

PRESENTED AT

28th Annual Conference on State and Federal Appeals

June 14-15, 2018

Austin, TX

Equitable Relief at Trial and on Appeal

Lara Hudgins Hollingsworth

Jeffrey S. Levinger

Authors Contact Information:

Lara Hudgins Hollingsworth
Rusty Hardin & Associates, LLP
Houston, TX

lhollingsworth@rustyhardin.com

713.652.9000

Jeffrey S. Levinger

Levinger PC

Dallas, TX

jlevinger@levingerpc.com

214.855.6817

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. THE BEAUTY AND THE BEAST OF TRIAL COURT DISCRETION 1

III. PRE-TRIAL CONSIDERATIONS 1

 A. Plaintiff's Petition 1

 1. Claims that Provide Equitable Remedies 2

 a. Fraud 2

 b. Breach of Fiduciary Duty 3

 c. Aiding and Abetting/Conspiracy/Inducement to Breach a Fiduciary Duty 4

 d. Other Claims Providing Equitable Relief 4

 (1) Quantum Meruit 4

 (2) Unjust Enrichment 4

 (3) DTPA 5

 (4) Breach of the Implied Warranty of Suitability 5

 2. Types of Equitable Relief 5

 a. Rescission and Restitution 5

 b. Profit Disgorgement 6

 c. Fee Forfeiture 7

 d. Constructive Trust 7

 e. Injunctive Relief 7

 f. Specific Performance 8

 3. Venue Considerations 8

 B. Defendant's Answer 8

 1. Equitable Affirmative Defenses 8

 a. Offset/Benefit Conferred 9

 b. Laches 9

 c. Unclean Hands 9

 d. Election of Remedies 9

 e. Ratification 10

 f. Waiver 10

 g. Justification 10

 2. Defenses Arising from the Elements of an Equitable Claim 10

 C. Is Adequate Remedy at Law a Bar to Equitable Relief 11

 1. Test for Whether a Party Has an Adequate Remedy at Law 11

 2. Equitable Relief Permitted Without Showing Lack of Adequate Remedy 11

Equitable Relief at Trial and on Appeal

a. Rescission Based on Fraud..... 11

b. Fee Forfeiture/Disgorgement for Breaches of Fiduciary Duty 12

c. Injunctions and Constructive Trusts to Protect Equitable Title 12

IV. TRIAL 12

 A. Fact Questions..... 13

 1. Right to a Jury Trial..... 13

 2. What is an “Ultimate” Issue of Fact Versus What Is an Issue for the Court to Decide 13

 a. Fee Forfeiture/Breach of Fiduciary Duty 14

 b. Fraud/Rescission 14

 c. Constructive Trust..... 14

 d. Quantum Meruit 14

 e. Specific Performance 15

 f. Aiding and Abetting/Conspiracy/Inducement to Breach of Fiduciary Duty..... 15

 g. Additional Affirmative Defenses 15

 3. 2018 PJC Comment on Attorney Fee Forfeiture..... 15

 B. Trial Court Exercise of Discretion 16

V. POST-TRIAL 17

 A. Motions for Judgment 17

 B. Motion for New Trial and Motion for JNOV 17

 C. Requesting Findings of Fact and Conclusions of Law 17

 D. The Judgment..... 17

 1. Multiple Grounds in Support of Judgment and Avoiding Double Recovery 17

 2. Necessary findings 18

 3. Exemplary Damages 18

 4. Prejudgment Interest 18

 E. Attacking on Appeal 19

 1. Reviewing Fact Findings and Legal Determinations 19

 2. Reviewing the Relief Granted 19

VI. CONCLUSION 20

TABLE OF AUTHORITIES

Cases

183/620 Group Joint Venture v. SPF Joint Venture,
765 S.W.2d 901 (Tex. App.—Austin 1989, writ dism'd w.o.j.) 12

Acevedo v. Stiles,
No. 04-02-00077-CV, 2003 WL 21010604 (Tex. App.—San Antonio May 7,
2003, pet. denied) 1

Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.,
299 S.W.3d 106 (Tex. 2009) 3

Alamo Title Co. v. San Antonio Bar Ass 'n,
360 S.W.2d 814, 816 (Tex. Civ. App.—Waco 1962, writ ref d n.r.e.)..... 19

