BUSINESS TORTS UPDATE: RECENT TRENDS AND DEVELOPMENTS IN EIGHT LITIGATION TOPICS

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CHAPTER 11

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Recognized in 2012 as the Woodrow B. Seals Outstanding Young Lawyer in Houston, he has represented entities and individuals in criminal and regulatory investigations, RICO litigation, antitrust, products liability, First Amendment litigation, and other crisis situations. In each of his representations, Collin prides himself on his ability to get to the heart of a complex matter, making everything as simple as possible, but not simpler (to quote Einstein), to tell a winning story to a jury or judge.

Prior to joining the firm, Collin practiced with Williams & Connolly LLP in Washington, D.C., and was a law clerk for the Honorable Anthony J. Scirica, Chief Judge of the United States Court of Appeals for the Third Circuit, in Philadelphia. He serves as Chairman of the Texas Lyceum, the pre-eminent leadership organization for Texans under the age of 45, and as Vice-Chair of the Buffalo Bayou Partnership. He is recognized as a "Texas Super Lawyer" by *Thomson Reuters* and a "Houston Top Lawyer" by *H Magazine.* Collin and his wife, Jacquelyn have three children.

Representative Experience

- *Fulcrum Credit Partners LLC v. Strategic Capital Resources, Inc.* In a collapsed sale for bankruptcy claims, first-chaired a four-day breach-of-contract action in Austin federal court to a unanimous jury verdict for our client. The ultimate award was just shy of $2 million, giving Fulcrum its full measure of lost contract damages and its attorney fees. The verdict was named one of the top 15 Texas contract verdicts for 2011 by *VerdictSearch*.
- *Berge Helene v. GE Oil & Gas.* Conducted five-week bench trial in Houston federal court resulting in a take-nothing judgment on behalf of GE Oil & Gas in a $52 million claim for breach of warranty and fraud. During trial, cross-examined six executives presented by plaintiffs and plaintiff's expert metallurgist, then conducted direct examinations of GE fact witnesses and experts.
- *Neon v. IBM*. Assisted in the defense of IBM Corporation in an antitrust lawsuit, including by taking ten depositions on IBM's behalf. Days before trial was to commence, Neon agreed to a permanent injunction by which it would no longer sell the mainframe software at issue in the litigation. No money exchanged hands between parties.
- *Transcom Enhanced Service, Inc. v. Qwest Corporation* Represented Qwest in Fort Worth federal lawsuit relating to the use of Internet Protocol in long-distance telephone calls. Currently representing Qwest in other related disputes involving others in the telecommunications industry.

- *Alewine et al. v. The City of Houston* Represented the City of Houston in an inverse-condemnation and nuisance case concerning expansions to Bush Houston Intercontinental Airport. After obtaining summary judgment for the City, presented the appellate argument to the Court of Appeals, Fourteenth District, in Houston. In 2010, the appellate court affirmed in full.
- *ASARCO v. Augusta Resource, Inc.* Represented Canadian mining company in adversary proceeding brought in Corpus Christi bankruptcy court concerning 20,000 acres of undeveloped land in the Santa Rita mountains. After an extensive discovery process involving dozens of fact and expert witnesses, the case settled favorably, just before Augusta's summary judgment was decided.
- *In re Dell Inc. Securities Litigation* Represented company in putative class action under Rule 10-b-5 in which plaintiffs sought over $40 billion in damages based on alleged misstatements in company's financial reports over a four-year period. The case was dismissed on scienter and loss causation grounds. After the oral argument in the Court of Appeals for the Fifth Circuit, the case settled favorably.

<u>Professional Honors and Affiliations</u>

- "Texas Super Lawyer" in Business Litigation, *Thomson Reuters*, 2013
- Chairman, Texas Lyceum, 2014
- 2012 Woodrow B. Seals Outstanding Young Lawyer Award, Houston Young Lawyers Association
- "Texas Rising Star," by Thomson Reuters' Super Lawyers in *Texas Monthly Magazine*, 2008-2013
- Vice Chair, Buffalo Bayou Partnership, 2013-14
- President, Baylor Alumni Association, 2013
- Member, Center for Houston's Future, Spring 2011 Business/Civic Leadership Forum
- Outstanding Young Alumnus of Baylor University, 2008
- "Leader of Tomorrow," the University of Texas Health Science Center at Houston
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<u>Presentations and Publications</u>

- Success Strategies and Key Lessons for Young Lawyers, State Bar of Texas CLE Conference, Houston, Texas, February, 2014
- The Federal Law Update, the Harris County Judicial Education Conference, Houston, Texas, 2010
- "Reconsidering the Sham Affidavit Doctrine", 50 Duke L.J. 261, 2000

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Prior to joining Yetter Coleman, she was an Assistant District Attorney with the New York County District Attorney's office in New York City, where she tried eleven trials as first-chair, including bench and jury trials, and prosecuted approximately 1,000 cases from arraignment to disposition.

Presentations and Publications

- "Organized Crime Control in the United States of America," *Oxford Handbook s Online,* 2013 (Co-Author)
- Note, United States v. International Longshoremen's Association: *Analyzing the Civil RICO Suit and Its Implications for the Future*, 65 N.Y.U. Ann. Surv. Am. L. 795, 2010

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I. NEGLIGENT MISREPRESENTATION

A. Background

Texas defines the tort of negligent misrepresentation as it is described in the Restatement (Second) of Torts § 522. This section states:

> One who, in the course of his business, profession or employment, or in any transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

The Supreme Court approved the application of § 522 to the tort of negligent misrepresentation in *Federal Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991). Specifically in that case, the Court used § 522 to clarify the scope of lenders' duties in representations they make to prospective borrowers.

Contexts. In addition to lenders, Texas law recognizes a cause of action for negligent misrepresentation against both professionals and businesses under § 522:

- Accountants. *See, e.g.*, *Blue Bell v. Peat, Marwick, Mitchell & Co.*, 715 S.W.2d 408, 411-12 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *Shatterproof Glass Corp. v. James*, 466 S.W.2d 873, 880 (Tex. App.—Fort Worth 1971, writ ref'd n.r.e.).
- Auditors. *See, e.g.*, *Steiner v. Southmark Corp.*, 734 F. Supp. 269, 279-80 (N.D. Tex. 1990) (applying Texas law).
- Insurance agents. *See, e.g.*, *Nast v. State Farm Fire and Cas. Co.*, 82 S.W.3d 114 (Tex. App.—San Antonio 2002, no pet.).
- Physicians. *See, e.g.*, *Smith v. Sneed*, 938 S.W.2d 181, 185 (Tex. App.—Austin 1997, no writ).
- Real estate brokers. *See, e.g.*, *Hagans v. Woodruff*, 830 S.W.2d 732, 736 (Tex. App.—Houston [14th Dist.] 1992, no writ).
- Securities placement agents. *See, e.g.*, *Lutheran Bhd. v. Kidder Peabody & Co.*, 829 S.W.2d 300, 309 (Tex. App.—Texarkana 1992, writ granted w.r.m.), judgment set aside, 840 S.W.2d 384 (Tex. 1992).
- Surveyors. *See, e.g.*, *Cook Consultants, Inc. v. Larson*, 700 S.W.2d 231, 234 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).
- Title insurers. *Great Am. Mortgage Investors v. Louisville Title Ins. Co.*, 597 S.W.2d 425, 429-30 (Tex. App.—Fort Worth 1980, writ ref'd n.r.e.).

To state a cause of action for negligent misrepresentation, in accordance with § 522, Texas has indicated that four elements must be met:

1. "the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest";
2. "the defendant supplies 'false information' for the guidance of others in their business";
3. "the defendant did not exercise reasonable care or competence in obtaining or communicating the information"; and
4. "the plaintiff suffers pecuniary loss by justifiably relying on the representation."

Sloane, 825 S.W.2d at 442.

Existing fact. The representation must relate to an existing fact. A representation regarding a promise of future conduct cannot support a cause of action for negligent misrepresentation. *Miller v. Raytheon Aircraft Co.*, 229 S.W.3d 358, 380 (Tex. App.—Houston [1st Dist.] 2007). In *Miller*, Eric Miller worked for Raytheon as a pilot. After Raytheon created a joint venture with Flight Options, Inc. (FOI), Miller began working as a pilot for FOI, and Raytheon ceased their flight operations. Miller's employment was terminated shortly thereafter. Miller brought a negligent misrepresentation claim based on allegations that Raytheon and FOI had both represented to him that all Raytheon pilots would have the opportunity to continue working for FOI and retain their flying positions. The court held that these representations were promises of future conduct, not statements of existing fact, and as a result, Miller's claim failed as a matter of law. *Id.* at 380; *see also Scherer v. Angell*, 253 S.W.3d 777, 781 (Tex. App.—Amarillo 2007) (promises of future action were not actionable as negligent misrepresentation); *Petras v. Criswell*, 248 S.W.3d 471, 476 (Tex. App.—Dallas 2008) (same).

Similarly, in *Maddox v. Vantage Energy, LLC*, 361 S.W.3d 752 (Tex. App.—Fort Worth 2012, review denied), the court reiterated that a promise "to do or to refrain from doing an act in the future" was not a basis for a negligent misrepresentation claim. *Id.* at 760. In this case, Maddox, a property owner, brought suit against Vantage Energy, claiming that Vantage offered him terms on an oil and gas lease that were less favorable than the terms offered to some of his neighbors. At its core, Maddox's complaint was that Vantage inaccurately represented how long its offer to Maddox would stay open. *Id.* at 760. The court, however, determined that Vantage's alleged statement that it "would give all un-leased mineral owners the opportunity to accept the deal" was only a promise to do an act in the future, not a misrepresentation of an

existing fact, and therefore Maddox had no cause of action for negligent misrepresentation. *Id.* at 761.

B. Recent Developments

1. Statute of Limitations—Discovery Rule

Texas has yet to determine whether the discovery rule tolls the statute of limitations in negligent representation cases, but at least one recent case points in that direction.

The Texas Supreme Court has addressed the matter in the past but did not decide the issue. In *HECI Exploration Co. v. Neel,* 982 S.W.2d 881 (Tex. 1999), the Court considered a set of facts where HECI had failed to notify royalty owners that it had successfully sued the operator of an adjoining lease for depleting a common reservoir. The royalty owners, the Neels, brought a negligent misrepresentation claim against HECI for failing to disclose this information, and they argued that the discovery rule tolled the statute of limitations, which would otherwise bar the suit. The Supreme Court acknowledged that there was an open question as to whether the discovery rule applies to negligent misrepresentation cases. *Id.* at 885-86. It noted that the principles guiding the application of the rule are that "the nature of the injury [is] inherently undiscoverable and . . . the injury itself must be objectively verifiable." *Id.* at 886. In *HECI*, the Court ultimately did not apply the discovery rule, holding the type of injury the Neels suffered was not inherently undiscoverable, as royalty owners have an obligation to determine whether adjoining operators are causing damage to their interests. *Id.* As a result, the Court did not make any generally applicable rulings as to whether the discovery rule may apply to all negligent misrepresentation cases.

In the years since *HECI*, a number of courts of appeals have indicated that the discovery rule may apply to negligent misrepresentation cases. *See, e.g.*, *Sabine Towing and Transportation Co., Inc. v. Holliday Insurance Agency, Inc.*, 54 S.W.3d 57 (Tex. App.—Texarkana 2000, pet. denied) (discovery rule can apply to negligent misrepresentation claims, but did not apply to the case at hand); *Matthiesen v. Schafer*, 27 S.W.3d 25, 31 (Tex. App.—San Antonio 2000, pet. denied) (applying the discovery rule to a negligent misrepresentation claim); *Heller Healthcare Finance, Inc. v. Boyes*, No. 300CV1335D, 2002 WL 1558340 (N.D. Tex. July 15, 2002) (discovery rule can apply to negligent misrepresentation claims, but did not apply to the case at hand).

Other courts, however, have held that the discovery rule cannot apply to negligent misrepresentation claims. *See, e.g.*, *Kansa Reins. Co. v. Cong. Mortgage Corp. of Tex.*, 20 F.3d 1362 (5th Cir. 1994) (Texas law does not allow the application of the discovery rule to negligent misrepresentation claims); *In re: Precept Business Services, Inc., et al. v. Jackson Walker, LLP*, 01-31351-SAF-7, 2004 WL 2074169 (Bankr. N.D. Tex. Aug. 23, 2004) (in Texas, the statute of limitations for negligent misrepresentation is not tolled by the discovery rule).

More recently, however, the Fifth Circuit has backed away from *Kansa*'s interpretation of Texas law in 1994. *See Armstrong v. Am. Home Shield Corp.*, 333 F.3d 556, 570 (5th Cir. 2003) ("It is unclear whether the discovery rule tolls the Texas statute of limitations for negligent misrepresentation claims."); *Ptasynski v. Shell Western E & P Inc.*, No. 99-11049, 2002 WL 32881277, *3-4 (5th Cir. Feb. 13, 2002) ("It is uncertain whether Texas's discovery rule applies to negligent misrepresentation claims."). *See also Best v. Exxon Mobil Corp.*, No. H-09-0625, 2010 WL 1169984, at *8 (S.D. Tex. March 23, 2010) ("The Fifth Circuit's holding in *Kansa Reinsurance* has been questioned in light of subsequent decisions from Texas courts.").

This year, a Texas Court of Appeals continued this trend, implying that the discovery rule could apply to negligent misrepresentation claims. In *Weaver & Tidwell, LLP v. Guarantee Co. of North America USA*, No. 05-12-00750-CV, 2014 WL 1389836 (Tex. App.—Dallas April 8, 2014), Guarantee, a bonding company, relied on an audited financial statement prepared by Weaver in issuing a performance bond to J&V Communication Services, a construction company. When J&V defaulted on a number of contracts, Guarantee suffered losses on its performance bonds. Guarantee brought a cause of action against Weaver for negligent misrepresentation, claiming their financial audit contained false statements, upon which Weaver had relied. Weaver argued that the statute of limitations barred the action, and that the limitations began to run when Guarantee issued its first bond on May 4, 2006. Guarantee responded that the discovery rule tolled the statute of limitations, and therefore its claim did not accrue until information about problems in the financial statements surfaced in 2008.

The court noted that "as a rule, a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred." *Id.* at *5. It further cited *Sabine* for its application of this "legal injury" standard to negligent misrepresentation claims. *Id.* *Weaver*, in line with *Sabine*, also considered applying the discovery rule to toll the statute of limitations. However, the *Weaver* court ultimately held that the discovery rule did not apply to Guarantee's claim. Using the "legal injury" standard, the court held that Guarantee's injury occurred when they first issued a bond for J&V, relying on Weaver's financial statements. *Id.* Further, Guarantee failed to obtain findings from the court at the bench trial as to when Guarantee "knew or should have known of the facts that gave rise to its cause of

action." *Id.* As there were no such findings in the record, Guarantee could not carry its burden to establish that the discovery rule applied, and it was barred by the statute of limitations. *Id.* The *Weaver* opinion, however, seems to indicate that the discovery rule may be available to negligent misrepresentation claims, given an appropriate set of facts. *See id.* (emphasizing that it was "*because Guarantee did not obtain those findings from the trial court*" that "Guarantee [could not] rely on the discovery rule to toll the statute of limitations.") (emphasis added).

2. Damages

As discussed, Texas follows § 552 of the Restatement (Second) of Torts for negligent misrepresentation claims. Under § 522B, an injured plaintiff can recover damages only for an injury that is *independent* of the loss of the benefit of the underlying contract. RESTATEMENT (SECOND) OF TORTS § 552B (1977); *D.S.A., Inc. v. Hillsboro Independent School Dist.*, 973 S.W.2d 662, 663 (Tex. 1998). The damages recoverable for independent injury include out-of-pocket expenses "necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is the legal cause, including (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation." RESTATEMENT (SECOND) OF TORTS § 552B (1977); *Federal Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991). The plaintiff, however, cannot recover "the benefit of the plaintiff's contract with the defendant." *Id.* To recover the benefit of the contract, the plaintiff would have to bring a contract action, due to Texas's application of the economic loss rule. *D.S.A., Inc.*, 973 S.W.2d at 663; *see also infra* (VII)(A) (Economic Loss Rule).

Two recent cases have further explored the availability of damages in negligent misrepresentation cases. In *Woodhaven Partners, Ltd. v. Shamoun & Norman, LLP*, 422 S.W.3d 821 (Tex. App.—Dallas 2014), the law firm Shamoun & Norman brought suit against Woodhaven and a number of other entities for failing to pay attorneys' fees. Woodhaven counterclaimed for negligent misrepresentation, among other claims, alleging that Shamoun & Norman overcharged them. The court affirmed summary judgment for Shamoun & Norman on the issue of negligent misrepresentation, holding that Woodhaven presented no evidence of having incurred any damages for any of their counterclaims that would be recoverable. *Id.* at 839. At summary judgment, Woodhaven only provided evidence that they had incurred legal fees and expenses in defending against the present lawsuit, brought by Shamoun & Norman, and in prosecuting their own counterclaims to that suit. *Id.* The court noted that "[w]ell-settled law recognizes that attorneys' fees and expenses are not recoverable as damages in and of themselves." *Id.* Therefore, as Woodhaven was unable to provide any evidence of its out-of-pocket, pecuniary damages relating to its negligent misrepresentation counterclaim, summary judgment for Shamoun & Norman was appropriate on this issue. *Id.*

The case of *BLM of Brownwood, Inc. v. Mid-Tex Cellular, Ltd.*, No. 11-11-00311-CV, 2014 WL 1285765 (Tex. App.—Eastland Mar. 31, 2014), also addressed the issue of damages in this context. In this case, BLM made an oral agreement to buy a piece of property from the Boysen family, but the Boysens subsequently sold the property to Mid-Tex. BLM brought claims against the Boysens and Mid-Tex, including claims against the Boysens for breach of contract and negligent misrepresentation. The court first held that the alleged oral contract between BLM and the Boysens was barred by the statute of frauds. *Id.* at *3-4. Turning to the negligent misrepresentation claim, the court held that the nature of the damages requested would control whether the claim could proceed past summary judgment, considering the court's holding on the breach of contract claim. *Id.* at *7-8. That is, where BLM could not recover the benefit of its alleged bargain under a breach of contract claim, it would not recover the benefit of the bargain under negligent misrepresentation either. "When a party claims negligent misrepresentation with respect to an alleged promise to sell real estate and the alleged promise is unenforceable under the statute of frauds, the party may not recover the benefit of the bargain because such a remedy frustrates the purpose of the statute of frauds." *Id.* at *8. As a result, BLM could not obtain specific performance of the alleged contract under the guise of a negligent misrepresentation claim. *Id.* BLM could, however, bring a negligent misrepresentation claim for independent injury. In this case, BLM was also seeking monetary, out-of-pocket damages for the Boysens' conduct. As a result, the court allowed BLM's claim for negligent misrepresentation to survive to the extent it sought only out-of-pocket damages. *Id.*

3. Justifiable Reliance

A cause of action for negligent misrepresentation requires proof of reliance. *See Haase v. Glazner*, 62 S.W.3d 795, 798 (Tex. 2001). Importantly, the reliance must be both *actual* and *justifiable*. *DRC Parts & Accessories, LLC v. VM Motori, SPA*, 112 S.W.3d 854, 858 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). Generally, where the terms of a written contract conflict with an oral representation, a court will find that there was no justifiable reliance on the oral statements. *Simpson v. Woodbridge Props.,*

LLC, 153 S.W.3d 682, 684 (Tex. App.—Dallas 2005).

