

***Tony Gullo Motors I, L.P. v. Chapa***, 212 S.W.3d 299 (Tex. 2006), *reh’g denied*.

*A claimant must segregate recoverable and unrecoverable attorneys’ fees. Legal services are only so intertwined that they need not be segregated when they advance both a recoverable and unrecoverable claim.*

Chapa sued Gullo Motors for breach of contract, fraud, and DTPA violation. The jury returned a verdict for Chapa awarding \$7,213 in economic damages; \$21,639 in mental anguish; \$250,000 in exemplary damages; and \$20,000 in attorneys’ fees. The

trial court disregarded the mental anguish and exemplary awards, saying that Chapa only had a claim for breach of contract and dismissed the award for attorneys' fees because Chapa had not segregated the fees that were attributable to the contract claim alone. The appellate court reinstated all the awards but reduced the exemplary damages to \$125,000. Gullo Motors appealed.

Chapa's claim arose from the delivery of a base-model Highlander rather than the Highlander Limited that she contracted to buy from Gullo Motors. Chapa asserted three theories of liability: breach of contract, fraud, and DTPA violation. Chapa could recover attorneys' fees for her breach of contract and DTPA claims, but not for her fraud claim. Moreover, Chapa's recovery was limited to recovery for one claim under the one-satisfaction rule. During and after the trial, Gullo Motors objected that the attorneys' fees were not recoverable on the fraud claim.

The Court agreed and reversed and remanded the case for a new trial. In reviewing Chapa's claim for attorneys' fees, the Court noted that under the "American rule" that attorneys' fees are not recoverable unless authorized by statute or contract, with the following exception:

When the attorney's fees are in connection with claims arising out of the same transaction and are so interrelated that their "prosecution or defense entails proof or denial of essentially the same facts."<sup>4</sup>

The court recognized that this exception was difficult to apply consistently because the attorney-client privilege made it hard for courts to say what is and what is not "inextricably intertwined."

The Court then reaffirmed the American rule that if any attorneys' fees relate solely to a claim upon which attorneys' fees are not recoverable, a claimant must segregate recoverable from unrecoverable fees. Modifying the exception, the court further held that "...it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." The Court further held that the question of segregating claims is a mixed question of law and of fact.

***Varner v. Cardenas***, 218 S.W.3d 68 (Tex. 2007), *reh'g denied*.

*Fees to defend against a counterclaim need not be segregated from a breach of contract claim because the attorney's efforts on the counterclaim were necessary to recover on the breach of contract claim.*

Plaintiffs sued Defendants on a promissory note for the sale of their ranch. In response, Defendants alleged in their counterclaim that the ranch was 180 acres less

---

<sup>4</sup> *Flint & Assoc. v. Intercontinental Pipe & Steel, Inc.*, 739 S.W.2d 622, 624-25 (Tex. App.—Dallas 1987, writ denied).

than represented. After a bench trial, the trial court granted judgment for Plaintiffs, but reduced the balance of the note to reflect the acreage shortage. The trial court also awarded Plaintiffs \$40,500 in attorneys' fees for trial.

The court of appeals reversed, granting Plaintiffs the full balance on the note because Defendants never pleaded mistake or requested reformation of the deed. The court of appeals also reversed the trial court's award of attorneys' fees because Plaintiffs failed to segregate fees incurred in their suit on the note from fees incurred pursuing claims against the title insurer or defending against Defendants' counterclaim.

Interpreting the ruling in *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006), the court found that the attorneys' fees incurred defending the counterclaim did not need to be segregated because Plaintiffs' attorney had to overcome the defense of the acreage shortage in order to collect on the contract claim. Therefore, although the attorneys' fees on the counterclaim would not have been recoverable on their own, because the fees were necessary for Plaintiffs' recovery, they were recoverable.

***Pac. Employers Ins. Co. v. Torres***, 174 S.W.3d 344 (Tex. App.—El Paso 2005, no pet.).

*Claimant was “prevailing party” under Workers Compensation Act when insurance company was the only one challenging the award and nonsuited claim on the eve of trial and after considerable discovery.*<sup>5</sup>

Pacific Employers filed a petition appealing from a Texas Workers' Compensation Appeals Panel decision, suing the injured employee, and contesting the award. Torres answered, filing a general denial and asserting a claim for attorneys' fees. On January 19, 2005 (three weeks before trial), Pacific filed a notice of nonsuit dismissing all claims without prejudice. On January 20th and 21st, Torres filed a motion for attorneys' fees and a supplemental motion for attorneys' fees. The order granting the nonsuit was filed on January 24. The trial court entered an order awarding attorneys' fees and expenses paid to counsel for Torres in the amount of \$15,175 plus interest, with an additional award of \$5,000 for an appeal to an intermediary court and another \$5,000 for an appeal to the Texas Supreme Court.

Pacific contested the award, arguing that the Texas Labor Code does not provide for an award of attorneys' fees in this type of litigation. It also argued that because a nonsuit was filed disposing of litigation, the employee was not a “prevailing party” and was not entitled to attorneys' fees. The court disagreed and affirmed the trial court's decision.

---

<sup>5</sup> See also *Am. Home Assurance Co. v. McDonald*, 181 S.W.3d 767 (Tex. App.—Waco 2005, no pet.) (holding that claimant was a “prevailing party” after carrier nonsuited claim and so the claimant was able to recover attorney's fees); *Am. Home Assurance Co. v. Vaughn*, Not Reported in S.W.3d, 2005 WL 2396833 (Tex. App.—Amarillo 2005, no pet.) (holding that claimant was the “prevailing party” under the Workers' Compensation Act because American's nonsuit made TWCC judgment final and enforceable and legislative intent that insurance companies know they are running a risk of paying the attorney's fees when delaying award of benefits).

The statute authorizes the award of attorneys' fees to the worker if the worker prevails in the underlying case being pursued by the insurance carrier. The court found it significant that Pacific nonsuited its claim on the "eve of trial" and after considerable discovery had been undertaken. Also important to the analysis was the fact that, because of the nonsuit, Torres was in the same position that he was in before the suit was filed. The court found further significance in the fact that Torres did not appeal or challenge the award below, he was merely in the position of defending that which had been awarded to him by the commission.

The court also looked to the legislative intent of the Workers' Compensation Act to determine what the statute meant by "prevailing party" because it was not defined in the statute. The court concluded that the legislature contemplated that the insurance carrier would be held responsible for attorneys' fees in the event of and to the extent that the employee is considered a prevailing party. Because the only party challenging the award conceded defeat by nonsuiting its challenge, Torres became a prevailing party who had "prevailed on an issue on which judicial review is sought by the insurance carrier."

***Nathan A. Watson Co. v. Employers Mut. Cas. Co.***, 218 S.W.3d 797 (Tex. App.—Fort Worth 2007, no pet.).

*When a subrogated insurance company sues under a contract, it is entitled to all the rights of the subrogee and likewise exposed to all the liabilities. Because the contract provided for payment of attorneys' fees, the insurance company was liable.*

Home builder's property insurer (EMC) brought a subrogation action for breach of contract against Watson to recover after paying claims for damages to homes. The jury found for Watson on all counts and no damages were awarded to any party. The trial court then signed a final judgment formalizing the jury verdict for Watson and denying Watson's request for its attorneys' fees and costs.

Watson claimed that the trial court erred in denying his request for attorneys' fees and costs based on the Lot Purchase Agreement. EMC argued that because it was not party to the Lot Purchase Agreement, it was not liable for attorneys' fees. Ultimately, EMC argued that although it was subrogated to the insured's rights under the contract, it was not responsible for the insured's liabilities.

The appellate court disagreed. As a matter of first impression, the court found that when an insurer sues in subrogation under a contract, it is entitled to all of the rights of its subrogee and *likewise is exposed to all of its liabilities*. In reaching this conclusion, the court relied on subrogation's general precepts which hold that a subrogated insurer stands in its insured's shoes.

The court cited to a Texas case holding that an insurer may recover attorneys' fees in a subrogation action where the insured would have been entitled to attorneys'

fees if it had prosecuted the suit.<sup>6</sup> The court reasoned that there is no reason that the converse should not be true. Accordingly, the court held that Watson was entitled to the \$583,000 in attorneys' fees stipulated to by the parties.

**Crites v. Collins**, 215 S.W.3d 924 (Tex. App.—Dallas 2007, pet. filed).

*If a defendant is not entitled to a dismissal with prejudice, then the defendant is not entitled to reasonable attorneys' fees and costs.*

The Collins family sued Dr. Crites for negligence and gross negligence alleging she improperly performed abdominal surgery on Linda Collins. The Collins did not file an expert report and ultimately filed a notice of nonsuit. Subsequently, Dr. Crites filed a motion to dismiss with prejudice and to recover reasonable attorneys' fees and costs because the Collins had not filed an expert report within 120 days of filing suit. The trial court entered an order dismissing the Collins' cause of action. At a later hearing, the trial court denied Dr. Crites' motion. Dr. Crites appealed.

The court found that because Dr. Crites' motion was filed *after* the notice of nonsuit, it was not a pending claim and was extinguished the moment the notice was filed. The court compared Tex. Civ. Prac. & Rem. Code § 74.351(b) with article 4590i, §§ 13.01(d) and (e), and found that after the time for serving the expert report has passed, there is a "race to the courthouse" between the plaintiff (to file a notice of nonsuit) and the defendant (to file a motion to dismiss with prejudice and for reasonable attorneys' fees and costs). If a defendant loses that race and is not entitled to dismissal with prejudice, it is also not entitled to reasonable attorneys' fees and costs.

**Intercontinental Group Partnership v. KB Home Lone Star L.P.**, No. 13-06-617, 2007 WL 2389492 (Tex. App. – Corpus Christi Aug. 23, 2007, no pet. h.).

*A plaintiff is a "prevailing party" and is entitled to attorneys' fees when a jury finds a defendant liable for breach of contract but awards no damages.*

Intercontinental entered into a contract to develop land with KB. The contract included language which awarded attorneys' fees under the following circumstances:

If either party named herein brings an action to enforce the terms of the contract or to declare rights hereunder, the *prevailing party* in any such action, on trial or appeal, shall be entitled to his reasonable attorney's fees to be paid by losing party as fixed by the Court.

The contract did not define the term "prevailing party."

---

<sup>6</sup> *Rushing v. Int'l Aviation Underwriters*, 604 S.W.2d 239, 243-44 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

A dispute arose between the parties and KB filed suit seeking specific performance and actual damages. The jury found Intercontinental liable for breach of contract, but did not award damages or grant KB's request for specific performance. Despite its failure to award damages, the jury found that KB was entitled to \$66,000 in attorneys' fees. The district court entered judgment that KB was the "prevailing party" and declared that it was entitled to the jury's award of attorneys' fees.

On appeal, the court determined that a "prevailing party is one who is vindicated by the trial court's judgment." Noting that "Texas law rejects the argument that a party, vindicated on a civil claim or right by a competent court, has not prevailed merely because the vindicated party received a take-nothing judgment," the Court concluded that KB was entitled to its attorneys' fees award.

