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**Equitable Relief at Trial and on Appeal**

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## 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.<sup>1</sup>

## 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 (7<sup>th</sup> 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 [14<sup>th</sup> 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.

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<sup>1</sup> 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 29<sup>th</sup> 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 [1<sup>st</sup> 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.<sup>2</sup>

### **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 [1<sup>st</sup> 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).<sup>3</sup> 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

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<sup>2</sup> 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).

<sup>3</sup> 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 [1<sup>st</sup> 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 [14<sup>th</sup> 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).

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