"Actual and justifiable" reliance can become a complicated inquiry when the statements in question constitute representations about a third party's contract. For instance, in *Affordable Power L.P. v. Buckeye Ventures, Inc.*, 347 S.W.3d 825 (Tex. App.—Dallas 2011), Buckeye Ventures terminated a contract with TXU, an electricity company, and switched to Affordable Power based on Affordable's agent's representations that there were no termination fees in Buckeye's contract with TXU. When TXU charged Buckeye a $13,822 cancellation fee and sued to recover, Buckeye filed a third-party petition alleging negligent misrepresentation on Affordable's part. The court found that Buckeye was justified in relying on Affordable's representation that the contract had no termination fee, as the agent had claimed that the "legal department" had reviewed the contract. *Id.* at 831.

Recent cases have examined whether justifiable reliance occurred where oral statements conflicted with the terms in a contract. In *Miller Global Properties, LLC v. Marriott International, Inc.*, 418 S.W.3d 342 (Tex. App.—Dallas 2013), the court addressed a situation where the oral representations and the written representations were in direct opposition. Miller, an investment company, and Marriott entered a development agreement to complete the construction of a resort. Miller later purchased the still-uncompleted resort. As part of the purchase agreement, the parties attached a copy of "Unapproved Elements" relating to the construction, and the contract noted that Miller would be "solely responsible for any cost over-runs arising from the design, construction, equipping or furnishing of the Resort." *Id.* at 346. Upon completion of the resort, the total cost was approximately $90 million over budget. Miller claimed that Marriott represented to it that the construction plans were essentially complete and the target budget was sufficient to finish the project. These statements were the basis for the negligent misrepresentation claim. The court held, however, that the details contained in the written contract directly contradicted any alleged oral representations. *Id.* at 348-49. Indeed, the court noted that "Miller cannot agree to jointly create a budget, sign a contract including extensive provisions addressing the eventuality of exceeding that budget, and then contend that it was misled when the budget is exceeded." *Id.* at 349.

In the case of *Collective Asset Partners, LLC v. Shaumburg*, No. 05-13-00040-CV, 2014 WL 1418109 (Tex. App.—Dallas April 11, 2014), CAP entered a joint venture agreement with Michael Shaumburg in which CAP paid for the purchase of a property located in a flood plain. CAP was later unable to develop the property and defaulted on its mortgage. CAP brought suit against Schaumburg for negligent misrepresentation, alleging, among other claims, that he failed to inform CAP that the property was in a flood plain. The summary judgment evidence, however, demonstrated that CAP received and signed closing documents which indicated that the property was located in a flood plain. *Id.* at *3. While CAP claimed its agent did not have notice about the flood plain because "you get a whole stack of documents" at closing, the court disagreed, stating, "[A] party who signs a document is presumed to know its contents." *Id.* As a result, CAP's claim that Shaumburg failed to disclose the property was located on a floodplain failed, based on CAP's knowledge of this information prior to closing on the property. *Id.*

4. Application to Attorneys

The issue of negligent misrepresentation is one that often arises in lawsuits against attorneys. By way of background, the Texas Supreme Court has previously held that there is no privity requirement to bring suit against an attorney for negligent misrepresentation. *McCamish, Martin, Brown, & Loeffler v. F.E. Appling Interests, et al.*, 991 S.W.2d 787 (Tex. 1999). In *McCamish*, the court determined that negligent misrepresentation is distinct from legal malpractice. A negligent misrepresentation claim arises from an independent duty to an individual, including a non-client, based only on the individual's actual and justifiable reliance on the misrepresentation and the attorney's intention that the individual rely on the misrepresentation. This rule places attorneys in the same category as other professionals. *Id.* at 791.

But there are limits on this cause of action as it applies to attorneys. In line with the Restatement (Second) of Torts § 522, the court in *McCamish* noted that liability is limited to situations where the attorney is aware of the non-client (i.e., the non-client is a "known party" to the attorney) and "information is transferred by an attorney to a known party for a known purpose." *Id.* at 794. To reduce the risk of liability, an attorney may set forth explicit limitations regarding the intended target of the representation or who should rely on the representation. *Id.* He or she may also make disclaimers regarding "the scope and accuracy of the factual investigation or assumptions forming the basis of the representation or the representation itself." *Id.* Moreover, in considering whether a non-client relied on the information justifiably, the court may consider the relationship between the parties. For instance, where the representation occurs in an adversarial context, reliance is generally not justified. *Id.*

In 2013, the Dallas Court of Appeals considered a number of cases in which plaintiffs brought claims of negligent misrepresentation against attorneys. In *Blankinship v. Brown*, 399 S.W.3d 303 (Tex. App.—

Dallas 2013), the Blankinships entered a business agreement with Brown, a golf professional, to pursue a golf company together. Before the parties signed the agreement, Brown gave a copy of the agreement to his attorney, Gary Blanscet, to review. Blanscet advised Brown against making certain representations and revised the agreement. Afterwards, the Blankinships signed the agreement. On later learning some previously undisclosed information from Brown, the Blankinships sued both Brown and Blanscet for fraud and negligent misrepresentation.

The court noted that under *McCamish*, there was no privity requirement between the Blankinships and Blanscet, who represented Brown. On the other hand, the doctrinal limitations outlined above controlled the holding in *McCamish*. Specifically, the court concluded that there was no evidence that Blanscet had any intention for the Blankinships to rely on any of his representations. *Id.* at 310. In addition, there was no evidence that the Blankinships ever communicated with Blanscet at all, and therefore they could not claim that Blanscet invited them to rely on any representations. *Id.* Considering that Blanscet reviewed the contract on behalf of Brown and had no interactions with the Blankinships, the court held that the Blankinships did not justifiably rely on any representations from Blanscet, and their claim for negligent misrepresentation failed. *Id.* at 310-11. Therefore, the court essentially applied the "reasonable" reliance inquiry to the situation.

In two related cases, the Dallas Court of Appeals also considered whether parties had justifiably relied on an attorney's representations. The two cases demonstrate the importance of directing representations towards the appropriate party in limiting liability. In *Bank of Texas, N.A. v. Ravkind*, 05-11-01123-CV, 2013 WL 1281860 (Tex. App.—Dallas Mar. 12, 2013), Bank of Texas sued attorney William Ravkind for negligent misrepresentation. Ravkind had completed a "Verification of Deposit" form on behalf of his client, Cindy Lantrip, asserting that he was the depository of two trust accounts belonging to Lantrip containing assets of $1.2 million. This form was addressed to Troy Jones of Bright Mortgage. Bank of Texas, however, received a copy of the form from Metropolitan Mortgage, a third-party mortgage broker, and issued Lantrip a loan for approximately $2 million. Lantrip then defaulted on the loan, and the Bank learned that the information on the Verification of Deposit form was false.

The court considered in this case whether Bank of Texas could justifiably rely on a form which was addressed to a different individual at a different financial institution. While Bank of Texas argued that it was common industry practice to receive financial information from a third-party mortgage broker, the court declined to extend *McCamish*. *Id.* at *3. Instead, the court reiterated that to bring a claim for negligent misrepresentation, the attorney who makes the representation must be "aware of the non-client" and must intend for the non-client to rely on the information. *Id.* As there was no evidence to indicate that Ravkind knew Bank of Texas was receiving a copy of the form, nor that the form was being supplied for the purpose of a specific property loan, the court held that the Bank did not justifiably rely on the form and its representations. *Id.* The court used forceful language in reaching its decision, stating, "[T]o hold Ravkind liable to any lender who may have come into possession of the Verification of Deposit addressed to Bright Mortgage would eviscerate the Restatement rule in favor of a de facto foreseeability approach—an approach [we] have refused to embrace and would render meaningless the restriction upon liability to those within a limited group of intended recipients." *Id.* (internal quotations deleted).

Ravkind, however, stands in contrast to *Bank of Texas, N.A. v. Glenny*, 405 S.W.3d 310 (Tex. App.—Dallas 2013). *Glenny* involves the same property loan to Lantrip that was at issue in *Ravkind*. In *Glenny*, however, a different attorney faced a negligent misrepresentation claim, with a different result. The Bank of Texas, prior to approving Lantrip's loan, received two letters from the law office of Clint Glenny, which stated that Lantrip owned an ongoing business and that she had full access to two trust accounts. These letters were both addressed "To Whom It May Concern," and they were faxed to Metropolitan Mortgage, who in turn provided them to Bank of Texas. There was evidence from the loan officer at Bank of Texas that she relied on the letters in approving the loan. In this case, the court denied Glenny's motion for summary judgment, finding there was an issue of fact as to whether the Bank of Texas justifiably relied on the letters. *Id.* at 318. Whereas in *Ravkind*, the form was addressed to a third party, here, the letters from Glenny's office were addressed more generally, "To Whom It May Concern." The court quoted *McCamish* to note that an attorney may reduce her risk of liability by setting on limits as to whom the representation is directed. *Id.* But the attorney's words were taken literally: "It is reasonable to infer that the Letters invite reliance from anyone who may be concerned with Lantrip." *Id.* Even though the letters did not specifically state a purpose related to the loan application, the broad address was enough for the court to conclude that there was a genuine issue of material fact as to the Bank's justifiable reliance. *Id.*

II. BREACH OF FIDUCIARY DUTY

A. Background

Texas recognizes a tort for breach of fiduciary duty. As a first step in determining whether an action exists, a plaintiff must first demonstrate that a fiduciary

relationship exists between the parties.

Some relationships are considered fiduciary as a matter of law:

- Attorneys and clients. *See, e.g.*, *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965).
- Directors and officers to corporations. *See, e.g.*, *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963).
- Licensors and licensees. *See, e.g.*, *Hyde Corporation v. Huffines*, 314 S.W.2d 763 (Tex. 1958).
- Partners. *See, e.g.*, *Johnson v. Peckam*, 120 S.W.2d 786 (Tex. 1938).
- Real estate broker/agent relationships. *See, e.g.*, *Anderson v. Griffith*, 501 S.W.2d 695 (Tex. App.—Fort Worth 1973, writ ref'd n.r.e.).
- Trustees and beneficiaries. *See, e.g.*, *Langford v. Shamburger*, 417 S.W.2d 438 (Tex. App.—Fort Worth 1967, writ ref'd n.r.e.).

Where a fiduciary relationship does not exist as a matter of law, it may still exist as a matter of fact. *See, e.g.*, *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005) (recognizing the possibility of "an informal fiduciary duty that arises from 'a moral, social, domestic or purely personal relationship of trust and confidence"); *Associated Indemnity Corp. v. CAT Contracting*, 964 S.W.2d 276 (Tex. 1998) (no fiduciary relationship as a matter of law between surety and principal on construction bond but considering duty as a fact question); *Insurance Co. of North America v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998) (recognizing that "confidential relationships may arise when the parties have dealt with each other in such a manner for a long period of time that one party is justified in expecting the other to act in its best interest," but finding no fiduciary duty on surety-principal on securities investment bonds); *Crim Truck & Tractor Co. v. Navistar Int'l Transport Corp.*, 823 S.W.2d 591 (Tex. 1992) (superseded by statute on other grounds) (no fiduciary duty as a matter of law between franchiser and franchisee; existence of relationship is a fact question).

<u>Entire relationship.</u> In considering whether a fiduciary duty exists, the courts will examine the entire relationship between the parties, including the defendant's actions. *See English v. Fisher*, 660 S.W.2d 521 (Tex. 1983). While the plaintiff's unilateral, subjective trust of the defendant does not establish the existence of a fiduciary duty, one may arise where the defendant gave the plaintiff some actual basis for the plaintiff's trust in the defendant. *Crim Truck & Tractor Co.*, 823 S.W.2d at 595-96.

For instance, to find a fiduciary relationship exists in a simple business transaction, Texas requires that a fiduciary relationship existed *before* the transaction in question. *See Swanson v. Schlumberger Tech. Corp.*, 959 S.W.2d 171 (Tex. 1997); *Ins. Co. of North America*, 981 S.W.2d at 674; *Meyer*, 167 S.W.3d at 331 ("To impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and part from, the agreement made the basis of the suit."). A court may also consider family relationships and non-legal professional relationships in making a finding that a fiduciary duty exists, but such a relationship alone is not controlling. *Texas Bank and Trust Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980) (aunt-nephew relationship); *Pace v. McEwen*, 574 S.W.2d 792, 796-97 (Tex. App.—El Paso 1978 writ ref'd n.r.e.) (stockbroker-client relationship); *Sauvres v. Christian*, 253 S.W.2d 470, 471-72 (Tex. App.—Fort Worth 1952, writ ref'd n.r.e.) (accountant-client relationship).

<u>Recognized duties.</u> A fiduciary's duties vary depending on the specific circumstances of his activities. Texas law has recognized a number of specific duties:

1. **Duty of competence.** TEXAS PROP. CODE ANN. § 113.056 (trustee); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567 (Tex. 1963) (corporate directors); *Davis v. Sheerin*, 754 S.W.2d 375 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (minority shareholders against majority).
2. **Duty to exercise reasonable discretion.** *Corpus Christi Bank & Trust v. Roberts*, 597 S.W.2d 752 (Tex. 1980) (trustee exercise of discretion always subject to review); *Sassen v. Tanglegrove Townhouse Condo Assoc.*, 877 S.W.2d 489 (Tex. App.—Texarkana 1994, writ denied) (condo association designated as attorney-in-fact).
3. **Duty of loyalty.** *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502 (Tex. 1980) ("presumption of unfairness" that arises from any gift or advantage of opportunity); *Holloway*, 368 S.W.2d 567 (violation of duty where corporate officers took secret commissions on sale of corporate real estate); *Slay v. Burnett Trust*, 187 S.W.2d 377 (Tex. 1945) (fiduciary cannot gain any benefit for himself at expense of his beneficiary).
4. **Duty of full disclosure.** *Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988) (breach of duty of disclosure is same as fraudulent concealment); *Montgomery v. Kennedy*, 669 S.W.2d 309 (Tex. 1984) (affirmative duty to make a full and accurate confession of transactions, profits, and mistakes); *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1965) (beneficiary not required to prove elements of fraud); *Johnson v. Peckam*, 120 S.W.2d 786 (Tex. 1938) (beneficiary not required to prove he relied on fiduciary to disclose).

Presumption of unfairness. When a fiduciary engages in self-dealing and profits or benefits in any way from a transaction with the beneficiary, a presumption of unfairness arises. In such circumstances, the fiduciary may rebut the presumption by demonstrating that the transaction (1) was made in good faith; (2) was fair and equitable to the beneficiary; and 3) was made after full and complete disclosure of all material information to the principal. *Fleming v. Curry*, 412 S.W.3d 723 (Tex. App.—Houston [14th Dist.] 2013), citing *Jackson Law Office, PC v. Chappell*, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied). If the fiduciary is unable to present any evidence to rebut the presumption of unfairness, it is assumed that a breach of duty occurred.

B. Recent Developments

1. Joint and Several Liability for Knowing Participation in a Breach of Fiduciary Duty

In general, Texas law supports actions against parties who assist a perpetrator in breaching a fiduciary duty. In fact, in some circumstances it may be easier to recover from the aider or abettor than the primary perpetrator. In *Hendricks v. Grant Thornton*, 973 S.W.2d 348 (Tex. App.—Beaumont 1998, pet. denied), the Beaumont Court of Appeals addressed the aiding and abetting of breaches of fiduciary duty in the context of a government securities trading program. The primary fiduciary duty claim was barred by the statute of limitations, and defendants argued that the aiding and abetting claims must therefore be barred as well, as they were merely "tag-along" claims. The court disagreed, holding that the aiding and abetting claims were "distinct": "It is settled as the law of this State that where a third party knowingly participates in the breach of a duty of a fiduciary, such third party becomes a joint tortfeasor with the fiduciary and is liable as such." *Id.* at 372. Therefore, even where the claims against the primary tortfeasor are time-barred, the aider or abettor may still be held liable.