Archer v. Griffith,
390 S.W.2d 735 (Tex. 1964) 4

Bank of Sw. v. Harlingen Nat. Bank,
662 S.W.2d 113 (Tex. App.—Corpus Christi 1983, no writ)..... 11

Baty v. ProTech Ins. Agency,
63 S.W.3d 841 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) 4, 10

Best Buy Co. v. Barrera,
248 S.W.3d 160 (Tex. 2007)..... 11

Birchfield v. Texarkana Mem. Hosp.,
747 S.W.2d 361, 367 (Tex. 1987) 17

Bocanegra v. Aetna Life Ins. Co.,
605 S.W.2d 848 (Tex. 1980) 8, 9, 10, 15

Boomer v. Atl. Cement Co.,
257 N.E.2d 870, 872–75 (N.Y. 1970)..... 16

Boyce Iron Works, Inc. v. S.W. Bell Telephone,
747 S.W.2d 785, 787 (Tex. 1988) 17, 18

Breaux v. Allied Bank of Tex.,
699 S.W.2d 599 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) 9

Bright v. Addison,
171 S.W.3d 588 (Tex. App.—Dallas 2005, pet. denied)..... 3

Burford v. Pounders,
145 Tex. 460, 199 S.W.2d 141 (1947) 8

Burlington N. R. Co. v. Sw. Elec. Power Co.,
925 S.W.2d 92 (Tex. App.—Texarkana 1996)..... 4

Burnett v. James,
564 S.W.2d 407 (Tex. Civ. App—Dallas 1978, writ dism'd)..... 2

Burrow v. Arce,
997 S.W.2d 229, 232–34 (Tex. 1999) passim

Butnaru v. Ford Motor Co.,
84 S.W.3d 198 (Tex. 2002) 11

Carlile v. Harris,
38 S.W.2d 622 (Tex. Civ. App.—Galveston 1931, no writ) 15

Equitable Relief at Trial and on Appeal

Carrow v. Bayliner Marine Corp.,
781 S.W.2d 691 (Tex. App.—Austin 1989, no writ)..... 6

Casa El Sol-Acapulco, S.A. v. Fontenot,
919 S.W.2d 709, 718 (Tex. App.—Houston [14th Dist.] 1996, writ dism'd by agr.)..... 12, 13

CBIF Ltd. P'ship v. TGI Friday's Inc.,
05-15-00157-CV, 2017 WL 1455407 (Tex. App.—Dallas Apr. 21, 2017, pet.
filed) 4, 10

Chambers v. Equity Bank, SSB,
319 S.W.3d 892 (Tex. App.—Texarkana 2010, no pet.)..... 15

Cimarron Country Prop. Owners Ass 'n v. Keen,
117 S.W.3d 509, 512 (Tex. App.—Beaumont 2003, no pet.) 19

Citizens Nat'l Bank v. Allen Rae Investments, Inc.,
142 S.W.3d 459 (Tex. App.—Fort Worth 2004, no pet.)..... 18

City of Fort Worth v. Pippen,
439 S.W.2d 660, 667 (Tex. 1969) 9, 14

City of Fredericksburg v. Bopp,
126 S.W.3d 218 (Tex. App.—San Antonio 2003, no pet.)..... 9

City of Harker Heights, Tex. v. Sun Meadows,
830 S.W.2d 313 (Tex. App.—Austin 1992, no writ)..... 5

Cluck v. Mecom,
401 S.W.3d 110 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) 3

Corzelius v. Oliver,
148 Tex. 76, 220 S.W.2d 632 (1949)..... 8

Costley v. State Farm Fire & Cas. Co.,
894 S.W.2d 380 (Tex. App.—Amarillo 1994, writ denied) 6

Crown Const. Co., Inc. v. Huddleston,
961 S.W.2d 552 (Tex. App.—San Antonio 1997, no writ) 9

Crown Life Ins. Co. v. Casteel,
22 S.W.3d 378 (Tex. 2000) 17

Cruz v. Andrews Restoration, Inc.,
364 S.W.3d 817 (Tex. 2012) 5, 14

Davis v. Estridge,
85 S.W.3d 308 (Tex. App.—Tyler 2001, pet. denied) 6

Davis v. Huey,
571 S.W.2d 859 (Tex.1978) 19

Dernick Res., Inc. v. Wilstein,
471 S.W.3d 468, 487 (Tex. App.—Houston [1st Dist.] 2015, pet. filed)..... 18, 19