### 3. CAUSATION & EVIDENCE

***Baker Botts, LLP v. Cailloux***, 224 S.W.3d 723 (Tex. App.—San Antonio 2007, no pet.).

*Speculative evidence of causation is not sufficient to prove a breach of fiduciary duty.*

Floyd and Kathleen Cailloux hired Baker Botts to devise an estate plan for their multi-million dollar estate. The goals of the plan were to: 1) provide for Kathleen in the event of Floyd's death, 2) provide for the couple's children, 3) provide for charitable organizations, and 4) reduce taxes. However, Floyd passed away before all stages of the plan was finished. As a result, Kathleen's estate would face a \$32 million tax if she were to pass away with the remaining phases unfinished. Therefore a revised plan was established for Kathleen. As a result of the revised plan, Kathleen voluntarily disclaimed her right to her husband's share of the marital estate, in turn resulting in \$65.5 million immediately vesting to various charitable organizations.

Subsequent to the disclaimer, Kathleen became incapacitated by Alzheimer's disease. At that point her son, Ken, took over her affairs. Ken filed suit against Baker Botts and Wells Fargo, executor of the estate, for breach of fiduciary duty relative to Kathleen's execution of the disclaimer. The suit alleged that each party breached its duties by: 1) failing to explain the implications of Baker Botts representing both Kathleen and the executor, Wells Fargo; 2) failing to inform her that there was an ongoing scheme to dispossess her of \$65.6 million; and 3) failing to explain the contents of Floyd's will and her rights under the will. The suit stated that had Wells Fargo and Baker Botts acted appropriately, Kathleen would not have disclaimed her right to Floyd's estate and would have pursued a different course of action. A jury found that Baker Botts and Wells Fargo did breach its duty to Kathleen. Baker Botts and Wells Fargo appealed.

On appeal, the Court reversed the jury's findings, stating that "there is no evidence that any of the alleged breaches of duty by [Wells Fargo and Baker Botts] caused Kathleen to disclaim her right to Floyd's estate." The Court based its decision on the fact that none of the witnesses who testified at trial had any knowledge of

Kathleen's true wishes or intentions. Thus, at best, any assumption about what Kathleen would have done had she known about the purported failures of the defendants is based on nothing more than conjecture. And even though Plaintiff showed that Ken may have made decisions that differed from his mother, such evidence did not prove that Wells Fargo and Baker Botts breached their respective duties to Kathleen.

#### 4. CONTRACTUAL LIMITATIONS OF DAMAGES

***Chaparral Texas, LP v. W. Dale Morris, Inc.***, No H-06-2468, 2007 WL 2455295 (S.D. Tex. August 24, 2007).

*Parties may stipulate to notice of claim provisions, as opposed to limitations periods, provided such provisions are reasonable.*

Chaparral, as buyer, and Morris, as seller, entered into an Agreement to purchase oil and gas wells, leases, and properties located in Texas. The Agreement closed on August 4, 2004 and contained the following provision:

*Limitation on Seller Liability.* After the Closing, any assertion by Buyer that Seller is liable under this Agreement or for any other reason must be given to Seller on or prior to the last business day preceding the first anniversary of the Closing Date. The notice shall state the facts known to Buyer that give rise to such notice in sufficient detail to allow Seller to evaluate the assertion by Buyer.

On April 26, 2006, counsel for Chaparral sent a letter to counsel for Morris invoking the Agreement's arbitration clause because a particular well as sold violated the rules and regulations of the Texas Railroad Commission. The letter also stated that Chaparral had already spent in excess of \$100,000 to bring the well into compliance and sought to recover those damages under the terms of the Agreement.

Morris responded stating that the claim was time barred under the *Limitation on Seller Liability* clause. Morris also contended that Chaparral failed to provide timely notice of its claim under the provision. A lawsuit ensued.

The parties agreed that the provision was a notice provision rather than a provision shortening the limitations period. The provision did not define a limitations period because it did not state that Chaparral must file a lawsuit within a particular period or the claim would be barred. Under Texas law, a notice provision within a contract is enforceable if such a stipulation is reasonable.<sup>7</sup> However, a notice provision of less than 90 days is void.<sup>8</sup>

---

<sup>7</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 16.071 (Vernon 2006).

<sup>8</sup> *Id.*

The Court held that the provision was similar to a clause in an insurance contract requiring notice of a loss or claim within a certain time period after it occurs. The purpose of such a provision is to give Morris enough information about Chaparral's asserted claim to allow Morris to investigate within a reasonable time after such assets were sold under the Agreement. Using the heading of the provision as guidance, the Court noted that the consequence of Chaparral's failure to give Morris timely and proper notice of a claim was that Morris was not liable for the claim. "This construction is consistent with the language of the Agreement and is permitted by Texas law, which allows contracting parties to stipulate that a claimant must give notice of a claim for damages as a condition precedent to the right to sue on a claim, if the stipulation is reasonable." As a result, Chaparral's claim was denied due to untimely notice.

This case stands for the proposition that while a party cannot contract around limitations periods (generally, a contractual limitations period shorter than two years is void as a matter of law<sup>9</sup>), a party can include a notice requirement that will bar liability if the notice requirement is reasonable.

***Dye v. Associates First Capital Corp. Cafeteria Plan***, No. 2:03-CV-289, 2006 WL 2612743 (E.D. Tex. Sept. 11, 2006).

*Texas law prohibiting contractual limitations periods of less than two years do not apply to contracts regulated by ERISA.*

Dye worked as a Project Manager for Associates. Associates provided Dye with short term and long term disability benefits. In June 2000, Dye underwent knee surgery and applied for short-term disability. While the plan stated she could receive as many as 26 weeks, Dye was approved for and received 12 weeks' short-term disability under the applicable plan. She subsequently filed for long-term disability after it became apparent she would be unable to return to work after the 12 weeks. This request was denied because the short-term disability had not been exhausted. Dye then appealed the short-term disability plan's decision to limit her benefits to 12 weeks. The appeal was denied on April 11, 2001.

Acting through counsel, Dye repeatedly sought information as to why the requested benefits under the short-term plan were denied but, in her view, she was never provided a sufficient response. Dye subsequently filed suit for the benefits in August 2003 seeking to recover under ERISA. However, the plan contained a 120-day statute of limitations period to challenge a denial of benefits, with which Dye failed to comply. Accordingly, Associates moved to dismiss.

The Court noted that benefits under ERISA accrue when a claim for benefits is formally denied. ERISA does not, however, provide a statute of limitations for denial of benefits lawsuits. Initially, the Court thought it prudent to look to the most analogous state statute on limitations. In Texas, the most analogous limitations period is the one

---

<sup>9</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 16.070(a) (Vernon 2006).

governing suits on contracts, which is four years.<sup>10</sup> Texas law also prohibits an agreement to shorten a statute of limitations to less than two years. However, the Court also noted that several federal courts had enforced contractual limitations periods in ERISA cases, most notably one as short as 90 days.

The Court finally concluded that Texas law was inapplicable to an ERISA contract: “A state statute prohibiting the shortening of a statute of limitations [in an ERISA contract] is not binding on ERISA claims.” Thus, the Court concluded that the claims were time-barred because they were filed more than 120 days after the benefits were denied.

## 5. DEFAULT JUDGMENTS

**EMCC, Inc. v. Johnson**, No. 10-05-002-CV, 2006 WL 3028062 (Tex. App. –Waco Oct. 25, 2006, no pet.)

*Plaintiff’s petition, which included affidavits and requests for admissions, presented sufficient evidence to support an award of damages for breach of contract. But the dissent argued that the appellate court’s modification of the district court’s nominal damages award potentially conflicted with the Texas Supreme Court’s analysis in Texas Commerce Bank, National Association v. New, 3 S.W.3d 515 (Tex. 1999).*

EMCC sued Johnson for a credit card debt. EMCC’s petition included requests for admission concerning the agreement between the parties, EMCC’s satisfaction of certain conditions precedent, and the amount of debt remaining on the credit card. Although he was properly served, Johnson failed to answer. EMCC sought a default judgment on its Texas Rule of Civil Procedure 185 (Suit on Sworn Account) or, alternatively, on its breach of contract claim.

The district court found that EMCC was entitled to a default judgment on its breach of contract claim. But the court determined that EMCC produced no evidence of damages at the default hearing and therefore awarded EMCC just \$100 in nominal damages.

The appellate court reversed. The court found that the requests for admission that EMCC included in its original petition had not been answered. Because there was evidence that Johnson was served with the original petition,<sup>11</sup> the appellate court concluded that Johnson was also served the requests for admission. The court determined that under Rule 198.2(c) of the Texas Rules of Civil Procedure, because Johnson failed to respond to the requests, they were deemed admitted.

---

<sup>10</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 16.070(a) (Vernon 2006).

<sup>11</sup> An officer’s return was filed with the court alleging that Johnson had been personally served. The court concluded that the officer’s return was prima facie evidence that Johnson was served with both the petition and the admissions.

The appellate court recognized that the trial court must hear evidence of unliquidated damages in default judgment cases. But the court concluded that “the pleadings, affidavits, and deemed admissions on which EMCC relied conclusively establish that Johnson breached his contract with EMCC in the amount of \$8,763.85. Thus the record provided the court with a sound basis for awarding damages in the amount of \$8,763.85.” Relying on the Texas Supreme Court’s determination that “unobjected to hearsay constitutes probative evidence,” the appellate court modified the trial court’s default judgment by awarding damages of \$8,763.85 and attorneys’ fees.

The dissent objected to the appellate court’s blanket award of damages. Claiming that the case presented “the reverse side of the coin that was addressed by the Texas Supreme Court in *Texas Commerce Bank, Nat. Ass’n v. New*, 3 S.W.3d 515 (Tex. 1999),” the dissent argued that the issue of determination of damages should have been set for trial.

In *New*, the trial court accepted pleading admissions to establish liability and affidavits to prove damages and attorneys’ fees. The *New* appellate court reversed the award of damages, holding that affidavits could not be used to prove unliquidated damages or attorneys’ fees on a default judgment because the affidavits constituted hearsay. The Texas Supreme Court reversed the appellate court’s decision and held that “the affidavits were probative and had not been objected to and, therefore, the trial court did not err in considering those affidavits as proof of damages and attorney’s fees.”

The *EMCC* dissent framed the issue as opposite of that reviewed in *New*. Namely, “the issue we have is what happens when the trial court rejects the affidavits as insufficient evidence upon which to base the default judgment as to damages and attorney’s fees.” The dissent agreed with the majority that the trial court erred in only awarding nominal damages, but found that the trial court was entitled to reject the affidavits submitted as proof of damages. The dissent questioned the “propriety” of serving requests for admission within the original petition, and therefore questioned the weight of their probative value.<sup>12</sup> Because the trial court appeared to question the value of the affidavits and pleadings, the dissent concluded that the trial court should have entered a default judgment on liability and then “set the matter for trial on the merits to determine the amount of damages and attorneys’ fees. This was not a summary judgment proceeding or a trial on unliquidated damages at the trial court; nor should we make it one at this Court.”

---

<sup>12</sup> *But see Sherman Acquisition II, L.P. v. Garcia*, 229 S.W.3d 802 (Tex. App. – Waco 2007, no pet.) (holding that the trial court erred in failing to render a default judgment and damages when requests for admissions filed with the original petition and deemed admitted established conclusive evidence of damages).