Additionally, a plaintiff need not show that a defendant who knowingly participated in a breach of fiduciary duty owed any independent duty to the plaintiff. In *Villarreal v. Wells Fargo Brokerage Services, LLC*, 315 S.W.3d 109, 126-27 (Tex. App.—Houston [1st Dist.] 2010, no petition), the beneficiaries of a trust account sued the trustee of the account as well as Wells Fargo and a Wells Fargo investment broker, alleging the Wells Fargo defendants knowingly participated in the trustee's breach of his fiduciary duty. The Wells Fargo defendants argued that their own conduct breached no duty towards the trust beneficiaries, but the court pointed out that the cause of action does not require any such duty. *Id.* at 127. Indeed, where the claim is for knowing participation in a breach of fiduciary duty, there is no requirement that plaintiffs demonstrate that the participants owed any fiduciary duty themselves to the plaintiffs, but only that another party owed a fiduciary duty to the plaintiffs, and that the defendants knowingly participated in a breach of that third party's duty. *Id.*

One issue that has begun to garner attention in Texas is whether a finding that a defendant knowingly participated in, or aided and abetted, a breach of fiduciary duty can result in that defendant being held jointly and severally liable. In Texas, Chapter 33 of the Civil Practice and Remedies Code provides for the proportionate liability of tort defendants. Under this chapter, the trier of fact determines the percentage of responsibility of each defendant, claimant, settling person, and responsible third party. TEX. CIV. PRAC. & REM. CODE § 33.003(a). Then, each defendant will be held liable only for that percentage of damages equal to the defendant's responsibility, unless the defendant is more than fifty percent responsible. TEX. CIV. PRAC. & REM. CODE § 33.013(a)-(b)(1).

Notwithstanding the provisions in Chapter 33, it remains an open question in Texas law as to whether a defendant may be held jointly and severally liable for knowing participating in a breach of fiduciary duty. One court addressed this issue recently, without coming to any conclusions. In *Hunter Bldgs. & Mfg., LP v. MBI Global, LLC*, No. 14-12-00246-CV, 2014 WL 1258017 (Tex. App.—Houston [14th Dist.] March 27, 2014), MBI Global brought suits against two individual defendants, Milo Nickel and Michael LeBlanc, as well as several corporate entities for breach of fiduciary duties and misappropriation of trade secrets. Nickel and LeBlanc were former officers at MBI Global who left to start their own company, allegedly bringing MBI Global's trade secret information with them. At trial, the jury made a number of findings, including (1) Nickel and LeBlanc violated their fiduciary duties to MBI Global; (2) the corporate defendants knowingly participated in Nickel and LeBlanc's breaches of fiduciary duty; (3) Nickel, LeBlanc, and the corporate defendants all misappropriated MBI Global's trade secrets; (4) $4.4 million would reasonably compensate MBI Global for its damages that were proximately caused by the conduct found by the jury to be either a breach of fiduciary duty or misappropriation of trade secrets; (5) a preponderance of evidence did not prove the existence of a conspiracy regarding the breach of fiduciary duty or misappropriation of trade secrets; and (6) the percentage of responsibility attributable to both Nickel and LeBlanc was zero percent. The trial court rendered judgment that MBI Global should recover $4.4 million against Nickel, LeBlanc, and the corporate defendants jointly and severally—in spite of the jury's finding that Nickel and LeBlanc had zero percent responsibility. The court of appeals noted that the trial court thus impliedly disregarded the jury's findings that each individual defendant had a percentage of

responsibility of zero as to his responsibility for the harm suffered by MBI Global. *Id.* at *3.

On appeal, Nickel and LeBlanc argued that the trial court erred in rendering joint and several judgment, as the jury found both of them had no responsibility whatsoever. In addition, the corporate defendants argued that they could not be held liable for breach of fiduciary duty because while the corporate defendants were found to have knowingly participated in the breach of fiduciary duty, they should only be liable to the extent Nickel and LeBlanc are liable, and Nickel and LeBlanc bore no liability based on the jury's findings.

MBI Global, on the other hand, argued that the corporate defendants' knowing participating in the breach of fiduciary duty made all defendants liable for all damages, regardless of whether the damages stemmed from the breach of fiduciary duty or from the misappropriation of trade secrets. This extension of liability mirrors somewhat that in civil conspiracy cases, where each conspirator is liable for all acts done by any conspirator in furtherance of the conspiracy, and where each conspirator is liable for all actual damages resulting from acts in furtherance of the conspiracy. *Id.* at *4.

Texas courts have rarely addressed this particular issue. Under Texas common law, a party who knowingly participates in a breach of fiduciary duty is jointly liable for damages caused by the breach of fiduciary duty. However, the court of appeals noted that "[t]he parties have not cited, and research has not revealed, any Texas case in which the court addresses (1) the distinction between civil conspiracy and knowing participation in a breach of fiduciary duty, or (2) the issue of whether a knowing-participation finding, by itself, makes the party breaching his fiduciary duty liable for damages caused by the party who knowingly participated in the breach of fiduciary duty." *Id.* Therefore, the question remains: Is the main perpetrator of the breach of fiduciary duty liable for acts of the secondary participant? The court had no guidance from existing Texas case law. In fact, the only case law cited on this issue was a case regarding "aider and abettor" liability, akin to "knowing participation," from the District of Columbia. *Halberstam v. Welch*, 705 F.2d 472, 477-78 (D.C. Cir. 1983) (holding that an aider or abettor is liable for damages which the primary participant caused, but that the primary participant is not liable for the acts of the aiders or abettors unless there is a finding of a civil conspiracy).

Ultimately, the Court of Appeals did not reach a conclusion as to whether all defendants could be jointly and severally liable for damages caused by any one of the defendants. Instead, the *Hendricks* court "presume[ed] for the sake of argument that the jury's breach-of-fiduciary-duty findings and its knowing-participation findings make the Defendants jointly and severally liable [for] the damages found by the jury, including the damages based on the Corporate Defendants' misappropriation of trade secrets," then decided the case on different grounds. *Id.* Specifically, the *Hendricks* court determined that the jury's answers to the submitted questions indicated that the damages award was based on the corporate defendants' conduct in misappropriating trade secrets. *Id.* at 5. Rather than deciding whether the individual defendants could be jointly and severally liable for these damages based on the corporate defendants' knowing participation in the individual defendants' breaches of fiduciary duty, the court instead held that the evidence at trial was not legally sufficient to support the amount of damages and reversed the judgment on that specific ground. *Id.* at 10. *Hunter*, therefore, raises but does not answer the joint and several liability question. It is likely that courts in the future will grapple with this same issue.

2. <u>Shareholder Relationships</u>

The Texas Supreme Court has yet to rule as to whether shareholders owe each other a fiduciary duty as a matter of law, even in close corporations. In the case of *Willis v. Donnelly*, 199 S.W.3d 262 (Tex. 2006), the trial court instructed the jury that a majority shareholder owed a minority shareholder a fiduciary duty. On appeal, the Texas Supreme Court noted that it was an open question "whether a majority shareholder in a closely held corporation owes a minority shareholder a general fiduciary duty under Texas law." *Id.* at 276. The Court continued, however: "We do not explore [this] issue . . . but hold instead that the breach of fiduciary duty claim in the pending case fails because all the alleged breaches of fiduciary duty occurred before Donnelly became a shareholder and before he was entitled to shareholder status." *Id.* at 276-77. The Court noted a general unwillingness to recognize a fiduciary relationship in these circumstances, "consistent with our previously recognized reluctance to recognize fiduciary relationships, especially in the commercial context. In order to give full force to contracts, we do not create such a relationship lightly." *Id.* at 278 (internal quotations omitted). On the other hand, the Supreme Court did not close the door on any possibility of a fiduciary relationship existing in a different set of circumstances among shareholders.

A number of opinions from the appellate courts have similarly declined to find a fiduciary duty between shareholders as a matter of law, but have left open the possibility of an informal fiduciary duty depending on the facts of the case. *See, e.g.*, *Pabich v. Kellar*, 71 S.W.3d 500, 504-05 (Tex. App.—Fort Worth 2002, pet. denied); *Hoggett v. Brown*, 971 S.W.2d 472, 487-88 (Tex. App.—Houston [14th Dist.]

1997, pet. denied); *Kaspar v. Thorne*, 755 S.W.2d 151, 155 (Tex. App.—Dallas 1988, no writ).

More recently, however, appellate courts have begun to find the existence of a fiduciary duty between shareholders based on particular circumstances. For example, in *Allen v. Devon Energy Holdings, LLC*, 367 S.W.3d 355 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgm't set aside, remanded by agr.), Robert Allen, a minority shareholder, had redeemed his interest in Chief Holdings, LLC. Two years later, Chief Holdings sold for approximately twenty times the value that had been used to calculate Allen's redemption price. Allen sued both Chief Holdings and Trevor Rees-Jones, the manager and majority owner, for breach of fiduciary duty, among other claims. Allen claimed that Rees-Jones withheld information that would have caused him to reject the redemption offer at the time it was made. Rees-Jones moved for summary judgment, claiming Allen could not demonstrate a fiduciary duty existed, and his motion was granted by the trial court.

The court of appeals reversed. While the court acknowledged that Texas law has not recognized a general fiduciary duty between a majority and a minority shareholder in a closely-held corporation (which they analogized to a closely-held LLC), it proceeded to consider whether there is a formal fiduciary duty owed by a majority owner and sole manager of an LLC in the context of a redemption. *Id.* at 389-91. The court concluded that there is such a duty. *Id.* at 391-92. Based on the lack of controlling case law on the issue, the court compared the situation to that of a partnership. Considering that Rees-Jones ran Chief Holdings' day-to-day operations and had "intimate knowledge" of its plans and daily business, the court determined that Rees-Jones essentially held the powers and responsibilities of a general partner. *Id.* at 392-93. In contrast, Allen was a "passive investor" without Rees-Jones' knowledge of the business. *Id*. at 393. As a result, the court held that "the relationship between Rees-Jones, as the majority owner and sole manager of Chief, and Allen, as a non-participating minority owner, is substantially similar to the relationship between the general partner and a limited partner in a limited partnership. The nature of this relationship supports recognizing a fiduciary duty between Rees-Jones and Allen with respect to Rees-Jones's operation and management of Chief." *Id.*

The *Allen* opinion goes further than the relationship between the particular individuals, holding that the nature of the transaction at issue—redemption—is further reason to recognize a formal fiduciary relationship. *Id.* Noting that a Dallas Court of Appeals case, *Miller v. Miller*, 700 S.W.2d 941 (Tex. App.—Dallas 1985), came to a similar conclusion, the *Allen* opinion held that "a shareholder and officer's material insider knowledge about corporate affairs may constitute 'special facts' giving rise to a fiduciary duty of disclosure when purchasing shares from a passive shareholder, and we extend that holding to a member-manager's offer to redeem a minority member's interest in an LLC when that redemption will increase the member-manager's ownership." *Id.* While *Miller* limited its holding to a fact issue of an informal fiduciary duty, *Allen* found a formal fiduciary duty as a matter of law. *Id.* The court's logic, in part, relied on the principle that recognizing a formal relationship as a matter of law, rather than relying on the jury to determine whether an informal relationship exists, will allow companies to run their affairs in a predictable environment. *Id.* Therefore, the court "conclude[d] that the 'special facts' doctrine supports recognizing a formal fiduciary relationship when an LLC's member-manager communicates a redemption offer to the minority members that may benefit the member-manager individually." *Id.*

The San Antonio Court of Appeals, in a similar vein, has found that a minority shareholder may have a fiduciary duty to a majority shareholder. In *Vejara v. Levior Intern., LLC*, No. 04-11-00595-CV, 2012 WL 5354681 (Tex. App.—San Antonio Oct. 31, 2012), Levior brought a claim against Vejara for breach of fiduciary duty relating to the operation of Bulls Eye Beverages, LLC. Vejara was a minority shareholder of the LLC, but she was a founder and retained control over the company inventory. A jury found that Vejara breached her fiduciary duties, and she appealed. The appellate court affirmed. While the court held that Vejara had no formal fiduciary duty as a matter of law, noting that Texas does not recognize "a broad formal fiduciary relationship between majority and minority shareholders in closely-held companies," it also held that "Texas courts have recognized that in the same manner that business partners owe each other and their partnership a fiduciary duty, the nature of the relationship between shareholders in a limited liability company sometimes gives rise to an informal fiduciary duty between the shareholders." *Id.* at *4. The court therefore found that Vejara's control over the company and knowledge of its affairs created an informal fiduciary duty to Levior, the majority shareholder. *Id.* at *5.

Most recently, the case of *Opperman v. Opperman*, No. 07-12-00033-CV, 2013 WL 6529228 (Tex. App.—Amarillo Dec. 9, 2013, rehearing overruled), also supported the extension of fiduciary duties between shareholders in a closely held corporation. Plaintiff Richard Opperman owned 10% of the shares in the corporation, while his brother, defendant Randal Opperman, owned the other 90%. After the sale of the corporation, the plaintiff filed suit for breach of fiduciary duties. The defendant moved for summary judgment, arguing that there was no

fiduciary relationship between the parties. While the trial court granted summary judgment for the defendant, the court of appeals reversed. The opinion noted that an informal fiduciary duty may exist between shareholders "where there is a confidential relationship between the parties." *Id.* at *4. The court considered the parties' status as co-officers and co-directors of the corporation, and also noted their familial relationship. Between these different factors, the court held there was a genuine issue of material fact as to whether an informal fiduciary relationship existed between the plaintiff and defendant. *Id.* at *5.

3. Partnerships

Statutory enactments of the last few years have changed the nature of fiduciary relationships between partners. Before 1994, common law held that each partner owed the highest fiduciary duty to every other partner, such that each partner has "his conduct towards the other measured by the standards of the finer loyalties exacted by courts of equity." *Johnson v. Peckham*, 132 Tex. 148, 152 (Tex. 1938). The Texas Supreme Court also cited with approval language from *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928), measuring the duty of joint adventurers and copartners by "[n]ot honesty alone, but the punctilio of an honor the most sensitive." *Id.*

The enactment of the Texas Revised Partnership Act (TRPA) in 1994 purported to change the landscape of fiduciary duties between partners. In fact, the Act did not use the word "fiduciary" in describing any duties, but its language seemed to leave the courts ample leeway to continue defining partnership duties broadly. *See, e.g.*, *Brosseau v. Ranzau*, 81 S.W.3d 3981, 395 (Tex. App.—Beaumont 2002, pet. denied) (partners owe each other a strict fiduciary duty of good faith, and a managing partner owes the highest fiduciary duty under the law); *Harris v. Archer*, 134 S.W.3d 411 (Tex. App.—Amarillo 2004, rehearing overruled) (partners owe each other a fiduciary duty without reference to the TRPA). The TRPA proved to hold more sway in determining whether a partnership exists than the extent of the fiduciary duty. In *Ingram v. Deere*, 288 S.W.3d 886 (Tex. 2009), the Texas Supreme Court discussed proving the existence of a partnership under five factors listed in the TRPA. The court found that the totality of the circumstances would control, and that a finding of only one factor would be insufficient to establish the existence of a partnership. *Id.* at 898.

In 2010, the Texas Business Organizations Code (TBOC) went into effect. As a result, partnerships formed after January 1, 2006 fall under the new TBOC, while partnerships formed after January 1, 1994 and before January 1, 2006 are still governed by the TRPA. The TBOC makes strides in clearly defining the partners' duties. TEX. BUS. ORGS. § 152.204-152.206.

Recent case law has demonstrated the difficulty of reaching the question of whether a partner breached a fiduciary duty, as parties have struggled at the threshold of demonstrating the existence of a partnership. In *Citrin Holdings, LLC v. Minnis*, No. 14-11-00644-CV, 2013 WL 1928652 (Tex. App.—Houston [14th Dist.] May 9, 2013), Matthew Minnis alleged that he entered into a partnership with Jacob Citrin and Citrin Holdings in approximately 2004, and that the Citrin parties breached their fiduciary duty by excluding Minnis from the ongoing business. The court, however, applied the TRPA factors for determining the existence of a partnership and found insufficient evidence that a partnership existed. *Id.* at *19. Specifically, the court held there was some evidence of two factors: an agreement to share profits and an expression of intent to be partners. *Id.* at 18. However, there was no evidence regarding (1) who had the right to control the business, (2) any agreement to share losses, or (3) any contribution of money or property to the business. *Id.* at *19. Therefore, the court held that no partnership existed, and thus there could be no breach of fiduciary duty. *Id.* An appeal on this case is currently pending before the Texas Supreme Court.

Additionally, a recent case has observed that a partner may not recover for breach of fiduciary duty where the economic loss rule applies. *Victory Park Mobile Home Park v. Booher*, No. 05-12-01057-CV, 2014 WL 1017512 (Tex. App.—Dallas Feb. 26, 2014). Generally, the economic loss rule bars tort actions where the damages arise from the breach of a contract. *See infra* (VII)(A) (Economic Loss Rule). In *Victory*, Shannon Booher brought suit against Victory for failing to make payments to her that she claimed were due under a partnership agreement. Victory counterclaimed for breach of fiduciary duty, claiming Booher failed to turn over to the partnership the rents she collected on certain mobile home lots. The parties had an oral partnership agreement which included sharing profits from renting out the lots. The trial court issued a directed verdict for Booher on the breach of fiduciary duty claims, and the court of appeals affirmed. Here, the court noted that Victory was only seeking to recover damages owed to it under the oral contract. *Id.* at *4. Where there was no allegation of a breach of fiduciary duty other than Booher's failure to turn over rent money, the economic loss rule operated to bar the claim. *Id.* at *4. In so holding, the court cited *Fish v. Tex. Legislative Serv.*, No. 03-10-00358-CV, 2012 WL 254613 at *14-15 (Tex. App.—Austin Jan. 27, 2012, no pet.) (economic loss rule barred a breach of fiduciary duty claim where "the damages alleged arise only from the nonperformance of duties governed by the partnership agreement"). *Id.*

III. TRADE SECRETS

A. Background

Texas courts have held that there are four elements to a cause of action for misappropriation of trade secrets:

1. the existence of a trade secret;
2. obtaining the secret through a confidential relationship or by other improper means;
3. the unauthorized use or disclosure of the trade secret; and
4. damage caused to the owner of the trade secret by its use.

K&G Oil Tool & Serv. Co. v. G&G Fishing Tool Serv., 314 S.W.2d 782, 787-90 (Tex. 1958), *cert. denied sub nom.*, 358 U.S. 898 (1958); *General Universal Sys., Inc. v. Lee*, 379 F.3d 131, 149-50 (5th Cir. 2004) (applying Texas law); *Avera v. Clark Moulding*, 791 S.W.2d 144, 145 (Tex. App.—Dallas 1990, no writ).