Deutsch v. Hoover, Bax & Slovacek, L.L.P.,
97 S.W.3d 179 (Tex. App.—Houston [14th Dist.] 2002, no pet.)..... 1

DiGiuseppe v. Lawler,
269 S.W.3d 588 (Tex. 2008) 8, 12, 13, 15

Downer v. Aquamarine Operators, Inc.,
701 S.W.2d 238 (Tex. 1985) 19

Dunnagan v. Watson,
204 S.W.3d 30 (Tex. App.—Fort Worth 2006, pet. denied) 9, 13

Equitable Relief at Trial and on Appeal

Energy Maintenance Servs. v. Sandt,
401 S.W.3d 204 (Tex. App.—Houston [14th Dist.] 2012, no pet. h.) 15

Ennis v. Interstate Distributors, Inc.,
598 S.W.2d 903 (Tex. Civ. App.—Dallas 1980, no writ) 11

Evans v. Wilkins,
No. 14-00-00831-CV, 2001 WL 1340356 (Tex. App.—Houston [14th Dist.] Nov.
1, 2001, no pet.) 2

Fazio v. Cypress/GR Hou. I, L.P.,
403 S.W.3d 390 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) 16

First Heights Bank, FSB v. Gutierrez,
852 S.W.2d 596 (Tex. App.—Corpus Christi 1993, writ denied) 11

First Nat. Bank of Beeville v. Fojtik,
775 S.W.2d 632 (Tex. 1989) 13

Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.,
960 S.W.2d 41, 47–48 (Tex. 1998) 3

Fortune Prod. Co. v. Conoco, Inc.,
52 S.W.3d 671 (Tex. 2000) 10

France v. American Indem. Co.,
648 S.W.2d 283 (Tex. 1983) 9, 15

Frost Nat'l Bank v. Burge,
29 S.W.3d 580 (Tex. App.—Houston [14th Dist.] 2000, no pet.) 11

*General Ass'n of Davidian Seventh Day Adventists v. General Ass'n of Davidian
Seventh Day Adventists*,
410 S.W. 2d 256 (Tex. App.—Waco 1966, writ ref'd n.r.e.) 7

Gowan v. Reimers,
220 S.W.2d 331 (Tex. Civ. App.—Fort Worth 1949, writ ref'd n.r.e.) 13

Hannon, Inc. v. Scott,
No. 02-10-00012-CV, 2011 WL 1833106 (Tex. App.—Fort Worth May 12, 2011,
pet. denied) 2, 5

Hearthshire Braeswood Plaza L.P. v. Bill Kelly Co.,
849 S.W.2d 380 (Tex. App.—Houston [14th Dist.] 1993, writ denied) 19

Hill v. Shamoun & Norman, LLP,
16-0107, 2018 WL 1770527 (Tex. Apr. 13, 2018) 4, 16, 17, 19

Holt v. Robertson,
No. 07-06-0220 CV, 2008 WL 2130420 (Tex. App.—Amarillo May 21,
2008, pet. denied) 6

Holubec v. Brandenberger,
214 S.W.3d 650 (Tex. App.—Austin 2006, no pet.) 11, 13

Homoki v. Conversion Servs., Inc.,
717 F.3d 388 (5th Cir. 2013) 15

Hous. First Am. Sav. v. Musick,
650 S.W.2d 764 (Tex. 1983) 2

Hous. Lighting & Power Co. v. City of Wharton,
101 S.W.3d 633 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) 9, 15

Equitable Relief at Trial and on Appeal

Houston v. Ludwick,
No. 14-09-00600-CV, 2010 WL 4132215, at *8 (Tex. App.—Houston [14th Dist.]
Oct. 21, 2010, pet. denied)..... 3

Iloff v. Iloff,
339 S.W.3d 74 (Tex. 2011) 19

In re Cont'l Airlines, Inc.,
988 S.W.2d 733, 736 (Tex. 1998) 8

In re Estate of Preston,
346 S.W.3d 137, 169—70 (Tex. App.—Fort Worth 2011, no pet.) 18