**Thomas v. Martinez**, 217 S.W.3d 680 (Tex. App.—Dallas 2007, no pet.).

*Medical bills with supporting affidavits stating that the expenses are “reasonable and necessary” are legally and factually sufficient to support an award of medical damages without producing supporting medical records.*

Martinez brought suit against Thomas for injuries she sustained in an automobile accident. At the default judgment hearing, Martinez testified that Thomas ran the red light and collided with her vehicle causing personal injury. Martinez entered her medical bills into evidence, which were supported by affidavits saying that the charges were reasonable and necessary. The trial court awarded Martinez \$10,350.27 for past medical expenses, \$22,100.50 for “past and future pain and suffering, loss of impairment,” and \$700 in lost wages.

Thomas appealed the judgment of the trial court alleging that the evidence was legally and factually insufficient to support an award for past medical expenses; to support the award for past and future pain and suffering, loss of impairment; and to show that there was a casual nexus between Martinez’s injuries and the accident. In particular, Thomas argued that because Martinez only presented evidence of her medical expenses (her medical bills), instead of producing her medical records, there was no evidence that her injuries and treatment were a result of the car accident.

The appellate court disagreed and held that the evidence was factually and legally sufficient to conclude that Martinez’s injuries and treatment were related to the car accident. The court found persuasive the fact that Martinez admitted into evidence affidavits stating that her expenses were reasonable and necessary along with her medical bills. The court also looked to the fact that Thomas did not cite any authority that a plaintiff must produce her medical records to support a finding of medical damages. Additionally, the court looked to the fact that Martinez testified that she injured her neck, back, and leg in the auto accident and the medical bills were for treatment of a neck, thoracic, and lumbar sprain. The court found that this evidence was sufficient to support an award for medical expenses and that it was unnecessary for Martinez to produce her medical records.

## **6. EXEMPLARY/PUNITIVE DAMAGES**

**Philip Morris USA v. Williams**, 127 S. Ct. 1057 (2007).

*The state cannot use a punitive damages award to punish a defendant for an injury inflicted upon nonparties or those whom they directly represent.*

Williams, the widow of a heavy cigarette smoker, brought a lawsuit in Oregon state court against Philip Morris for negligence and deceit, seeking compensatory and punitive damages for her husband’s smoking-related lung cancer and death. The jury found that Philip Morris was negligent and engaged in deceit, and awarded compensatory damage of \$821,000 and \$79.5 million in punitive damages. The trial

court found the \$79.5 million excessive and reduced it to \$32 million. Both sides appealed.

The Oregon Court of Appeals restored the \$79.5 million award in punitive damages. Philip Morris appealed to the Oregon Supreme Court. The Oregon Supreme Court rejected Philip Morris's argument that the Constitution prohibits a state court jury from using punitive damages to punish a defendant for harm to nonparties, *i.e.* other smokers, and found that the \$79.5 award was not grossly excessive. The U.S. Supreme Court granted certiorari.

On appeal, Philip Morris made two arguments: 1) the trial court should have accepted a proposed jury instruction that would instruct the jury not to punish Philip Morris for injury done to people who were not parties to the suit (this instruction was made in response to the plaintiff's attorney telling the jury to think about all of the other people that Philip Morris has hurt); and 2) the roughly 100-to-1 ratio of punitive damages to compensatory damages was "grossly excessive."

The Supreme Court's 5-4 majority<sup>13</sup> held that "the Constitution's Due Process Clause forbids a state to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent." The Court reasoned that because a defendant has no opportunity to defend against nonparty victims' charges, threatening punishment for injuring nonparty victims does not give the defendant "an opportunity to present every available defense" as guaranteed by the Due Process Clause.

The Court also found it significant that permitting punishment for injury to nonparties would add a "near standardless dimension to the punitive damages equation." This could lead to arbitrary awards, as the jury doesn't know how many nonparty victims there are and how seriously they were injured. Additionally, there is no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming strangers to the litigation. Accordingly, the Court found that although juries are allowed to consider harm to nonparties when they are looking at the reprehensibility of the defendant's conduct, juries are not permitted to use that evidence to punish the defendant directly for harm to people who are not parties to the suit.

Justice Stevens filed a dissenting opinion in which he discussed the Court's "imposition of a novel limit on the State's power to impose punishment in civil litigation." Specifically, Justice Stevens argued that a court should take a wrongdoer's harm to persons not before the court into consideration when assessing punitive damages. Justice Stevens noted that "punitive damages are a sanction for the public harm the defendant's conduct has caused or threatened. There is little difference between the justification for a criminal sanction, such as a fine or a term of imprisonment, and an award of punitive damages." Justice Stevens recognized that the court could not award

---

<sup>13</sup> The majority included Justices Breyer, Roberts, Kennedy, Souter, and Alito. Justices Stevens and Thomas filed dissenting opinions. Justice Ginsburg also filed a dissenting opinion in which Justices Scalia and Thomas joined.

*compensatory* damages for injury to absent third parties. But he argued that “a punitive damages award, instead of serving a compensatory purpose, serves the entirely different purpose of retribution and deterrence that underlie every criminal sanction.” Justice Stevens concluded that the majority’s nuanced differentiation between directly punishing a defendant and taking the defendant’s actions against third parties into account when determining the reprehensibility of its conduct is not well-reasoned or justified. In fact, Justice Stevens compared the reprehensibility of Philip Morris’s conduct with a murderer:

When a jury increases a punitive damages award because the injuries to third parties enhanced the reprehensibility of the defendant’s conduct, the jury is by definition punishing the defendant – directly – for third party harm. A murderer who kills his victim by throwing a bomb that injures dozens of bystanders should be punished more severely than one who harms no one other than his intended victim. Similarly, there is no reason why the measure of the appropriate punishment for engaging in a campaign of deceit in distributing a poisonous and addictive substance to thousands of cigarette smokers statewide should not include consideration of the harm to those “bystanders” as well as the harm to the individual plaintiff. The Court endorses a contrary conclusion without provided us with any reasoned justification.

Justice Thomas also filed a dissenting opinion. He reiterated his view that “the Constitution does not constrain the size of punitive damages awards.” Justice Thomas concluded that the majority Court’s opinion on punitive damages jurisprudence is “insusceptible of principled application.”

Finally, in her dissenting opinion, Justice Ginsberg argued that the majority’s conclusion was incomprehensible given the status of the law on punitive damages. Namely, Justice Ginsberg noted that the jury was instructed to consider the extent of harm to others as a measure of the reprehensibility of Philip Morris’s conduct, but not to mete out punishment for injuries in fact sustained by non-parties. Justice Ginsberg noted that the majority did not identify any evidence or objection to the jury charge to support its reversal of the Oregon Supreme Court. Given this lack, Justice Ginsberg concluded that she would “accord more respectful treatment to the proceedings and dispositions of state courts that sought diligently to adhere to our changing, less than crystalline precedent.”

***Tony Gullo Motors I, L.P. v. Chapa***, 212 S.W.3d 299 (Tex. 2006), *reh’g denied*.

*An award of exemplary damages within Texas' statutory cap does not foreclose a constitutional review for excessiveness.*

Chapa sued Tony Gullo Motors for breach of contract, fraud, and DTPA violation. Chapa's claim arose from the delivery of a base-model Highlander rather than the Highlander Limited that she contracted to buy from Tony Gullo Motors. Chapa asserted three theories of liability: breach of contract, fraud, and DTPA violation. The jury found that Gullo Motors committed deceptive acts knowingly and found clear and convincing evidence that it committed fraud. Based upon its finding, the jury awarded \$250,000 in exemplary damages.

The trial court disregarded Chapa's mental anguish and exemplary damages awards, holding that Chapa could only recover on her claim for breach of contract. The appellate court reinstated all of the jury's awards but reduced the exemplary damages to \$125,000.

The Texas Supreme Court reviewed whether the award of exemplary damages was constitutional. In recognizing the statutory caps under the DTPA and the Civil Practice and Remedies Code for fraud, the Court noted that the mere existence of a statutory cap does not foreclose a federal constitutional review for excessiveness. The Court then conducted an independent constitutional review of the exemplary damages award.

The Court followed three guideposts in reviewing the award's constitutionality:

- (1) the nature of the defendant's conduct; (2) the ratio between exemplary and compensatory damages; and (3) the size of civil penalties in comparable cases.

The Court noted that the reprehensibility of the defendant's conduct is the most important guidepost. This depends upon five additional factors:

- (1) whether defendant's actions caused physical rather than economic harm; (2) whether the conduct threatened the health or safety of others; (3) whether the conduct involved repeated acts rather than an isolated incident; (4) whether the conduct threatened financial ruin; and (5) whether the conduct at issue was deceitful rather than accidental.<sup>14</sup>

The Court noted that only one of the five factors supported the exemplary damages award. It further found that the exemplary damages award vastly exceeded Chapa's recoverable economic damages. Noting that the appellate court's award of \$125,000 was 5-10 times more than comparable civil penalties, or what Chapa could recover under the DTPA, the court concluded that this award pushed "exemplary

---

<sup>14</sup> The Court based its analysis on the Supreme Court's decision in *BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1999).

damages to the absolute constitutional limit” thereby leaving “no room for greater punishment in cases involving death, grievous physical injury, financial ruin, or actions that endanger a large segment of society.” Accordingly, the Court remanded the issue to the appellate court to determine the constitutionally permissible remittitur.

Justice O’Neill dissented. After discussing various factors that supported Chapa’s claim for fraud, Justice O’Neill noted that the amount of exemplary damages for which a defendant may be capped under Texas law *for fraud* is the greater of (1)(A) two times the amount of economic damages; or (B) an amount equal to any noneconomic damages found by the jury, not to exceed \$75,000; or (2) \$200,000. TEX. CIV. PRAC. REM. CODE § 41.008(b).

Justice O’Neill agreed with the majority that the statutory damages cap does not foreclose a constitutional review. But she noted that “the United States Supreme Court has instructed that reviewing courts should accord ‘substantial deference’ to legislative judgments concerning appropriate sanctions.”<sup>15</sup> Justice O’Neill noted that the award the majority deemed excessive “is well below the appropriate statutory cap that the Legislature determined appropriate when a defendant engages in conduct that would support an exemplary damages award.” Justice O’Neill further argued that the majority ignored all three of the constitutional guideposts and in particular gave “short shrift” to the reprehensibility factors.

Justice O’Neill concluded that the “low threshold this Court steps over to declare a jury award constitutionally exorbitant” was improper and intrudes upon an area that has been traditionally patrolled by the appellate courts.

***E.E.O.C. v. Du Pont de Nemours & Co.***, 480 F.3d 724 (5th Cir. 2007).

*Because front- and back-pay awards serve a compensatory function, they are sufficient to sustain an award for punitive damages.*

The E.E.O.C. brought an action on behalf of Barrios, a discharged employee, against DuPont under the Americans with Disabilities Act. The jury found that Barrios was discharged in violation of the ADA and awarded her \$91,000 in back-pay, \$200,000 in front-pay, and \$1 million in punitive damages. The district court reduced the punitive damages award to \$300,000. DuPont appealed.