The requirement that the trade secrets be obtained through a confidential relationship or "improper means" includes a number of possibilities, including theft, wiretapping, and aerial espionage. *See E.I. DuPont de Nemours & Co. v. Christopher*, 431 F.2d 1012, 1016 (5th Cir. 1970) (applying Texas law, holding "[t]his is a case of industrial espionage in which an airplane is the cloak and a camera the dagger"). When evaluating whether a misappropriation has occurred, "the question is not 'How could he have secured the knowledge?' but 'How did he?'" *American Precision Vibrator Co. v. National Air Vibrator Co.*, 764 S.W.2d 274, 277 (Tex. App.—Houston [1st Dist.] 1988, no writ), *as modified*, 771 S.W.2d 562 (Tex. App.—Houston [1st Dist.] 1989, no pet.). For example, it may be legal to learn a trade secret through actual "reverse engineering," but not through theft. *Id.* at 278.

The leading recent case defining whether information is a trade secret is *In Re Bass*, 113 S.W.3d 735 (Tex. 2003). *Bass* defined a trade secret as "any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it." *Id.* at 739. The *Bass* court further adopted a six-factor test from the Restatement of Torts to determine whether a trade secret exists:

1. "the extent to which the information is known outside of his business";
2. "the extent to which it is known by employees and others involved in his business";
3. "the extent of the measures taken by him to guard the secrecy of the information";
4. "the value of the information to him and to his competitors";
5. "the amount of effort or money expended by him in developing the information";
6. "the ease or difficulty with which the information could be properly acquired or duplicated by others."

Id. at 739. *Bass* also held, however, that all six criteria need not be satisfied to qualify for trade secret status. Instead, a balancing test applies. *Id.* at 740. Appellate court decisions since 2003 have relied heavily on *Bass*. *See, e.g.*, *Lee*, 379 F.3d at 150 (relevant factors in determining trade secret protection include the value of the information to the plaintiff and its competitors and the amount spent on developing the information).

Former employees. Texas courts have determined that employees have a duty not to use confidential, proprietary, or trade secret information acquired during their employment in a manner that competes with or is adverse to their employer. *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 21-22 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *Dannenbaum, Inc. v. Brummerhop*, 840 S.W.2d 624, 632 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *Reading & Bates Constr. Co. v. O'Donnell*, 627 S.W.2d 239, 242-43 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.); *Jeter v. Associated Rack Corp.*, 607 S.W.2d 272, 276 (Tex. App.—Texarkana 1980, writ ref'd n.r.e.); *Johnston v. American Speedreading Academy, Inc.*, 526 S.W.2d 163, 166 (Tex. App.—Dallas 1975, no writ); *Crouch v. Swing Machinery Co.*, 468 S.W.2d 604, 605-07 (Tex. App.—San Antonio 1971, no writ); *Welex Jet Servs., Inc. v. Owen*, 325 S.W.2d 856, 858 (Tex. App.—Fort Worth 1959, writ ref'd n.r.e.). This employee duty arises from the confidential relationship with their employer not to disclose information received during employment, "if the employee knows that his employer desires such information kept secret, or if, under the circumstances, he should have realized that secrecy was desired." *Lamons Metal Gasket Co. v. Traylor*, 361 S.W.2d 211, 213 (Tex. App.—Houston 1962, writ ref'd n.r.e.). This implied duty exists regardless of whether the employee is subject to a written contract. *T-N-T Motorsports*, 965 S.W.2d at 21-22; *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 600 (Tex. App.—Amarillo 1995, no writ); *Texas Shop Towel, Inc. v. Haire*, 246 S.W.2d 482, 485 (Tex. App.—San Antonio 1952, no writ); *see also Lamons Metal Gasket Co. v. Traylor*, 361 SW.2d 211, 213 (Tex. App.—Houston 1962, writ ref'd n.r.e.).

On the other hand, Texas does recognize the right of a former employee to use the general knowledge, skill, and experience she garnered in her former employment, even to the extent that she may use her knowledge to compete with her former employer. *Johnston*, 526 S.W.2d at 166. The Houston Court of Appeals expounded on this employee right in *Abetter Trucking Co. v. Arizpe*:

> Absent special circumstances, once an employee resigns, he may actively compete with his former employer. In Texas, to resign from one's employment and go into

> business in competition with one's former employer is, under ordinary circumstances, a constitutional right. There is nothing legally wrong in engaging in such competition or in preparing to compete before the employment terminates. Moreover, the possibility of crippling, or even destroying, a competitor is inherent in a competitive market. An employer who wishes to restrict the post-employment competitive activities of a key employee may seek to accomplish that goal through a non-competition agreement.

113 S.W.3d 503, 510 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (internal citations omitted).

Common law misappropriation. In addition to trade secret misappropriation, Texas supports a cause of action for common law misappropriation. This tort prohibits "the appropriation and use by the defendant, in competition with the plaintiff, of a unique pecuniary interest created by the plaintiff through the expenditure of labor, skill and money." *Universal City Studios, Inc. v. Kamar Indus., Inc*., 217 U.S.P.Q. 1162, 1168 (S.D. Tex. 1982) (applying Texas law). The elements of common-law misappropriation are:

1. "the creation of plaintiff's product through extensive time, labor, skill and money"
2. "the defendant's use of that product in competition with the plaintiff, thereby gaining a special advantage in that competition (i.e., a 'free ride') because defendant is burdened with little or none of the expense incurred by plaintiff"; and
3. "commercial damage to the plaintiff."

United States Sporting Prod., Inc. v. Johnny Stewart Game Calls, Inc., 865 S.W.2d 214, 218 (Tex. App.—Waco 1993, writ denied); *see also Gilmore v. Sammons*, 269 S.W. 861, 863 (Tex. App.—Dallas 1925, writ ref'd); *Aldridge v. The Gap, Inc.*, 866 F. Supp. 312, 313 (N.D. Tex. 1994).

There are two major differences between misappropriation of trade secrets and common law misappropriation. First, common law misappropriation does not have an element requiring secrecy, and it will protect any fully disclosed product or tangible property. Second, common law misappropriation adds an element requiring that the misappropriated item be used in competition with its creator. *Compare K&G Oil Tool & Serv. Co.*, 314 S.W.2d at 787-90, *with United States Sporting Products*, 865 S.W.2d at 218.

Texas Uniform Trade Secret Act. It is also important to note that the Texas Uniform Trade Secrets Act (UTSA), Texas Civil Practice and Remedies Code § 134A, became effective on September 1, 2013. By its terms, the UTSA "displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret." TEXAS CIV. PRAC. & REM. § 134A.007. Under the UTSA, "misappropriation" means:

> (A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
> (B) disclosure or use of a trade secret of another without express or implied consent by a person who:
> > (i) used improper means to acquire knowledge of the trade secret;
> > (ii) at the time of disclosure or use, knew or had reason to know that the person's knowledge of the trade secret was:
> > > (a) derived from or through a person who had utilized improper means to acquire it;
> > > (b) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
> > > (c) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
> >
> > (iii) before a material change of the person's position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

TEX. CIV. PRAC. & REM. § 134A.002(3). This definition will control in cases involving misappropriations occurring after September 1, 2013.

Additionally, there are criminal liabilities for misappropriation of trade secrets. TEX. PENAL CODE sec. 31.05 (Vernon's 2000); *Shalk v. State*, 823 S.W.2d 633 (Tex. Crim. App., 1991, pet. denied); *Weightman v. State*, 975 S.W.2d 621 (Tex. Crim. App. 1998); *see also* Economic Espionage Act of 1996, 18 U.S.C. §§ 1831-1839.

B. Recent Developments

1. Damages

A party who has suffered trade secret misappropriation can recover actual damages, a reasonable royalty, or the benefit which the defendant obtained. *See, e.g.*, *American Precision Vibrator Co.*, 764 S.W.2d at 279 (affirming damages for either plaintiff's loss or benefits obtained by defendant); *Taco Cabana Int'l v. Two Pesos, Inc.*, 932 F.2d 1113, 1128 (5th Cir. 1991) ("[t]rade-secret misappropriation damages typically embrace some form of royalty"). If the plaintiff seeks actual damages, the amount at issue will usually fall into the category of lost profits. *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 89-90 (Tex. 1973). The Texas Supreme Court has held that "[r]ecovery for lost profits does not require that the loss be susceptible of exact calculation." *Holt Atherton Indus. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992). But

the plaintiff must show the amount of its loss "by competent evidence with reasonable certainty. What constitutes reasonably certain evidence of lost profits is a fact intensive determination. As a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained." *Id.* Lost profits, more specifically, are equal to the loss of net business income, due to lost business activity, subtracting any expenses that would have been incurred through the business activity. *Miga v. Jensen*, 96 S.W.3d 207, 213 (Tex. 2002). Moreover, there must be a direct causal link between the damages, the defendant's actions, and the injury which the plaintiff suffered. *Haynes & Boone v. Bowser Bouldin, Ltd.*, 896 S.W.2d 179, 181 (Tex. 1995) (abrogated on other grounds by *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007)).

Two recent cases illustrate these principles. *Hunter Bldgs. & Mfg.*, 2014 WL 1258017 (introduced above), demonstrated the problems with imprecision in expert opinions regarding lost profits. In this case, MBI Global brought claims for breach of fiduciary duty and lost profits against two former officers, Milo Nickel and Michael LeBlanc, as well as several of their corporate entities. MBI Global claimed that Nickel and LeBlanc left MBI Global to start their own business, and that they misappropriated MBI Global's trade secrets. The jury found all defendants liable on both the breaches of fiduciary duty claims and the misappropriation of trade secret claims. The jury further found that $4.4 million would compensate MBI Global for its damages caused by either breaches of fiduciary duty or misappropriation of trade secrets, based on Global's lost profits. The appellate court, however, overturned the judgment based on the insufficiency of the testimony regarding the damages.

At trial, one of MBI Global's expert witnesses testified only as to the value of MBI Global's goodwill in 2009. The second expert witness, Jeffrey Spilker, testified as to a number of matters. He calculated MBI Global's lost profits at $26,554,000, attributing the lost profits to the "asserted acts of the defendants." *Id.* at *7. But he also affirmatively stated that he was not giving an opinion on "causality." *Id.* at *8. Spilker failed to offer an opinion as to whether the damages were due to trade secret misappropriation or to the breaches of fiduciary duty. *Id.* These omissions became an issue on appeal, because the jury's findings on certain questions indicated that the damages could *not* be attributed to the breaches of fiduciary duty. *Id.* at *5. The court of appeals therefore had to determine whether the evidence was sufficient to support the damages award where it could only be for damages due to trade secret misappropriation.

Considering the lack of testimony regarding causality, the *Hunter* court found the evidence did not support the damages award. *Id.* at *8. While the expert testified that the lost profits were generally due to the actions of the defendants, the defendants were alleged to have committed a number of acts, including competing against MBI Global and soliciting their customers and employers, which did not constitute any misappropriation of trade secrets. *Id.* The court could not overcome this "fundamental difficulty" with the expert's testimony. *Id.* at *9. In short, the expert's testimony "at best . . . addresse[d] lost gross revenue caused by all of the actionable conduct alleged in Global's petition, and significant components of this alleged conduct do not constitute misappropriation of trade secrets. Spilker's calculation of lost profits was not tied in any way to the portion, if any, of the lost profits which may have been caused by the Defendants' alleged misappropriation of Global's trade secrets, but instead extended globally to all of the Defendants' allegedly actionable conduct." *Id.* As the only evidence in the record as to damages was Spilker's testimony, and his testimony was "legally insufficient to support a finding that the Corporate Defendants' misappropriation of trade secrets proximately caused Global to sustain lost-profits damage in the past," the court found the evidence insufficient to support the damages award. *Id.* at *9-10.

On the other hand, another recent court supported a jury finding of damages, employing a "flexible approach." *Wellogix, Inc. v. Accenture*, 716 F.3d 867 (5th Cir. 2013), involved the application of Texas misappropriation law in federal court. In this case, Wellogix, a new software company, brought suit against Accenture for misappropriating trade secrets, including source code. The jury found for Wellogix and awarded it $26.2 million in compensatory damages as well as additional punitive damages. The compensatory damages award was based on Wellogix's expert witness's testimony regarding the value of Wellogix before the misappropriation, as well as his testimony that Wellogix's value after the misappropriation was "zero." *Id.* at 880. Accenture appealed, arguing that the method Wellogix's expert witness used in valuing Wellogix was "too speculative." *Id.* at 880. The expert based his valuation on the investment venture capital groups made into Wellogix, specifically a $8.5 million investment for a 31% stake in the company. Accenture argued that this investment was based on speculation that Wellogix "would suddenly begin reaping huge profits." *Id.* Accenture also took issue with the fact that Wellogix had supplied the investors with their information, implying it was biased. The expert, however, testified that the venture capital groups examined Wellogix audited financials, spoke with Wellogix customers and partners, asked for opinions on Wellogix's software, and investigated Wellogix's potential competition. In addition, the court cited

Bohnsack v. Varco, LP, 668 F.3d 262, 280 (5th Cir. 2012), for the idea that the calculation of damages in a trade secret misappropriation case may take a "flexible approach." With this legal principle in mind, the Fifth Circuit held that reasonable jurors could find that the evidence supported the valuation of Wellogix and the related compensatory damages award. *Id.* at 880-81.

2. Proving the Use of Trade Secrets through Circumstantial Evidence

Recent case law demonstrates that the use of a trade secret may be proven through purely circumstantial evidence. In *Southwestern Energy Production Co. v. Berry-Helfand*, 411 S.W.3d 581 (Tex. App.—Tyler 2013), Toby Berry-Helfand, a petroleum engineer, conducted an extensive geological and engineering study of the James Lime formation, identifying a number of "sweet spots" for oil and gas production. Helfand sought investors for drilling these identified locations, and presented information to Southwestern Energy Production Company (Sepco) under a confidentiality agreement. While Sepco informed Helfand that it declined to invest in Helfand's project, Sepco subsequently began leasing land in the James Lime formation. In fact, two years later, Sepco had drilled over eighty wells, clustered around Helfand's sweet spots. Helfand filed suit for misappropriation of trade secrets, among other claims. The jury found that Helfand's engineering study constituted a trade secret, and that Sepco was liable for trade secret misappropriation.

Sepco challenged the sufficiency of the evidence, arguing that the engineering study was not a trade secret, and that Sepco did not make unauthorized use of the trade secret. As to the first issue, the court held that although Helfand drew some of the data for her study from public or semi-public sources, her compilation of the production history from six hundred wells, added to her own analysis of well logs and the preparation of cross-sections, geomaps, and spreadsheets, constituted a compilation of information and a protectable trade secret. As to the second issue, Sepco argued that Helfand's evidence essentially amounted to an observation that Sepco had no James Lime wells before meeting with Welfand and it had over eighty James Lime wells three years later. Sepco claimed this observation did not prove that Sepco used Helfand's trade secrets. The court, however, pointed to evidence that within months of Helfand's presentation, Sepco started noting the James Lime formation as an objective in its internal documents, preparing maps and marking Helfand's sweet spots. *Id.* at 598-99. While Sepco was still subject to the confidentiality agreement, it took a number of leases along the James Lime formation, focusing on Helfand's sweet spots. *Id.* at 599. In addition, while Sepco claimed that its own engineers independently studied the James Lime formation and analyzed potential drilling sites, it was able to produce no documentation supporting this assertion, claiming all such documentation had been destroyed. *Id.* The court held that, under these circumstances, it was not unreasonable for the jury to infer that Sepco made unauthorized use of Helfand's trade secrets. *Id.* at 600. While the evidence was circumstantial, "many, if not most trade secret appropriation cases, rest… on circumstantial evidence." *Id.* at 599. Therefore, "[t]he jury was entitled to consider the circumstantial evidence, weigh the witnesses' credibility, and make reasonable inferences from the evidence it chose to believe." *Id.* at 600.

Similarly, *Lamont v. Vaquillas Energy Lopeno Ltd.*, 421 S.W.3d 198 (Tex. App.—San Antonio 2013), demonstrates the effective use of circumstantial evidence to prove the unauthorized use of trade secrets. In *Lamont*, Jerry Hamblin and Thomas Lamont formed Ricochet Energy to develop oil and gas leases with various other energy companies. Ricochet's geologist identified a promising area for exploration, the Lopeno Prospect. A map of the reservoir was known as the "treasure map" due to the prospect's high value. Ricochet and two partners began acquiring leases over the surface properties but had difficulty acquiring an important property, known as El Milagro, because of ongoing litigation. Ricochet instead leased a neighboring property and began drilling as close as they could to the El Milagro property line. After the identification of the Lopeno Prospect, Lamont decided to separate from Ricochet. Soon after leaving, he, together with another investor, under the guise of various entities, began working to lease El Milagro. While Ricochet also made several offers to lease El Milagro, Lamont ultimately obtained the lease. Lamont then drilled a well on El Milagro and depleted the Lopeno Prospect gas reservoir. The jury found that Lamont misappropriated Ricochet's trade secrets.

Lamont appealed, claiming both that the "treasure map" was not a trade secret, and that he did not use the treasure map. First, he argued that the map lost trade secret protection because Ricochet emailed it to him after his effective resignation date. However, at the time Ricochet emailed the map to him, Lamont had yet to sign the actual, postdated separation agreement. In addition, the court noted a "long tradition of Texas law forbidding employees from using trade secret information acquired during the employment relationship in a manner adverse to their employer, and this obligation survives the termination of employment." *Id.* at 211 (internal quotations omitted). As a result, sharing the treasure map with Lamont did not destroy any trade secret status, even if his resignation was effective prior to his obtaining the map. *Id.* at 211-12.

Turning to the second claim, Lamont claimed that the treasure map did not affect his decision to lease the El Milagro property. Rather, Lamont claimed that a well log acquired through other means convinced him to lease and drill on the land, as it showed a good sand depth on an adjoining property. As the court pointed out, however, Lamont did not actually conduct any independent research into the reservoir. *Id.* at 215. In addition, there was evidence that Lamont worked to hide his involvement in the El Milagro lease and drilling. *Id.* at 216. The court therefore held it was "not unreasonable for the jury to determine that Appellant improperly used the Treasure Map." *Id.* at 215. While it would be theoretically possible for someone to duplicate Ricochet's work through legitimate means, there was no evidence that Lamont had actually done so. "One may use his competitor's secret process if he discovers the process by reverse engineering applied to the finished product; one may use a competitor's process if he discovers it by his own independent research; but one may not avoid these labors by taking the process from the discoverer without his permission at a time when he is taking reasonable precautions to maintain its secrecy." *Id.* (citing *E.I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1015-16 (5th Cir.1970) (applying Texas law)).

