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Orders that Stick:
Sticky Issues to Consider when Drafting Orders

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Table of Contents

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Most orders require very little thought to draft. But issues do arise with certain types of orders. And the consequence of oversight can be significant. This paper addresses some of those types of orders.

Before discussing specific types of orders, it is important to emphasize, from an appellate attorney's perspective, that written orders are always preferred over oral rulings. Quite frequently, too, the recitations in orders—who appeared? Who had notice? Was the hearing evidentiary? What papers were before the judge?—become meaningful on appeal. These "recitations control over the rest of the record." *In re Gen. Motors Corp.*, 296 S.W.3d 813, 829 (Tex. App.—Austin 2009, orig. proceeding). Always draft (and read) recitations with caution, even in a very simple order.

1. Temporary Injunctions.

To be valid, a temporary injunction must be in writing, signed by the judge, and entered of record. *Ex Parte Price*, 741 S.W.2d 366, 367-68 (Tex. 1987). Texas Rules of Civil Procedure 683 and 684 also mandate that the order make certain statements:

- The injunction must state the reason for its issuance by describing the injury and why it is irreparable.
- The injunction must define, in reasonable detail, the act to be constrained.
- The injunction must set the case for trial on the merits.
- The injunction must set the amount of bond.

The requirements are mandatory and must be strictly followed. *Qwest Comms. V. AT&T Corp.*, 24 S.W.3d 335, 337 (Tex. 2000) (per curiam); *Interfirst Bank San Felipe, N.A. v. Paz Constr. Co.*, 715 S.W.2d 640, 641 (Tex. 1986) (per curiam). An injunction order that does not comply with Rule 683 could be dissolved and declared void. *Qwest Comms.*, 24 S.W.3d at 337.

This may be true even if the injunction is agreed. The courts of appeals are split on the issue. *Compare Cleere v. City of Mesquite*, 594 S.W.2d 831 (Tex. App.—Dallas 1980, no writ) (enforcing an agreed injunction that did not state reasons for its issuance); *Henke v. Peoples State Bank of Halletsville*, 6 S.W.3d 717, 719 (Tex. App.—Corpus Christi 1999, dis'd w.o.j.) (enforcing an agreed injunction because "a party may not appeal from or attack a judgment to which he has agreed, absent allegation and proof of fraud, collusion, or misrepresentation.") *with Conlin v. Haun*, 419 S.W.3d. 682 (Tex. App. Houston [1st Dist.] 2013, no pet.) (injunction that did not contain trial date void); *Chambers v. Rosenberg*, 916 S.W.2d 633 (Tex. App.—Austin 1996, writ denied) (per curiam) (injunction that did not contain amount of bond void).

Frankly, Texas law has run amuck on this point. The cases finding agreed injunctions that do not comport with Rules 683 or 684 rely on a single case from San Antonio. *See In re Garza*, 126 S.W.3d 268 (Tex. App.—San Antonio 2003, orig. proceeding). *Garza* reaches the radical result that a party can agree to be bound by a temporary injunction and then, later, seek the aide of the appellate courts to renege on that agreement when the party no longer desires to be bound by its terms.

The reasoning the *Garza* court offers to support this view of Texas law is questionable, at best. *Garza* held that a temporary injunction that does not comply with Rules 683 and 684 is void, not voidable, and, as such, a party does not waive its right to attack the injunction—even if the party agreed to its issuance. In reaching this conclusion, the *Garza* court relied heavily on two per curiam opinions from the Texas Supreme Court: *Qwest*, 24 S.W.3d at 334; *Interfirst*, 715 S.W.2d at 641.

But neither *Qwest* nor *Interfirst* concerned an agreed temporary injunction. *Interfirst* is a two-paragraph opinion that mentions nothing about the entry of the injunction. In *Qwest*, the parties reached a tentative agreement concerning the injunction at the entry hearing, which they then read into the record, but "[u]ltimately, the parties could not agree to the terms of the written order to be submitted to the trial court." 23 S.W.3d at 335. So neither opinion addressed whether parties may agree to dispense with the requirements of Rule 683 and 684. In fact, the *Qwest* court stated that the "single issue in this petition is whether the trial court's interlocutory order is a temporary injunction." *Id.* Anything the *Qwest* court wrote about the voidability of an injunction was not relevant to the "single issue" before it and was thus dicta.

Equally critical is the actual language used in *Qwest* and *Interfirst*. In both cases, the court stated that an order that does not adhere to the requirements of the injunction rules "is subject to being declared void and dissolved." *Qwest*, 24 S.W.3d at 337; *Interfirst*, 715 S.W.2d at 641. If an order is "subject to being declared void," it is voidable. "[T]he key distinction between a void act and a voidable act . . . is a party's ability—either through its own action or through the judicial process—to disaffirm, ratify, or confirm a voidable act." *Wood v. HSBC Bank USA, N.A.*, 439 S.W.3d 585, 591 (Tex. App.—Houston [14th Dist.] 2014, pet. filed). In other words, a voidable order is "subject to being declared void," upon an affirmative act by a party or court. *See Cummings v. Powell*, 8 Tex. 80, 80 (1852) ("[A] voidable act is one which is obligatory upon others until disaffirmed by the party with whom it originated, and which may be subsequently ratified or confirmed."). A void order, on the other hand, "is entirely null, not binding on either party and not susceptible of ratification." *Id.*

The *Garza* court rejected this argument, emphasizing the supreme court's explanation in *Qwest* that, in *InterFirst*, the court "declared the temporary injunction void." *Garza*, 126 S.W.3d at 273. But, even assuming this dicta has any meaning, the declaration in *InterFirst* does not answer the question of whether a non-compliant temporary injunction is void or voidable. The declaration in *InterFirst* was made because a party, at that point, had challenged the order. The voidable order, when challenged (or "disaffirmed," to use the *Cummings* language), was, at that moment, declared void.

Texas Supreme Court cases actually deciding the issue of whether an order is void or merely voidable are far more instructive than *Qwest* and *InterFirst*, which do not. These cases emphasize that void orders are "rare." *Comm'n for Lawyer Discipline v. Schaefer*, 364 S.W.3d 831, 836 (Tex. 2012); *In re U.S. Silica Co.*, 157 S.W.3d 434, 438–39 (Tex. 2005) (orig. proceeding) (per curiam). A judgment or order is void only when it is apparent that the court rendering it had no jurisdiction of the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment or order, or no capacity to act as a court. *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990) (orig. proceeding) (per curiam). The high court has applied this principal in the context of allegedly erroneous temporary injunctions and emphasized: "[I]t is evident that the writ was not wholly void for want of jurisdiction, but at most was only voidable as to some of the acts sought to be restrained. . . . If the district had jurisdiction of the parties and the matter adjudicated, the injunction cannot be said to be absolutely void." *Ex Parte Kimberlin*, 126 Tex. 60, 66 (1935).

The same is true of an injunction issued without precise compliance with Rule 683. Judgments which are rendered without observance of statutory requirements which are purely procedural are not void,

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