DuPont first argued that there was not enough evidence to support a finding of malice or reckless indifference to support the punitive damages claim. The appellate court found that the working conditions and attitude of management towards Barrios was sufficient to allow a reasonable jury to believe that DuPont intentionally discriminated against Barrios.

DuPont next argued that punitive damages are not recoverable in the absence of compensatory damages. The court was not persuaded by DuPont’s attempt to

---

<sup>15</sup> Citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 583 (1999).

characterize the front- and back-pay awards as solely equitable remedies. Under section 1981a of the ADA, front- and back-pay serve a compensatory function. The court also looked to the fact that Barrios' back-pay award was intended to remedy her wage loss following illegal termination by DuPont. Accordingly, the court concluded that although front- and back-pay are not compensatory damages, they serve a compensatory function and therefore are sufficient to sustain an award for punitive damages.

***Davenport v. Scheble***, 201 S.W.3d 188 (Tex. App.—Dallas 2006, no pet.).

*Divorcee was not entitled to exemplary damages based on her claim for fraud against her ex-husband for hiding community property because it is not an independent tort giving rise to a cause of action between the spouses.*

Davenport (former husband) and Scheble (former wife) divorced in 1998. The divorce decree divided their community property and gave Scheble a promissory note for \$400,000. Scheble then filed suit against Davenport for failure to pay on the promissory note, division of community property, and fraud. Scheble's fraud claim arose when Davenport failed to disclose stock and other assets that he acquired during the marriage, which he subsequently sold. Because Davenport refused to respond to discovery, the trial court granted a motion to compel and \$1,250 in attorneys' fees. After Davenport failed to fully comply with the motion to compel, the trial court granted Scheble's motion to strike Davenport's pleading. Scheble then moved for default judgment against Davenport, which was rendered by the trial court. The trial court awarded Scheble \$118,932.32 for breach of the promissory note, \$19,585.37 in prejudgment interest, postjudgment interest at 15% per annum, and \$55,400 in attorneys' fees. For the fraud claim, the trial court awarded Scheble \$306,000 for the stock, \$50,000 for other undivided assets, \$350,000 in exemplary damages, and \$140,000 in attorneys' fees.

On restricted appeal, Davenport argued that the trial court erred in imposing death penalty sanctions and in awarding Scheble exemplary damages. In challenging the exemplary damages award, Davenport argued that, as a matter of law, there is no independent tort for fraud based on the wrongful disposition of community property. Scheble responded arguing that she proved actual fraud through evidence of Davenport's intentional concealment of community assets.

The appellate court recognized that a claim for fraud on community property is a means for a spouse to recover property wrongfully conveyed in order to compensate her lost interest in the community estate. However, the concept of fraud on community property is not an independent tort giving rise to a cause of action between the spouses. Therefore, there was no basis for punitive damages because punitive damages require an independent fraudulent tort with accompanying actual damages.

## 7. EXPERT WITNESSES

***Kozak v. Medtronic, Inc.***, No. H-03-4400, 2007 WL 788163 (S.D. Tex. Mar. 14, 2007).

*The plaintiff, an orthopedic surgeon, was not qualified to testify as to future damages because he had no specialized knowledge or expertise at formulating damage models.*

Plaintiff was an orthopedic surgeon with extensive training in biomedical engineering, and had several medical inventions to his credit. Plaintiff sued Defendant for misappropriation of trade secrets and offered his own testimony to support his claim for future damages. Plaintiff contended that he was qualified to construct a future damages model that projects the future adoption of the trade secrets and based his opinion on “his twenty-three years of experience as an orthopedic surgeon, product consultant and inventor.”

The court noted that Plaintiff’s declaration of his qualifications as an “expert” was vague, and merely showed that Plaintiff had experience marketing inventions. The court concluded that Plaintiff could not demonstrate expertise in “calculating future damages or royalties based on projected future sales and market adoption/penetration rates of spinal products such as anterior lumbar plates.” Accordingly, the court found that the Plaintiff was not qualified to testify as to future damages.

***Pittman v. General Nutrition Corp.***, No. 04-3174, 2007 WL 951638 (S.D. Tex. Mar. 28, 2007).

*An expert must have more experience calculating damages for lost income than general experience as a human resources executive.*

Pittman alleged that GNC rescinded a proposed promotion when Pittman announced he would promote a black employee, Demeke, to fill his position. Pittman and Demeke filed EEOC claims against GNC, alleging GNC discriminated and retaliated against them. To support their damages claim, Pittman and Demeke offered Richard Adams, a human resources professional, as an expert. Adams specifically testified that both plaintiffs suffered quantifiable financial losses cumulating in economic damages of \$1.8 million to Demeke and \$3.6 million to Pittman.

GNC submitted its own expert report, which concluded that Adams’ work was “speculative, erroneous and overstates potential economic losses.” In response, Adams prepared a supplemental report in which he acknowledged several errors, including his failure to apply a present-value discount to his economic damages calculation. GNC moved to strike Adams’ report.

The district court concluded that Adams was fundamentally a human resources professional, not an accountant. Adams was qualified by experience and training to testify regarding prevailing standards in the personnel field and GNC’s adherence to such standards, but the court concluded that he was not qualified to quantify the plaintiffs’ damages. The court found that much of Adams’ damages analysis was outside his realm of expertise. “His numerous errors in calculation and analysis

demonstrate that many of his opinions are not reliable because they were not derived in accordance with accepted methodology.” For example, the court noted that Adams stated in his supplemental report that *Plaintiffs’ counsel* had informed Adams that “it is standard in the industry to discount between 6.5% and 9%.” Based on this representation, Adams arbitrarily chose a rate of 7% to apply in his future calculations of lost wages.

The court concluded that Adams’ calculations of lost future earnings were too speculative and unreliable. The court precluded Adams from offering any opinions on lost future earnings. But the court noted that Adams might be qualified to render an opinion on the plaintiffs’ past lost earned income “derived from simple mathematical calculations of the differential between the salary for the positions that Plaintiff held during times relevant to the case as compared to eth position to which he claims he was entitled.” The court cautioned, however, that Adams’ opinion on lost past earnings must be supplemented with more information concerning Adams’ experience in performing such calculations.

***State v. Bristol Hotel Asset Co.***, No. 04-06-00150, 2007 WL 2042793 (Tex. App. – San Antonio July 18, 2007, no pet.).

*An appellate court will extensively review an expert’s opinion and the facts that form the basis of that opinion in determining whether the trial court abused its discretion in failing to exclude the expert’s testimony.*

When the State of Texas decided to expand Loop 410 in San Antonio, the State filed for a partial taking of hotel property. Before the taking, the hotel had three entrance driveways. After the taking, however, the hotel lost its main driveway and six parking spaces, and the remaining driveways needed to be completely rebuilt.

The hotel offered David Bolton as an appraisal expert to testify as to the value of the land lost due to the taking. The State submitted a motion to exclude Bolton, claiming his testimony regarding the capitalization rate following condemnation was unreliable. The State argued that Bolton’s testimony regarding permanent damages was based on unreliable data and an “analytical gap.” The District Court denied the State’s motion. The jury subsequently awarded damages.

The appellate court affirmed. The court specifically analyzed Bolton’s theory and methodology, recognizing that Bolton was a real-estate appraiser for 41 years and a member of the Appraisal Institute. Bolton based his opinion on the argument that hotel properties are priced by investors according to their income stream, especially when an existing hotel has a proven operating record. According to Bolton, this appraisal is known as the “income approach” and “has been called the most important hotel approach by the Appraisal Institute.”

To calculate the hotel’s value after condemnation, Bolton considered how the changes to the hotel could affect an investor’s appraisal of the property’s value. Bolton noted that an investor comparing the pre- and post-taking property would see different

risks and therefore assess a capitalization penalty for the new risk. Specifically, Bolton noted that the hotel's loss of parking spaces, loss of compliance for its sign, and diminished line of sight for the new driveways impacted the capitalization value of the property. "Given these impacts to the hotel as a result of the taking, Bolton testified that an investor buying the hotel would attribute a greater risk to the asset and would thereby penalize its value by raising the capitalization rate fifty basis points, or half a percent." Bolton testified that he consulted industry surveys to determine capitalization rates.

Based on its review of Bolton's testimony and the evidence upon which he based his opinion, the court concluded that Bolton's testimony was sufficient to establish the hotel's permanent damages.

The court also upheld Bolton's calculation of temporary damages. The hotel lost 43 parking spaces due to the construction and reconfiguration of its driveways. Bolton testified that parking is an integral part of the hotel's business and that the temporary loss of a portion of its spaces caused a net income loss in rental value.

The State, however, argued that the hotel, *on average*, only rented 75% of its rooms. Therefore, the temporary construction did not take more spaces than the average occupancy rate. The court dismissed this argument, noting that an "average" calculation does not take into account the nature of a hotel's business. Namely, a hotel is at times 100% occupied, and at others only 40% – thus an average calculation of 75%. The court further recognized that loss of rental value is an appropriate measure of damages for the temporary loss of use and land. Since Bolton calculated the net operating income based on the hotel's income history and occupancy, the court affirmed Bolton's methodology.

## 8. JURY CHARGE

***Equistar Chemicals, L.P. v. Dresser-Rand Co.***, No. 04-0121, 2007 WL 1299161 (Tex. May 4, 2007).

*Objections to the jury charge on the basis of legal and factual insufficiency failed to preserve a claim that the measure of damages in the charge violated the economic loss rule.*

In the mid-1970's Equistar Chemicals purchased two gas compressors from Dresser-Rand. Each gas compressor contained impellers, which resemble large fan blades and are essential components of the operation of the gas compressors. In 1989, Dresser upgraded the gas compressors by replacing the 42-inch impellers with 44-inch impellers. After the upgrade, the impellers failed catastrophically on multiple occasions. To address the failures, Equistar retained Dresser who reverted the 44-inch impellers to 42 inches by trimming a 44-inch impeller and making other modifications. To maintain the desired efficiency, Dresser also advised Equistar to operate the compressors at higher speeds than previously maintained.

In April 1999, one of the 42-inch impellers failed, causing extensive damage. Equistar again retained Dresser to repair and reassemble the gas compressor. The replacement impeller failed in May 1999, again causing extensive damage.

Equistar sued Dresser for the April and May 1999 failures, seeking recovery for the cost of repair of all damaged property and its lost business income. A jury found Dresser liable on all tort and warranty claims submitted. In answer to a single jury charge on damages, the jury found that damage for repairs amounted to \$3,641,210. Dresser did not object to the jury charge except as to the legal and factual sufficiency of the evidence.

Dresser appealed, asserting for the first time on appeal that the economic loss rule precluded recovery on Equistar's tort claims, and asserting limitations defenses. The court of appeals reversed the trial court's judgment, finding that Dresser preserved error with regard to the economic loss rule and finding that Equistar's warranty claims were barred by limitations.

The Texas Supreme Court reversed, holding that Dresser failed to preserve error when it failed to specifically object to measure of damages in the jury charge. The Court stated that "If Dresser believed that the jury charge presented an improper measure of damages because it allowed the jury to find both tort and contract damages by a single answer, it was required to timely object and make the trial court aware of its complaint in order to preserve error." Dresser failed to preserve such error when it failed to challenge the measure of damages in the jury charge. The Court agreed that Equistar's tort claims were not barred by limitations, reversed the court of appeals' finding that Dresser properly preserved error on the economic loss rule, and remanded to the court of appeals for further proceedings.