In *Bishop v. Miller*, 412 S.W.3d 758 (Tex. App.—Houston [14th Dist.] 2013), William Bishop had developed a method to mine potash in a particular area of Utah. After Bishop formed a partnership with E. Barger Miller and shared his information, Miller left the partnership. Miller then started a new company, Carnallite Enterprises, which later bought Reunion Potash Company, and he created a business plan for the development of a mining project. He attempted to market this development plan to BHP-Billiton, but BHP declined to participate. Bishop later learned that Miller had used Bishop's mining method in his proposal to BHP, and he sued Miller for misappropriation of trade secrets. The jury agreed, finding Miller and Reunion liable.

While Miller did not appeal the verdict, Reunion did. It challenged the findings that Bishop owned any trade secrets and that Reunion used any trade secrets. In its decision, the court of appeals upheld the verdict and judgment. As to the existence of trade secrets, the court held that even though Miller used some publicly available data and calculations, his use of the data in creating his mining process created a compilation of information, which was a protected trade secret. *Id.* at 769. Further, Reunion argued that Bishop's mining process and the operating plan developed by Miller were not identical, and therefore the evidence did not show that Reunion used Bishop's plan. One of Reunion's experts testified regarding the differences between the plans, and also testified that the similarities arose because the two plans were for developing the same geographical area. Bishop and his expert also testified about their similarities. While the evidence was circumstantial, the court held that as the two plans contained similarities, "reasonable and fair-minded people could reach the verdict the jury reached in this case." *Id.* at 775.

3. Federal Computer Fraud and Abuse Act

An option to consider in a case involving the misappropriation of trade secrets is the use of the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030. This statute requires a showing that the defendant intentionally accessed a protected computer without authorization or beyond authorization, causing damage. Primarily a criminal statute, the CFAA makes illegal a number of acts, including accessing a protected computer without authorization and obtaining anything of value. 18 U.S.C. § 1030 (a)(4). Additionally, and importantly for present purposes, the CFAA creates a private civil cause of action for a party who was damaged by any violation of the CFAA, allowing her to receive compensatory damages or equitable relief. 18 U.S.C. § 1030(g). Moreover, the CFAA gives federal courts subject matter jurisdiction over the claims.

Recently, pleading violations of the CFAA has allowed plaintiffs to bring causes of action for misappropriation of trade secrets in federal court. In *Beta Technology, Inc. v. Meyers*, No. H-13-1282, 2013 WL 5602930 (S.D. Tex. Oct. 10, 2013), Beta accused Leigh Meyers, Beta's director and president, of downloading Beta's confidential information from a computer before resigning from the company and using the information to compete with Beta. Beta brought a federal suit against Myers for misappropriation of trade secrets as well as the violation of the CFAA.

Meyers moved for summary judgment, arguing that the court did not have subject matter jurisdiction over the case, as Beta failed to state a claim under the CFAA. Specifically, Meyers asserted that he did not access any information without authorization, as Beta provided him with the computer that he used to download the information. The court held, however, that just because Meyers was authorized the use the computer did not mean he was authorized to us it to access and download confidential information. *Id.* at *3. Under the facts in the petition, the court held the plaintiffs adequately alleged that Meyers exceeded his authority in accessing and downloading the data on his computer. *Id.* at *3. The company policy limited Meyers' authorization, including "making unauthorized copies of company files." *Id.* Additionally, Meyers argued that he did not obtain anything of value from the company files. But the court noted that the plaintiffs alleged he downloaded confidential and proprietary information, which has

value. *Id.* at 4. As a result, plaintiffs sufficiently alleged that Meyers violated the CFAA, and the court had subject matter jurisdiction over both the CFAA and the related trade secret appropriation claims.

A district court examined the same issue in *Absolute Energy Solutions, LLC v. Trosclair*, No. H-13-3358, 2014 WL 360503 (S.D. Tex. Feb. 3, 2014). Absolute alleged that Trosclair accessed its computer system after his employment ended and used Absolute's date to compete with Absolute. They brought a claim for misappropriation of trade secrets and violations of the CFAA. Trosclair moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim, arguing his access to the computer system was authorized, and therefore no federal jurisdiction remained. The court, however, held that whether Trosclair was authorized to access the computer system was a question of fact that could not be decided on a motion to dismiss. *Id.* at 3. Additionally, "[b]ecause Plaintiff's CFAA claim—a federal cause of action—is properly before this Court, the Court has supplemental jurisdiction over Plaintiff's state law claim for misappropriation of trade secrets. Both claims appear to arise from the same set of circumstances and thus form part of the same case or controversy." *Id.* (internal quotations omitted). Therefore, where trade secrets have been accessed from a plaintiff's computer, the CFAA can be a useful tool in pursuing a claim in federal court.

IV. FRAUD

A. Background

There are six elements to a common law fraud claim in Texas:

1. a material representation was made;
2. the representation was false;
3. when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion;
4. the speaker made the representation with the intent that the other party should act upon it;
5. the party acted in reliance on the representation; and
6. the party thereby suffered injury.

In re FirstMerit Bank, N.A., 52 S.W.3d 749, 758 (Tex. 2001); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 211 n.45 (Tex. 2002).

Opinions as fraud. In general, a material representation must be one of fact, not opinion, in order to be actionable. *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930 (Tex. 1983). On the other hand, an opinion may constitute fraud if:

1. "the speaker has knowledge of its falsity";
2. "the speaker purports to have special knowledge of facts that will occur or exist in the future"; or
3. the opinion "is based on past or present facts."

Id. In considering whether a representation is material, the courts will consider whether a "reasonable person would attach importance to and would be induced to act on the information in determining his choice of actions in the transaction in question." *Burleson State Bank v. Plunkett*, 27 S.W.3d 605, 613 (Tex. App.—Waco 2000, pet. denied).

Promises as fraud. The Texas Supreme Court has held that a promise made with no intention of performing can give rise to a cause of action for fraud, even where the promise is later subsumed in a contract. *Formosa Plastics Corp. v. Presidio Engins. and Contractors, Inc.*, 960 S.W.2d 41 (Tex. 1998); *Crim Truck & Tractor Co.*, 823 S.W.2d 591; *Hawkins v. Walker*, 233 S.W.3d 380 (Tex. App.—Fort Worth 2007). The mere breach of a contract, however, is not necessarily evidence of fraud. *See Formosa*, 960 S.W.2d at 48*; see also Petras v. Criswell*, 248 S.W.3d 471 (Tex. App.—Dallas 2008); *Weinberger v. Longer*, 222 S.W.3d 557 (Tex. App.—Houston [14th Dist.] 2007).

Actual and justifiable reliance. Reliance on the representation must be *both actual and justifiable*. *See Haralson v. E. F. Hutton Group, Inc.*, 919 F.2d 1014 (5th Cir. 1990). In determining whether reliance took place, the court may consider the particular plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances. *See Haralson*, 919 S.W.2d at 1026; *see also Grand Champion Film Prod., L.L.C. v. Cinemark USA, Inc.*, 257 S.W.3d 478 (Tex. App.—Dallas 2008) (no evidence that Cinemark made any representation to movie producers that they relied upon in making their decision to allow their film to be used); *Gray v. Waste Res., Inc.*, 222 S.W.3d 522 (Tex. App.—Houston [14th Dist.] 2007) (reliance negated by testimony that Gray did not rely on any misrepresentations, rather he could not obtain necessary financing to purchase the shares).

Damages. Texas courts recognize fraud damages under either an out-of-pocket or benefit-of-the-bargain theory. *Arthur Anderson & Co. v. Perry Equip.*, 945 S.W.2d 812 (Tex. 1997); *W. O. Bankston Nissan, Inc. v. Walters*, 754 S.W.2d 127 (Tex. 1988); *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369 (Tex. 1984). The two theories differ in that "out-of-pocket damages measure the difference between the value the buyer has paid and the value of what he has received; benefit-of-the-bargain damages measure the difference between the value as represented and the value received." *Arthur Anderson*, 945 S.W.2d at 817. However, the statute of frauds will bar benefit-of-the-bargain damages when the claim arises from a contract that has been held to be unenforceable. *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007). Finally, in addition to actual damages, a party may receive consequential damages that are foreseeable and

directly traceable to the fraud. *Arthur Anderson*, 945 S.W.2d at 817. "[C]onsequential damages could include foreseeable profits from other business opportunities lost as a result of the fraudulent misrepresentation." *Formosa Plastics Corp.*, 960 S.W.2d 49 n.1.

B. Recent Developments

1. Fraudulent Inducement

a. Necessity of a Valid Contract

The Texas Supreme Court has held that a plaintiff may not maintain a cause of action for fraudulent inducement where there is no enforceable contract underlying the action. *R.E. Haase & PRH Invs. v. Glazner*, 62 S.W.3d 795 (Tex. 2001). The Court held that fraudulent inducement includes the element of reliance, and where there is no binding agreement, there is no reliance. *Id.* at 798-99.

Last year, two court of appeals case expounded on the holding in *Haase*. In *Wright v. Modern Group, Ltd.*, No. 13-12-00293, 2013 WL 4714930 (Tex. App.—Corpus Christi Aug. 30, 2013), former employees of the Modern Group brought suit for claims relating to purported contracts, alleging fraud (among other claims), and seeking the benefit of their contracts. Summary judgment was granted for the Modern Group. The plaintiffs alleged that they had oral five-year employment agreements, an equity agreement, and a bonus agreement. However, the court of appeals held that the employment agreement was unenforceable under the statute of frauds. *Id.* at *5. Further, the court found the equity agreement illusory, and that the bonus agreement was based on a condition precedent which did not occur. Therefore, those agreements were likewise unenforceable. *Id.* at *6. As all the agreements at issue were unenforceable, the court of appeals held the claims for fraudulent inducement failed as a matter of law. *Id.* at *9. Because actual and justifiable reliance is an essential element for a fraudulent inducement claim, there must be a binding agreement. Otherwise, there is no reliance. *Id.* As the court succinctly stated, "[W]hen a party has not incurred a contractual obligation, it has not been induced to do anything." *Id.*

In *Iverson v. Dolce Mktg. Group*, No. 05-12-01230-CV, 2014 WL 1415106 (Tex. App.—Dallas 2014), Dolce brought a claim against Allen Iverson, a basketball player, for failing to appear at an event. Dolce claimed Iverson had a contract to appear, and the company brought suit for breach of contract and fraudulent inducement. Iverson answered the petition, but failed to appear on the trial date. The trial court entered judgment against him, based on the evidence heard in Iverson's absence. Iverson appealed, arguing the evidence was insufficient to support the judgment. The court of appeals agreed. The holding was based on the fact that Dolce Marketing failed to produce any testimony or evidence regarding the formation of a contract with Iverson or the terms of the alleged contract. *Id.* at *3. Similarly, Dolce Marketing was unable to produce the written contract itself. *Id.* As a result, the court held there was "no more than a scintilla of evidence" that a contract existed between the parties, and therefore the trial court should not have issued a judgment for Dolce Marketing. *Id.* at *2. And because the plaintiff did not prove a valid contract existed, its fraudulent inducement claim failed as well: "Fraudulent inducement is a species of fraud that arises in the context of a contract; the elements of fraud must be established as they relate to a contract between the parties. A plaintiff cannot assert a fraudulent inducement claim when there is not contract." *Id.* at *3 (internal citations omitted).

b. Merger and "As Is" Clauses

The Texas Supreme Court has held that merger clauses in contracts waiving reliance on the other party's representations may be enforceable, depending on the particular clause. In *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51 (Tex. 2008), the Supreme Court considered a settlement agreement between the parties that disclaimed reliance "upon any statement or any representation of any agent of the parties," and noted that the parties were "fully advised" by counsel regarding the substance and the consequences of the release. *Id.* at 54. James McAllen later attempted to bring suit against Forest Oil on additional issues, and Forest Oil sought to compel arbitration under the terms of the settlement agreement. McAllen, however, refused to arbitrate and claimed the arbitration provision in the agreement was fraudulently induced and unenforceable.

Citing the earlier case of *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 179 (Tex. 1997), the Supreme Court confirmed that "a disclaimer of reliance on representations, where the parties' intent is clear and specific, should be effective to negate a fraudulent inducement claim." 268 S.W.3d at 56. Whether the allegedly fraudulent statement had to do with the specific matter at issue in the settlement, or a separate, collateral issue, the court held that "when knowledgeable parties expressly discuss material issues during contract negotiations but nevertheless elect to include waiver-of-reliance and release-of-claims provisions, the Court will generally uphold the contract. An all-embracing disclaimer of any and all representations, as here, shows the parties' clear intent." *Id.* at 58. While the Court acknowledged that a disclaimer of reliance may not always bar a claim for fraudulent inducement, the issue will depend on whether the disclaimer has "the requisite clear and unequivocal expression of intent necessary to disclaim reliance on the specific representations at issue." *Id.* at

60 (internal quotations omitted). The most relevant facts in determining whether the intent is clear are as follows:

1. "the terms of the contract were negotiated, rather than boilerplate, and during negotiations the parties specifically discussed the issue which has become the topic of the subsequent dispute";
2. "the complaining party was represented by counsel";
3. "the parties dealt with each other in an arm's length transaction";
4. "the parties were knowledgeable in business matters";
5. "the release language was clear."

Id.

Three years later, the Supreme Court clarified the opposite side of the coin in *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America*, 341 S.W.3d 323 (Tex. 2011). Two tenants brought suit to rescind their lease and recover damages for fraud where their building was filled with a persistent sewer gas odor. They claimed Prudential, the building owner and landlord, informed them that there no problems whatsoever with the property, even though Prudential was aware of the odor before leasing the property to the tenants. The lease between the parties contained provisions stating, "Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises with respect to the Site, the Shopping Center or this Lease except as expressly set forth herein . . . . This lease constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and no subsequent amendment or agreement shall be binding upon either party unless it is signed by each party." *Id.* at 328.

Prudential argued that this disclaimer negated the reliance element of Italian Cowboy's fraud claim. The Supreme Court, however, concluded the lease provisions only amounted to a merger clause, not a disclaimer of reliance. *Id.* at 333. "Pure merger clauses, without an expressed clear and unequivocal intent to disclaim reliance or waive claims for fraudulent inducement, have never had the effect of precluding claims for fraudulent inducement." *Id.* at 334. Notably, the language in the clauses in *Italian Cowboy* differed significantly from that of *Schlumberger*, 959 S.W.2d at 180 ("[N]one of us is relying upon any statement or representation of any agent of the parties being release hereby.") and *Forest Oil*, 268 S.W.3d at 54 n.4 ("[I]n executing the releases contained in this Agreement, [the parties are not] relying upon any statement or representation of any agent of the parties being released hereby."). As the lease in Italian Cowboy's contract merely stated that "neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises with respect to the Site, the Shopping Center or this Lease as expressly set forth herein," the court held that the provisions were not enough to suggest that the parties intended to disclaim reliance. *Id.* at 335. "[P]arties must use clear and unequivocal language" to disclaim reliance. *Id.* at 336.

Several cases since *Italian Cowboy* have addressed disclaimers of reliance in contract. *Dresser-Rand Co. v. Bolick*, No. 14-12-00192-CV, 2013 WL 3770950 (Tex. App.—Houston [14th Dist.] July 18, 2013), involved an employment contract between Scott Bolick and Dresser-Rand. Bolick claimed that he was orally promised a promotion which did not occur, and therefore his later breach of the contract was excused by the defense of fraudulent inducement. The contract included a provision that stated, "Employee hereby expressly warrants and represents that, before entering into this agreement, that they [sic] have read, informed themselves [sic] of and understand all the terms, contents, conditions and effects of all provisions of this agreement, that no promise or representation of any kind has been made, except for those expressly stated in this agreement and that they are entering into this agreement on a knowing and voluntary basis." *Id.* at *2. The contract further stated that Bolick's job title would be "global commodity manager." *Id.* at *9. The court cited *Italian Cowboy* for the standard in determining whether there is clear intent to disclaim reliance and in determining the enforceability of that disclaimer. *Id.* at *8. Here, the court found that there was intent to disclaim reliance in the clause, explaining that it was "broader and more explicit" than the language in *Italian Cowboy. Id.* at *9. The court further noted that the contract contradicted Bolick's claim that he was orally promised a promotion, as his job title was clearly indicated in writing, and a party cannot rely on any oral representation that contradicts the written agreement. *Id.* The court therefore held that the fraudulent inducement claim failed as a matter of law. *Id.* at *10.

In addition to disclaimers of reliance, contracts may contain "as-is" clauses that will defeat a claim for fraudulent inducement. In *LBM Investments, Inc. v. Caribe Properties, Inc.*, No. 09-13-00060-CV, 2013 WL 5658555 (Tex. App.—Beaumont Oct. 17, 2013), a contract for the purchase of real estate noted that the "[b]uyer accepts the [p]roperty in its present condition." *Id.* at *1. The buyer, LBM, learned after closing that there were serious issues with the drainage of the property, and they claimed the seller gave false information about the quality of the property. The court affirmed summary judgment for Caribe. In determining whether an "as-is" clause may be enforced, the court considered "the nature of the transaction and the totality of the circumstances, including:

1. "whether the as-is clause is an important part of the basis of the bargain, not an incidental or boilerplate provision";
2. "the parties are sophisticated, of relatively equal bargaining position";
3. "the contract was freely negotiated"; and
4. "the contract was an arm's-length transaction."

Id. at *2. While the contract in this case was a standard commercial contract from the Texas Association of Realtors, the court noted that the contract was negotiable, the parties were sophisticated, and the contract was an arm's-length transaction. Therefore, the court found the as-is clause enforceable. *Id.* at *3. Summary judgment therefore was appropriate. *Id.* at *4.