In re Francis,
186 S.W.3d 534 (Tex. 2006) 9, 13

In re Freligh,
894 F.2d 881 (7th Cir. 1989) 1

In re Guardianship of Fortenberry,
261 S.W.3d 904 (Tex. App.—Dallas 2008, no pet.)..... 11

In re Hardwick,
426 S.W.3d 151
(Tex. App.—Houston [1st Dist.] 2012, no pet.) 8

In re Laibe Corp.,
307 S.W.3d 314 (Tex. 2010)..... 8, 9

Isaacs v. Bishop,
249 S.W.3d 100 (Tex. App.—Texarkana 2008, pet. denied) 12

Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.,
341 S.W.3d 323 (Tex. 2011) 5, 14

Jernigan v. Langley,
111 S.W.3d 153 (Tex. 2003) 10

Jim Rutherford Invs., Inc. v. Terramar Beach Cmty. Ass'n,
25 S.W.3d 845 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) 8

KCM Fin. LLC v. Bradshaw,
457 S.W.3d 70 (Tex. 2015) 7

Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh,
20 S.W.3d 692 (Tex. 2000) 4

Kinzbach Tool Co. v. Corbett–Wallace Corp.,
138 Tex. 565, 160 S.W.2d 509 (1942) 4, 7, 15

Lachalet Int'l, Inc. v. Nowik,
787 S.W.2d 101 (Tex. App.—Dallas 1990, no writ) 18

Land Title Co. of Dallas, Inc. v. F.M. Stigler, Inc.,
609 S.W.2d 754 (Tex. 1980) 10

Lauret v. Meritage Homes of Texas, LLC,
455 S.W.3d 695 (Tex. App.—Austin 2014, no pet.) 11

Leonard v. Hare,
161 Tex. 28, 30-31, 336 S.W.2d 619, 621 (1960) 10

Lesikar v. Rappeport,
33 S.W.3d 282, 311 (Tex. App.—Texarkana 2000, pet. denied) 18

Equitable Relief at Trial and on Appeal

Logan v. Logan,
156 S.W.2d 507 (Tex. 1941) 7

Longview Energy Co. v. Huff Energy Fund LP,
60 Tex. Sup. Ct. J. 1195, 2017 WL 2492004 (Tex. June 9, 2017) 6, 14, 18

Loye v. Travelhost, Inc.,
156 S.W.3d 615 (Tex. App.—Dallas 2004, no pet.)..... 11

Manges v. Guerra,
673 S.W.2d 180 (Tex. 1984) 3

McAdams v. McAdams,
No. 07-01-0343-CV, 2002 WL 342639, at *7 (Tex. App.—Amarillo Mar. 1,
2002, no pet.) 18

McAfee MX v. Foster,
No. 02-07-0080-CV, 2008 WL 344575, at *1 (Tex. App.—Fort Worth Feb. 7,
2008, pet. denied)..... 19

McHaney v. Hackleman,
347 S.W.2d 822, 826 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.) 9, 15

Meadows v. Bierschwale,
516 S.W.2d 125 (Tex. 1974) 5, 6, 7

Meyer Farms, Inc. v. Texaco Producing, Inc.,
No. 07-01-0344-CV, 2002 WL 31261163 (Tex. App.—Amarillo Oct. 2, 2002,
pet. denied) 10

Minexa Arizona, Inc. v. Staubach,
667 S.W.2d 563 (Tex. App.—Dallas 1984, no writ) 11

Nabours v. Longview Sav. & Loan Ass'n,
700 S.W.2d 901 (Tex.1985) 18

Old Republic Ins. Co. v. Fuller,
919 S.W.2d 726 (Tex. App.—Texarkana 1996, writ denied)..... 10

Omega Energy Corp. v. Gulf States Petrol. Corp.,
No. 13-03-275-CV, 2005 WL 977573 (Tex. App.—Corpus Christi Apr. 28, 2005,
pet. denied) 2

Pate v. Eversole,
No. 14-03-00250-CV, 2004 WL 582319 (Tex. App.—Houston [14th Dist.] Mar.
25, 2004, pet. denied) 10

Peirce v. Sheldon Petroleum Co.,
589 S.W.2d 849 (Tex. App.—Amarillo 1979, no writ) 7

Pepsi Corp. v. Galliford,
254 S.W.3d 457 (Tex. App.—Houston [1st Dist.] 2007, no pet.)..... 9