***Morris v. Morris***, No. 13-05-00297-CV, 2007 WL 2128882 (Tex. App.—Corpus Christi July 26, 2007, no pet.).

*Party's failure to properly object to jury charge relating to exemplary damages failed to preserve error.*

On June 21, 1991, a husband and wife were married. On September 24, 2001, the wife filed a petition for divorce, and filed suit for assault and intentional infliction of emotional distress stemming from multiple instances of alleged abuse and sexual assault. The wife also sought custody of the couple's two children. On a ten-to-two verdict, the jury awarded custody to the wife, found that the husband had assaulted the wife and intentionally inflicted severe emotional distress, awarded her \$165,000 in past compensatory damages, and awarded \$250,000 in exemplary damages. The trial court also entered a divorce decree and judgment based upon the jury's verdict. The husband appealed the custody and damage awards, specifically challenging the jury charge relating to the exemplary damages award.

The husband argued that the charge was flawed because it allowed for a recovery of exemplary damages 1) without a finding of malice; 2) on a less than

unanimous verdict; and 3) under a “preponderance of the evidence” standard instead of a “clear and convincing” standard.

The Court rejected the unanimous verdict argument, concluding that a unanimous verdict is only required for causes of action filed on or after September 1, 2003.<sup>16</sup> The Court found that because the wife’s cause of action accrued in 1995, and her suit was originally filed on September 24, 2001 (and amended on August 18, 2003), there was no unanimous verdict requirement.

The Court further noted that exemplary damages may only be awarded if the claimant proves by clear and convincing evidence that the recovery for harm sought resulted from fraud, malice, or gross negligence.<sup>17</sup> Here, the charge did not require the jury to make a finding of malice, nor did it specify a clear and convincing standard. However, counsel for the husband failed to object to the charge. Accordingly, the husband’s arguments were not preserved for review.

## 9. LIQUIDATED DAMAGES

***Sunbelt Services, Inc. v. Grove Temporary Service, Inc.***, No. 05-05-01090-CV, 2006 WL 2130144 (Tex. App. – Dallas Aug. 1, 2006, no pet.).

*Where the substance of a “liquidated damages” provision indicates that it is actually a fee for service, the court may actually treat it as such and enforce it.*

Grove is an employment agency that provides temporary and permanent employees for its clients. Grove charges an hourly fee for a temporary employee’s services. Grove also charges an industry standard percentage of the salary for permanent hire placements. If a client decides to permanently hire a temporary employee, and the temporary employee worked for the client for less than 520 hours, then Grove charges the standard percentage fee. But if the temporary employee worked for the client for more than 520 hours, then Grove does not charge a placement fee.

Sunbelt used Grove’s services to find and hire a temporary employee, Nanine Young, for 4-6 weeks. Sunbelt’s contract with Grove set out the hourly fee for Young’s services. The contract contained the standard provision regarding the permanent placement fee should Sunbelt hire Young on a permanent basis. A similar provision was also on Young’s timecards, which Sunbelt turned over to Grove as the basis for billing Sunbelt for Young’s services. The cards contained the agreement that “in the event the above employee is employed by us prior to completing 520 hours, we will pay 1% per thousand of their annual gross salary, to a maximum of 30%, in liquidated damages for the replacement costs of like personnel.”

---

<sup>16</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(d) (Vernon 2006).

<sup>17</sup> *Id.*

Young worked at Sunbelt as a temporary employee for approximately 4 weeks, or 126 hours. Eight months after her work at Sunbelt as a temporary employee, Sunbelt contacted and hired Young on a full-time basis. Sunbelt did not contact Grove regarding its hiring decision.

When Grove learned that Sunbelt permanently hired Young, it sent an invoice for \$9,984, 30% of Young's permanent salary. Sunbelt refused to pay the fee, claiming that the fee was actually a liquidated damages provision, and that the provision, as written, constituted an unenforceable penalty.

The court disagreed, holding that the "liquidated damages" provision was, in fact, a fee for compensation for the service of providing a permanent employee. The court noted that the use of the words "liquidated damages" does not control the court's interpretation of the contractual provision described as "liquidated damages." Rather, the court stated that it should look to the "substance of the contract's terms to determine if the provision constitutes 'liquidated damages.'" Since the effect of the provision was to actually compensate Grove for referring a permanent employee, the court found that the provision was not a "liquidated damages" provision.

#### **10. MEASURE OF DAMAGES: LOST PROFITS**

***Brooks v. Goettl***, No. 05-CA-642, 2006 WL 3691000 (W.D. Tex. Dec. 12, 2006).<sup>18</sup>

*Lost value and lost business are lost profits and must be proved, under Texas law, by demonstrating a loss of net profits.*

Plaintiff traveled from Wisconsin to Texas to purchase two miniature horses from Marystown Miniatures in Blanco, Texas. When Plaintiff arrived at the horse farm to pick up her horses, Hotsy and Jazz, she was informed that the horses were feeling under the weather, but being given medication for their ailments. Before returning to Wisconsin, Plaintiff and the Seller went to Behrands veterinary medical clinic to obtain a certificate of health for the horses. Behrands issued a health certificate based on an examination of the horses two days prior. Behrands admitted his exam consisted of examining the horses for "probably a minute."

After returning to Wisconsin with Hotsy and Jazz, Plaintiff's horse farms were hit with an outbreak of "strangles," a highly contagious bacterial infection that affects horses. The disease is deadly in young foals, though adult horses usually recover.

Plaintiff contacted Seller and learned that Seller's horse farm had experienced a strangles outbreak 3 months before the purchase of Hotsy and Jazz. Plaintiff subsequently sued Seller and Behrands for extensive monetary and emotional damages. Behrands argued that Plaintiff was not entitled to lost profits damages,

---

<sup>18</sup> The District Court accepted the Magistrate Judge's recommendation on February 2, 2007.

mental anguish damages, or lost wages damages. Specifically, Plaintiff could not produce evidence of past profits at the horse farm.<sup>19</sup>

Plaintiff argued that she was not seeking lost profits but the lost value of horses infected with strangles and lost business and good will. The magistrate court noted that “while good will is an independent concept from profits, ‘lost value of horses’ and ‘lost business’ sound suspiciously like lost profits dressed up in different language.” Since Plaintiff could produce no evidence of past profits, and under Texas law the correct measure of lost profits is net profits, not gross profits, the magistrate recommended that “Plaintiffs be barred from presenting at trial any evidence of lost profits, regardless of the name under which they might seek such damages.”

***East Hill Marine, Inc. v. Rinker Boat, Co.***, No. 2-06-210, 2007 WL 1776086 (Tex. App. – Fort Worth June 21, 2007, pet. filed).

*A plaintiff cannot maintain a claim pursuant to the DTPA when his damages exceed \$500,000.*

Plaintiff allegedly entered into a verbal dealership agreement with Defendant to exclusively sell Defendant’s boats. Under the initial agreement, Plaintiff did not have purchase a minimum number of Defendant’s boats. After 7 months, Defendant terminated Plaintiff’s dealership status due to lack of sales.

Plaintiff brought suit against Defendant under the Texas Occupations Code, Breach of Contract, and DTPA. Defendant moved for summary judgment on Plaintiff’s claims. Defendant argued that Plaintiff’s DTPA claim failed because the set of transactions between the parties involved consideration of more than \$500,000. The trial court granted Defendant’s summary judgment motions and dismissed Plaintiff’s claims.

The appellate court affirmed, noting that the DTPA limits a consumer’s cause of action if the claim arises out of a transaction or set of transactions relating to the same project if the total consideration is greater than \$500,000. The court noted that Plaintiff promised to purchase and resell \$859,513 of boats for Defendant. In reviewing the Plaintiff’s petition, the court further noted that Plaintiff sought 10 years of lost profits. The court found that these claimed lost profits included Plaintiff’s loss of profits on the sale of the \$859,513 boat order.

Plaintiff argued that the \$859,513 should not be considered in determining whether the DTPA limitation applied. Rather, Plaintiff argued that the sole transaction it sued Defendant on was the *initial* application to sell boats. At the time of that application, there was no promise to pay more than \$500,000.

---

<sup>19</sup> It was not clear from the magistrate’s report whether the plaintiffs sought actual damages for the value of Hotsy and Jazz.

The court rejected Plaintiff's argument, noting that because the Plaintiff promised to pay Defendant \$859,513 and then sued to recover the lost profits on this amount, Plaintiff's transactions with Defendant exceeded \$500,000 and thus were beyond the scope of the DTPA.

***ISG State Operations, Inc. v. Nat'l Heritage Ins. Co.***, No. 11-05-00359-CV, 2007 WL 2274885 (Tex. App—Eastland Aug 9, 2007, no pet. h.).

*Because the plaintiff's damage model was the profits it anticipated earning from an unexecuted contract, it failed to offer evidence of recoverable damages.*

Plaintiff and Defendant entered into a contract whereby Plaintiff provided services to process medical claims submitted in paper format. Plaintiff and Defendant allegedly discussed entering into a contract regarding electronically submitted claims, but the parties never executed that contract.

Over the course of the contract, Plaintiff was unable to meet the paper claims processing contract's performance requirements. Defendant then terminated the contract for failure to timely process claims. Plaintiff sued Defendant, alleging it was fraudulently induced into the paper claims processing contract on the expectation that it would receive the electronic claims processing contract as well. Plaintiff sought lost profits for the electronic claims processing contract.

The court determined that Plaintiff was not entitled to lost profits relating to electronic claims processing. Specifically, the court found that a fraudulent inducement claim and lost profits must be predicated on an executed contract. Because there was no contract in place between the Plaintiff and Defendant related to electronically submitted claims, the Plaintiff could not recover lost damages from that unexecuted contract. Rather, the basis of any fraudulent inducement claim must be an executed contract that was procured by fraud, without which would not have been executed, and the damages sought must flow directly from *that* contract.

## 11. PRE-JUDGMENT INTEREST

***State Farm Mutual Automobile Insurance Co. v. Norris***, 216 S.W.3d 819 (Tex. 2006).

*If an insured under a UIM policy settles with a third-party tortfeasor for less than the tortfeasor's policy limits, any claim for pre-judgment interest on the difference between liability coverage limits and tort settlement is released.*

Norris was injured during a car accident caused by Johnston. Norris sued Johnston and subsequently settled for \$40,000, which was \$10,000 less than Johnston's policy limits. At the time of the accident, Norris was covered under an uninsured motorist policy issued by State Farm. An uninsured motorist ("UIM") policy allows an insured to recover the difference between a negligent driver's insurance policy limit and the full amount of damages, including pre-judgment interest.

On the same day Norris settled his claim with Johnston, he added State Farm as a defendant, seeking UIM benefits. While State Farm had previously tendered \$5,000 in personal injury protection benefits, it never offered to settle Norris' UIM claim.