Even so, a fraudulent inducement action may lie where the buyer was induced to enter an as-in clause *because of* the seller's fraudulent representations. *Id.* In this case, however, LBM was unable to provide any evidence as to the allegedly fraudulent statements. *Id.*

The Fort Worth Court of Appeals came to the same conclusion in *Volmich v. Neiman*, No. 02-12-00050-CV, 2013 WL 978770 (Tex. App.—Fort Worth March 14, 2013). In this case, the Volmiches brought suit against the Neimans after they bought a house from the Neimans. The house had a severely leaking roof. Prior to closing, the Neimans had asserted in their seller's disclosures that they knew of no problems with the property. The contract contained a provision that the property was being purchased "in its present condition." Before closing on the house, the Volmiches also obtained an inspection of the property that revealed the defects in the roof. In this case, the court noted that the as-is clause was valid, using the same factors as *LBM*. Both parties were represented by real estate agents, the contract was arm's-length, and both parties negotiated freely. *Id.* at *3. The court then determined that the Volmiches could not have been fraudulently induced to accept the as-is clause where they conducted their own inspection of the property and independently learned of its defects. *Id.* at *7.

2. Fraud Claims Against Employers

The Texas Supreme Court answered two questions in 2014 regarding the ability of employees to bring fraud claims against their employers relating to their discharge. *Sawyer v. E.I. DuPont De Nemours and Co.*, No. 12-0626, 2014 WL 1661492 (Tex. 2014), involved a fraudulent inducement lawsuit brought by a number of DuPont employees against their employer in federal district court. DuPont had announced that it was moving certain operations to a subsidiary, DuPont Textiles and Interiors (DTI), and it wanted employees to move over to DTI, to save the company training costs. On the other hand, the employees were concerned that DuPont would soon sell DTI, causing a negative impact on their compensation and retirement packages. The employees were covered by a collective bargaining agreement, allowing them to move to other jobs within DuPont rather than transferring to DTI. DuPont allegedly told the employees that it would not sell DTI, and the employees chose to move to the subsidiary—but DuPont had already entered discussions to sell DTI. Approximately a year later, DuPont sold DTI to another company, which reduced the employees' compensation and retirement benefits. The employees brought their suit on the basis of DuPont's fraudulent assurances that they would not sell DTI.

DuPont argued that the employees were at-will, and that at-will employees could not sue their employer for fraud. The employees, however, pointed out that under their collective bargaining agreement, they could not be discharged without just cause. In response, DuPont further noted that the bargaining agreement could be terminated with sixty days notice, and therefore, the employees were still considered at-will.

The district court granted summary judgment for the employer. On appeal the Fifth Circuit certified two questions to the Texas Supreme Court: "(1) Under Texas law, may at-will employees bring fraud claims against their employers for loss of their employment?; (2) If the above question is answered in the negative, may employees covered under a 60-day cancellation-upon-notice collective bargaining agreement that limits the employer's ability to discharge its employees only for just cause, bring Texas fraud claims against their employer based on allegations that the employer fraudulently induced them to terminate their employment?" *Id.* at *2.

In answering the first question, the Supreme Court noted that Texas has long held that "absent a specific agreement to the contrary, employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all." *Id.* Texas does not recognize many limits on the termination of at-will employment that other jurisdictions have put in place—Texas does not recognize common-law whistleblower liability, any duty of the employer to exercise ordinary care in investigating employee misconduct, or any duty of the employer to act with good faith and fair dealing. *Id.* While the Supreme Court did not decide the issue at hand until *Sawyer*, it noted that courts of appeals had previously held that a fraud claim could not be based on a promise of continued at-will employment. *Id.* The Supreme Court adopted this holding as well, based on the principle that if an "employer or employee can avoid performance of a promise by exercising a right to terminate the at-will relationship, which each is perfectly free to do with or without reason at any time, the promise is illusory and cannot support an

enforceable agreement." *Id.* Just as the employee could not sue for breach of contract in such an at-will situation, they may not sue for fraud, as there can be no justifiable reliance "on the continuation of employment that can be terminated at will." *Id.*

The Supreme Court then turned to the second question. Concluding it made no difference that the collective bargaining agreement could be canceled with sixty days notice—as DuPont did not, in fact, cancel it—the Court only asked whether the "just cause" provision in the bargaining agreement modified the employees' at-will status. The Court noted that Texas permits employees and employers to modify their at-will relationship, but only when their intent to do so was expressed definitively. *Id.* at *4. General statements that an employee will be terminated only for "good cause" are insufficient to modify the at-will relationship when the term is not defined. *Id.* In the case at hand, "just cause" was not defined in the bargaining agreement, but the agreement allowed for a complaint process for unjust termination, including the determination of whether there actually existed just cause, by either committee or arbitration. The Court held that the bargaining agreement was therefore definite enough to modify the at-will relationship.

The analysis continued, however, to determine whether employees who could be discharged only for just cause had a cause of action against their employer for fraudulently inducing them to transfer to DTI. The Court determined there was no such cause of action here. The employees essentially alleged constructive discharge from their employment, and the bargaining agreement carried its own remedies for discharge without just cause, namely reinstatement and lost wages. *Id.* at 5. While the employees argued that DuPont did not discharge them, but in fact wanted them to stay at their jobs, DuPont actually wanted them to move to DTI, which was sold. The employees' relationship with DuPont was, in fact, terminated, and if it was terminated due to fraudulent inducement—that is, without just cause—the bargaining agreement is the sole remedy: "An employee discharged for refusing to go to DTI would clearly have been limited to his remedies under the [collective bargaining agreement]. To allow an employee fooled into going to DTI to recover for fraud would defeat the [collective bargaining agreement]." *Id.* Therefore, both the employees and the employers would be held to the terms of the bargaining agreement. *Id.* Under the facts presented, the employees had no cause of action for fraudulent inducement. *Id.* at *6.

3. Intent to Deceive

Two recent opinions—one from the San Antonio Court of Appeals and one from the Texas Supreme Court, reversing the appellate court—addressed the necessity of the intent to deceive in a fraud claim. *See Dynegy v. Yates*, 345 S.W.3d 516, 530 (Tex. App.—San Antonio 2011), *rev'd*, 422 S.W.3d 6398 (Tex. 2013). In this case, Terry Yates, an attorney, represented an officer of Dynegy on criminal charges. An attorney with Dynegy, Cristin Cracraft, orally informed Yates that Dynegy would pay the officer's legal expenses. After Yates represented the officer through trial, however, Dynegy informed him that they would not be paying the legal expenses. Yates then brought suit against Dynegy for breach of contract and fraudulent inducement. The jury found in Yates' favor.

On appeal, the court considered whether the statute of frauds barred enforcement of the oral contract to pay the debt of another. *Id.* at 521. The San Antonio Court of Appeals held that Dynegy's promise was a primary obligation on its own behalf, not a promise to pay the debts of another, and therefore it was not barred by the statute of frauds. *Id.* at 525. However, Dynegy argued that no fraud occurred because there was no evidence Cracraft had no intent to perform at the time the oral agreement to pay Yates' fee was made. Dynegy asserted that there was "no 'mix and match' theory of fraud in which one corporate actor of Dynegy could make the oral promise and another corporate actor could possess the intent not to perform." *Id.* at 530. While one corporate agent of Dynegy's arguably had the intent not to pay Yates, Dynegy argued that Cracraft herself, at the time she made the representation, had no intent not to perform. Yates, on the other hand, argued that because a corporation can only act through its agents, the fraudulent intent of an agent can be imputed to the corporation.

The San Antonio Court of Appeals ultimately agreed with Dynegy, holding that "the same corporate agent must commit all the elements of fraud before the corporation may be held liable for fraud . . . since Cracraft was the corporate speaker who made the oral agreement with . . . Yates, it is her knowledge and intent that is at issue." *Id.* at 531. The court held there was no evidence that Cracraft did not intend to perform, and therefore the fraudulent inducement claim failed. *Id.* at 532-34.

The Texas Supreme Court took up *Dynegy* on appeal. *Dynegy, Inc. v. Yates*, 422 S.W.3d 6398 (Tex. 2013, reh'g denied). Their decision ultimately reversed that of the appellate court, but it relied on statute of frauds grounds and did not address the fraudulent inducement issues. The Supreme Court, unlike the court of appeals, held that the contract was to pay the debts of another, and therefore the statute of frauds controlled. *Id.* at 642. Yates did not sufficiently establish an exception to the statute of frauds which would render the oral contract enforceable. *Id.* at 642-43. As a result, not only was the breach of contract claim barred, but so was the fraudulent inducement

claim, as "the Statute of Frauds bars a fraud claim to the extent the plaintiff seeks to recover as damages the benefit of a bargain that cannot otherwise be enforced because it fails to comply with the Statute of Frauds." *Id.* at 643 (quoting *Haase*, 62 S.W.3d at 799). As the Supreme Court did not address the substantive fraudulent inducement issue, the court of appeals' rejection of the "mix and match" theory of fraudulent inducement is still persuasive and may gain further support in future cases.

V. TORTIOUS INTERFERENCE

A. Background

Under Texas law, a plaintiff has a cause of action for tortious interference with a contract if he proves the following elements:

1. the existence of a contract subject to interference;
2. willful and intentional interference;
3. interference that proximately caused damage; and
4. actual damage or loss.

Powell Indus. v. Allen, 985 S.W.2d 455, 456 (Tex. 1998); *see also ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426 (Tex. 1997); *Fluorine On Call, Ltd. v. Fluorogas Ltd*., 380 F.3d 849, 864 (5th Cir. 2004).

A defendant may defeat a claim for tortious interference by affirmatively demonstrating that his actions were privileged or legally justified. *Prudential Ins. Co. of America v. Financial Review Services, Inc.*, 29 S.W.3d 74, 77-78 (Tex. 2000). This justification defense "can be based on the exercise of either (1) one's own legal rights or (2) a good-faith claim to a colorable legal right, even though that claim ultimately proves to be mistaken." *Id.* at 80.

B. Recent Developments

1. Causation

One case currently pending review in the Texas Supreme Court examined the sufficiency of the evidence to prove causation in a tortious interference claim. *HMC Hotel Props. II Ltd. P'ship v. Keystone-Texas Prop. Holding Corp*., No. 04-10-00620-CV, 2011 WL 5869608 (Tex. App.—San Antonio Nov. 23, 2011, review granted), involved the issue of tortious interference in a real estate contract. Keystone owned a mall and land underlying a hotel in San Antonio. HMC leased the land underlying the hotel from Keystone. Under Section 14.02 of the lease, "Tenant's First Right of Negotiation," Keystone was required to send notice of a potential sale to HMC. In 2004, Keystone began marketing the mall and hotel properties for sale, and a memorandum was sent to a number of potential investors. HMC did not receive the memorandum. Meanwhile, Keystone began negotiating a contract for the sale of the mall and hotel land to Ashkenazy Acquisition Corporation, and the parties signed letters of intent. Ashkenazy agreed to pay $166 million for both properties, but knowing HMC would want to know an approximate purchase price for the hotel land itself, Keystone asked Ashkenazy to allocate a portion of the total price for the hotel land.

Ashkenazy allocated $65 million. On January 7, 2005, Keystone sent HMC a letter informing them of the pending sale of the hotel land for $65 million, with closing to take place in seventy-five days. Keystone asked HMC to sign a waiver of its rights under the lease to allow the sale to take place, but Keystone also gave HMC thirty days to express an intention to negotiate its own purchase of the hotel land.

HMC's parent company, Host, requested more information on the sale and expressed some interest in negotiating. HMC, however, thought the land was only worth about $30 million, and believed the value Ashkenazy allocated was inflated to prevent HMC from competing in the negotiations. In April 2005, Ashkenazy's lender asked HMC to sign an estoppel certificate form that waived HMC's first right of negotiation under Section 14.02. HMC, instead, sent a letter to Keystone claiming Keystone was in default under Section 14.02, and asking for an additional ninety days to continue negotiating for the purchase of the hotel land. The sale to Ashkenzay, scheduled to finalize on April 28, 2005, did not occur. HMC sued Keystone for breaching the lease, and Keystone counterclaimed for tortious interference with their agreement with Ashkenzay. The jury found for Keystone.

On appeal, HMC argued that Keystone did not prove HMC's conduct caused the agreement with Ashkenzay to fail. In evaluating causation, the court explained that "more than one act may be the proximate cause of the same injury." *Id.* at *12. Proximate cause involves both cause in fact and foreseeability. *Id.* To demonstrate cause in fact, the plaintiff must prove: "(1) the act or omission was a substantial factor in bringing about the harm at issue; and (2) absent the act or omission ('but for' the act or omission), the harm would not have occurred." *Id.*

The question the court considered was whether HMC's letter informing Keystone they were in breach of Section 14.02 caused the sale to fail, or whether Keystone's own failure to meet certain closing conditions caused the sale to fail. Ashkenazy's attorney had insisted that Keystone provide a "subordination, attornment, and non-disturbance agreement" (that is, a "non-disturbance agreement in which a tenant agrees to subordinate its rights to the lender while the lender agrees not to terminate a lease upon foreclosure unless the lease is in default"), an estoppel certificate, and waiver prior to closing, and Keystone was unable to do so. *Id.* However, Ashkenzay's attorney also testified that the closing

could have gone forward without those particular documents. *Id.* The closing agent and the insurance account manager on the deal both testified that the letter was a substantial factor in their decisions not to move forward in the closing of the sale. *Id.* at *13. While there was also some testimony that the closing could not have occurred without HMC's express waiver of Section 14.02, even if the absence of their letter accusing Keystone of breaching the provision, the court ultimately upheld the verdict. *Id.* at *13. The court observed that they "must defer to the jury's role in judging the credibility of the witnesses and the weight of the testimony and determine whether the evidence at trial enables reasonable and fair-minded people to find that the April 18 letter proximately caused the sale to Ashkenazy not to close." *Id.* The evidence was sufficient in the court's eyes to support the jury's findings. *Id.*

Although the Supreme Court originally denied review of the appellate court's decision in *HMC*, it later granted review on rehearing. The Supreme Court's decision is pending at publication.

2. Prospective Contracts

Texas allows tortious interference claims for prospective as well as existing contracts. The boundaries of this rule, however, are not well-established. In *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001), the Texas Supreme Court considered a case in which the plaintiffs brought suit for tortious interference with prospective leases. The Supreme Court determined that in order for a plaintiff to recover for tortious interference in a case of a prospective business relationship, the "plaintiff must prove that the defendant's conduct was independently tortious or wrongful." *Id.* at 726. While the behavior must be "actionable under a recognized tort," the plaintiff does not need to prove the actual tort. *Id.* By way of example, "a plaintiff may recover for tortious interference from a defendant who makes fraudulent statements about the plaintiff to a third person without proving that the third person was actually defrauded." *Id.* The *Wal-Mart* case did not expound on the specific elements for a cause of action in the case of prospective contracts.

A case from the Houston Court of Appeals later attempted to fill that gap. In *Baty v. Protech Ins. Agency*, 63 S.W.3d 841 (Tex. App.—Houston [14th Dist.] 2001, pet. denied), the plaintiff insurance agency sued two former officers and four former clients for tortious interference with prospective business relationships, where the officers had formed a competing business. The *Baty* court interpreted the *Wal-Mart* case to require four elements in a claim for tortious interference with a prospective business relationship:

1. "a reasonable probability that the plaintiff would have entered into a business relationship";
2. "an independently tortious or unlawful act by the defendant that prevented the relationship from occurring";
3. "the defendant did such act with a conscious desire to prevent the relationship from occurring or the defendant knew the interference was certain or substantially certain to occur as a result of the conduct"; and
4. "the plaintiff suffered actual harm or damages as a result of the defendant's interference."

Id. at 860.

Another court addressed a case involving tortious interference with prospective clients in *Alliantgroup, LP v. Solanji*, No. 01-12-00798-CV, 2014 WL 1089284 (Tex. App.—Houston [1st Dist.] Mar. 18, 2014). Alliantgroup brought a tortious interference claim against a group of former employees who left to start their own company. The defendants contacted two companies who had previously contracted with Alliantgroup for services. Alliantgroup argued that the two companies remained their clients at the time the defendants contacted them. Although Alliantgroup and the clients had signed contracts for a limited period of time, which had expired, Alliantgroup testified that they still considered the companies "continuing clients" until the client notified them that they wished to disengage from Alliantgroup.

The trial court granted summary judgment for the employees, finding that there was no evidence that there were any current contracts or relationships between Alliantgroup and the clients. The court of appeals agreed, as the contracts were no longer in effect and Alliantgroup was not currently performing any work for the clients. *Id.* at *7-8. The appellate court then went on to consider whether Alliantgroup had any action for tortious interference with prospective business relationships. While noting that Texas recognizes a cause of action for tortious interference with prospective contracts, it also noted that the plaintiffs must present evidence of interference with a "specific" contract. *Id.* at *8. In this case, Alliantgroup did not identify any specific contract or potential contract with which the defendants interfered. *Id.* Therefore, the Houston Court of Appeals affirmed summary judgment for defendants. *Id.*

3. Damages

In Texas, "[t]he basic measure of actual damages for tortious interference with a contract is the same as the measure of damages for breach of the contract interfered with, to put the plaintiff in the same economic position he would have been in had the contract interfered with been actually performed." *Am. Nat'l Petroleum Co. v. Transcontinental Gas Pipe*

Line Corp., 798 S.W.2d 274, 278 (Tex. 1990). This rule has practical limits, however. As the Fifth Circuit has noted in applying Texas law, a "plaintiff must adduce substantial, competent evidence of a character that can permit reasonable men and women to determine that damage was caused by the breach [of contract] or [tortious] interference, and to assess with reasonable certainty the amount of damage and degree of causation of the damage by the breach [of contract] or [tortious] interference relative to other factors." *Univ. Computing Co. v. Mgmt. Sci. Am.*, 810 F.2d 1395, 1398 (5th Cir. 1987). Two recent cases illustrate these limiting principles.