Perry Homes v. Cull,
258 S.W.3d 580 (Tex. 2008) 1, 19

Pitman v. Lightfoot,
937 S.W.2d 496 (Tex. App.—San Antonio 1996, writ denied) 10

Recon Expl., Inc. v. Hodges,
798 S.W.2d 848 (Tex. App.—Dallas 1990, no writ) 11

Remington Arms Co. v. Luna,
966 S.W.2d 641 (Tex. App.—San Antonio 1998, pet.denied) 19

Equitable Relief at Trial and on Appeal

Rosenbaum v. Texas Bldg. & Mort. Co.,
140 Tex. 325, 167 S.W.2d 506 (1943) 10

Royal Petroleum Corp. v. McCallum,
135 S.W.2d 958 (Tex. 1940) 11

Rush v. Barrios,
56 S.W.3d 88 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) 3

Saden v. Smith,
415 S.W.3d 450 (Tex. App.—Houston [1st Dist.] 2013, pet. denied)..... 18

Schenck v. Ebby Halliday Real Estate, Inc.,
803 S.W.2d 361 (Tex. App.—Fort Worth 1990, no writ) 9

Sears, Roebuck & Co. v. Abell,
157 S.W.3d 886 (Tex. App.—El Paso 2005, pet. denied)..... 12

Sharp v. Landowners Oil Ass'n,
92 S.W.2d 435 (Tex. 1936) 11

Smith v. Nat'l Resort Communities, Inc.,
585 S.W.2d 655 (Tex.1979) 2, 5, 6

Spencer v. Eagle Star Ins. Co.,
876 S.W.2d 154 (Tex. 1994) 12

SRS Products Co., Inc. v. LG Engineering Co., Ltd.,
994 S.W.2d 380 (Tex. App.—Houston [14th Dist.] 1999, no pet.) 19

Stanley Works v. Wichita Falls Indep. Sch. Dist.,
366 S.W.3d 816 (Tex. App.—El Paso 2012, pet. denied) 6

State v. Tex. Pet Foods, Inc.,
591 S.W.2d 800 (Tex. 1979) 13, 19

Stephens Cty. Museum, Inc. v. Swenson,
517 S.W.2d 257 (Tex. 1974) 4

Summers v. WellTech, Inc.,
935 S.W.2d 228 (Tex. App.—Houston [1st Dist.] 1996, no writ) 6

Tex. Bank & Trust Co. v. Moore,
595 S.W.2d 502 (Tex. 1980) 4

Tex. Capital Sec., Inc. v. Sandefer,
58 S.W.3d 760 (Tex. App.—Houston [1st Dist.] 2001, pet. denied)..... 2

Tex. Dept. of Corr. v. Herring,
513 S.W.2d 6 (Tex. 1974) 2

Tex. Emp. Ins. Ass'n v. Kennedy,
135 Tex. 486, 143 S.W.2d 583 (Comm'n App. 1940) 5

Tex. Enters., Inc. v. Arnold Oil Co.,
59 S.W.3d 244 (Tex. App.—San Antonio 2001, no pet.)..... 8

Tex. Indus. Gas v. Phoenix Metallurgical Corp.,
828 S.W.2d 529 (Tex. App.—Houston [1st Dist.] 1992, no writ)..... 11

Triantaphyllis v. Gamble,
93 S.W.3d 398 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) 16, 19

Truly v. Austin,
744 S.W.2d 934 (Tex. 1988) 9

Equitable Relief at Trial and on Appeal

Vinson v. Tex. Commerce Bank—Hou., N A.,
880 S.W.2d 820 (Tex. App.—Dallas 1994, no writ) 19

Vortt Expl. Co., Inc. v. Chevron U.S.A., Inc.,
787 S.W.2d 942 (Tex. 1990) 4

Wagner & Brown, Ltd. v. Horwood,
58 S.W.3d 732 (Tex. 2001) 9, 19

Walker v. Packer,
827 S.W.2d 833 (Tex. 1992) 19

Warfield v. Marks,
190 F.2d 178 (5th Cir. 1951) 11

Wasson v. Strancener,
786 S.W.2d. 417 (Tex. App.—Texarkana 1990, writ denied)..... 10