At trial, the jury determined Norris suffered \$51,200 in damages, plus attorneys' fees. However, the trial court applied a \$55,000 credit (Johnston's \$50,000 policy limits plus the \$5,000 personal injury protection payment) and therefore found Norris was not entitled to pre-judgment interest. The court of appeals reversed, finding that Norris was due pre-judgment interest pursuant to the terms of his UIM policy and applicable Texas insurance law.

As a matter of first impression, the Texas Supreme Court determined that Norris was entitled to some pre-judgment interest. "UIM policies are intended to compensate injured parties 'up to the limit specified in the policy, reduced by the amount *recovered or recoverable* from the insurer of the underinsured motor vehicle.'"<sup>20</sup> The Court held that when Norris settled and released his claims against Johnston, he also released any interest in the difference between Johnston's policy limits and the settlement amount. Therefore, having released any entitlement to the \$10,000 difference, Norris could only recover pre-judgment interest on the amount of the settlement from Johnston (\$40,000) and the amount that exceeds Johnston's policy limits (\$1,200).

**SAP Trading, Inc. v. Sohani**, No. 14-06-00641-CV, 2007 WL 1599719 (Tex. App.—Houston [14th Dist.] June 5, 2007, no pet.).

*14th District Court of Appeals recognizes split of authority among Texas Courts of Appeals, and among the Court's own cases, concerning whether an award of pre-judgment interest is mandatory.*

This case involved a suit on sworn account. SAP argued that it was due pre-judgment interest under section 302.002 of the Texas Finance Code. However, section 302.002 prescribes the rate of "legal interest" a "creditor" may charge. The definitions of "legal interest" and "creditor" specifically exclude judgment creditor and judgment interest. Thus, the Court held that SAP was not entitled to prejudgment interest.

In reaching this conclusion, however, the Court noted a split in authority among Texas Courts of Appeals, and notably among cases in the 14th District, regarding whether an award of pre-judgment interest is mandatory. For example in *Apache Corp. v. Dynegy Midstream Services, L.P.*<sup>21</sup> and *Baker Hughes Oilfield Operations, Inc. v. Hennig Production Co.*,<sup>22</sup> the 14th District stated that a "prevailing party is awarded pre-judgment interest as a matter of course."

---

<sup>20</sup> TEX. INS. CODE ANN. art 5.06-1(5) (Vernon 2006).

<sup>21</sup> *Apache Corp. v. Dynegy Midstream Servs., L.P.*, 214 S.W.3d 554, 566 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

<sup>22</sup> *Baker Hughes Oilfield Operations, Inc. v. Hennig Prod. Co.*, 164 S.W.3d 438, 447 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

The majority of Texas courts, including the 14th District, have held that an award of pre-judgment interest is within the trial court's discretion. For example, in *Citizens National Bank v. Allen Rae Investments, Inc.*, the Fort Worth Court of Appeals held that "where no statute controls, the award of prejudgment interest is left to the sound discretion of the trial court."<sup>23</sup> In *Marsh v. Marsh*, the 14th District also applied an abuse of discretion standard to a review of whether the trial court properly applied and calculated prejudgment interest.<sup>24</sup> And finally, in *Larcon Petroleum, Inc. v. Autotronic Systems, Inc.*, the 14th District held that a trial court is permitted, but not required, to award pre-judgment interest under the authority of a statute, an equitable theory, or both.<sup>25</sup>

## 12. PROPORTIONATE RESPONSIBILITY

***F.F.P. Operating Partners, L.P. v. Duenez***, 50 Tex. Sup. Ct. J. 764, 2007 WL 1376357 (Tex. May 11, 2007).

*The Proportionate Responsibility Act includes claims under the Dram Shop Act and therefore a dram shop will be held responsible to third parties for only its proportionate share of responsibility.*

Ruiz spent a day consuming a case and a half of beer while chopping firewood. After finishing his task, Ruiz drove to a convenience store owned by F.F.P. where he purchased a twelve-pack of beer. Ruiz then climbed into his truck, opened one of the recently purchased beers and drove off. As Ruiz was driving, he collided with the Plaintiffs' car, causing personal injury and property damage.

Plaintiffs sued F.F.P. under the Dram Shop Act. F.F.P. filed a cross-claim against Ruiz, naming him as a responsible third party and contribution defendant under Chapter 33 of the Civil Practice and Remedies Code. At the pre-trial conference, Plaintiffs argued that Chapter 33 did not apply to Dram Shop Claims. The trial court agreed, severed F.F.P.'s cross-claim, and submitted Plaintiffs' negligence claims against F.F.P. to the jury without any questions regarding proportionate responsibility.

The appellate court affirmed, distinguishing the Supreme Court's holding in *Smith v. Sewell*, 858 S.W.2d 350 (Tex. 1993), on the basis that the comparative responsibility statute applied to dram-shop causes of actions brought by the intoxicated patron (first-party actions). The appellate court concluded that Chapter 33 is inapplicable when the plaintiff is an innocent third party. The Texas Supreme Court reversed.

The Court recognized that under the Dram Shop Act, once a third party plaintiff demonstrates that the dram shop served alcohol to an "obviously intoxicated person,"

---

<sup>23</sup> *Citizens Nat'l Bank v. Allen Rae Invs., Inc.*, 142 S.W.3d 459, 487 (Tex. App.—Fort Worth 2004, no pet.).

<sup>24</sup> *Marsh v. Marsh*, 949 S.W.2d 734, 744 (Tex. App.—Houston [14th Dist.] 1997, no writ).

<sup>25</sup> *Larcon Petro., Inc. v. Autotronic Sys., Inc.*, 576 S.W.2d 873, 879 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

the plaintiff does not have to prove proximate cause. But the Court also noted that Chapter 33 broadly applies to “any cause of action based in tort.” It further noted that §33.002 listed causes of action expressly excluded from coverage and dram shop claims did not fall under any listed exclusion.

Based on its interpretation of the two statutes and its opinion in *Sewell*, the Court concluded that the dram shop should only be held liable for its own conduct, and, accordingly, that the Proportionate Responsibility Act applied. It further held that the dram shop is not vicariously liable for the conduct of an intoxicated patron. Accordingly, the Court found that the trial court should have submitted an instruction to the jury to apportion responsibility among Ruiz and F.F.P.

Chief Justice Jefferson and Justice O’Neill each filed dissenting opinions. Chief Justice Jefferson recognized that the Proportionate Responsibility Act does not harmonize with the Dram Shop Act. To give effect to both statutes, Chief Justice Jefferson argued that the Dram Shop Act imposes a form of vicarious liability. Specifically, the Chief Justice argued that once alcohol is provided to a person “so obviously intoxicated to the extent that he presented a clear danger to himself and others,” the dram shop owner’s liability is fixed. “From that point forward, any harm caused by the intoxicated person is imputed to the provider; indeed, for purposes of the Dram Shop Act, the provider virtually becomes the drunk.” Hence, the only causation required under the statute focuses on the intoxicated person’s, not the dram shop’s, actions.”

Under that analysis, Chief Justice Jefferson argued that the dram shop’s proportionate responsibility need not be considered. The Chief Justice noted that the Proportionate Responsibility Act does not require that all persons be submitted in the apportionment question. Instead, the Proportionate Responsibility Act only requires submitting an apportionment for “those persons ‘who caus[ed] or contribut[ed] to cause in any way the harm for which recovery of damages is sought.’” The Chief Justice concluded that “given that causation is imputed to the provide in an action under the [Dram Shop] Act, section 33.003 neither contemplates or permits the apportionment of responsibility between the intoxicated patron and the provider in an action brought by an injured third party.”<sup>26</sup> The Chief Justice therefore concluded that “whatever percentage of responsibility is attributed to the drunk should be imputed to the provider, who may then seek indemnity from the intoxicated person.”

---

<sup>26</sup> Quoting William D. Underwood & Michael D. Morrison, *Apportioning Responsibility in Cases Involving Claims of Vicarious, Derivative, or Statutory Liability for Harm Caused by Another*, 55 BAYLOR L. REV. 617, 624-625 (2003).

**Jackson v. Axelrad**, 221 S.W.3d 650 (Tex. 2007).

*The plaintiff physician's negligence may be considered when determining the extent of the defendant physician's proportionate responsibility.*

In this medical malpractice case, both the physician and the patient were doctors. At trial, each claimed the other was negligent. The jury agreed and assessed the plaintiff's fault to be 51% and the defendant's as 49%. Pursuant to Tex. Civ. Prac. & Rem. Code §33.001, the trial court entered a take nothing judgment. The appellate court reversed, disregarding the plaintiff's negligence on the basis that laymen generally have no duty to volunteer information during medical treatment.

The Supreme Court reversed and affirmed the trial court's judgment. There was conflicting evidence as to whether the plaintiff informed the defendant where his abdominal pain began. The defendant alleged that if the plaintiff had told him where the pain started, the defendant would have correctly diagnosed the plaintiff's condition.

The Court found that a medical history is a cooperative venture requiring active participation by both the doctor and the patient. The Court rejected a bright line compartmentalization of the patient's duty to report medical history. Instead, the Court recognized that many factors contributed to a patient's duty to disclose medical history. In this matter, the Court recognized that the patient was a physician. Therefore, the Court determined that the plaintiff's medical training should have been taken into account in evaluating the medical history given. Specifically, the Court determined that the ordinary care standard a jury evaluates encompasses the plaintiff's medical training.

**Pilgrim's Pride Corp. v. Cernat**, 205 S.W.3d 110 (Tex. App. – Texarkana 2006, pet. denied).

*Under the revised Texas Civil Practice and Remedies Code, a defendant's liability is capped at the defendant's proportionate responsibility for the gross damages. The plaintiffs' recovery is then calculated by reducing each plaintiff's recovery by the plaintiff's proportionate responsibility. If the defendant's total liability is less than each plaintiff's recoverable damages, each plaintiff can only recover a pro-rated portion of its total award.*

The appellate court began its analysis of this proportionate responsibility issue with a poem:

On a midnight dark and dreary, / Our two plaintiffs, worn and weary,  
Slowly going, a "dark" truck towing on lonely stretch of road.  
Suddenly, there came approaching / Pilgrim truck, their rear encroaching,  
Crashed into the truck that the two startled trav'lers towed.  
In the wreckage sat the two, / All immersed in chicken "stew,"  
With hurts sustained and backs that pained; / Decided that they'd sue.  
Judge and jury found for the pair, / For hurts to backs (and "parts" in hair).  
The Pilgrim, placed in some despair, / Now asks of us, "Please, make it fair."

On this appeal, Pilgrim contends / The trial court gave too much amends.  
He says the proof is just too small / To make a damages pile this tall;  
For weakness of proof on some damages found  
We must cut a part out of that mound. / He, too, asks fault be re-  
compared-  
The fault that the Pilgrim and two plaintiffs shared.  
“The way that the trial court figured, it erred.”

The jury in this truck accident/personal injury dispute found the defendant 50% liable for the loss and the two plaintiffs each 25% liable. After the jury apportioned fault and found damages, the trial court “rendered judgment for each plaintiff in the amount of 66-2/3 percent of his respective gross damages.” The defendant appealed, claiming that an award of 66-2/3 to each plaintiff misapplied its percentage of liability since the jury found the defendant responsible for only 50% of the loss.