In *Palla v. Bio-One, Inc.*, No. 05-12-01657-CV, 2014 WL 1008072 (Tex. App.—Dallas Feb. 24, 2014), Mark Palla sued Bio-One for breach of contract—specifically, a commission agreement—and sued two other defendants, Aydemir Arapoglu and Transtrade, LLC for tortious interference with the contract. A jury found in Palla's favor. Jurors determined that Bio-One failed to comply with its commission agreement with Palla, and that $278,718.28 would compensate Palla for his breach of contract damages. Additionally, the jury found Transtrade and Arapoglu intentionally interfered with the agreement, and that $100,000 would fairly compensate Palla for this tortious interference. Palla appealed, arguing that the damages on the tortious interference claim should have been the same as the damages for breach of contract, and all damages should have been joint and several. He contended that damages for tortious interference normally would place him in the same economic position he would have been, but for the breach of contract. The Dallas Court of Appeals, however, noted that "the question is whether there is sufficient evidence that Arapoglu and Transtrade's interference with the Agreement was the proximate cause of the *entire amount of damages* the jury found for breach of the Agreement." *Id.* at 4 (emphasis added). The court then found that there was "no basis in the record for concluding the entire amount of the breach of contract damages in this case related to Bio-One product sales arising from the relationship between Bio-One and Transtrade." *Id.* Considering the jury found different amounts for the different defendants and causes of action, however, "the damages related to tortious interference could, and apparently did, differ from the total damages for Bio-One's breach of the Agreement, and the variance between the damages found for breach of the Agreement and for tortious interference with contract reflects the jury's judgment that Arapoglu and Transtrade were not responsible for all of the damages caused Palla by Bio-One's breach of the Agreement." *Id.*

A Fifth Circuit case applying Texas law reflected the same theory. *Homoki v. Conversion Services, Inc.*, 717 F.3d 388 (5th Cir. 2013), involved a claim by Global Check Services (GCS), a provider of a check and debit/credit processing service, against a sales agent and a competitor, bringing a cause of action for tortious interference where the sales agent stopped selling GCS's products and started selling the competitor's. A jury awarded GCS $700,000 in a judgment against the competitor for tortious interference and $2.15 million in an action against the sales agent for breach of contract and breach of fiduciary duty. GCS appealed, arguing that the court should have entered a judgment holding the competitor jointly and severally liable for the damages caused by the agent's breach of fiduciary duty. The Fifth Circuit noted that "[i]n Texas, tortious interference with contract and breach of contract typically share the same measure of damages: to place the injured party in the position he would have been had the contract been performed." *Id.* at 398. But the rule is not automatic: "Damages for tortious interference with contract are necessarily limited to damages proximately caused by the act of interference and do not extend to any other breach of the contract that the contracting party happened to commit." *Id.* at 401. The court held that the evidence showed with "reasonable certainty" that the tortious interference itself caused GCS to lose $700,000 of profits. *Id.* Conversely, the evidence did not indicate that the tortious interference accounted for all lost profits do to another party's breach of contract and fiduciary duty. *Id.* The jury's differing verdicts were held to account for the different roles and different damages of each party and each tort. *Id.*

VI. COVENANTS NOT TO COMPETE

A. Background

Under the common law, Texas determined that "covenants not to compete which are primarily designed to limit competition or restrain the right to engage in a common calling are not enforceable." *Hill v. Mobile Auto Trim, Inc.*, 725 S.W.2d 168, 172 (Tex. 1987). This rule, however, was quickly superseded by statute, with the passage of the (aptly named) Covenant Not to Compete Act in 1989, which allowed for the enforcement of covenants not to compete in certain circumstances. TEX. BUS. & COM. CODE § 15.50. Section (a) of § 15.50 provides the general rule, while § 15.50(b) provides statutory provisions specific to physicians. Section 15.50(a) provides as follows:

> Notwithstanding Section 15.05 of this code, and subject to any applicable provision of Subsection (b) a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the

goodwill or other business interest of the promisee.

Violations of a covenant not to compete can support both monetary damages and injunctive relief. TEX. BUS. & COM. CODE § 15.51(a). In addition, where a covenant not to compete is overly broad in its time, geographical area, or scope of activity, the court may reform it and thereby render it enforceable. TEX. BUS. & COM. CODE § 15.51(c). In addition, the statute preempts any previously existing common law action or remedy. TEX. BUS. & COM. CODE § 15.52.

In applying the statutory scheme, the Supreme Court of Texas has identified two initial inquiries in the enforcement of covenants not to compete. First, is there an otherwise enforceable agreement? Second, was the covenant not to compete ancillary to or a part of the enforceable agreement at the time the agreement was made? *Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 642, 644 (Tex. 1994). Additionally, to be enforceable, the covenant not to compete must be reasonably limited as to time, geographical area, and scope of activity, with no more restraint than is necessary to protect the business interest of the promisee. *Id.*

While generally an at-will employee will not have an "otherwise enforceable agreement" with his employer regarding continued employment, at-will employees and employers may still form other contracts, bearing in mind an employer may not make an illusory promise for continued employment to an at-will employee. *Id.* at 644-45. In the *Light* case, the court found that Centel had contracted to provide Debbie Light with certain training, and that this agreement was enforceable even if they terminated her employment. *Id.* at 645-46. In addition, Light was required to give fourteen days notice before ending her employment and to provide an inventory of any of her employer's property that she possessed when her employment ended. *Id.* The court found this to be an "otherwise enforceable agreement." *Id.* at 646. In asking whether the covenant not to compete was ancillary to this agreement, the court held: "(1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing; and (2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement." *Id.* at 647. Here, the court held that because the promise of fourteen days notice and conducting an inventory did not have a connection to a covenant not to compete, the covenant was not designed to enforce the employee's consideration in an otherwise enforceable agreement, and the covenant not to compete was not enforceable. *Id.* at 648.

Twelve years later, the Supreme Court modified the holding in *Light* in *Alex Sheshunoff Mgmt. Servs., LP v. Johnson*, 209 S.W.3d 644 (Tex. 2006). Here, contrary to *Light*, the court held that a unilateral contract could comply with the statute; even if not enforceable at the time it was made, it could become enforceable on performance. *Id.* at 650-51. Specifically, the Supreme Court held, "We now conclude, contrary to *Light*, that the covenant need only be 'ancillary to or part of' the agreement at the time the agreement was made. Accordingly, a unilateral contract formed when the employer performs a promise that was illusory when made can satisfy the requirements of the Act." *Id.* at 651.

Turning once more to the issue in *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844 (Tex. 2009), the Supreme Court held that a non-compete agreement is enforceable where the employee will necessarily receive confidential information during the course of his employment. Essentially, where an employee signs a covenant not to compete in this situation, the Court held it will be enforceable where the company impliedly promises to supply her with confidential information. *Id.* at 850.

Most recently, in *Marsh USA Inc. v. Cook*, 354 S.W.3d 764 (Tex. 2011), the Supreme Court abrogated part of *Light*. Cook moved for summary judgment based on the ground that the covenant not to compete was an unenforceable contract as it was not ancillary to or part of an otherwise enforceable agreement. *Id.* at 767. While the trial court and the appellate court held that under *Light*, summary judgment was appropriate, the Supreme Court revisited the issue. In the end, the court redefined its previous explanation of "ancillary," holding that a covenant must simply be "supplementary" to the enforceable agreement. In addition, the consideration in the enforceable agreement does not need to "give rise" to the interest in restraining competition with the employer. *Id.* 775. Rather, there need only be a nexus, in that the covenant not to compete is "ancillary to" or "part of" the otherwise enforceable agreement. *Id.*

B. Recent Developments

1. Public Interest

At least one court of appeals has confirmed that public interest is a valid consideration in determining the enforceability of covenants not to compete. *See Nacogdoches Heart Clinic, P.A. v. Pokala*, No. 12-11-00133-CV, 2013 WL 451810 (Tex. App.—Tyler Feb. 6, 2013, pet. filed). Two doctors opened a cardiovascular laboratory, Nacogdoches Heart Clinic (NHC), and after a disagreement, Pokala left the office to open his own. NHC sued Pokala for breaching a covenant not to compete. The trial court and the appellate court held that the covenant was unenforceable. First, the covenant prevented Pokala from practicing any variety of medicine, not just the cardiology and internal medicine he previously

practiced at NHC. *Id.* at *4. The court held this term was not reasonably limited in scope. *Id.* Second, and more importantly, both courts held that the public interest is a factor in determining the validity of covenants not to compete. *Id.* In the words of the appellate court, the statute allowing for the enforcement of covenants not to compete is a "codification of the rule of reason, of which the public interest is one factor." *Id.* The appellate court recognized that "being a small community, Nacogdoches needs all the doctors it can get." *Id.* at *5 (internal citations and alterations omitted). There was a shortage of cardiologists in Nacogdoches that meant Pokala's absence would have a negative effect on the public. *Id.* at *6. Further, there was evidence that Pokala did not turn away patients who were unable to pay, while NHC did. *Id.* Finally, while NHC argued that the court was forcing it to bear the financial consequences of Pokala's competition, the appellate court noted, "If NHC did not want to bear financial consequences from a potential violation of the covenant not to compete, it was incumbent on it to draft a covenant that did not violate public policy." *Id.*

2. Injunctive Relief

A number of courts have come to the conclusion that the Covenant Not to Compete Act does not preempt the common law requirements for a temporary injunction. *See, e.g.*, *EMSL Analytical, Inc. v. Yonker*, 154 S.W.3d 693 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Wright v. Sport Supply Group, Inc.*, 137 S.W.3d 289, 293 n.1 (Tex. App.—Beaumont 2004, no pet.); *Cardinal Health Staffing Network, Inc. v. Bowen*, 106 S.W.3d 230, 239 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (en banc).

More than one court, however, has refused to consider whether a covenant not to compete is enforceable at the temporary injunction stage. In *Loye v. Travelhost, Inc.*, 156 S.W.3d 615, 620 (Tex. App.—Dallas 2004), the court held that "the issue of whether the covenant not to compete is enforceable must await a final judgment on the merits." A different appellate court came to the same conclusion in *Vaughn v. Intrepid Directional Drilling Specialists, Ltd.*, 288 S.W.3d 931, 937 (Tex. App.—Eastland 2009) ("At a temporary injunction hearing, a trial court does not address the ultimate issue of whether a covenant not to compete is enforceable under Section 15.50 of the Business and Commercial Code.").

On the other hand, a more recent case addressed the enforceability of the agreement at the temporary injunction stage. In *Dickerson v. Acadian Cypress & Hardwoods, Inc.*, No. 09-13-00299, 2014 WL 1400659 (Tex. App.—Beaumont Apr. 10, 2014), Chad Dickerson worked for Acadian as a sales representative and signed a "Non-Competition/Non-Solicitation Agreement." The agreement prohibited him from competing with Acadian within a certain geographical area for two years after leaving the company. When Dickerson resigned from Acadian and began working for one of its competitors as a sales representative within the same region, Acadian requested and received a temporary injunction prohibiting Dickerson from working for others in Acadian's industry. Dickerson challenged the injunction on the ground that the covenant not to compete was unenforceable. While the court cited to *Vaughn* for the rule that "by granting a temporary injunction, a trial court does not declare that a covenant not to compete is valid," the court nonetheless went on to consider whether the covenant was enforceable. *Id.* at *3-4. It concluded that "[i]n light of the promises that are found in the agreement, as well as the evidence during the hearing, the trial court properly determined that the agreement constitutes 'an otherwise enforceable agreement,' and that Dickerson was bound by his promise not to disclose Acadian's confidential information." *Id.* at *5. In line with the common law temporary injunction requirements, the court also determined that Acadian demonstrated irreparable harm would occur without a temporary injunction. *Id.* at *5.

Unlike temporary injunctions, however, in securing a permanent injunction, courts have held that there is no requirement to demonstrate irreparable injury under the Covenant Not to Compete Act. In *Butler v. Arrow Mirror & Glass, Inc.*, 51 S.W.3d 787, 795 (Tex. App.—Houston [1st Dist.] 2001, no pet. h.), the Houston Court of Appeals held that "a showing by the promisee of an irreparable injury for which he has no adequate legal remedy, is not a prerequisite for obtaining injunctive relief under the Covenant Not to Compete Act." In explaining the differences between temporary injunctive relief and a permanent injunction, the court in *Primary Health Physicians, P.A. v. Sarver*, 390 S.W.3d 662, 665 (Tex. App.—Dallas 2012) noted, "We agree . . . that the Act governs only final remedies and does not supplant the common law requirements for a pretrial temporary injunction."

A recent case supports this holding. In *Tranter, Inc. v. Liss*, No. 02-13-00167-CV, 2014 WL 1257278 (Tex. App.—Fort Worth Mar. 27, 2014), James Liss was a regional sales manager for Tranter and signed a covenant not to compete. Liss then left Tranter and began working for a competitor. Tranter applied to the court for a temporary injunction to prevent Liss from working at the competitor. The trial court, after a hearing, held that the covenant not to compete was unenforceable due to a lack of consideration and lack of geographic restrictions. Therefore, it denied the application for temporary injunction. On appeal, the court considered a number of issues, including whether irreparable injury was likely. The court held: "[C]ommon law requires a showing of a probable, imminent, and irreparable injury as a prerequisite for

injunctive relief. The Covenants Not to Compete Act preempts that requirement for permanent injunctive relief, but it does not preempt the requirements for temporary injunctive relief." *Id.* at *7. In addition, the court clarified that while "an appeal of an order denying temporary injunction based on noncompete clauses does not present for appellate review the ultimate question of whether the agreement is enforceable," the appellate court would still review the enforceability "to the extent necessary to determine whether the requirements for a temporary injunction [i.e., the likelihood of prevailing on the merits of the claim] have been met." *Id.* at *3.

3. Scope and Reasonableness

As noted, a covenant not to compete must contain "limitations as to time, geographical area and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee." TEX. BUS. & COM. CODE § 15.51. The reasonableness of the restraints is a question of law for the court to decide. *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 388 (Tex. 1991). A number of courts have addressed the reasonableness of such restrictions. In *Sheshunoff*, the Texas Supreme Court upheld a covenant not to compete that restricted a former employee from soliciting 821 clients of his former employee for a one-year period, regardless of geographic area. 209 S.W.3d 644. The Supreme Court found this agreement reasonable, as Johnson "helped develop ASM's goodwill and could have tried to capitalize on it unfairly after going to [the competitor.]" *Id.* at 657.

A recent case from the Dallas Court of Appeals addressed the same issue. In *U.S. Risk Ins. Group, Inc. v. Woods*, 399 S.W.3d 295 (Tex. App.—Dallas 2013), the court considered a covenant not to compete that prohibited a former employee from "being associated with or employed by any business that competes in the business currently engaged in by USRIG or any of its subsidiaries," where the provision was not limited to the type of business the employee had personally performed for USRIG. The court determined that this provision was not reasonable. Specifically, because it extended beyond activities which the employee had previously performed for the company, it was not reasonably limited in its scope of activities. *Id.* at 301.

As discussed above, in *Nacogdoches Heart Clinic, P.A.*, 2013 WL 451810, the Tyler Court of Appeals has also held that a covenant not to compete was overly broad where it prohibited a doctor, who had previously practiced only internal medicine and cardiology, from practicing any type of medicine within ten miles of Nacogdoches. *Id.* at *4.

4. Attorneys' Fees

The Covenant Not to Compete Act provides for attorneys' fees only in certain circumstances:

> If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisor establishes that the promisee knew at the time of the execution of the agreement that the covenant did not contain limitations as to time, geographical area, and scope of activity to be restrained that were reasonable and the limitations imposed a greater restraint than necessary to protect the goodwill or other business interest of the promisee, and the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee, *the court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant*.

TEX. BUS. & COM. CODE § 15.51 (emphasis added). The Act also states that it "preempt[s] . . . any other . . . procedures and remedies in an action to enforce a covenant not to compete under common law or otherwise." *Id.* § 15.52.

Courts have differed as to when a party may receive an award for attorneys' fees in an action involving the Covenant Not to Compete Act. The court in *Gage Van Horn & Assoc. v. Tatom*, 26 S.W.3d 730, 732 (Tex. App.—Eastland 2000, pet. denied), held that where an employee brought a declaratory judgment action to declare a covenant not to compete void, the Declaratory Judgment Act permitted the award of attorneys' fees beyond the limits of § 15.51. The court reasoned that the plaintiff was not bringing an action to "enforce a covenant" under § 15.52, but rather an action to declare the covenant void, and therefore the preemption language did not apply. *Id.*

On the other hand, *Perez v. Texas Disposal Systems, Inc.*, 103 S.W.3d 591, 594 (Tex. App.—San Antonio 2003, pet. denied), interpreted § 15.52 more strictly. An employer argued that because the statute was silent regarding attorneys' fees awards to a promisee employer where the court reformed a covenant not to compete, the employer could receive such fees. The appellate court, however, held that the Covenant Not to Compete Act controlled any award for attorneys' fees. *Id.* Similarly, the court in *Glattly v. Air Starter Components, Inc.*, 332 S.W.3d 620, 645 (Tex. App.—Houston [1st Dist.] 2010), held that the Covenant Not to Compete Act does not allow employers to be awarded attorneys' fees when bringing an action to enforce their rights under the Act.