Weidner v. Sanchez,
14 S.W.3d 353 (Tex. App.—Houston [14th Dist.] 2000, no pet.) 17

Wetzel v. Sullivan, King & Sabom, P.C.,
745 S.W.2d 78 (Tex. App.—Houston [1st Dist.] 1988, no writ) 19

Willis v. Donnelly,
118 S.W.3d 10 (Tex. App.—Houston [14th Dist.] 2003), *rev'd in part on other grounds*, 199 S.W.3d 262 (Tex. 2006) 11

Wilson v. Klein,
715 S.W.2d 814 (Tex. App.—Austin 1986, writ ref'd n.r.e.)..... 8

Wilz v. Flournoy,
228 S.W.3d 674 (Tex. 2007) 7, 9, 14

Wooters v. Unitech Int'l, Inc.,
513 S.W.3d 754 (Tex. App.—Houston [1st Dist.] 2017, pet. denied)..... 4

Statutes

TEX. BUS. & COM. CODE § 17.50(b)(3) 5

TEX. BUS. & COM. CODE ANN. § 27.01 2

TEX. CIV. PRAC. & REM. CODE § 15.011 8

TEX. CIV. PRAC. & REM. CODE § 33.013 15

TEX. CIV. PRAC. & REM. CODE § 65.023(a)..... 8

TEX. CONST. art. V, § 10..... 13

Other Authorities

10 TEX. JUR. 3d *Cancellation and Reformation* § 94 6

12A C.J.S. § 171 6

Chris Dove, *Finding Our Way Through Findings of Fact*,
2013 State Bar Advanced Civil Appellate Practice Course 17

Doug Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 81–82 (2007) 16

George P. Roach, *Rescission in Texas: A Suspect Remedy*,
31 REV. LITIG. 493 (2012)..... 2, 10, 16

George P. Roach, *Texas Remedies in Equity for Breach of Fiduciary Duty: Disgorgement, Forfeiture, and Fracturing*, 45 ST. MARY'S L.J. 367, 370 (2014) 2, 3, 11

Equitable Relief at Trial and on Appeal

George P. Roach, *Unjust Enrichment in Texas: Is It A Floor Wax or A Dessert Topping?*, 65 BAYLOR L. REV. 153 (2013) 2, 4

TEXAS PJC BUSINESS § 101.1..... 15

TEXAS PJC BUSINESS § 101.2..... 15

TEXAS PJC BUSINESS § 101.21..... 15

TEXAS PJC BUSINESS § 101.24..... 15

TEXAS PJC BUSINESS § 101.42..... 14

TEXAS PJC BUSINESS § 104.1..... 14

TEXAS PJC BUSINESS § 104.2..... 14, 15

TEXAS PJC BUSINESS § 104.3..... 14

TEXAS PJC BUSINESS § 105.7..... 15

TEXAS PJC BUSINESS § 115.16..... 14

TEXAS PJC BUSINESS § 115.16 & 115.17..... 14

TEXAS PJC BUSINESS § 115.17..... 14

TEXAS PJC BUSINESS § 115.18..... 14

TEXAS PJC BUSINESS § 105.1..... 14

TEXAS PJC MALPRACTICE § 84.5 15-16

William W. Miller, Jr., *Non-Monetary Relief, Equitable Relief*,
7th Annual Damages in Civil Litigation Course (State Bar of Texas Feb. 2015)..... 5

Rules

TEX. R. APP. P. 33.1 12

TEX. R. CIV. P. 276 12

TEX. R. CIV. P. 278 12

TEX. R. CIV. P. 279 12

TEX. R. CIV. P. 296..... 17

TEX. R. CIV. P. 48 1

I. INTRODUCTION

To some, equitable relief is viewed with skepticism because the ultimate relief is generally left to the discretion of a trial court judge. To others, it is confusing because of the lack of clarity regarding the overlap of legal and equitable issues. However, what many enterprising litigants are finding out is that equitable relief affords the potential opportunity to achieve big results. As one esteemed colleague has noted, litigants are turning to equitable relief as the punitive damages of the future.