The court reviewed the language in Section 33.012 and 33.013 of the Texas Civil Practice and Remedies Code and found that the trial court incorrectly applied the parties’ proportionate responsibility. Specifically, the trial court’s calculation applied the predecessor statute’s language and assessed the defendant’s liability to a particular claimant without assessing the other claimant’s responsibility. The appellate court determined that under Sections 33.012 and 33.013, as well as the entire Chapter regarding Proportionate Responsibility, all claimants’ and defendants’ proportion of responsibility should be considered in awarding damages.

Applying Texas Supreme Court precedent, the court determined that §33.012 controls the claimant’s total recovery and §33.013 control’s the defendant’s separate liability. The court found that the two sections set *independent* limits on recoveries. Thus, the court found that each plaintiff was entitled to no more than 75% of his total damages. Independently, however, the defendant’s liability was capped at 50% of the *gross damages*. If the defendant’s liability is less than the claimants’ combined recoverable damages, each claimant’s recovery must be reduced and prorated.<sup>27</sup>

---

<sup>27</sup> The court calculated the recoverable damages as follows:

Thus, Section 33.012 limits Cernat's recovery to no more than seventy-five percent of \$120,000.00, making Cernat's maximum recovery \$90,000.00. It limits Ciupitu's recovery to no more than seventy-five percent of \$75,000.00, making Ciupitu's maximum recovery \$56,250.00. Independently, Section 33.013 sets a limit to Pilgrim's Pride's liability at no more than fifty percent of \$195,000.00, making Pilgrim's Pride's maximum liability \$97,500.00. Because the maximum recovery of Cernat and Ciupitu is \$146,250.00, and the maximum liability of Pilgrim's Pride is \$97,500.00, the judgment against Pilgrim's Pride must be reduced to a total of \$97,500.00. Prorating yields a judgment for Cernat in the amount of \$60,000.00 and a judgment for Ciupitu in the amount of \$37,500.00.

***Pochucha v. Galbraith Engineering Consultants***, No. 04-07-00119-CV, 2007 WL 2608367 (Tex. App. – San Antonio Sept. 12, 2007, no pet. h.).

*Section 33.002(e)'s "savings clause" permits plaintiffs to add parties designated as responsible third parties after the statute of repose has passed.*

On April 10, 1995, Plaintiffs purchased their home from Cox. On April 1, 2005, Plaintiffs brought suit against Cox due to construction defects in the home. On November 3, 2005, Cox filed a motion for leave to designate Galbraith as a responsible third party. After the court granted that motion, the Plaintiffs sought to join Galbraith as a defendant pursuant to Section 33.004(e) of the Texas Civil Practice and Remedies Code. Section 33.004(e) states:

If a person is designated under this section as a responsible third party, *a claimant is not barred by limitations* from seeking to join that person, even though such joinder would otherwise be barred by limitations, if the claimant seeks to join that person no later than 30 days after that person is designated as a responsible third party.

Galbraith filed a motion for summary judgment, contending that the 10-year statute of repose precluded the Plaintiffs' recovery. Galbraith argued that because §16.008 of the Texas Civil Practice and Remedies Code is a statute of repose and §33.004(e) refers to "limitations," §33.004(e) does not apply to extend the 10-year period in §16.008. Thus, Galbraith argued that the Plaintiffs' claim is time-barred. The trial court granted Galbraith's motion and dismissed that party from suit.

The appellate court reversed. The court noted that "while section 16.008 may be a statute of repose, the Texas Legislature did not distinguish between statutes of limitations or statutes of repose when it enacted section 33.004(e)." The court recognized that the §33.002 provided the only exceptions to the responsible third party statute. Since the statute of repose was not listed as an exception, and Chapter 33 applies to *any* cause of action based in tort, the court determined that the savings clause permitted the Plaintiffs' suit. The court further found that the Legislature's use of the word "limitations" in §33.004(e) applied to each of the "limitations" periods listed in Chapter 16 of the Civil Practice and Remedies Code, without regard to limiting a statute of repose.

The court therefore concluded that a Plaintiff is entitled to bring a defendant designated under Chapter 33 as a responsible third party into the suit as a defendant, even if the statute of repose has run.

### 13. SETTLEMENT CREDIT

***Gilcrease v. Garlock, Inc.***, 211 S.W.3d 448 (Tex. App.—El Paso 2006, no pet.).

*Plaintiffs are entitled to recover punitive damages based on the jury's award of actual damages, even though the Plaintiffs' recovery of actual damages is offset by a settlement credit.*

Gilcrease, widow of a deceased worker, and her adult children brought a wrongful death action against Garlock seeking damages arising from the deceased worker's exposure to asbestos and resulting mesothelioma. The jury apportioned Garlock's responsibility as 25% and awarded the Gilcreases compensatory and punitive damages. The trial court determined that Garlock was entitled to a settlement credit that offset both the compensatory and punitive damages. Accordingly, the trial court entered a take-nothing judgment for the Gilcreases because the settlement credits exceeded the damages awarded by the jury. Both sides appealed.

The Gilcreases argued that the settlement credits should not have been applied to offset the exemplary damages award, citing §33.002(c)(2) of the Texas Civil Practice and Remedies Code. Section 33.002(c)(2) provides that "this chapter does not apply to ... a claim for exemplary damage included in an action to which this chapter otherwise applies." Garlock, on the other hand, argued that section 33.002(c)(2) "means only that a non-settling defendant cannot claim a settlement credit for that part of a settlement paid by a settling defendant for punitive damages." *Id.* at 457.

The appellate court overruled Garlock's challenge because it was inconsistent with the "one-satisfaction rule," which states that the non-settling defendant may only claim a credit based on the damages for which all tortfeasors are jointly liable. Because the jury assessed exemplary damages against Garlock alone, the court held that Garlock is not entitled to offset its personal liability for exemplary damages by the amount of common damages paid by the settling defendants.

Garlock then argued that the Gilcreases were not entitled to exemplary damages because they did not recover any actual damages once the settlement credits were applied. The court disagreed with Garlock's argument. Relying on §41.004 of the Texas Civil Practices & Remedies Code, the court noted that the legislature used the word *award* rather than *recovery*. Therefore, the court found that it is not essential that the plaintiff *recover* compensatory damages from the defendant after settlement credit, only that he is awarded damages. Consequently, the court concluded that the Gilcreases were entitled to recover punitive damages based on the jury's award of actual damages, even though their recovery of actual damages was offset by the settlement credit.

**Allstate Indemnity Co. v. Hyman**, No. 06-05-00064-CV, 2006 WL 694014 (Tex. App. – Texarkana March 21, 2006, no pet.).

*As a matter of first impression, bad faith damages under the revised Texas Insurance Code are limited to three times the actual damages, not “treble” damages. Any setoff for settlement credits, however, applies after trebling, not before.*

Hyman was involved in a car accident with Baker. Hyman made a claim against her insurer, Allstate, but was unsatisfied with Allstate’s settlement offer. Hyman then brought suit against Allstate and Baker to recover her property and personal injury damages arising out of the collision. Hyman eventually settled with Baker, but took her claims for breach of contract and bad faith to trial. The jury found Allstate liable for breach of contract and knowing violation of Article 21.21 of the former Texas Insurance Code. Based on its findings, the jury awarded Hyman \$18,000 for property damage and an additional \$54,000 for Allstate’s knowing bad faith.

Allstate argued that the award of \$54,000 did not comport with the legislature’s statutory caps. The Texas Insurance Code provides that “a prevailing plaintiff may recover the amount of actual damages, and if the trier of fact finds that the defendant’s conduct was committed knowingly, the ‘trier of fact may award not more than three times the amount of actual damage.’”<sup>28</sup> Allstate compared this language with similar language in the DTPA and courts’ application of that language. Specifically, courts have interpreted the similar DTPA provision as a cap on the total recoverable damages.

The court agreed. It found that the Insurance Code “can be read to allow both actual damages and then an additional punitive award of no more than three times the actual damage award. However, in light of the historical background of the section, and because very similar language in the current version of the DTPA is interpreted in this fashion, it is our conclusion that the section limits a plaintiff’s recovery to three times actual damages (plus court costs and reasonable and necessary attorney’s fees).” Accordingly, the court reduced the plaintiff’s award of punitive damages from \$54,000 to \$36,000.

Allstate then argued that it was entitled to an offset of damages due to Hyman’s settlement with Baker on a dollar-for-dollar basis.<sup>29</sup> Since Baker settled with Hyman for \$17,500, Allstate argued that Baker was entitled to only \$500. Allstate further argued that the offsets should have been taken *before* determining the additional bad faith damages.

The court found that Allstate was entitled to the offset, but disagreed that the offset affected the calculation of the punitive damage award. The court determined that under the one satisfaction rule, “the nonsettling defendant may only claim a credit based

---

<sup>28</sup> Citing TEX. INS. CODE §541.152 (Vernon 2005).

<sup>29</sup> This case was filed prior to September 1, 2003 when §33.012 of the Texas Civil Practice and Remedies Code took effect to eliminate the dollar-for-dollar credit in favor of pure proportionate responsibility.

on the damages for which all tortfeasors are jointly liable.” The court noted that if it applied the offset before calculating the punitive damage award, it would effectively delete that award and eliminate the defendant’s responsibility for its bad faith. Accordingly, the court concluded that Hyman’s actual damages should be multiplied and then offset by the settlement credit.

#### 14. SPECIAL DAMAGES

***Texas Mutual Insurance Co. v. Ray Ferguson Interests, Inc.***, No. 01-02-00807-CV, 2006 WL 648834 (Tex. App.—Houston [1st Dist.] July 28, 2006, pet. denied).

*Unless provided by statute or under the terms of a contract, damages for “lost time” due to litigation are not recoverable.*

Ray Ferguson had been in the paving business since 1976. Ray Ferguson was the majority owner of Ray Ferguson Interests, Inc. (“RFI”), which generally operated as a general contractor. Ray Ferguson also the minority owner of RFI Brazos Paving, Inc. (“Brazos”), which operated as a subcontractor performing concrete-paving work. The majority of Brazos’ work came from RFI.

RFI carried worker’s compensation insurance with Texas Mutual Insurance Co. (“TMIC”). Brazos, however, was a non-subscriber under the State’s worker compensation system. In 1997, RFI was working as a subcontractor on a job for another general contractor. RFI had in turn subcontracted with Brazos for a crew of four men to perform the storm-sewer work for the paving project. When the general contractor found out that Brazos was a non-subscriber, it demanded the crew have worker’s compensation coverage. As a result the Brazos crew was put on the RFI payroll sometime around the middle of 1997.

A few days after the employee transfer, one of the crew members was injured and applied for worker’s compensation benefits with TMIC. While processing the claim, TMIC learned of the recent employee transfer and reported it to the agency’s fraud department. The fraud department began to investigate whether Brazos was truly an independent subcontractor of RFI or whether RFI owed premiums for Brazos’ employees. TMIC also informed RFI that it wanted to review both RFI’s and Brazos’ books and records. RFI and Brazos spent a considerable amount of time preparing the books and records for TMIC’s inspection. However, TMIC never actually performed the inspection until well after RFI filed suit.