In 2013, *Franlink, Inc. v. GJMS Unlimited, Inc.*, 401 S.W.3d 705 (Tex. App.—Houston [14th Dist.]),

also addressed the issue. The employer, Franlink, succeeded in a suit to enforce its covenant not to compete against various franchisees, but the court reformed the covenant to limit its scope and refused to award attorneys' fees. The court of appeals affirmed, noting, "Section 15.51, which governs the procedures and remedies in actions to enforce covenants not to compete, reflects that the legislature expressly intended to permit an award of attorney's fees in certain circumstances but not in others." *Id.* at 711. More specifically, when "[v]iewed in its entirety, subsection (c) provided for an award of attorney's fees in a *single circumstance*: In the context of a personal-services agreement, attorney's fees may be awarded to a promisor who satisfies certain evidentiary requirements in defending against enforcement of an unreasonable covenant." *Id.* (emphasis added). As that particular circumstance did not apply to Franlink, as the promisee, Franlink could not receive attorney's fees under that section. *Id.* at 711-12. Moreover, "the legislature did not similarly provide for an award of attorney's fees to a promisee who seeks to enforce an unreasonable covenant not to compete that must be judicially reformed, as this one was." *Id.* at 712. Franlink's only remedy was injunctive relief. *Id.* The court's logic rested in part on § 15.51's "intent to discourage the enforcement of unreasonable covenants not to compete by precluding a promisee from obtaining an award of either damages or attorney's fees when it seeks to enforce a covenant so overly restrictive that it requires reformation. To allow an award of attorney's fees . . . when the covenant was judicially reformed would be contrary to the plain meaning of Section 15.51(c)." *Id.*

VII. ECONOMIC LOSS RULE

A. Background

Broadly speaking, the economic loss rule in Texas holds that a plaintiff cannot recover in tort for economic losses unaccompanied by personal injury or property damage. *See, e.g.*, *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 415 (Tex. 2011); *Equistar Chems., L.P. v. Dresser-Rand Co.*, 240 S.W.3d 864, 867 (Tex. 2007); *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986). As the Texas Supreme Court has noted, however, "there is not one economic loss rule broadly applicable throughout the field of torts, but rather several more limited rules that govern recovery of economic losses in selected areas of the law." *Sharyland*, 354 S.W.3d at 415 (quoting Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 534-35 (2009)).

One limited area applies to products liability. In Texas, "[t]he economic loss rule applies when losses from an occurrence arise from failure of a product and the damage or loss is limited to the product itself." *Equistar*, S.W.3d at 867. In such a case, a plaintiff cannot recover in tort, as damages are "more appropriately recovered through the UCC's thorough commercial warranty framework." *Sharyland*, 354 S.W.3d at 416. On the other hand, a plaintiff may pursue a products liability action in tort where the defective product causes either personal injury to a user, or it damages the property of a user. *Equistar*, 240 S.W.3d at 867; *see also Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 325 (Tex. 1978); *Mid Continent Aircraft Corp. v. Curry County Spraying Serv.*, 572 S.W.2d 308, 313 (Tex. 1978); *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 79-80 (Tex. 1977).

Texas also applies the economic loss rule in certain contract cases, barring tort recovery where the damages arise from the breach of contractual relationship. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986). Where a contract exists, courts will consider two tests in determining whether the economic loss rule applies:

1. First, where the acts of one party appear to breach both tort and contract duties, *the court will look to the nature of the injury*. *Id.* For instance, where a builder negligently constructed a house with subpar materials, but the homeowner had no damages besides the reduced value of the house, the injury was entirely economic. *Id.* As a well-constructed home of a certain value was the subject of the contract itself, plaintiff's cause of action was for a breach of contract, and the economic loss rule applied. *Id.*
2. Second, the court considers whether a party has breached a duty *independently imposed by law*. Where a party breaches a contract, causing economic loss, but has breached no duty independently imposed by law, the economic loss rule governs the case. *Southwestern Bell Telephone Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991) (holding that in failing to publish an advertisement, Southwestern Bell breached no duty imposed by law, but only breached its contract with DeLanney).

The Texas Supreme Court has noted that both tests should be considered in determining whether a claim sounds in contract or tort. *DeLanney*, 809 S.W.2d at 494; *Crawford v. Ace Sign, Inc.*, 917 S.W.2d 12, 12 (Tex. 1996). In certain circumstances, however, the two tests for applying the economic loss rule to a contracts case may push against each other. For instance, the nature of the injury may be within the scope of the contract (leading to the application of the economic loss rule under *Reed*), but there may be an independent legal duty which was also violated (allowing tort recovery under *DeLanney*).

In *Formosa Plastics Corp.*, 960 S.W.2d 41, a case displaying this dichotomy, the Texas Supreme Court focused on the existence of an independent legal duty, rather than the nature of the injury. Formosa induced a contractor to submit a low bid based on false representations about the scope of the project. *Id.* at 44. The contractor filed suit for breach of contract and fraudulent inducement, based on its economic loss in executing the contract. *Id.* at 43. In examining the case, the Texas Supreme Court noted that while the contractor's losses were linked to the subject matter of the contract, Formosa had an independent legal duty not to induce the contract through fraud. *Id.* at 46. This independent legal duty controlled, and "[a]ccordingly, tort damages are recoverable for a fraudulent inducement claim irrespective of whether the fraudulent representations are later subsumed in a contract or whether the plaintiff only suffers an economic loss related to the subject matter of the contract." *Id.* at 47. Under *Formosa*, therefore, where the two tests give conflicting results, the existence of an independent legal duty will control.

B. Recent Developments

In *Sharyland Water Supply Corp.*, 354 S.W.3d 407, the Texas Supreme Court addressed additional questions relating to the economic loss rule. Sharyland, a non-profit company, owned a water system servicing Alton. Alton contracted to build a sewer system, and the contractors negligently installed the system, such that it threatened to contaminate Sharyland's water supply. Therefore, Sharyland would be required to remediate its own system to prevent contamination. The appellate held that Sharyland had suffered only economic loss, as its water system had not been physically damaged. *Id.* at 415. It further held that although Sharyland was not a party to the contract with Alton, it was prevented from recovering in tort under the economic loss rule. *Id.* at 418.

The Supreme Court disagreed and reversed, noting at least two grounds for permitting Sharyland's recovery in tort. First, the Court noted that while the economic loss rule may apply in a products liability case where parties are not in privity, the Court has "never held that it precludes recovery completely between contractual strangers in a case not involving a defective product." *Id*. at 418. Rather, under current law, a "contractual stranger" may recover for the breach of an independent duty. *Id.* at 419.

In its second basis for reversal, the Court further determined that Sharyland *had* actually suffered property damage. Although Sharyland's water system may not have been physically touched by the sewer system, the negligent installation of the sewer required Sharyland to either move or encase its water lines, at a significant expense. *Id.* at 420. As the Court noted, "Costs of repair necessarily imply that the system was damaged." *Id.* at 420. This property damage removes the case from the reach of the economic loss rule.

After *Sharyland*, Texas courts have continued to grapple with the boundaries of the economic loss doctrine. In *P. McGregor Enterprises, Inc. v. Hicks Const. Group, LLC*, 420 S.W.3d 45 (Tex. App.—Amarillo 2012), the Amarillo Court of Appeals addressed whether a property owner could sue a subcontractor for negligence, where the property owner was not in privity of contract with the subcontractor. While briefly mentioning that the Texas Supreme Court "revisited" the economic loss rule in *Sharyland*, *McGregor* did not address *Sharyland*'s principal holding that contractual strangers are not bound by the economic loss rule except in cases of defective products. *Id.* at 51. As the property owner in *McGregor* had no contract with the subcontractor (and was not in privity), *Sharyland*'s holding would not bar a tort action. *McGregor*, however, holds that the existence of a contract between the property owner and the contractor was enough to bar a tort action between the property owner and subcontractor. *Id.*

The decision in *The Peterson Group, Inc. v. PLTQ Lotus Group, L.P.*, 417 S.W.3d 46 (Tex. App.—Houston [1st Dist.] 2013), also addressed the economic loss doctrine in these circumstances. The Houston Court of Appeals considered the application of the economic loss rule where an investor sued a real estate developer for both breach of contract and for fraud that occurred during the developer's execution of the contract. Following both *Sharyland* and *Formosa*, fraud is an actionable tort, even where a contract exists. The majority opinion in *Peterson*, in fact, cites both cases for the proposition that "the economic loss rule has been applied to bar negligence and products liability causes of action when the injury alleged was also the subject matter of a contract . . . [but] it has not been extended to bar recovery for fraud or fraudulent inducement." *Id.* at 62. Nevertheless, the court evaluated whether the investor suffered an injury due to the fraud distinct from the injury due to the breach of contract, *id.* at 62-64. Ultimately, the court determined that the defendants' fraud had led to distinct, separate damages and that the economic loss rule did not apply. *Id.*

In a similar vein, the Corpus Christi Court of Appeals in *Bank of America, N.A. v. Barth*, 13-08-00612-CV, 2013WL5676024 (Tex. App.—Corpus Christi Oct. 17, 2013), recently cited *Sharyland* for the proposition that economic losses may be recovered in tort for fraud, when the contract predates the fraud. But the court did not cited to *Formosa* at all. *Id.* at *11. The court noted, "In determining whether the plaintiff may recover on a tort theory when the facts of the case include a contract, it is *instructive* to examine the nature of the plaintiff's loss—whether the loss is the subject matter of the contract or whether the loss is

distinct from the subject of the contract." *Id.* (emphasis added) (citations omitted). But the court ultimately found this factor more than simply "instructive," as its rejection of the economic loss rule ultimately rested on its finding that "Barth's asserted loss is distinct from the subject of any contract that existed between Barth and the Bank." *Id.* Neither the *Peterson* nor the *Barth* courts evaluated the *Formosa* concern with whether an independent duty could give rise to a tort action.

Bank of Texas, N.A. v. Glenny, 405 S.W.3d 310 (Tex. App.—Dallas 2013), on the other hand, approached the issue differently. Bank of Texas sued an attorney for negligent misrepresentation for writing two letters vouching for a third party's financial soundness, which the bank used in granting that third party a promissory note. *Id.* at 311. The letters turned out to be false, and the third party failed to make payments on the promissory note. *Id.* Glenny, the attorney, argued that the economic loss rule applied, and that the bank must prove an injury separate from the contract for the payment of the promissory note. *Id.* at 316. Instead of engaging in this analysis, the Dallas Court of Appeals followed *Sharyland*, noting that Glenny was a stranger to the contract between the bank and the promise, and that the economic loss rule therefore did not bar the bank's claim.

VIII. PERSONAL JURISDICTION

A. Background

Personal jurisdiction plays an important role in business tort cases. The limits on personal jurisdiction may allow a defendant to avoid answering a lawsuit in this state. Texas courts have defined the boundaries of personal jurisdiction in a number of cases, noting that personal jurisdiction over a non-resident must comply both with the Texas long-arm statute and with federal and state constitutional due process. *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 574 (Tex. 2007). The Texas long-arm statute permits personal jurisdiction over a nonresident who "commits a tort in whole or in part in this state." TEX. CIV. PRAC. & REM. CODE § 17.042(2). Under the statute, in order to obtain long-arm jurisdiction, the plaintiff must first plead allegations sufficient to establish jurisdiction. *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 337 (Tex. 2009). Then, the burden shifts to the defendant to counter any bases for personal jurisdiction asserted by the plaintiff. *Id.*

In considering whether jurisdiction conforms with due process, the court will consider whether the nonresident defendant has had minimum contacts with Texas, and also whether asserting jurisdiction would comply with traditional notions of fair play and substantial justice. *Id.* at 338. A defendant may be determined to have minimum contacts with Texas when it has "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Id.* (quoting *Hanson v. Denckla*, 357 U.S.235, 253 (1958)). Where the cause of action is related to the defendant's "purposeful availment" of the state, specific jurisdiction may exist. *Id.* Also, where the claim is not related to the defendant's contacts with the state, if the defendant has continuous and systematic contact with the state nonetheless, general jurisdiction may exist. *Id.*

In determining whether the defendant "purposefully availed" himself of a forum, the court will consider a number of factors. First, the court must disregard contacts that arise solely from a third party's unilateral activity. *Michiana Easy Livin' Country v. Holten*, 168 S.W.3d 777, 785 (Tex. 2005). Second, were the defendant's contacts with the forum purposeful, or were they "random, isolated, or fortuitous"? *Id.* Third, did the defendant seek a benefit, advantage, or profit by directing his activities at a forum, and also thereby invoke the benefits and protections of the forum state's laws? *Id.* In short, the defendant's actions must indicate that he could reasonably anticipate litigating disputes in the forum state. *Retamco*, 278 S.W.3d at 338.

Finally, in analyzing whether jurisdiction offends fair play and substantial justice, the court should consider "the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." *Asahi Metal Indus. Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 113 (1987).

B. Recent Developments

In *Lensing v. Card*, 417 S.W.3d 152 (Tex. App.—Dallas 2013), the court expounded on the standard for specific personal jurisdiction in Texas. Donald and Ida Mae Card owned a grave marker that previously marked the gravesite of Lee Harvey Oswald. The Cards left the grave marker with Ida Mae's sister and brother-in-law for safekeeping, and eventually it moved to the home of Ida Mae's niece and nephew, Johnny and Holly Ragan. After the Cards died, the ownership of the grave marker passed to David Card and Cleo Lowe. Lowe contacted Holly Ragan with the intention of having her return the grave marker, but Holly Ragan disclaimed any knowledge of the marker's location. Later, Card and Lowe discovered that a museum in Illinois was exhibiting the Oswald grave marker, and they learned that Holly Ragan had sold the grave marker to Wayne Lensing, an Illinois resident, through contacts at Heritage Auctions, Inc., a Texas corporation. Lensing had traveled to Texas to

close the sale and take possession of the grave marker. When Lensing refused to return the grave marker to Lowe and Card, they brought suit against him, Holly Ragan, and Heritage Auctions. Lensing filed a special appearance challenging the court's personal jurisdiction. The trial court denied the special appearance.

The appellate court affirmed the denial of the special appearance. Noting "[t]he Texas long-arm statute reaches as far as due process allows," the court relied on a number of facts to support specific jurisdiction. *Id.* at 155. While Lensing never lived in Texas, he flew to Fort Worth to purchase the grave marker from Holly Ragan. He then spent the night at a motel in Fort Worth and flew back to Illinois the following day. Lensing argued that this evidence negated the existence of minimum contacts. The court held, however, that "Lensing's Texas contacts—specifically his flying to Texas and his purchasing and taking possession of the grave marker in Texas before transporting it back to Illinois—amounted to purposeful availment." *Id.* at 158. His contact was not "random, isolated, or fortuitous." *Id.* Rather, the court noted that it mirrored the facts in *Retamco*, in which the Texas Supreme Court supported specific jurisdiction where a nonresident acquired property in Texas and the litigation had a substantial connection to the property at issue. *Id.* The court found that "in this case the evidence supports an implied finding that Lensing made a deliberate and purposeful decision to come to Texas to purchase and take possession of a specific chattel located in this state. And the evidence supports an implied finding that Lensing established his contacts with Texas to obtain the benefit of adding the grave marker to his collection and displaying it in a museum." *Id.* at 159. Lensing argued that he did not commit any alleged tort until he failed to return the grave marker, which occurred while he was in Illinois. The court, however, noted that personal jurisdiction inquiries must focus on the "physical fact" of the contacts with the state, rather than determining the merits of the case. *Id.* at 160.

The Texas Supreme Court also recently addressed personal jurisdiction in *Moncrief Oil Intern. v. OAO Gazprom*, 414 S.W.3d 142 (Tex. 2013). Moncrief entered a series of contracts with subsidiaries of OAO Gazprom regarding development of a Russian gas field. Moncrief later sued Gazprom for tortious interference and trade secret misappropriation in Texas state court. Gazprom filed a special appearance. The Texas Supreme Court on appeal considered whether specific jurisdiction existed for either of these claims. Gazprom asserted that any contacts regarding the trade secrets claim were merely fortuitous. Although Gazprom met with Moncrief in Fort Worth and Houston to discuss business relating to the claims, they also met in Moscow, Boston, and Washington, D.C. Moncrief countered that the locations in Texas were purposeful because Moncrief's headquarters is located in Houston, and that the parties discussed the creation of a joint facility in Houston. The Supreme Court held that Gazprom's contacts with Texas were not random or fortuitous. *Id.* at 153. The activities were not unilateral on Moncrief's end, but rather, Gazprom was attempting to gain "extensive business in or from the forum state." *Id.* As a result, "[b]ecause the Gazprom Defendants attended two Texas meetings, at which they accepted Moncrief's alleged trade secrets regarding a proposed joint venture in Texas, their contacts were not unilaterally from Moncrief, nor were they random and fortuitous." *Id.* at 153-54. The court further held that personal jurisdiction would not offend traditional notions of fair play and substantial justice. *Id.* at 154.

As to the tortious interference claim, Moncrief alleged that Gazprom tortiously interfered with an agreement it had with Occidental, a California company. The Supreme Court, however, noted that the tortious interference claim primarily involved a meeting in California, and that the California meeting could not form the basis for specific jurisdiction. *Id.* at 157. Although Gazprom may have been "directing a tort at Texas from afar," this allegation was not sufficient to confer jurisdiction. *Id.*

The Houston Court of Appeals also considered personal jurisdiction issues in *Washington DC Party Shuttle, LLC v. IGuide Tours*, 406 S.W.3d 723 (Tex. App.—Houston [14th Dist.] 2013, pet. filed) (en banc). DC Party Shuttle filed suit against IGuide tours for breach of contract, breach of fiduciary duty, and misappropriation of trade secrets. DC Party Shuttle alleged that the proceeding arose "out of the business done in Texas and torts committed in Texas," with personal jurisdiction over IGuide "because it is conducting business in Texas by marketing its services in Texas through a website and because it is conspiring . . . to commit torts in Texas." *Id.* at 727. IGuide filed a special appearance. The trial court dismissed the case for lack of jurisdiction.

IGuide stated a number of facts in its affidavit supporting its special appearance, including that it was incorporated in Delaware and did not conduct business in Texas. While DC Party Shuttle argued that the affidavit was defective as it did not demonstrate the basis of the affiant's personal knowledge of the stated facts, the appellate court noted that this objection was not preserved for appeal. *Id.* at 736. DC Party Shuttle further argued that the affidavit did not deny that IGuide markets tours in Texas through its website. On the other hand, IGuide's affidavit did state that IGuide "does not specifically target Texas with its advertising," and there was no allegation that IGuide "has made a single internet sale to a person in Texas or that it target the Texas market." *Id.* at 736-37.

Therefore, the court of appeals "conclude[d] that the level of interactivity and commercial nature of the exchange of information that occurs on IGuide's website does not show that IGuide has invoked the benefits and protections of Texas laws by purposefully availing itself of the privilege of conducting activities here." *Id.* at 738 (internal quotations omitted). Therefore, the allegations were insufficient to support personal jurisdiction. *Id.*