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Beyond Breach: Recent Developments in Contract Issues

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Kendyl T. Hanks

Kendyl is a Shareholder with the Appellate Practice Group in Greenberg Traurig's Austin office. Licensed to practice in Texas and New York, Kendyl is an experienced appellate advocate who represents clients throughout the country in state and federal forums. Kendyl works with clients and trial teams in resolving high-stakes business disputes and litigating test cases involving constitutional rights, business and contract disputes, fraud and fiduciary duty claims, medical malpractice and similar tort liability, bankruptcy adversary proceedings, trade secrets, employment disputes, and other issues of importance to her business clients. In addition to federal and state appellate experience in numerous jurisdictions, Kendyl frequently works as embedded appellate counsel with trial teams to ensure minimization of risk and preservation of error for appeal.

In 2011, Kendyl was elected to the American Law Institute, considered to be one of the highest honors in the legal profession. Kendyl formerly served on the Board of Governors for the American Bar Association, and she currently serves on the Board of Trustees for Project Healing Waters Fly Fishing, an organization dedicated to the physical and emotional rehabilitation of disabled active military service personnel and disabled veterans through fly fishing. She is a co-founder of the popular Twitter handle @LadyLawyerDiary, a forum for women in the legal profession. Kendyl is a graduate of University of Texas School of Law, where she served on law review and was elected to the Order of Barristers, and graduated with honors Princeton University.

Nichole Cordoba

Nicole Leonard Cordoba is a member of the Appellate Practice Group in Greenberg Traurig's Austin office. Nicole represents both plaintiffs and defendants in a broad range of civil litigation with a focus on appellate issues. She has experience litigating disputes involving contracts, medical malpractice, environmental law, constitutional issues, and other business matters. Nicole has litigated in state and federal courts throughout the country but has particular experience in Texas appellate courts. Nicole's practice also includes representing individuals seeking asylum and related immigration issues.

Prior to joining the firm, she clerked for Chief Justice Nathan Hecht of the Supreme Court of Texas. Nicole graduated with high honors from the University of Texas School of Law in 2017. She received a B.A. with honors from the University of Maryland.

I. Introduction

"In Texas, a deal is, of course, a deal."[1] This pithy and forthright proclamation of Texas law's commitment to enforcing contracts—in the Texas Supreme Court's recent *Chalker* opinion, penned by Chief Justice Hecht—comes on the heels of a long line of cases making the same point in a variety of contexts. As the Court reiterated in *Chalker*, ""Texas's strong public policy favoring freedom of contract is firmly embedded in our jurisprudence."'[2] The Texas Supreme Court "has reaffirmed time and time again that…

> men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.[3]

The firmly-established preference for enforcing contractual promises impacts rights far beyond the standards breach-of-contract dispute. The concept of "enforcing" a bargained-for contract impacts, among other things, parties' ability to bring statutory and tort claims, to form partnerships, the scope and consequences of ongoing and future negotiations, the circumstances under which parties may enter to enter into further and future contracts, and their ability to waive rights otherwise recognized under Texas law.

The purpose of this paper is to address recent developments, beyond breach, where the Texas Supreme Court has enforced contractual promises and representations in a manner that impacts otherwise available rights and remedies under Texas law.

II. Contracts Creating Conditions Precedent to Future Contracts or Partnerships.

In two recent cases the Court has enforced contracts entered before the parties engaged in further negotiations or business deals to limit the scope of that business based on the existing contract. The first—*Chalker*—addresses (among other things) only the question of contract formation where the parties specifically addressed in a prior contract the circumstances under which a new contract could be formed (*i.e.*, conditions precedent to

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1 *Chalker Energy Partners III, LLC v. Le Norman Operating LLC*, 595 S.W.3d 668, 669 (Tex. 2020).

2 *Id.* at 673 (quoting *Phila. Indem. Ins. Co. v. White*, 490 S.W.3d 468, 471 (Tex. 2016)).

3 *Id.* (quoting *Energy Transfer Partners, L.P. v. Enter. Prod. Partners, L.P.*, 593 S.W.3d 732, 738 (Tex. 2020) (in turn quoting *Wood Motor Co. v. Nebel*, 150 Tex. 86, 238 S.W.2d 181, 185 (1951)))); *see also St. Louis Sw. Ry. Co. of Tex. v. Griffin,* 106 Tex. 477, 171 S.W. 703, 704 (1914) ("The citizen has the liberty of contract as a natural right which is beyond the power of the government to take from him. The liberty to make contracts includes the corresponding right to refuse to accept a contract or to assume such liability as may be proposed.").

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