In February 1998, RFI sued TMIC, alleging that TMIC had improperly sought to inspect the books and records with the sole intention of reassessing premiums for prior years. Later RFI amended its petition to allege breach of contract, breach of good faith and fair dealing, and claims under Article 21.21 of the Texas Insurance Code for “economic, special, and consequential” damages. At trial the jury found that TMIC had breached the contract and violated six specific unfair and deceptive acts under Article 21.21. With regard to the Article 21.21 claims, the jury awarded \$3,670,000, which included \$70,000 for lost time spent by RFI’s officers and employees attempting to

remedy the problems arising from TMIC's actions. This included time RFI had lost "putting in a lot of hours gathering documents and doing things" and "going and doing depositions, getting all these documents ready."

TMIC appealed all aspects of this decision, but specifically challenged the damages for RFI's officers and employees "lost time" due to due to litigation. The Court found that RFI's evidence can only be summarized as "financial loss due to time spent by RFI's employees on litigation matters," such as discovery, depositions and the like. The Court held that such damages are not recoverable unless a statute or a contract provides for their recovery. RFI did not claim that a statute or a contract provided for such recovery. Therefore, as a matter of law, the evidence provided did not support the jury's award for "the lost time spent by officers and employees of RFI attempting to remedy the problems arising" from TMIC's actions, and TMIC's challenge of the \$70,000 award was sustained.

#### 15. STATUTORY DAMAGE CAPS

***Poliner v. Tex. Health Sys.***, 239 F.R.D. 468 (N.D. Tex. 2006).

*Statutory exception to cap on exemplary damages under §41.008(c) did not apply because the defendant's conduct in using coercion and duress to obtain a signature did not violate Penal Code 32.46 (securing execution of document by deception).*

Dr. Poliner brought an action against his employer hospital, challenging his suspension and alleging defamation. The cause of action resulted from the Hospital's use of duress and coercion to pressure Poliner to sign an abeyance letter. The Hospital labeled Poliner as a "dangerous doctor," which, he alleged, effectively ruined his practice because he relied almost solely on emergency room referrals.

The jury awarded Poliner non-economic actual damages, lost earnings, and \$90 million in punitive damages. On appeal, the Hospital argued that the statutory cap on exemplary damages applied. Poliner argued that because the "defendant used deception to secure the execution of a document," he was entitled to uncapped exemplary damages under §41.008(c) of the Texas Civil Practice & Remedies Code.

The appellate court determined that the exception did not apply to the present case, and therefore exemplary damages were subject to the statutory cap. The court found that although the defendant used coercion and duress to convince Poliner to sign the abeyance letter, there was no evidence that the defendant used deception. Therefore, the defendant could not have violated Penal Code 32.46, securing execution of document by *deception*. The court also noted that Poliner's claim, defamation, is not a claim based on securing a document by deception. Accordingly, the court concluded that the punitive damages cap applied and that Poliner's punitive damage award was limited to \$750,000 plus two times the economic damages awarded against each defendant.

**Rivera v. United States**, No. SA-05-CV-0101-WRF, 2007 WL 1113034 (W.D. Tex. Mar. 7, 2007).

*Chapter 74 of the Texas Civil Practice and Remedies Code, limiting tort recovery, does not violate the Texas Constitution because it is a damage cap and the Texas Constitution directs the legislature to provide damage caps on healthcare liability claims.*

Rivera's heirs alleged medical and healthcare negligence by military physicians and military and civilian healthcare providers under the Federal Tort Claims Act. After undergoing two blood transfusions, Rivera died because she received the wrong blood type.

Rivera's heirs brought a motion for partial summary judgment on the defendant's affirmative defenses, claiming in part that Chapter 74 of the Texas Civil Practice and Remedies Code violated the Texas Constitution. Specifically, Rivera's heirs argued that Chapter 74 "provides health care providers with exclusive privileges in violation of the equal protection provisions in the Texas Constitution."

The portion of Chapter 74 that Rivera's heirs alleged conflicted with the Texas Constitution was a damages cap that limits a plaintiff's recovery to \$1.5 million (not including medical costs) against healthcare providers. The district court rejected Rivera's heirs argument. The court noted that the Texas Constitution directs the legislature to establish damages caps on healthcare liability claims. The court concluded that Chapter 74 does not violate the Texas Constitution and therefore, the defendants had a right to base their affirmative defense on the damages cap provided.

**Murphy v. Am. Rice, Inc.**, No. 01-03-01357-CV, 2007 WL 766016 (Tex. App.—Houston [1st Dist.] Mar. 9, 2007, no pet.).

*Defendant's argument that the jury's "cap busting" finding that he had violated the Penal Code was insufficient because it was not unanimous was waived by not objecting to the jury charge at trial. Additionally, the jury does not have to be unanimous to find a violation of the Penal Code in civil matters.*

ARI brought suit against Murphy, claiming: "monies had and received; breach of fiduciary duty and usurpation of corporate opportunity; conversion; actual fraud; and constructive fraud." The trial court found in favor of ARI and awarded \$4,404,171 in actual damages and \$10 million in exemplary damages. The jury also found that Murphy had committed three penal code offenses, avoiding the cap on exemplary damages pursuant to §41.008(b) & (c) of the Texas Civil Practice & Remedies Code (Vernon 2006).

Murphy appealed, claiming that the award should be reduced to the statutory cap because the jury finding that he had violated the Penal Code was insufficient. In support of this argument, Murphy argued that a jury's verdict must be unanimous to find a violation of the Penal Code.

The appellate court found that Murphy waived this argument by failing to object to the jury charge. The jury charge did not require that the decision be unanimous. Regardless, the court concluded that even if Murphy had made the argument, it failed. The court concluded that there is “no case law requiring that, in a civil case, for purposes of determining whether the cap on exemplary damages can be exceeded under the law in effect at the time that this case was tried, a jury’s findings that a criminal offense was committed must be unanimous.”

***Bossier Chrysler-Dodge II, Inc. v. Riley***, 221 S.W.3d 749 (Tex. App.—Waco 2007, no pet.).

*DTPA (Deceptive Trade and Practices Act) imposes no cap on mental anguish damages.*

Bossier Chrysler-Dodge brought a breach of contract claim against Riley for failure to deliver his pickup truck as a trade-in for a used car. Riley counterclaimed, alleging that Bossier had committed fraud and DTPA violations. The jury failed to find that Bossier and Riley had entered into a contract, but awarded Riley damages on his claims of fraud and DTPA violations plus additional damages after finding that Bossier acted knowingly.

Bossier appealed the judgment alleging that the court erred in failing to cap the jury’s award for mental anguish damages at three times the amount of economic damages awarded, as set out under § 17.50(b)(1) of the DTPA. That section provides that a plaintiff may recover:

the amount of economic damages found by the trier of fact. If the trier of fact finds that the conduct of the defendant was committed knowingly, the consumer may also recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of economic damages; or if the trier of fact finds the conduct was committed intentionally, the consumer may recover damages for mental anguish, as found by the trier of fact may award not more than three times the amount of damages for mental anguish and economic damages.

The court interpreted this section to provide that, while the plaintiff’s “additional damages” were subject to the damages cap, the plaintiff’s recovery for economic damages and mental anguish damages were not limited when the defendant’s conduct was committed knowingly. “The statute imposes no cap on the amount of damages the jury may award for mental anguish.”

**Phillips v. Bramlett**, No. 07-05-0456-CV, 2007 WL 836871 (Tex. App.—Amarillo Mar. 19, 2007, no pet.).

*Court found that the damages cap did not apply because the facts of this case invoked the “Stowers doctrine” (which allows an insured to bring a cause of action against his insurer for the insurer’s negligent failure to settle a claim within applicable policy limits) and the court concluded that the Medical Liability and Insurance Improvement Act did not apply to Stowers claims.*

Bramlett died from complications due to postoperative bleeding. Her heirs brought a wrongful death claim against the physician, Phillips, and hospital. The hospital settled pre-trial.

The Bramletts took their claims against Phillips to trial. The jury found that Phillips was grossly negligent and 75% responsible for Bramlett’s death. The jury awarded Bramlett \$11,000,000 in actual damages and \$3,000,000 in punitive damages. The trial court entered judgment but reduced Bramlett’s award to \$9,196,364.50 in actual damages and \$2,972,000 in punitive damages. Phillips appealed alleging that the trial court erred in failing to apply the damages cap under the Medical Liability and Insurance Improvement Act, Tex. Rev. Civ. Stat. Ann. art. 4590i, §11.02(a) (Vernon 2001).

The appellate court reviewed art. 4590i, § 11.02(c) which states: “This section shall not limit the liability of any insurer where facts exist that would enable a party to invoke the common law theory of recovery commonly known in Texas as the ‘Stowers Doctrine.’” The “Stowers Doctrine” is a common law theory that “permits an insured to maintain a cause of action against his insurer to settle a claim within applicable policy limits.”

The court recognized that in *Welch v. McLean*, 191 S.W.3d 147 (Tex. App. – Fort Worth 2005, no pet.), the appellate court concluded that an insurer’s “Stowers” liability can only be owed to the insured physician. Therefore, the *Welch* court concluded that the physician’s insurer would not be liable to a third party, *i.e.* patient plaintiff, above the damages cap.

The *Phillips* court disagreed with this conclusion, however, and **further** concluded that the Act was not meant to abrogate the “Stowers Doctrine.” Rather, the court noted that the legislature specifically provided for Stowers claims:

By enacting the damage caps of section 11.02(a), the legislature provided certain statutory protections to physicians and health care providers, but expressly excepted successful health care liability claims “where facts exist that would enable a party to invoke the ‘Stowers Doctrine.’” Art. 4590i, §11.02(c). Thus, before a trial court may enter judgment in a medical liability case, it must

determine whether facts exist that would enable a party to invoke the “Stowers Doctrine.”

The court concluded that the damage caps were not meant to interfere with or affect “Stowers” claims. In fact, the court recognized that the “Stowers Doctrine” served to ensure that a physician’s insurance carrier bargained with a plaintiff in good faith.

Accordingly, the court concluded that if a plaintiff could demonstrate an insurer’s liability under the “Stowers Doctrine,” the plaintiff could recover her full actual and punitive damages award without application of damage caps.

***Arismendez v. Nightingale Home Health Care, Inc.***, No. 06-40593, 2007 WL 2083710 (5th Cir. July 23, 2007).

*Defendant did not waive his right to invoke a statutory cap by not pleading it because Defendant raised the cap “at a pragmatically sufficient time” and the plaintiff was not prejudiced.*

Arismendez brought a gender discrimination suit against Nightingale Home Health Care under the Texas Commission on Human Rights Act. The jury found that Arismendez’s pregnancy was a motivating factor in her discharge and awarded damages for back pay, compensatory damages, and \$1,000,000 in punitive damages. The court remitted the damages to \$200,000, sustaining Nightingale’s objection that the jury failed to apply a statutory cap on punitive damages.

On appeal, Arismendez argued that Nightingale waived any statutory cap by failing to timely plead it. The appellate court found that although Nightingale had failed to plead a statutory cap in its answer, Nightingale had not waived its right to the cap’s protection. The court noted that Nightingale raised the argument prior to the entry of judgment and that there were no factual issues to determine. The court concluded that Nightingale had raised the cap at a “pragmatically sufficient time” and that Arismendez was not prejudiced.