The hope is that this paper can provide at least some guidance, if not answers, dealing with equitable relief at trial and on appeal. It will provide information on pleading, trying, and ultimately securing or defeating the recovery of equitable relief.¹

II. THE BEAUTY AND THE BEAST OF TRIAL COURT DISCRETION

Most plaintiffs' attorneys find comfort in relying on juries as the fact finder and the ones ultimately responsible for determining the extent of the plaintiff's recovery. In seeking legal damages, as long as the evidence and the law supports the jury's finding, a trial court has little discretion, if any, but to enter judgment based on the jury's findings. With equitable relief, however, while the jury is responsible for making essential fact findings, *see infra*, Section IV. A., the trial judge will be the ultimate decider on what the plaintiff will recover, *see infra*, Section IV. B.

A trial court does not have unfettered discretion in deciding what equitable relief will be awarded. *See infra*, Section IV. B. & V. D. But, the fact remains that the judge's determination will only be reviewed on appeal for an abuse of discretion. This standard, regardless of who is challenging the trial court's decision, is a difficult one to meet. Thus, while plaintiffs may hesitate to leave the ultimate decision on recovery in the hands of the trial court, the flip-side is that equitable rewards face a more deferential standard of review on appeal. Similarly, though defendants may be more comfortable permitting the trial court to ultimately fashion any relief, they will face a more

difficult battle in challenging any equitable relief on appeal.

"Every abuse-of-discretion review is not identical because 'a trial judge's discretion may be applied to scores of situations and in many different ways.'" *Perry Homes v. Cull*, 258 S.W.3d 580, 597–98 (Tex. 2008) (citations omitted). Even still, as Judge Posner has explained:

A modern federal equity judge does not have the limitless discretion of a medieval Lord Chancellor to grant or withhold a remedy. **Modern equity has rules and standards, just like law.** And although the ratio of rules to standards is lower in equity than in law, in cases where the plaintiff has an established entitlement to an equitable remedy the judge cannot refuse the remedy because it offends his personal sense of justice.

In re Freligh, 894 F.2d 881, 887 (7th Cir. 1989) (emphasis added).

III. PRE-TRIAL CONSIDERATIONS

A. Plaintiff's Petition

In certain circumstances, a party may have the option to "elect" legal or equitable relief as a remedy for another's wrong. This election is not made at the pleading stage, but instead can wait until post-trial. *See Deutsch v. Hoover, Bax & Slovacek, L.L.P.*, 97 S.W.3d 179, 190 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (noting that even though the same facts supported both negligence and breach of fiduciary, the plaintiff was entitled to have both issues submitted to the jury); *Acevedo v. Stiles*, No. 04-02-00077-CV, 2003 WL 21010604, at *2 (Tex. App.—San Antonio May 7, 2003, pet. denied) ("The trial court correctly submitted the contested fact issues to the jury and considered the propriety of equitable relief after the verdict was returned."). Therefore, a party can and should plead for both. TEX. R. CIV. P. 48.

In pleading for equitable relief, standard notice pleading requirements apply. The best practice though is to plead for the specific equitable relief that you are seeking even if it may not be necessary to do so. *See Hannon, Inc. v. Scott*, No. 02-10-00012-CV, 2011 WL 1833106 (Tex. App.—Fort Worth May 12, 2011, pet.

¹ The author would like to sincerely thank Kirsten Castañeda for generously permitting the author to use, and at times plagiarize (with permission!) from Ms. Castañeda's paper *The Newly Prominent Role of Equitable Claims in Litigation, Finding Our Way Through Findings of Fact*, presented at

the 2015 State Bar 29th Annual Advanced Civil Appellate Practice Course (and available through the Texas Bar CLE online library).

denied) (reasoning that while the plaintiff did not specifically request rescission as an equitable remedy for the defendant's fraud, he did assert a claim for damages based on fraud, and the plaintiff's fraud claim "contemplated the remedy of rescission. . . . It is well settled that '[a]s a rule, a party is not bound by a contract procured by fraud' and that rescission is a proper remedy for a contract procured by fraud."); *see also Nelson v. Najm*, 127 S.W.3d 170, 177 (Tex. App.—Houston [1st Dist.] 2003, pet. denied); *Omega Energy Corp. v. Gulf States Petrol. Corp.*, No. 13-03-275-CV, 2005 WL 977573 (Tex. App.—Corpus Christi Apr. 28, 2005, pet. denied); *but see Burnett v. James*, 564 S.W.2d 407, 409 (Tex. Civ. App.—Dallas 1978, writ dism'd) (denying rescission for failure to specifically plead rescission in general pleading).

When asserting both legal and equitable claims, counsel should be careful that the factual allegations set forth in the petition to support the legal claims do not plead the client out of an equitable claim. Although pleadings generally do not constitute summary judgment proof, a pleading that contains judicial admissions negating a cause of action will support a take-nothing summary judgment on that claim. *Tex. Dept. of Corr. v. Herring*, 513 S.W.2d 6, 9 (Tex. 1974). A judicial admission is: (1) an assertion of fact; (2) *not* pled in the alternative; and (3) in a party's live pleading. *See Hous. First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983). To avoid this problem, if need be, plead conflicting factual assertions in the alternative. *Id.* If taking a stand on the facts threatens to plead your client out of one or the other of dueling legal and equitable claims, consider whether asserting both the legal and equitable claims creates strategic disadvantages that even if pleaded in the alternative make the strategy undesirable.

As detailed below, parties have the right to a jury trial on ultimate issues of fact that affect equitable relief.

As such, practitioners should make sure that a jury demand is included if they choose to have a jury make these factual determinations.

1. Claims that Provide Equitable Remedies

This paper will give a brief summary of a few of the more common claims that could give rise to equitable relief. These claims provide powerful tools for seeking relief. It is not the intent of this paper to fully flesh out the substantive issues related to these claims. Thus, practitioners should reference other sources to obtain more specific information related to the claims. In particular, George P. Roach has written extensively on certain equitable claims and relief. This paper references several of his articles.²

a. Fraud

When there is fraud in the inducement to sign a contract, the injured party may elect between legal damages or the equitable remedy of rescission and restitution of the consideration paid. *See Smith v. Nat'l Resort Communities, Inc.*, 585 S.W.2d 655, 658 (Tex. 1979) (allowing equitable remedies of rescission and restitution for common law fraud); *Tex. Capital Sec., Inc. v. Sandefer*, 58 S.W.3d 760, 773 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (noting equitable rescission is a remedy for common law and statutory fraud); *Scott v. Seebree*, 986 S.W.2d 364, 368 (Tex. App.—Austin 1999, pet. denied) (allowing equitable remedies of rescission and restitution for statutory fraud under Texas Business and Commerce Code § 27.01).³ The general rule is that there is less strictness in granting rescission or restitution in contrast to actions where damages are sought. *Smith*, 585 S.W.2d at 658.

The Texas Supreme Court recognized that the standard elements of fraud apply in fraudulent

² The list of Mr. Roach's articles referred to herein include:

- George P. Roach, *Rescission in Texas: A Suspect Remedy*, 31 REV. LITIG. 493, 494 (2012).
- George P. Roach, *Unjust Enrichment in Texas: Is It A Floor Wax or A Dessert Topping?*, 65 BAYLOR L. REV. 153, 154 (2013).
- George P. Roach, *Texas Remedies in Equity for Breach of Fiduciary Duty: Disgorgement, Forfeiture, and Fracturing*, 45 ST. MARY'S L.J. 367, 370 (2014).

³ A party should consider whether his fraud claim involves the

conveyance of stock or real estate transaction. A transaction involves stock or real estate when the contract affects the conveyance of stock or real estate between the parties. *See Ginn v. NCI Bldg. Sys., Inc.*, 472 S.W.3d 802, 824 (Tex. App.—Houston [1st Dist.] 2015, no pet.). It "cannot merely be tangentially related or a means of facilitating a conveyance." *See Evans v. Wilkins*, No. 14-00-00831-CV, 2001 WL 1340356 (Tex. App.—Houston [14th Dist.] Nov. 1, 2001, no pet.). Texas Business and Commerce Code § 27.01 provides a statutory fraud claim in these situations and has the same elements as common law fraud. TEX. BUS. & COM. CODE § 27.01. The added benefit of statutory fraud is that section 27.01 provides for the recovery of attorneys' fees. *Id.* § 27.01(e).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Equitable Relief at Trial and on Appeal

Also available as part of the eCourse

[2018 eConference on State and Federal Appeals](#)

First appeared as part of the conference materials for the
28th Annual Conference on State and Federal Appeals session
"Equitable Relief at Trial and on Appeal"